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The Law Society of Upper Canada | Barreau du Haut-Canada

October 24, 2013
8:30 a.m.

CONVOCATION MATERIAL

PUBLIC COPY

THIS PAGE CONTAINS

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CONVOCATION AGENDA
October 24, 2013

Convocation Room – 8:30 a.m.

Committee of the Whole *(D. Wright/M. Sandler)*

Treasurer's Remarks

Address by Heather J. Laing, QC, President of the Law Society of Saskatchewan

Consent Agenda - Motion [Tab 1]
- **Appointment**
- **Confirmation of Draft Minutes of Convocation** – September 25, 2013
- **Report of the Director of Professional Development and Competence** - Deemed Call Candidates

Audit and Finance Committee Report *(C. Bredt, C. Hartman)* [Tab 2]
- 2014 Law Society Budget

For Information
- Law Society Funding of External Organizations

Professional Regulation Committee Report *(M. Mercer)* [Tab 3 and separate cover]
- Amendments to the Rules of Professional Conduct Arising from Implementation of the Federation of Law Societies Model Code of Professional Conduct

For Information
- Professional Regulation Division Quarterly Report

Inter-Jurisdictional Mobility Committee Report *(J. Horvat)* [Tab 4]
- Amendments to By-Law 6 Respecting National Mobility Agreement 2013 Insurance

Professional Development and Competence Committee Report *(J. Minor)* [Tab 5]
- Articling Enhancements and Experiential Assessment
- In Camera Item

Access to Justice Committee Report *(M. Boyd)* [Tab 6]
- Law Society Funding of External Organizations

Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones Report *(H. Goldblatt)* [Tab 7]
- Human Rights Award
- Human Rights Monitoring Group Intervention

For Information
- Sexual Orientation and Gender Identity Guide for Law Firms and Other Organizations
- Law Society Funding of External Organizations
- Public Education Equality and Rule of Law Series Calendar 2013/2014

REPORT FOR INFORMATION ONLY

Tribunals Committee Report [Tab 8]
- Terms of Reference - Law Society Tribunal Chair's Practice Roundtable
- In Camera Item

Lunch – Benchers' Dining Room

Tab 1

THE LAW SOCIETY OF UPPER CANADA

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON OCTOBER 24, 2013

MOVED BY:

SECONDED BY:

THAT Convocation approve the consent agenda set out at Tab 1 of the Convocation Materials.

Tab 1.1

THE LAW SOCIETY OF UPPER CANADA

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON OCTOBER 24, 2013

THAT Avvy Go be appointed to the Hearing Panel for a term ending May 22, 2014.

Tab 1.2

D R A F T

MINUTES OF CONVOCATION

Wednesday, 25th September, 2013
9:00 a.m.

PRESENT:

The Treasurer (Thomas G. Conway), Anand, Armstrong, Backhouse, Banack, Boyd, Bredt, Callaghan, Campion, Copeland (by telephone), Doyle, Dray, Earnshaw, Elliott, Epstein, Eustace, Evans, Falconer, Finkelstein (by telephone), Furlong, Go, Gold (by telephone), Goldblatt, Haigh, Halajian, Hare, Hartman (by telephone), Horvat, Hunter (by telephone), Krishna, Leiper, Lerner, MacKenzie (by telephone), MacLean, Marmur, McDowell, McGrath, Minor, Murchie, Murray, Pawlitza, Potter (by telephone), Pustina, Rabinovitch, Richardson (by telephone), Richer, Robins, Ross, Rothstein, Ruby (by telephone), Sandler, Scarfone, Sikand, Silverstein, C. Strosberg, Sullivan, Wadden, Wardle, Wright (by telephone) and Yachetti (by telephone).

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Secretary: James Varro

The Reporter was sworn.

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OPENING OF CONVOCATION

The Treasurer introduced Alex Jacobs – Elder Waasaanese who the Treasurer advised had earlier performed a smudging ceremony with benchers.

Waasaanese opened Convocation with a prayer and teachings on the eagle feathers.

The Treasurer introduced Diane Kelly who addressed Convocation and recounted the story of the gift of the eagle feathers to the Law Society by her father. She also spoke to her experiences as a lawyer in the aboriginal community.

Susan Hare thanked Elder Waasaanese and Diane Kelly for opening Convocation.

TREASURER'S REMARKS

The Treasurer expressed condolences to the family and friends of Austin M. Cooper, Q.C., former bencher, who passed away on September 24, 2013.

The Treasurer expressed condolences to the family of former bencher Marshall A. Crowe who passed away on August 16, 2013.

The Treasurer congratulated bencher Malcolm Mercer on being awarded the 2013 Louis St-Laurent Award of Excellence by the Canadian Bar Association.

The Treasurer congratulated bencher Derry Millar, former Treasurer, on receiving the Catzman Award for Professionalism and Civility at the Opening of the Courts on September 24, 2013.

The Treasurer congratulated bencher Joseph Sullivan who will be receiving the Emilius Irving Award from the Hamilton Law Association on October 24, 2013.

The Treasurer congratulated the following benchers who received recognition at the 2013 Lexpert Zenith Awards presented on September 24, 2013: Janet Leiper, Janet Minor, Laurie Pawlitza and Linda Rothstein.

The Treasurer congratulated the 241 lawyers called to the bar September 18, 2013.

The Treasurer announced the Alternative Business Structures Working Group Symposium scheduled for October 4, 2013.

The Treasurer updated Convocation on the progress of the Treasurer's Advisory Group on Access to Justice (TAG) initiative including the TAG Symposium scheduled for October 29, 2013.

The Treasurer announced the membership of the Working Group on Legal Information and Support Services which includes Susan Elliott, Chair, representatives James Bennett (The Advocates' Society), Douglas Downey (Ontario Bar Association), Dirk Derstine (Toronto Lawyers Association), Janet Whitehead (County and District Law Presidents), John Tzanis (Paralegal Society of Ontario), Rick Haga (County of Carleton Law Association), and benchers Jan Richardson and Adriana Doyle.

The Treasurer introduced David Wright, the newly appointed Tribunals Chair, to Convocation.

MOTION – CONSENT AGENDA

It was moved by Mr. Lerner, seconded by Ms. Strosberg, that Convocation approve the consent agenda set out under Tab 1 of the Convocation Materials.

Carried

DRAFT MINUTES OF CONVOCATION – Tabs 1.1 and 1.2

The draft minutes of Convocation of June 27 and Special Convocation of July 15, 2013 were confirmed.

MOTION – APPOINTMENTS – Tab 1.3

That Convocation approve the appointments as set out in the motion at Tab 1.3
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Carried

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REPORT OF THE DIRECTOR OF PROFESSIONAL DEVELOPMENT AND COMPETENCE – Tab 1.5

THAT the Report of the Director of Professional Development and Competence listing the names of the call to the bar candidates be adopted.

Carried

PARALEGAL STANDING COMMITTEE REPORT

Re: Changes to the Paralegal Election Process – Tab 1.6

THAT Convocation approve the changes to the process for the election of paralegals to the Paralegal Standing Committee as set out in the Report.

Carried

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LAWPRO Report

Ms. McGrath presented the Report.

It was moved by Ms. McGrath, seconded by Mr. Silverstein, that Convocation approve the program of insurance offered by LAWPRO for 2014 as set out in the Report at Tab 2.

Carried

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EQUITY AND ABORIGINAL ISSUES COMMITTEE/COMITÉ SUR L'ÉQUITÉ ET LES AFFAIRES AUTOCHTONES REPORT

Mr. Falconer and Mr. Anand presented the Report.

Re: Human Rights Monitoring Group Request for Intervention

Mr. Falconer presented the Report.

It was moved by Mr. Falconer, seconded by Ms. Potter, that Convocation approve the Human Rights Monitoring Group's request for intervention in the following case:

> China – the detention of Lawyer Ni Yulan, with the proposed letter of intervention and public statement presented at Tab 3.1.1 and proposed letters to Lawyers' associations as set out at Tab 3.1.2.

Carried

Re: Challenges Faced by Racialized Licensees Working Group Report

Mr. Anand spoke to the Report for information.

For Information

- Challenges Faced by Racialized Licensees Working Group Update
- *Accessibility for Ontarians with Disabilities Act* – Integrated Regulation
- Discrimination and Harassment Counsel Ten-Year Report for December 2002 to December 2012 and Report for January to June 2013
- Human Rights Monitoring Group Interventions
- Public Education Equality and Rule of Law Series Calendar 2013

TRIBUNALS COMMITTEE REPORT

Mr. Anand presented the Report.

Re: Adjudicator as Witness

It was moved by Mr. Anand, seconded by Ms. Doyle, that Convocation

a. revoke its 1995 policy respecting "benchers as witness" and replace it with the following policy respecting adjudicators as witnesses:

> No adjudicator, bencher or elected paralegal member of the Paralegal Standing Committee shall provide written or oral

evidence as a character witness in support of a party before either the Hearing Panel or Appeal Panel unless the party demonstrates that the inability to put such evidence before the Panel would unfairly prejudice the party.

Aucun arbitre, conseiller ou parajuriste élu membre du Comité permanent des parajuristes ne doit fournir de preuve écrite ou orale à titre de témoignage de la bonne moralité à l'appui d'une partie devant le Comité d'audition ou le Comité d'appel, à moins que la partie ne démontre que l'incapacité de présenter une telle preuve au Comité lui causerait un préjudice indu.

b. approve the inclusion of the policy respecting adjudicators as witnesses in the Adjudicator Code of Conduct as set out at Tabs 5.1.1 and 5.1.2.

Carried

For Information

- Tribunals Office Quarterly Statistics for the periods ending March 31, 2013 and June 30, 2013

BENCHER ELECTION WORKING GROUP REPORT

Ms. Leiper presented the Report.

Re: Amendments to By-Law 3 to Implement Reforms to the Bencher Election and Paralegal Standing Committee Election Process

It was moved by Ms. Leiper, seconded by Mr. Scarfone, that Convocation approve the amendments to By-Law 3 [Benchers, Convocation and Committees] set out in the motion at Tab 12.1.

Carried

PROFESSIONAL DEVELOPMENT AND COMPETENCE COMMITTEE REPORT

Ms. Minor presented the Report.

Re: By-Law 6.1 Amendments Respecting Continuing Professional Development (CPD) Program Changes

It was moved by Ms. Minor, seconded by Ms. Horvat, that Convocation:

a. approve the proposed amendments to By-Law 6.1 as set out at Tab 12.2 and
b. reverse its decision, in paragraph 3(g) of the May 30, 2013 Joint Report to Convocation on the Two Year CPD Review, that a fee be charged to licensees when they return from suspension for having failed to meet the annual CPD reporting deadline of December 31 and/or for failing to complete their annual CPD requirement by December 31.

Carried

Re: By-Law 7.1 Amendments Respecting Summer Law Students Appearing Before Courts and Tribunals

It was moved by Ms. Minor, seconded by Mr. Lerner, that Convocation approve amendments to By-Law 7.1 as set out at Tab 12.3.

Carried

For Information

- Contingency Planning Resources

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Audit and Finance Committee Report

Re: Law Society of Upper Canada Financial Statements for the Six Months Ended June 30, 2013

Mr. Bredt presented the financial statements for the Law Society for the six months ending June 30, 2013 for information.

For information

- LAWPRO Financial Statements for the six months ended June 30, 2013
- Law Society of Upper Canada Financial Statements for the six months ended June 30, 2013
- LibraryCo. Financial Statements for the six months ended June 30, 2013
- Performance of Investment Manager
- Investment Compliance Reporting

ANNOUNCEMENTS BY THE TREASURER AND THE CHIEF EXECUTIVE OFFICER

The Treasurer announced that Convocation has approved a registration fee for the Law Society CPD programs and practice management ("professionalism") content in the amount of $25 for programs under three (3) hours in length and $50 for programs that are three (3) or more hours in length, to begin in 2014.

Mr. Lapper announced that the Law Society has concluded a collective agreement with Law Society Security staff for two years, which has been ratified.

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REPORTS FOR INFORMATION ONLY

Paralegal Standing Committee Report
- Professional Regulation Division Quarterly Report
- 2013 Paralegal Annual Report

Professional Regulation Committee Report
- Amendments to the *Rules of Professional Conduct* Arising from Implementation of the Federation of Law Societies of Canada Model Code of Professional Conduct
- Professional Regulation Division Quarterly Report
- 2013 Lawyer Annual Report

CONVOCATION ROSE AT 3:10 P.M.

Tab 1.3

To the Benchers of the Law Society of Upper Canada Assembled in Convocation

The Director of Professional Development and Competence reports as follows:

CALL TO THE BAR AND CERTIFICATE OF FITNESS

Licensing Process and Transfer from another Province – By-Law 4

Attached is a list of candidates who have successfully completed the Licensing Process and have met the requirements in accordance with section 9.

All candidates now apply to be called to the bar and to be granted a Certificate of Fitness on Thursday, October 24th, 2013

ALL OF WHICH is respectfully submitted

DATED this 24th day of October, 2013

CANDIDATES FOR CALL TO THE BAR
October 24, 2013

Transfer from another province (Mobility)

Ryan Allen Arthur Goodman
Kevin John Heinrichs
Joseph Logan Atkinson

Transfer from another province (Quebec)

Charles Edouard Moulins

Licensing Process

Jonathan Michael Mac Kenzie
Trevor Kevin Cunningham

The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 2

Report to Convocation
October 24, 2013

Audit & Finance Committee

Committee Members
Christopher Bredt (Co-Chair)
Carol Hartman (Co-Chair)
John Callaghan (Vice-Chair)
Adriana Doyle
Paul Dray
Susan Elliott
Seymour Epstein
Janet Leiper
James Scarfone
Alan Silverstein
Catherine Strosberg
Robert Wadden
Peter Wardle

Purpose of Report: Decision and Information

Prepared by the Finance Department
Wendy Tysall, Chief Financial Officer, 416-947-3322 or wtysall@lsuc.on.ca

TABLE OF CONTENTS

For Decision

For Information

COMMITTEE PROCESS

1. The Audit & Finance Committee ("the Committee") met on October 9, 2013. Committee members in attendance were Chris Bredt (co-chair), Carol Hartman (co-chair) (phone), John Callaghan (Vice-Chair), Adriana Doyle, Paul Dray, Seymour Epstein, Janet Leiper (phone), Alan Silverstein, Catherine Strosberg, Robert Wadden and Peter Wardle.

2. Law Society staff in attendance: Robert Lapper, Wendy Tysall, Fred Grady and Andrew Cawse.

TAB 2.1

FOR DECISION

2014 LAW SOCIETY OF UPPER CANADA BUDGET

Motion:

3. That Convocation approve the Law Society's 2014 Budget including the following annual fee amounts.

For lawyers:

General Fee	**$1,376**
Compensation Fund	**238**
LibraryCo	**202**
Capital	**50**
Total	**$1,866**

For paralegals:

General Fee	**$796**
Compensation Fund	**150**
Capital	**50**
Total	**$996**

Budget Material

4. The Society's draft 2014 budget materials are presented as :

- 2014 Draft Budget Summary at Tab 2.1.1
- 2014 Draft Budget Detail (in camera) at Tab 2.1.2

5. A full discussion of the budget can be found in the above materials.

Law Society of Upper Canada
2014 Draft Budget Summary

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The Law Society of Upper Canada | Barreau du Haut-Canada

Presented on October 24, 2013

Convocation

FOR BENCHER USE ONLY

Law Society of Upper Canada
2014 Draft Budget Summary
Table of Contents

This material has two parts – a medium term financial plan comprising budget scenarios for 2015 and 2016 and the 2014 Draft Budget.

Three Year Budget Scenarios

For the first time, the Society's annual budget includes a forecast of revenues, expenses and annual fees for the next three years. This presents Convocation with the financial implications of decisions made in the 2014 budget for 2015 and 2016. This budgetary process will continue with each succeeding budget providing the current year budget and projected estimates for following years. This will enable Convocation to engage in longer term financial planning and provide lawyers and paralegals with guidance on the future direction of the annual fee.

ACHIEVEMENTS

Addressing Convocation Priorities and Fiscal Prudence

The budget has been prepared to address the priorities of Convocation established in 2011 for the 2011-2015 Bencher term.

1. Access to justice
2. Competence and professional standards
3. Equity, diversity and retention
4. Tribunal issues
5. Business structures / law firm financing
6. Professional regulation

The Society has engaged in a review of operations with the intention of improving the efficiency of its program delivery and administrative activities and procedures. This review has already reaped the benefits of administrative consolidation resulting in staffing reductions and cost savings reflected in 2014, with additional savings expected in future years.

Annual Fee Stability

Since 2005, lawyers (paralegals since 2008) have experienced an increase in their annual fee each year. Although these increases have been relatively modest year over year, the total fee for lawyers increased by $410 to $1,851 between 2005 and 2013. The 2014 budget increases the annual fee to $1,866 for lawyers, an increase of less than 1%, and holds the annual fee at $996 for paralegals. The scenario for 2015 and 2016 maintains the annual fee for lawyers and paralegals at these levels.

Reduced Use of Fund Balances to Mitigate Annual Fees
In past years the Society has utilized the accumulated fund balances of the General and Compensation funds to mitigate fees. In 2013, the total of fund balances utilized was $5.4 million representing just over 5% of the Society's total budget. While utilizing fund balances to mitigate fee increases is an accepted practice in not-for-profit budgeting, it is by its nature a short-term funding mechanism that cannot be sustained for an extended period of time. In 2014, the use of General and Compensation fund balances to mitigate annual fees is reduced to $1.5 million and declines to $413,000 in 2016.

Fund Balance Policy
In 2014, the annual fee will be due on March 1st, one month earlier than in 2013 and two months earlier than in 2012. This change has significantly reduced the Society's exposure to cash flow risk. Convocation's approved fund balance policy requires that a minimum of two months and a maximum of three months operating expenses be maintained in the General Fund balance. For current 2014 projections, that would translate into a minimum of $14.8 million and a maximum fund balance of $22.2 million. Given the significant reduction in cash flow risk, it is reasonable to maintain the General Fund balance at or near the lower range of the spectrum. The budget scenarios maintain a General Fund balance at the two month minimum through 2016.

Investment in Information Systems
The budget earmarks a substantial funding pool ($8 million) in the Capital Fund to invest in information systems over the next three years. The Society must enhance its current level of technology to meet the growing demands of the digital age. The pool earmarked for technology enhancements will be utilized as projects intended to improve efficiency and effectiveness are identified and approved.

LAWYER LICENSING PROCESS

Pathways Pilot Project
The lawyer licensing process is undergoing major change and, at the time of drafting, the financial implications of the changes are unknown. The budget scenario assumes that the licensing process fee will be set to cover the full cost of the program net of any contribution from the Law Foundation of Ontario and any contribution from lawyers.

The draft budget scenario revenues and expenses (including allocated administrative costs) associated with the lawyer licensing process are based on 2013 budgeted activity. The actual cost of the new program and the full impact on the fee charged to candidates is still to be determined.

The development costs of the new program are assumed to be $500,000 and are incorporated in program expenses allocated entirely to lawyers. These costs are assumed to be a one-time cost and are eliminated from the budget projections in 2015.

In November 2012, Convocation approved an appropriate member contribution to help defray costs of the pilot Pathways project. The actual amount of this contribution is still to be recommended by the Professional Development and Competence Committee but a preliminary $1 million contribution from lawyers has been included in these budget scenarios. This will reduce the fee for licensing candidates by approximately $500, assuming 2,000 candidates in 2014.

CONTINUING PROFESSIONAL DEVELOPMENT "CPD" REVENUE

CPD revenue has exceeded budget in each of the last three years. For 2014 and beyond, $1.0 million has been added to budgeted CPD revenue to reflect actual results over the past three years.

SIGNIFICANT PROGRAM CHANGES INCLUDED IN SCENARIOS

As approved by Convocation, a nominal charge for professional responsibility programming, generates an additional $1.3 million in revenue starting in 2014.

Changes to the spot and focused audit program approved by Convocation generate savings of $500,000 over 2014 and 2015.

The Law Society's funding of LibraryCo has been maintained at the 2013 amount of $7.5 million for 2014. The Law Society remains committed to a viable library system and will be exploring potential efficiencies and other sources of funds to supplement the LibraryCo levy. To this end, there have been meetings with stakeholders and a working group of these stakeholders has been established. The budget scenario reductions of $500,000 in each of 2015 and 2016 are intended to indicate a direction only while we await the results from the stakeholder working group.

The contingency is reduced from $1.0 million in 2014 to $250,000 in 2015 and beyond.

Also it is assumed, that effective 2015, credit card payments will only be accepted through a third party payment processor that will charge processing fees directly to the credit card user and not to the Society. This will remove approximately $1.0 million from expenses in 2015 and beyond.

CAPITAL EXPENDITURE FUNDING

For many years the Society has incorporated a capital levy in its annual fee to provide a source of funds to maintain and upgrade its facilities at Osgoode Hall and to acquire, maintain and upgrade information technology in support of operations. The levy has been set at $85 for the past few years. Over the years, management has attempted to restrain capital spending to the amount raised by the annual levy without a detailed assessment of capital needs extending out over a number of years. This is particularly true in regard to information systems.

The Society has recently undertaken a review of its information systems governance procedures, management, skill requirements and physical assets. The Society will require a significant investment in information technology over the next several years in order to achieve efficiencies in its operations and to meet the expectations of members and the public in terms of accessing information and interacting with the Society. Increasingly, these expectations include the use of electronic communications, electronic data collection and dissemination and the transition of processes that have been traditionally paper based to electronic formats. Meeting these expectations will require significant financial resources and effort.

Steps have been taken as part of the operational review to address the management structure of information systems and a governance structure for managing the establishment of priorities and monitoring progress on activities is under development.

The budget scenarios presented include a provision of $8.0 million ($6.0 million transferred from the General Fund balance to the Capital Fund and $2.0 million from the existing Capital Fund balance) dedicated to the revitalization of the Society's information systems over the next three years. Details of proposed capital spending beyond 2014 are not included but will be presented to the Audit & Finance Committee for consideration and recommendation to Convocation upon completion of management's planning.

FINANCIAL OUTCOMES

i. The 2014 budget increases the annual fee by $15 to $1,866 for lawyers and holds the annual fee at $996 for paralegals. The forecast for 2015 and 2016 maintains the annual fee for lawyers and paralegals at these levels.

ii. The use of General and Compensation fund balances to mitigate annual fees is reduced from $5.4 million in 2013 to $1.5 million in 2014 and declines to $413,000 in 2016. The balance of the lawyer General Fund at the end of 2013 is projected to be $19.6 million. After the proposed transfer to the Capital Fund ($6 million), the fund balance at the end of 2014 will be $13.2 million. Together with the paralegal General Fund balance ($1.3 million), this will comply with the fund balance policy approved by Convocation.

iii. Earmarks $8 million in the Capital Fund for critical information systems development and upgrades from 2014-2016 allowing the capital levy, currently $85, to be dedicated solely to facilities projects for the period 2014-2016. This being the case, the levy could be reduced to $50 in 2014 and gradually restored to an appropriate level to maintain the Society's facilities and information systems infrastructure

iv. Maintains the transfer to LibraryCo at the 2013 level of $7.5 million for 2014; reduced to $6.5 million by 2016.

v. Compensation fund balances remain in a strong position to absorb an extraordinary defalcation

Law Society of Upper Canada
2014-2016 Budget Scenario
Lawyers and Paralegals

	Revenue	Approved 2013 Budget	Draft 2014 Budget	Projected 2015 Budget	Projected 2016 Budget
1	Annual fee revenue	71,758,050	73,731,200	75,178,210	76,590,980
2	Licensing process	7,494,600	6,753,800	6,842,640	7,035,540
4	CPD and other revenue	18,789,900	19,637,000	19,833,370	20,043,710
5	Fund Balances	5,401,000	1,506,400	492,230	413,000
6	**Total Funding**	103,443,550	101,628,400	102,346,450	104,083,230
	Expenses				
7	**General fund**	89,843,800	89,405,500	88,552,150	90,024,380
8	**Capital fund**	3,455,250	2,077,500	2,631,900	3,381,300
9	**LibraryCo**	7,498,000	7,498,000	7,000,000	6,500,000
10	**Compensation Fund**	2,646,500	2,647,400	2,647,400	2,647,400
11	**Total Expenditures**	103,443,550	101,628,400	100,831,450	102,553,080

Line 1 ***Annual fee revenue is based on a consistent levy of $996 for paralegals and for lawyers: $1,851 in 2013 and $1,866 thereafter***

Law Society of Upper Canada
2014-2016 Budget Scenario
Lawyers

	Revenue	Approved 2013 Budget	Draft 2014 Budget	Projected 2015 Budget	Projected 2016 Budget
1	Annual fee revenue	67,725,300	69,400,000	70,545,620	71,657,240
2	Licensing process	6,186,700	5,446,700	5,521,110	5,671,410
3	CPD and other revenue	17,799,500	18,409,400	18,593,490	18,785,430
4	Fund Balances	4,551,000	1,153,200	433,000	413,000
5	**Total Funding**	96,262,500	94,409,300	95,093,220	96,527,080
	Expenses				
6	**General fund**	83,118,000	82,514,900	81,698,220	82,965,330
7	**Capital fund**	3,111,000	1,860,000	2,343,600	2,995,200
8	**LibraryCo**	7,498,000	7,498,000	7,000,000	6,500,000
9	**Compensation Fund**	2,535,500	2,536,400	2,536,400	2,536,400
10	**Total Expenditures**	96,262,500	94,409,300	93,578,220	94,996,930
11	**Full Fee Paying Equivalent Lawyers**	**36,600**	**37,200**	**37,800**	**38,400**

Law Society of Upper Canada
2014-2016 Budget Scenario
Paralegals

	Revenue	Approved 2013 Budget	Draft 2014 Budget	Projected 2015 Budget	Projected 2016 Budget
1	Annual fee revenue	4,032,750	4,331,200	4,632,590	4,933,740
2	Licensing process	1,307,900	1,307,100	1,321,530	1,364,130
3	CPD and other revenue	990,400	1,227,600	1,239,880	1,258,280
4	Fund Balances	850,000	353,200	59,230	-
5	**Total Funding**	7,181,050	7,219,100	7,253,230	7,556,150
	Expenses				
6	**General fund**	6,725,800	6,890,600	6,853,930	7,059,050
7	**Capital fund**	344,250	217,500	288,300	386,100
8	**Compensation Fund**	111,000	111,000	111,000	111,000
9	**Total Expenditures**	7,181,050	7,219,100	7,253,230	7,556,150
10	**Full Fee Paying Equivalent Paralegals**	**4,050**	**4,350**	**4,650**	**4,950**

THE LAW SOCIETY OF UPPER CANADA

Fund Balance Projections

For years 2013-2016

($000's)

		General Fund		Compensation Fund		Capital	E&O Investment
		Lawyer *	Paralegal	Lawyer	Paralegal	Fund	Income
1	**Projected December 31, 2013**	**$ 19,622**	**$ 1,613**	**$ 25,001**	**$ 400**	**$ 2,000**	**$ 2,500**
2	Transfer to Capital Fund	-$ 6,000	$ -	$ -	$ -	$ 6,000	$ -
3	Investment Income 2014						$ 1,000
4	Dedicated to IT upgrades 2014-2016					-$ 3,000	
5	Proposed 2014 fee mitigation	-$ 446	-$ 313	-$ 707	-$ 40	$ -	-$ 1,500
6	**Projected December 31, 2014**	**$ 13,176**	**$ 1,300**	**$ 24,294**	**$ 360**	**$ 5,000**	**$ 2,000**
7	Investment Income 2015						$ 1,000
8	Dedicated to IT upgrades 2014-2016					-$ 3,000	
9	Proposed 2015 fee mitigation	-$ 433	-59	$ -			
10	**Projected December 31, 2015**	**$ 12,743**	**$ 1,241**	**$ 24,294**	**$ 360**	**$ 2,000**	**$ 3,000**
11	Investment Income 2016						$ 1,000
12	Dedicated to IT upgrades 2014-2016					-$ 2,000	
13	Proposed 2016 fee mitigation	-$ 413	$ -	$ -			
14	**Projected December 31, 2016**	**$ 12,330**	**$ 1,241**	**$ 24,294**	**$ 360**	**$ -**	**$ 4,000**

* includes working capital reserve of $10.7 million

2014 Draft Budget Overview

The draft 2014 budget is based on the 2014 – 2016 budget scenario and increases the annual fee by $15 to $1,866 for lawyers and holds the annual fee at $996 for paralegals, broken down as follows:

	2014		2013	
	Lawyers	**Paralegals**	**Lawyers**	**Paralegals**
General Fee	$ 1,376	$ 796	$ 1,340	$ 758
Compensation Fund	238	150	221	153
Capital	50	50	85	85
LibraryCo Inc.	202	0	205	0
Total	$ 1,866	$ 996	$ 1,851	$ 996

2014 Budget Highlights

The 2014 budget incorporates the results of the recent operational review and while demonstrating fiscal restraint, the draft budget focuses on the organization's core responsibilities of professional regulation, professional development and competence, policy development and facilitating access to justice, while addressing the established priorities for the 2011-2015 Bencher term.

Growth in the number of lawyers will increase budgeted full fee paying equivalent lawyers by 600 to 37,200. Growth in the number of paralegals will increase the budgeted full fee paying equivalent paralegals by 300 to 4,350. While the "full fee equivalent" is used as a measure for budget purposes, by the end of 2014, the Law Society will regulate over 50,000 active lawyers and paralegals.

The primary factors that have played a role in drafting the 2014 budget are:

- focussing on the priorities for the 2011-2015 Bencher term
- considering the three-year Pathways pilot project that will allow lawyer licensing candidates to either article or complete a Law Practice Program, starting in the 2014-15 licensing year
- incorporating sustainable CPD revenues based on a longer history of the mandatory program
- charging a nominal amount for professional responsibility CPD programming
- streamlining the Spot Audit program
- decreasing the number of full-time equivalent employees

- reducing outside counsel expenses
- incorporating the new office of the Tribunals Chair
- reducing the costs of the Member Assistance Plan
- positioning remuneration costs in respect of the market and merit

Revenue Summary

The budget utilizes a combined total of $1.5 million (2013: $5.4 million) from accumulated fund balances to mitigate fee increases comprising $1.2 million from the lawyer fund balances and $353,000 from the paralegal fund balances. If these funds were not utilized, lawyers' annual fees would increase by $31 and paralegals' by $81. In addition, $1.5 million (2013: $3 million) in surplus investment income is being transferred from the Errors & Omissions Insurance Fund.

Continuing Professional Development "CPD" revenue has exceeded budget in each of the last three years. For 2014, $1 million has been added to budgeted CPD revenue to reflect actual results over the past three years. In addition, a nominal charge for professional responsibility programming has been implemented in the 2014 budget, generating an additional $1.3 million in revenue.

The lawyer Licensing Process is undergoing major change and, at the time of drafting, the implications of the changes are unknown. The 2014 budget assumes that the licensing process fee will be set to cover the full cost of the program net of any contribution from the Law Foundation of Ontario and net of any contribution from lawyers. Revenues and expenses associated with the lawyer licensing process are based on 2013 budgeted activity. The fee charged to lawyer candidates in 2013 was $2,400. We know the fee will increase in 2014; the amount of that increase is yet to be determined. In November 2012, Convocation approved an appropriate member contribution to help defray costs of the pilot Pathways project. The actual amount of this contribution is still to be recommended by the Professional Development and Competence Committee but a preliminary $1 million contribution from lawyers has been included in these budget scenarios. This will reduce the fee for licensing candidates by approximately $500, assuming 2,000 candidates in 2014.

Investment income in the General Fund is budgeted to remain at the 2013 level of $700,000.

Under an Administrative Services Agreement between LibraryCo Inc. and the Law Society, the Law Society performs the administrative functions for LibraryCo. The fee for these services is estimated at $520,000 in 2014 (2013 budget: $520,000), funding the operating expenses of the Law Society necessary to provide these services.

The Compensation Fund component is budgeted to increase from a levy of $221 to $238 per lawyer primarily because of reduced use of the fund balance to mitigate fees. Investment income is consistent at $900,000. The paralegal Compensation Fund levy is relatively stable at $150 compared to $153 in 2013. The Compensation Fund levies have been set after an actuarial assessment of claims and fund balances based on expected requirements to meet future potential claims in excess of routine annual requirements. No change in the provision for claims is budgeted. Both Funds, lawyer and paralegal, are financially and actuarially sound.

For both lawyers and paralegals, the Capital Allocation levy decreases from $85 to $50 as part of the financing plan for the acquisition and maintenance of capital assets discussed in this material.

The Law Society's budget sets the LibraryCo levy at $202 (2013: $205 per lawyer), which maintains Law Society funding of LibraryCo at 2013 levels ($7.5 million).

Expense Summary

Total direct expenses are decreasing from $103.4 million in 2013 to $101.6 million in 2014.

Total salary and benefit costs are increasing from $56.3 million budgeted in 2013 to $56.7 million in 2014 or less than 1%. This includes a general provision for salary adjustments with a median value of 2%.

The draft 2014 budget contains a net decrease of full-time-equivalent employees as analyzed in more detail below.

The budget request for Professional Regulation, Tribunals and Compliance is at $28.1 million. The major changes are the two new employees in the office of the Tribunals Chair and the decrease in external counsel expenses of $400,000.

The budget request for Professional Development and Competence is at $22.3 million.

- The draft 2014 budget expenses associated with the lawyer licensing process are based on 2013 budgeted activity. The development costs of the new program are assumed to be $500,000 and are incorporated in program expenses allocated entirely to lawyers. These costs are assumed to be a one-time cost and are eliminated from the budget in 2015.
- The scope of the Spot Audit program is being reduced by $320,000 and 3 FTEs.
- Staffing in Practice Management and Continuing Professional Development is being reduced by 1 and 3 FTEs respectively.

The budget request for Convocation, Policy and Outreach is at $9.9 million. Payments to the Federation and CanLII are increasing by just over a total of $100,000. Equity and Communications' program expenses are declining by a total of $260,000. The budget for bencher remuneration and expenses is being reduced by $275,000 reflecting trends in the past year.

The budget request for Services to Members and the Public is at $16.3 million. The major change in this area is the reduction in the net cost of the Members Assistance Plan by $323,000. After the first year of operation of the new program it is apparent that the original budget was conservative so both the underlying cost and LAWPRO's contribution to the program are being reduced.

The budget request for Corporate Services & Administration is at $22.9 million. The major changes are that Legal Affairs is adding two employees and reducing their external counsel budget by $130,000. There are also staff reductions in Human Resources, Information Systems and Security Services.

The budget provides $400,000 (2013 budget: $400,000) for payments to lawyers in small firms or sole practice under the Parental Leave Assistance Program.

The Society's contingency allowance to provide funding for unanticipated events or activities that occur throughout the year is maintained at $1.0 million.

General Fund Balance

In May 2013, Convocation approved policies to manage the size and use of the Law Society's lawyer General and Compensation Fund balances maintaining the sum of the lawyer General Fund balance (now including the Working Capital Reserve) at no less than two, and no more than three months of General Fund budgeted expenses. The projected balance of the lawyer General Fund at the end of 2014 is $13.2 million, at the low end of the approved range. This projected balance is after a proposed $6 million transfer to the Capital Fund as part of the Information Systems improvement initiative.

The balance in the paralegal General Fund balance is projected at $1.3 million at the end of 2014. This is viewed as appropriate although no formal fund balance management policies have been adopted due to the size of the balance and limited operational history.

Compensation Fund
The budget for 2014 sets the allowance for claims at $2.45 million (2013 budget: $2.45 million) for lawyers and $111,000 (2013 budget: $111,000) for paralegals. The Fund's actuary indicates this level of claims experience is consistent with routine, recurring claims levels for lawyers over the past ten years and a reasonable estimate for paralegals given the six years of historical data.

LibraryCo Inc.
The Law Society's budget provides for $7.5 million funding for LibraryCo, the same as in 2013.

Other Canadian Law Society Fees
The Law Society's current and proposed annual lawyer fee is $1,866. Although it is difficult to compare annual fees with other Canadian law societies because of the difference in the numbers of members and responsibilities, the following are some of their most recent fees: Law Society of Alberta - $1,760, Manitoba - $2,025 and Nova Scotia - $1,795. At the Law Society of British Columbia, possibly the Law Society of Upper Canada's closest comparator, the proposed 2014 practice fee is $1,940 (an increase of 2.5% from 2013).

Operational Summaries

Professional Regulation Division
The Law Society's Professional Regulation division carries out a variety of activities, including working with complainants, lawyers and paralegals to resolve complaints received by the Law Society, and when necessary, undertaking investigations that may result in disciplinary prosecutions. In addition, the division provides Trustee Services for the practices of lawyers and paralegals who are incapacitated by legal or health reasons.

The Professional Regulation predicted intake of new cases in Professional Regulation is expected to follow historical trends increasing at an average rate of 2.5% for Intake, Complaints Resolution, Investigations and Discipline, although as of September 2013 the intake has increased by 7% as compared to the first three quarters of 2011. It is expected that incoming new complaints can be absorbed by the existing staff resources. The Discipline department's inventory of current cases has continued to remain high as cases require more hearing days to complete.

The 2014 Professional Regulation budget request includes no new positions. The Division will rely on new processes and strategies to maintain a stable input/output throughout 2013 and 2014. The need for outside counsel and expert witnesses has reduced in 2013 and will be further reduced in 2014. This is in part due to the completion of hearings in two major cases. In addition, the costs for outside

counsel are more stable as a result of greater reliance on specific firms with expertise in mortgage fraud and unauthorized practice, which are able to provide services at a reduced rate. To reflect this, the outside counsel and expert witness budget has been reduced to $2 million for 2014 (from $2.4 million in 2013 and $2.7 million in 2012).

Compliance

Complaints Services is the starting point for all complaints about lawyers and paralegals. Administrative Compliance administers most of the Law Society's by-law driven processes. There are no significant changes to this department's budget in 2014. By-law Administration Services is responsible for the annual member filing process and a number of other by-law driven processes. The introduction of several new administrative suspension types and the reduction in default periods is increasing activity. The staffing composition is gradually being upgraded from Representatives to Law Clerks and one position is being transferred to Client Service Centre Administration, reducing BAS headcount from 10 to 9.

Tribunals

The Tribunals Office supports the Law Society tribunals, including scheduling and clerking hearings, reviewing and serving tribunal orders, reviewing and publishing written and oral reasons of the tribunals and responding to enquiries about the hearings process and the status and results of hearings.

The 2014 budget also includes the new office of Tribunals Chair. The Chair is responsible for the overall implementation of the strategic direction and performance of tribunals, including Hearing and Appeal Panels, in conformity with the provisions of the Law Society Act and Convocation's policies.

The 2014 Tribunals budget provides a total budget for Tribunals of $2.3 million (2013 budget: $1.9 million) with FTEs increasing from 11 to 14 with the specific inclusion of the office of the Tribunals Chair. Some program expenses have decreased by a total of $231,000 to better reconcile with the recent history for adjudicator remuneration and disbursements and due to fewer lengthy and complex hearings.

Professional Development and Competence Department

The Professional Development and Competence ("PD&C") department is responsible for all activities relating to licensing, Continuing Professional Development, practice management support and remedial competence for lawyers and paralegals.

The 2014 PD&C budget increases revenues from $14.8 million to $16.5 million. CPD revenue has exceeded budget in each of the last three years so for 2014, $1.0 million has been added to budgeted CPD revenue to reflect actual results over the past three years.

A nominal charge for professional responsibility programming generates an additional $1.3 million in revenue.

The lawyer licensing process is undergoing major change and, at the time of drafting, the implications of the changes are unknown. The 2014 budget assumes that the licensing process fee will be set to cover the full cost of the program net of any contribution from the Law Foundation of Ontario and any contribution from lawyers. The LFO grant has decreased by 30%. In November 2012, Convocation approved an appropriate member contribution to help defray costs of the pilot Pathways project. The actual amount of this contribution is still to be recommended by the Professional Development and Competence Committee but a preliminary $1 million contribution from lawyers has been included for 2014. This will reduce the fee for licensing candidates by approximately $500, assuming 2,000 candidates in 2014. Other revenues and expenses associated with the lawyer licensing process are based on 2013 budgeted activity with the exception of a one-time development cost of the new program estimated at $500,000 and incorporated in program expenses.

Changes to the spot and focused audit program generate net savings of $320,000 in 2014. Operating and program expenses for the Great Library are effectively stable.

Policy Secretariat

Policy is responsible for a number of functions important to the corporate interests of the Law Society, including policy development and Convocation support. Staff acts as secretaries to committees, task forces and working groups. Policy Counsel are responsible for developing policy ideas, including research, consultation with stakeholders, and writing reports. The Director of Policy and Tribunals acts as Secretary to Convocation.

The Policy Secretariat also contributes time and expertise to the work of the Federation of Law Societies of Canada.

There are no significant changes in staffing numbers, operating or program expenses for Policy in 2014 with expenses totaling $1.2 million.

Bencher / Treasurer Expenses and Remuneration

The total budget for Bencher and Treasurer's expenses has decreased from $3.4 million in 2013 to $3.1 million in 2014 because of reductions in bencher remuneration and bencher functions totaling $275,000 based on the recent history of these expenses.

Communications

The Communications Department provides comprehensive and strategic communications advice and support to all areas of the Law

Society to promote and enhance the organization's profile and credibility. The services provided include:

- media relations
- issues management
- web content
- lawyer and paralegal communications including production of the Gazette, the Annual Report and items in the Ontario Reports
- public communications including creation and distribution of corporate brochures
- creative services such as desktop publishing and photography and
- french language services and translation

The total budget requirement for 2014 is $1.6 million (2013: $1.7 million) with a reduction in staffing by one to eleven.

Public Affairs

The Public Affairs department is responsible for managing strategic outreach and external relations for the Law Society. This includes the articulation of a strategic vision consistent with the Law Society's mandate and profile for interactions with external stakeholders, including government.

Expenses of the Public Affairs department total $804,000 in 2014 (2013: $867,000). The position of Liaison Counsel has been eliminated and the position of Government and Stakeholder Relations Advisor is being shared with Equity.

Federation of Law Societies of Canada

In 2014, the Law Society is budgeting to provide $980,000 for Federation annual fees and potential litigation expenses of the Federation, up slightly from $937,000 in 2013 primarily based on membership numbers.

Equity Initiatives

Consistent with the Law Society's mandate to govern the profession in the public interest and to facilitate access to justice, the Equity Initiatives department undertakes activities to help ensure that:

- the Law Society's services, programs and decision-making as well as its practitioners, are reflective of the Ontario population and accessible to diverse communities
- there are no discriminatory barriers to participation in the legal profession in Ontario and
- the governance of the profession is guided at all times by goals of non-discrimination, equity and diversity

The department's total budget for 2014 has decreased to $1.2 million from $ 1.4 million in 2013. The decrease is a result of the completion of the preliminary consultation in the Challenges Faced by Racialized Licensees Project ($120,000) and the Access to Justice Guide ($40,000) in the Department's Program Expenses. The total employee count remains at 6. The position of Government and Stakeholder Relations Advisor is being shared with Public Affairs.

Contingency
Total corporate expenses include a contingency of $1 million (2013: $1 million).

Catering
The primary function of Catering is to provide food services for benchers and staff and a restaurant also operates in Convocation Hall offering lunch service to lawyers, paralegals, judges, benchers and members of the public. In addition, the department caters internal functions and events for outside organizations wishing to use the facilities at Osgoode Hall.

The cafeteria in the basement is also used for the provision of meals for the Lawyers Feed the Hungry program. The site and its facilities are provided to the program free of charge. The program provides over 2,000 meals a week. Meals are served on Wednesday, Thursday, Friday and Sunday. At three of the meals, brown bag lunches are also provided to guests as a take-away.

In 2014, Catering expenditures are budgeted at $2 million, effectively the same as 2013. After offsetting revenues the department has a net cost of $302,000 (2013: $306,000).

Law Society Referral Service ("LSRS")
The LSRS is a public service of the Law Society that helps people find a lawyer or paralegal. Members of the public calling the LSRS, are provided with the name of a lawyer or paralegal who will provide a free consultation of up to 30 minutes. On-line assistance is also available. The expense budget for the LSRS is effectively the same at $966,000 offset by revenues of $325,000.

Compensation Fund
The lawyer Compensation Fund levy for 2014 of $238 is $17 higher than 2013 due to the reduced use of the Fund's balance. $707,000 has been used in 2014 compared to $1.8 million in 2013 to mitigate the increase to lawyer's fees that would otherwise be required.

The lawyer Fund's actuary has indicated a provision for claims for 2014 of $2.45 million (unchanged from 2013) is sufficient based on the Fund's claims history.

The paralegal Compensation Fund levy of $150 has decreased slightly from $153 in 2013. The provision for claims remains the same at $111,000, with the Fund benefiting from the increased number of members. As in 2013, the relatively large projected fund balance has allowed the use of $40,000 of the fund balance to mitigate the 2014 levy without impairing the financial integrity of the fund.

Funding of External Organizations

In June 2012, Convocation approved a policy for requests to the Law Society from external organizations for support and funding of initiatives that will assist the Law Society to fulfill its mandate. The Law Society received twelve grant applications for the 2014 budget year requesting a total of $1.4 million in funding for a variety of programs. After the grant applications have been assessed, the current draft of the budget includes funding to the County and Districts Law Presidents Association ($248,000, unchanged from 2013) and Pro Bono Law Ontario ($125,000, unchanged from 2013). A summary of all applications is in the detailed budget material (in camera).

In 2010, Convocation approved support for the Law Commission of Ontario ("LCO") for a further five year mandate subject to budgetary considerations. In 2014, the Law Society is budgeting to provide $138,000 to the LCO, unchanged from 2013. The Law Society also provides services in kind to the Osgoode Society for Legal History and the Ontario Justice Education Network.

Canadian Legal Information Institute ("CanLII")

CanLII is a non-profit organization managed by the Federation of Law Societies of Canada. CanLII's goal is to make Canadian law accessible for free on the Internet. The website provides access to court judgments, tribunal decisions, statutes and regulations from all Canadian jurisdictions.

Similar to the funding of the Federation, funding of CanLII is membership based and the 2014 budget allocates $1.3 million (2013: $1.2 million) for the operation of CanLII. Ontario lawyers continue to support three types of library-related services:

LibraryService	*2014 Budget*	*2013 Budget*
County and District Law Libraries (through LibraryCo Inc.)	$7,500,000	$7,500,000
The Great Library	$3,100,000	$3,100,000
CanLII	$1,300,000	$1,200,000
TOTAL	$11,900,000	$11,800,000
Cost per lawyer	$320	$322

Member Assistance Plan ("MAP")
MAP is a confidential service sponsored by the Law Society providing a suite of life event services that allows lawyers, paralegals and their family members to address and resolve any personal or professional concerns. The net cost of MAP is decreasing from $538,000 to $215,000. The 2013 budget for MAP was established prior to the contract being finalized and was set at a conservative estimate. The 2014 budget is based on the contract and the experience of the first year of the program's operation.

Parental Leave Assistance Program ("PLAP").
Convocation has approved an extension of the PLAP with the implementation of a means test. However the approval was subject to any tax implications determined by the Canada Revenue Agency which has not been finalized and the program, as currently structured, continues to be offered.

The budget provides $400,000 (2013 budget: $400,000) for payments to lawyers in small firms or sole practice under the PLAP.

Chief Executive Officer ("CEO") and Finance
The four main activities are the operation of the office of the CEO, the finance services for the Law Society, the provision of administrative and accounting services in support of LibraryCo Inc. and the provision of administrative and accounting services in support of the Law Society Foundation.

- The CEO's Office oversees the implementation of policy decisions made by Convocation and leads the operations of the Law Society
- The Finance department provides services for the Society in the areas of financial reporting, general accounting, accounts payable, cash and investment management, payroll, financial policy development, insurance, government filings/returns, central purchasing and the billing of all member and candidate related fees. The department is responsible for ensuring the adequacy of internal financial controls intended to safeguard the financial assets of the Society and for ensuring the Society's books and records are in compliance with generally accepted accounting principles
- The Finance department administers the Society's Parental Leave Assistance Program
- The Finance department provides administrative and accounting services to the Law Society Foundation

The total budget of $4.3 million in 2014 compares to $4.2 million in 2013 with no change in staffing.

Facilities

The Facilities Department provides ongoing facility services for the Law Society's buildings and grounds. Services consist of housekeeping and maintenance, event booking, security, fire prevention, environmental and energy management, space and accommodation planning, building preservation, curatorial, and minor and major capital project services. The latter includes:

- renovations and re-configurations
- major equipment repairs and replacements
- structural reinforcements and stabilization
- energy conservation renovations and retrofits
- security improvement upgrades
- accessibility alterations and heritage restorations

The Facilities 2014 budget of $5.1 million is effectively unchanged.

The Facilities capital budget for 2014 is at the end of this material.

Client Service Centre

Corporate Services is a new division, created as a result of the operational review. Its mandate is to consolidate and align all of the Law Society's shared services, resulting in better coordination and increased efficiencies.

The Client Service Centre ("CSC") is the largest area in Corporate Services which also includes the Corporate Resource and Training Centre, Facilities, Security Services, Catering, the Member Assistance Plan, Human Resources and Information Systems.

The CSC is the front line one-stop access point to the Law Society. The department is equipped to effectively deal with a range of requests from the public, lawyers and paralegals, providing services in a number of languages and formats.
The CSC includes:

- Call Centre
- Law Society Referral Service (included in the Services to Member and Public area for the budget)
- Membership Services
- Complaints Services (included in the Professional Regulation, Tribunals and Compliance area for the budget)
- By-Law Administration (included in the Professional Regulation, Tribunals and Compliance area for the budget)
- Administrative Compliance (included in the Professional Regulation, Tribunals and Compliance area for the budget)

The Call Centre serves as the primary gateway for telephone communication with the Law Society. The 2014 budget for the Call Centre is relatively constant at $875,000 and 12 employees.

The principal function of Membership Services is to administer and maintain the Law Society's licensee database and member files. The 2014 budget for Membership Services is relatively constant at $1.3 million and 19 employees.

Information Systems, Project Management Office and Web Content

The Information Systems ("IS") department is responsible for the computing infrastructure, communication networks, web sites, databases and business applications that support the Law Society in fulfilling its mandate to the public and to its members. During 2013, with the assistance of consultants, the Law Society has assessed IS operational efficiency and effectiveness identifying three areas of focus – governance, flexibility and process management leading to the creation of a Project Management Office ("PMO"). This area's mandate is to assist SMT in identifying which projects should take priority at the Law Society, and to coordinate those projects and work closely with IS to bring them in on time and within budget. The creation of the PMO will also allow for a smaller, more streamlined IS department.

The PMO team consists of five full-time and one contract position. Positions were funded through a combination of budget transfers from IS, approved consulting funds, unfilled vacancies, and transfers of existing positions including the position of IS Director which has been eliminated as IS is now overseen by the Director, Corporate Services.

IS provides technical services to the Society in the areas of computer operations, data storage/backup/retrieval, and design / development of business applications and problem resolution. Specific accountabilities include the Law Society's corporate databases, business support applications, electronic files and document access, numerous web sites, telecommuting and remote support, all aspects of telephony and telecommunications services, maintenance of security measures and disaster recovery/business continuity plans.

Because a significant portion of its workload has shifted to the PMO, the IS staff complement has been reduced. Freed-up resources have been redeployed in other areas, allowing changes to be made in those areas without affecting the division's net 2014 budget request. It is believed that these adjustments will better position IS to concentrate on its core mandate of supporting the Law Society's technical infrastructure and delivering services on a targeted, prioritized basis.

The Information Systems capital budget for 2014 is at the end of this material.

Human Resources
The Human Resources ("HR") function provides a full range of services, including development and implementation of programs to support the organization, employee relations and performance improvement as well as maintenance, compliance and administrative activities.

The budget requirement for HR for 2014 is $1.8 million, a decrease from $2.1 million in 2013 with FTEs declining by 2 to 8.

Corporate Resource and Training Centre
The Corporate Resource and Training Centre's ("CRTC") primary activities are as a resource and consulting group for all Law Society divisions in the areas of quality improvement, process analysis and development, documentation and corporate and technical training.

The 2014 budget of $567,000 is effectively unchanged.

Legal Affairs
Legal Affairs is responsible for providing in house legal services to the organization, and is also responsible for managing and supporting the Litigation Committee and the organization with respect to litigation matters. The budget for 2014 is $993,000 compared to $843,000 for 2013 after the addition of two counsel to make a total headcount of 6. The budget for external counsel is declining by $128,000.

Corporate Revenues and Expenses
The 2014 budget includes the transfer of surplus investment income from the Law Society's Errors and Omissions Insurance Fund in the amount of $1.5 million (2013: $3 million). Other corporate revenues are relatively static. For instance, the current financial markets have led to no change in the budgeted self-generated investment income of $700,000 in the General Fund and $900,000 in the Compensation Fund. Miscellaneous revenues are increasing by $200,000 to account for the impact of fees from lawyers and paralegals for late filings and late payment of annual fees.

Other corporate expenses of $2 million (2013: $3.2 million) include the costs for insurance, professional services, severance, an allowance for unpaid fees and credit card charges which continue to increase to $929,000.

Paralegal Fee Model

In most areas of the Society's operations it is difficult to isolate direct expenditures related specifically to paralegals. A notable exception to this is the paralegal licensing process.

Since all operational departments are providing some level of support to the licensing and regulation of paralegals, a method of allocating a reasonable portion of expenses for departments without direct paralegal resources is required. The model is based on the percentage of paralegals to the total population of licensees, discounted for the limited scope of paralegal practice.

Conclusion

The Law Society has conducted an operational review that systematically reviewed operations and initiated changes directed at the organization and management of operations, and potential efficiencies. The results of the operational review have been incorporated into the 2014 budget and the three year budget scenario. Fee increases have been moderated and the use of fund balances to mitigate annual fees is phased out in a measured manner, $8 million is earmarked for critical Information Systems development and Compensation Fund balances have been maintained to absorb any potential extraordinary defalcation.

The 2014 budget and medium term financial plan are intended to ensure operational sustainability and ongoing support of the Law Society's core functions and the priorities of Convocation.

The Law Society of Upper Canada
2014 Draft Budget
Assumptions

- Increase in Full Fee Paying Equivalents members, 600 for lawyers to 37,200 and 300 for paralegals to 4,350
- Provision for salary merit increases of up to 2%.
- Allocation of $1.5 million from the accumulated surplus investment income in the E&O Fund to mitigate fee increase for lawyers (2013: $3 million)
- Allocation of $446,000 from the General Fund accumulated surplus to mitigate fee increase for lawyers (2013: $2.75 million)
- Allocation of $313,000 from the General Fund accumulated surplus to mitigate fee increase for paralegals (2013: $810,000)
- Allocation of $707,000 (2013:$1.8 million) from accumulated surplus in the lawyer Compensation Fund and $40,000 (2013:$40,000) from the paralegal Compensation Fund
- Capital levy decreased from $85 to $50
- LibraryCo funding maintained at $7.5 million
- Contingency set at $1 million (2013: $1 million)
- Preliminary estimate of a $1million contribution by lawyers to the cost of the Pathways pilot project. No provision has been made for any revenues or expenses unique to the Pathways program with the exception of program development costs.
- A nominal fee for professional responsibility programming in CPD, increasing revenues by $1.3 million
- Grants from the Law Foundation of Ontario for the licensing processes at $365,000 for lawyers (2013: $520,000) and $36,000 for paralegals (2013: $50,000)
- Declining trends in bencher remuneration, functions and disbursements leading to a reduction in the budget for 2014 of $275,000
- Lawyer General Fund balance projected to comply with Convocation's fund balance management policy

THE LAW SOCIETY OF UPPER CANADA
Draft Budget Lawyers and Paralegals
For the year ending December 31, 2014
Budget Summary

	Professional Regulation/ Tribunals and Compliance		Professional Development & Competence		Convocation Policy and Outreach		Services to Members and Public		Corporate Services & Administration		Capital Allocation Fund	2014 Draft Budget		2013 Approved Budget	
1 **Total Employees/FTE**	211.0	205.5	144.0	137.4	29.0	29.0	42.0	32.0	149.0	146.3		**575.0**	**550.2**	**583.0**	**558.6**
2 **Operating Revenues**	988,500		16,493,800		45,000		3,445,000		5,418,500		-	**26,390,800**		**26,284,500**	
3 **Fund Balance Utilized**	-		-		-		746,800		759,600		-	**1,506,400**		**5,401,000**	
4 **Total Operating Revenue and Fund Balance Utilized**	988,500		16,493,800		45,000		4,191,800		6,178,100			**27,897,200**		**31,685,500**	
5 **Salaries & Benefits**	22,644,900		13,777,000		3,614,500		2,585,300		14,058,400		-	**56,680,100**		**56,346,600**	
6 **Dept. Operating Expenses**	1,703,600		926,900		206,700		140,400		845,100		-	**3,822,700**		**3,761,300**	
7 **Total Sal., Ben. & Oper. Exp.**	24,348,500		14,703,900		3,821,200		2,725,700		14,903,500		-	**60,502,800**		**60,107,900**	
8 **Program Expenses**	3,791,100		7,635,300		6,046,400		13,538,100		8,037,200		2,077,500	**41,125,600**		**43,335,650**	
9 **Total Direct Expenses**	28,139,600		22,339,200		9,867,600		16,263,800		22,940,700		2,077,500	**101,628,400**		**103,443,550**	
10 **Direct Operating Result**	(27,151,100)		(5,845,400)		(9,822,600)		(12,072,000)		(16,762,600)		(2,077,500)	**(73,731,200)**		**(71,758,050)**	

THE LAW SOCIETY OF UPPER CANADA
Draft Budget Lawyers and Paralegals
For the year ending December 31, 2014
Professional Regulation, Tribunals and Compliance

	Director of Professional Regulation		Case Management		Investigations		Complaints Resolution		Complaints Resolution Commissioner		Intake		Enforcement		Trustee Services		Discipline		Complaints Services		Admin Compliance		By-Law Administration		Tribunals		2014 Total	
1 **Total Employees/FTE**	6.0	6.0	5.0	5.0	59.0	58.3	24.0	23.8	4.0	3.8	10.0	10.0	5.0	4.4	12.0	12.0	36.0	34.8	14.0	13.2	12.0	11.2	10.0	9.2	14.0	13.8	**211.0**	**205.5**
2 **Revenues**	-		-		-		-		-		-		200,000		200,600		-		-		522,700		65,200		-		**988,500**	
3 **Salaries & Benefits**	1,049,500		568,900		6,269,300		2,575,100		422,900		1,060,100		501,000		1,175,300		4,829,200		1,191,900		876,400		694,400		1,430,900		**22,644,900**	
4 **Dept. Operating Expenses**	157,900		25,500		577,600		166,100		23,100		41,100		21,500		58,700		314,100		78,900		71,100		81,400		86,600		**1,703,600**	
5 **Total Sal., Ben. & Oper. Exp.**	1,207,400		594,400		6,846,900		2,741,200		446,000		1,101,200		522,500		1,234,000		5,143,300		1,270,800		947,500		775,800		1,517,500		**24,348,500**	
6 **Program Expenses**	2,029,000		101,000		253,500		34,400		172,200		2,500		44,000		140,000		218,500		6,100		13,100		12,800		764,000		**3,791,100**	
7 **Total Direct Expenses**	3,236,400		695,400		7,100,400		2,775,600		618,200		1,103,700		566,500		1,374,000		5,361,800		1,276,900		960,600		788,600		2,281,500		**28,139,600**	
8 **Direct Operating Result**	(3,236,400)		(695,400)		(7,100,400)		(2,775,600)		(618,200)		(1,103,700)		(366,500)		(1,173,400)		(5,361,800)		(1,276,900)		(437,900)		(723,400)		(2,281,500)		**(27,151,100)**	

THE LAW SOCIETY OF UPPER CANADA
Draft Budget Lawyers and Paralegals
For the year ending December 31, 2014
Professional Development & Competence

		Licensing Process		Quality Assurance		Competence		Total	
1	**Total Employees/FTE**	30.0	29.2	51.0	50.0	63.0	58.2	**144.0**	**137.4**
2	**Revenues**	6,753,800		-		9,740,000		**16,493,800**	
3	**Salaries & Benefits**	2,596,800		5,655,500		5,524,700		**13,777,000**	
4	**Dept. Operating Expenses**	130,000		505,300		291,600		**926,900**	
5	**Total Sal., Ben. & Oper. Exp.**	2,726,800		6,160,800		5,816,300		**14,703,900**	
6	**Program Expenses**	3,560,200		218,000		3,857,100		**7,635,300**	
7	**Total Direct Expenses**	6,287,000		6,378,800		9,673,400		**22,339,200**	
8	**Direct Operating Result**	466,800		(6,378,800)		66,600		**(5,845,400)**	

THE LAW SOCIETY OF UPPER CANADA
Draft Budget Lawyers and Paralegals
For the year ending December 31, 2014
Quality Assurance

	Practice Review		Spot Audit		Total	
1 **Total Employees/FTE**	16.0	16.0	35.0	34.0	**51.0**	**50.0**
2 **Revenues**		-		-		**-**
3 **Salaries & Benefits**	1,737,300		3,918,200		**5,655,500**	
4 **Dept. Operating Expenses**	146,900		358,400		**505,300**	
5 **Total Sal., Ben. & Oper. Exp.**	1,884,200		4,276,600		**6,160,800**	
6 **Program Expenses**	77,600		140,400		**218,000**	
7 **Total Direct Expenses**	1,961,800		4,417,000		**6,378,800**	
8 **Direct Operating Result**	(1,961,800)		(4,417,000)		**(6,378,800)**	

THE LAW SOCIETY OF UPPER CANADA
Draft Budget Lawyers and Paralegals
For the year ending December 31, 2014
Competence

	Practice Management		Certified Specialist		Continuing Professional Development		Archives		Great Library		Total	
1 **Total Employees/FTE**	9.0	9.0	1.0	1.0	30.0	26.5	4.0	3.5	19.0	18.2	**63.0**	**58.2**
2 **Revenues**		-		270,000		9,277,000		-		193,000		**9,740,000**
3 **Salaries & Benefits**		1,258,100		65,500		2,367,100		278,400		1,555,600		**5,524,700**
4 **Dept. Operating Expenses**		78,900		7,000		116,200		13,900		75,600		**291,600**
5 **Total Sal., Ben. & Oper. Exp.**		1,337,000		72,500		2,483,300		292,300		1,631,200		**5,816,300**
6 **Program Expenses**		90,800		50,800		2,180,600		39,400		1,495,500		**3,857,100**
7 **Total Direct Expenses**		1,427,800		123,300		4,663,900		331,700		3,126,700		**9,673,400**
8 **Direct Operating Result**		(1,427,800)		146,700		4,613,100		(331,700)		(2,933,700)		**66,600**

THE LAW SOCIETY OF UPPER CANADA
Draft Budget Lawyers and Paralegals
For the year ending December 31, 2014
Policy, Outreach and Convocation

	Policy Secretariat		Treasurer/ Bencher		Communications		Public Affairs		Federation of Law Societies	Equity		Contingencies	Total	
1 **Total Employees/FTE**	7.0	7.0	1.0	1.0	11.0	11.0	4.0	4.0		6.0	6.0		**29.0**	**29.0**
2 **Revenues**	20,000		-		-		-			25,000			**45,000**	
3 **Salaries & Benefits**	1,036,000		100,800		1,221,100		509,900			746,700			**3,614,500**	
4 **Dept. Operating Expenses**	52,300		19,800		50,900		35,100			48,600			**206,700**	
5 **Total Sal., Ben. & Oper. Exp.**	1,088,300		120,600		1,272,000		545,000			795,300			**3,821,200**	
6 **Program Expenses**	79,000		2,981,600		298,900		258,900		980,000	448,000		1,000,000	**6,046,400**	
7 **Total Direct Expenses**	1,167,300		3,102,200		1,570,900		803,900		980,000	1,243,300		1,000,000	**9,867,600**	
8 **Direct Operating Result**	(1,147,300)		(3,102,200)		(1,570,900)		(803,900)		(980,000)	(1,218,300)		(1,000,000)	**(9,822,600)**	

THE LAW SOCIETY OF UPPER CANADA
Draft Budget Lawyers and Paralegals
For the year ending December 31, 2014
Services to Members and Public

	Catering		LSRS		Compensation Fund		ProBono & LCO	Cty. & Dist. Liaison	CANLII	County Libraries		MAP	PLAP	Total	
1 **Total Employees/FTE**	28.0	18.0	10.0	10.0	4.0	4.0				0.0	0.0			**42.0**	**32.0**
2 **Operating Revenues**	1,735,000		325,000		1,200,000				-			185,000	-	**3,445,000**	
3 **Fund Balance Utilized**	-		-		746,800				-			-	-	**746,800**	
4 **Total Operating Revenue and Fund Balance Utilized**	1,735,000		325,000		1,946,800				-			185,000	-	**4,191,800**	
3 **Salaries & Benefits**	1,237,900		853,500		493,900				-			-	-	**2,585,300**	
4 **Dept. Operating Expenses**	40,900		79,100		20,400				-			-	-	**140,400**	
5 **Total Sal., Ben. & Oper. Exp.**	1,278,800		932,600		514,300				-			-	-	**2,725,700**	
6 **Program Expenses**	758,500		33,500		2,647,400		263,000	247,700	1,290,000	7,498,000		400,000	400,000	**13,538,100**	
7 **Total Variable Expenses**	2,037,300		966,100		3,161,700		263,000	247,700	1,290,000	7,498,000		400,000	400,000	**16,263,800**	
8 **Direct Operating Result**	(302,300)		(641,100)		(1,214,900)		(263,000)	(247,700)	(1,290,000)	(7,498,000)		(215,000)	(400,000)	**(12,072,000)**	

THE LAW SOCIETY OF UPPER CANADA
Draft Budget Lawyers and Paralegals
For the year ending December 31, 2014
Corporate Services and Administration

	CEO/ Finance		Facilities		Client Service Centre		I.S. & Web Content		Human Resources		Corporate Resource Centre		Legal Affairs		Corporate	Total	
1 **Total Employees/FTE**	31.0	30.2	25.0	24.1	36.0	35.2	38.0	38.0	8.0	7.8	5.0	5.0	6.0	6.0		**149.0**	**146.3**
2 **Operating Revenues**	351,000		-		37,500		12,000		-		-		-		5,018,000	**5,418,500**	
3 **Fund Balance Utilized**	-		-		-		-		-		-		-		759,600	**759,600**	
4 **Total Operating Revenue and Fund Balance Utilized**	351,000		-		37,500		12,000		-		-		-		5,777,600	**6,178,100**	
5 **Salaries & Benefits**	3,530,100		1,766,900		2,819,200		3,806,900		828,500		523,800		783,000		-	**14,058,400**	
6 **Dept. Operating Expenses**	324,900		67,600		170,100		102,900		76,200		25,900		77,500		-	**845,100**	
7 **Total Sal., Ben. & Oper. Exp.**	3,855,000		1,834,500		2,989,300		3,909,800		904,700		549,700		860,500		-	**14,903,500**	
8 **Program Expenses**	422,100		3,287,100		35,400		1,214,400		893,900		17,700		132,600		2,034,000	**8,037,200**	
9 **Total Direct Expenses**	4,277,100		5,121,600		3,024,700		5,124,200		1,798,600		567,400		993,100		2,034,000	**22,940,700**	
10 **Direct Operating Result**	(3,926,100)		(5,121,600)		(2,987,200)		(5,112,200)		(1,798,600)		(567,400)		(993,100)		3,743,600	**(16,762,600)**	

THE LAW SOCIETY OF UPPER CANADA
Draft Budget Lawyers and Paralegals
For the year ending December 31, 2014
Client Service Centre

	Administration		Corporate Services		Call Centre		Client & Member Services		Total	
1 **Total Employees/FTE**	2.0	2.0	3.0	3.0	12.0	12.0	19.0	18.2	**36.0**	**35.2**
2 **Revenues**		-		-		-		37,500		**37,500**
3 **Salaries & Benefits**		278,700		529,700		834,100		1,176,700		**2,819,200**
4 **Dept. Operating Expenses**		27,400		60,000		22,200		60,500		**170,100**
5 **Total Sal., Ben. & Oper. Exp.**		306,100		589,700		856,300		1,237,200		**2,989,300**
6 **Program Expenses**		-		1,100		18,500		15,800		**35,400**
7 **Total Direct Expenses**		306,100		590,800		874,800		1,253,000		**3,024,700**
8 **Direct Operating Result**		(306,100)		(590,800)		(874,800)		(1,215,500)		**(2,987,200)**

The Law Society of Upper Canada
Facilities Capital Fund Proposed Projects
For the year ended December 31, 2014

Item	Project Description	Budget
1	New air handling units - Bencher Wing Attic	$1,200,000
2	Roof - Benchers Wing	$80,000
4	Office space reconfiguration	$410,000
5	Contingency	$400,000
6	**TOTAL 2014 CAPITAL REQUEST**	**$2,090,000**

The Law Society of Upper Canada
Information Systems Capital Fund Proposed Projects
For the year ended December 31, 2014

Item	Project Description	Budget
1	Enterprise Content Management	$675,000
2	E-Tribunals	$350,000
4	LSRS System Development	$350,000
5	Microsoft Office Upgrade	$350,000
6	Lawyer/Paralegal Database Redevelopment	$300,000
7	E-Commerce System Replacement	$300,000
8	Technology Upgrades	$265,000
9	E-mail Replacement of Lotus Notes with MS Exchange	$100,000
10	Asset, Contract and License Management System	$75,000
11	Data Centre Upgrades	$60,000
12	Application Virtualization	$50,000
13	Security/Threat Protection	$50,000
14	**TOTAL 2014 CAPITAL REQUEST**	**$2,925,000**

THIS SECTION CONTAINS

IN CAMERA MATERIAL

TAB 2.2

REPORT FOR INFORMATION

TAB 2.2.1

FOR INFORMATION

FUNDING OF EXTERNAL ORGANIZATIONS

7. In June 2012, Convocation approved a policy for requests to the Law Society from external organizations for support and funding of initiatives that will assist the Law Society to fulfill its mandate. The policy has been amended so that the Law Society would invite applications to meet identified needs rather than accepting a variety of grant applications as part of the annual budget process. The new policy maintains the existing objectives, a similar application form and criteria but envisages the Law Society inviting funding applications from specific service providers if a specific need has been identified and specific funds have been allocated. The Audit & Finance Committee and the Equity and Aboriginal Issues Committee approved the amended policy. The amended policy is available in the Access to Justice Committee report to Convocation.

The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 3

Report to Convocation
October 24, 2013

Professional Regulation Committee

Committee Members
Malcolm Mercer (Chair)
Paul Schabas (Vice-Chair)
John Callaghan
Robert Evans
Julian Falconer
Janet Leiper
William C. McDowell
Kenneth Mitchell
Ross Murray
Jan Richardson
Susan Richer
Peter Wardle

Purpose of Report: Decision and Information

Prepared by the Policy Secretariat
(Margaret Drent (416-947-7613)

TABLE OF CONTENTS

For Information

COMMITTEE PROCESS

1. The Professional Regulation Committee ("the Committee") met on October 10, 2013. In attendance were Malcolm Mercer (Chair), John Callaghan, Robert Evans, Ross Murray, Susan Richer, and Peter Wardle. Staff members attending were Zeynep Onen, Naomi Bussin, and Margaret Drent.

Tab 3.1

FOR DECISION

PROPOSED AMENDMENTS TO THE *RULES OF PROFESSIONAL CONDUCT* ARISING FROM IMPLEMENTATION OF THE FEDERATION OF LAW SOCIETIES MODEL CODE OF PROFESSIONAL CONDUCT

MOTION

2. That Convocation approve the amendments to the *Rules of Professional Conduct* as set out in Tab 3.1.2, to be effective October 1, 2014.

INTRODUCTION

3. The Federation of Law Societies of Canada (FLSC), the national coordinating body of Canada's 14 provincial and territorial law societies, adopted the Model Code of Professional Conduct ("the Model Code") in December 2011 and revised the Model Code with the addition of a new numbering scheme in December 2012. The Law Society of Upper Canada's *Rules of Professional Conduct* ("the Rules") were used as the basis for the Model Code.[1]

4. The primary impetus for the Model Code was the increased mobility of lawyers in Canada and the need to have uniform ethical standards for the practice of law in Canada. This was based on a belief that there are national, and international ethical standards for the practice of law which should be reflected in consistent conduct rules across the country.

5. Law Societies in Canada are now implementing the Model Code as the rules or codes of professional conduct of their jurisdictions.[2]

[1] Background to the development of the Model Code is described at **Tab 3.1.1**.

[2] British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia and Newfoundland and Labrador have already adopted new professional codes based on the Model Code. The Barreau du Quebec's process has advanced to the stage of publication of a draft regulation to implement the rules.

6. This report presents amendments to the Rules, based on the Model Code, that the Committee proposes be adopted by Convocation. A blackline version of the amendments to the Rules is at **Tab 3.1.2** and the Rules incorporating these changes appear at **Tab 3.1.3**. A Table of Concordance between the current Rules and the Rules as amended is at **Tab 3.1.4**.

THE LAW SOCIETY'S REVIEW OF THE MODEL CODE

The Committee's Process

7. Since the fall of 2011, the Committee has been reviewing the Model Code for the purpose of implementing it in Ontario. In keeping with the goal of achieving national standards, the Committee focused on making changes to the Rules to achieve consistency with the Model Code and only varying from that approach when necessary.

8. The Committee reviewed the Model Code against the current Rules and incorporated its suggestions and proposals for amendments to the Rules based on the Model Code in a blackline version of the rules.

Call for Input

9. Early in its deliberations, the Committee determined that a call for input on the proposed changes to the Rules would be required. The purpose was to obtain comments from the profession and relevant legal organizations and institutions on the merits of the amendments, particularly the more substantive ones.

10. In May of 2012 the Committee received Convocation's approval to issue a Call for Input on the proposed changes to the Rules and request submissions by August 31, 2012. A Call for Input document to accompany the blackline version of the Rules was prepared which discussed the more substantive rule changes and included a separate part devoted

exclusively to the conflicts rule, as many of the substantive changes were in this rule.

11. The Call for Input was published on the Law Society's website and in the *Ontario Reports*, and letters were sent to relevant legal organizations[3], requesting comments on the proposed amendments.

12. By the fall of 2012, the Law Society had received 34 submissions from individuals, government, legal organizations, equality-seeking groups, and academia. The Committee wishes to thank all of the respondents for their thoughtful contributions to the review. A summary of all of the responses received appears at **Tab 3.1.5**.[4]

INTRODUCTORY COMMENT ON THE AMENDMENTS

Nature of the Amendments

13. The report discusses the more substantive rule changes which will result from implementing the Model Code. In certain cases, the amendments introduce new standards. One of the more significant changes is to the rule on conflict of interest. As such, the report does not discuss every rule change. The blackline version of the Rules should be reviewed for this purpose.

14. To the extent possible, the Committee adopted the Model Code Rules without modification. However, the amended Rules include some rules that are not included in the Model Code, do not include some Model Code provisions and in some cases, vary the language of the Model Code's provisions. In the Committee's view, this approach was appropriate to ensure that rules unique to Ontario's practice environment and specific terminology important to ethical guidance based on Ontario's experience were preserved.

[3] The organizations include but are not limited to: LawPRO, Advocates Society, Ontario Bar Association, Criminal Lawyers Association, Toronto Lawyers Association, Ontario Trial Lawyers Association, Family Lawyers Association, CDLPA, and the Association of Law Officers of the Crown.

[4] A number of issues which were raised by respondents to the Call for Input have been placed on a list of topics for future consideration by the Committee.

15. Beyond the changes to the conflict of interest rule, the following highlights some of the more substantive proposed changes based on the Model Code:

    a. Provisions regarding integrity, which currently appear in Law Society Rule 1.03 with the heading "Interpretation – Standards of the Legal Profession", now appear in a discrete Rule with the title "Integrity". Commentary that previously appeared elsewhere in the Rules has been moved to this rule. Certain components of the existing commentary under Rule 1.03 are included in the new rules' commentary, including references to the diversity of Ontario and the obligation to advise a client regarding their French-language rights, where appropriate.

    b. A new commentary in the new Integrity rule encourages lawyers to become involved in community and other activities to enhance the profession. The commentary also notes that in engaging in these activities, lawyers must be mindful of the perception that they are providing legal advice and that a lawyer-client relationship has been created.

    c. There is new commentary regarding competence and quality of service.

    d. New commentary has been proposed to the rule on honesty and candour.

    e. The prohibition on lawyers threatening criminal proceedings is extended to include making a complaint to a regulatory authority in analogous circumstances.

    f. The exceptions to the circumstances in which a lawyer may disclose confidential information concerning the business and affairs of a client are expanded. For example, the Rules will now permit a lawyer to disclose confidential information to another lawyer to secure legal advice about the lawyer's proposed conduct.

    g. The Rules now include commentary under the joint retainer rule regarding retainers in which different lawyers in the same firm act for clients who are competing for the same opportunity.

    h. The commentary regarding a lawyer's duty to preserve a client's property has been amended.

    i. There are new rules regarding withdrawal from representation and new

commentary regarding optional withdrawal.

j. There is new commentary regarding making legal services available.

k. The rules dealing with the submission by a lawyer of affidavit evidence are now combined with the previous rule regarding providing lawyers providing testimony.

l. A new rule requires lawyers to notify the sender if in the course of client representation they receive a document that they know or reasonably should know was inadvertently sent.

16. The rules regarding retired Judges returning to practice are streamlined.

New Numbering Scheme and Drafting Protocols

Numbering

17. The Committee is proposing that the Model Code numbering scheme be adopted. The purpose of matching the Model Code scheme is to ensure consistency with the Model Code approach, and to make it easier to search for the equivalent provision in the Law Society's Rules to a Model Code provision.

18. Primarily because of the new rule on Integrity, the amendments have shifted the Rules' chapter numbers up by one. For example, the provisions which previously appeared in Rule 1.03 are now in Rule 2 on Integrity, and current Rule 2 (Relationship to Clients) has become Chapter 3 in the Model Code.

19. The Model Code is divided into chapters, sections, rules and commentaries, as follows:

a. Chapter numbers have a single digit, as in Chapter 1 – Citation and Interpretation.

b. Section numbers include two digits separated by a decimal point, as in Section 3.1 – Competence.

c. Rules repeat the section number and are designated with the addition of a number preceded by a dash, as in Reasonable Fees and Disbursements 3.6-1.

d. Each paragraph in a commentary is preceded by a number in square brackets, as in [6]. Subject to paragraph 20, sections, rules and paragraphs of commentary all

begin with the number 1.

20. Where the Law Society Rules do not include a Model Code section, rule or paragraph of commentary, the phrase "[FLSC - not in use]" will appear.[5]

21. Additions to the Model Code's rules or commentaries are shown and will be shown with a capital letter suffix, for example, 3.4-1A. As such, where the Law Society Rules include a rule or add a rule that does not appear in the Model Code, a *numerical* suffix preceded by a decimal point will be used in order to maintain consistency between the Law Society Rules numbering scheme and the Model Code numbering scheme. For example, rule 3.4-11.1 on affiliations between lawyers and affiliated entities does not appear in the Model Code. A similar format is used in the commentary. Where the Law Society includes a paragraph of commentary that does not appear in the Model Code, it will be designated, for example, as "[4.1]".

22. Where the Law Society's section, rule or paragraph of commentary is the first provision at that location, the number 0 is assigned to that particular section, rule or paragraph, as in Section 1.0 or rule 4.2-0.

Drafting Protocols

23. The Law Society's Rules drafter, Donald Revell, reviewed all of the amendments and provided helpful guidance and suggestions to improve the draft. The Committee thanks Mr. Revell for his contribution to this initiative.

24. Based on advice from the drafter, the following drafting protocols have been observed in the amended Rules:

    a. Gender-neutral language has been adopted, so that references to "her or her" have

[5] The amended Rules do not indicate "FLSC – not in use" for FLSC commentary that in its entirety is not included. This occurs very infrequently.

been replace with “their”;

b. “Law Society” replaces “Society” in the definitions rule;

c. The word “Section” is added before the appropriate section numbers;

d. The word “rules” where applicable is used to refer to the *Rules of Professional Conduct*;

e. All subparagraphs in commentary begin with a bracketed lower-case letter, as in “(a)”.

IMPLEMENTATION

25. The Committee, in consultation with Law Society staff, has chosen October 1, 2014 as the effective date for the amended Rules. Staff from the Professional Regulation Division, the Professional Development and Competence Division and the Policy Secretariat will be working on the operational initiatives required to incorporate the changes to the Rules within the Law Society. This includes changes to information on the Law Society’s web site and licensing materials. A comprehensive communications plan is also being developed and a CPD program on the amended Rules is being developed.

LOOKING AHEAD

26. Approval and implementation of the Model Code by each law society in Canada is only the first step toward the goal of standardizing lawyers’ ethical and professional conduct obligations in Canada. The FLSC has determined that it has an ongoing role in this process through the work of its Standing Committee on Model Code. Jurisprudential and practice changes that might have an impact on the specific provisions of the Model Code will need to be monitored.

27. The Standing Committee on the Model Code continues this work and it is expected that as it unfolds, matters will be referred to the Law Society for consideration as amendments to the Rules.

28. The FLSC also established a Model Code Liaison Committee, composed of representatives of each law society, which meets periodically to discuss the work of the Model Code committee and review the feedback received from various law societies.

DISCUSSION OF THE PROPOSED AMENDMENTS

29. All amendments to the Rules proposed by the Committee are shown in the blackline version of the Rules found at **Tab 3.1.2**. Unless otherwise indicated, this document refers to the Model Code December 2012 version, at **Tab 3.1.6**.

30. The title headings in the report correspond to the new *Rules of Professional Conduct* as they appear with the new numbering system based on the Model Code, and discussed in more detail below. The titles to the various sections discussing the new Rules indicate the new rule number, the title of the chapter, section or rule, and the current Law Society rule number.

31. The many changes to the Law Society's current conflicts rules made the preparation of a blackline showing changes against the Model Code rule impractical. However, as the Committee is proposing some changes to the Model Code's conflicts rules, a blackline version of those rules has been prepared. Definitions in the amended rules that relate to the new conflict of interest rules are discussed in the section of the report on conflicts.

Chapter 1 – Citation and Interpretation (Law Society Rules 1.01 to 1.03)

32. The Committee proposes to replace the current rule 1.03 with the equivalent Model Code Rule. Current Rule 1.03 (Standards of the Legal Profession) is reorganized under the heading "Integrity" to include some language from current Rule as well as Rule 6.01 ("Responsibility to the Profession Generally"). The amended Rule 2.1 (Integrity) includes the commentary under current Rule 6.01, the current commentary following the definition of "conduct unbecoming" in current rule 1.02, and some new commentary.

33. The Model Code Rule 2.1 does not include the reference in current Law Society rule 1.03(1)(b) to the lawyer's duty regarding diversity, dignity of individuals, and human rights laws in force in Ontario, or the commentary to that rule on French language rights. The Committee proposes that this guidance remain in the commentary under new rule 2.1-1.

34. One respondent recommended adding the following language to the commentary to rule 2.1-1, noting that

> [W]hen participating in the various community activities listed in this rule, lawyers should keep in mind their professional obligations in respect of current, past or potential clients. To reduce their exposure to malpractice claims they should avoid giving legal advice, in particular in circumstances where it could be alleged that legal advice was provided and the lawyer had no intention of creating a lawyer-client relationship.

35. The Committee proposes the addition of the following paragraph in the Commentary to capture this recommendation:

> When participating in community activities, lawyers should be mindful of the possible perception that the lawyer is providing legal advice and a lawyer-client relationship has been created.

Section 3.1 – Competence (Law Society Rule 2.01)

36. The Model Code reorganizes the rules and commentary on competence (rule 3.1) and adds new commentary following rule 3.1-2. The new Commentary will include a discussion of the relevant factors in determining whether or not a lawyer has employed a requisite degree of knowledge and skill in a particular matter.

Section 3.2 - Quality of Service (Law Society Rule 2.02)

37. The Model Code adds a new rule 3.2-1 and commentary on quality of service. While some of the commentary mirrors concepts discussed in rule 3.1 on competence, the proposed additions to the rules and commentary in the Committee's view are useful guidance, as competent practice and quality of service obviously intersect.

Rule 3.2-2 – Honesty and Candour (Law Society Rule 2.02(1)

38. The Model Code adds the following underlined phrase to the Rule regarding honesty and candour (2.02(2)): "when advising clients, a lawyer shall be honest and candid and shall inform the client of all information known to the lawyer that may affect the interests of the client in the matter". After careful consideration, the Committee decided not to adopt this addition, as the principle is captured in the first paragraph of the commentary.

39. The Committee also determined that the commentary to the rule should be varied from that appearing in the Model Code. This is because the Committee believes that it is important to address circumstances in which the duty to disclose may be properly limited e.g. litigation dealing with confidential information.

40. The Committee's proposed commentary, which incorporates one paragraph of existing commentary, is as follows:

> A lawyer has a duty of candour with the client on matters relevant to the retainer. This arises out of the rules and the lawyer's fiduciary obligations to the client. The duty of candour requires a lawyer to inform the client of information known to the lawyer that may affect the interests of the client in the matter.
>
> In some limited circumstances, it may be appropriate to withhold information from a client with consent. For example, with client consent, a lawyer may act where the lawyer receives information on a "for counsel's eyes only" basis. However, it would not be appropriate to act for a client where the lawyer has relevant

> material information received through a retainer for another client. In those circumstances the lawyer cannot be honest and candid with the client and should not act.
>
> The lawyer's duty to the 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.
>
> A lawyer who is acting for both the borrower and the lender in a mortgage or loan transaction should also refer to Rule 3.4-15, which continues to apply.[6]

Rule 3.2-4 Commentary – Encouraging Settlement or Compromise (Law Society Rule 2.02(2))

41. The Model Code includes rule 3.2-6 which prohibits a lawyer from offering or advising an accused to offer or give any valuable consideration to another person in exchange for influencing the withdrawal of criminal or regulatory proceedings.

42. One respondent to the Call for Input indicated that in their view, it was unnecessary to amend the Rules in this area in the manner proposed by the Model Code, since the *Criminal Code* already has offences relating to improper interference with the administration of justice and the Crown is involved in any negotiation relating to the withdrawal of charges.

43. Based on submissions received during the Call for Input, the Committee determined that

[6] Rule 3.4-15 provides that "when a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction".

the Model Code provision should not be adopted.

44. However, the Committee proposes to refer to settlement discussions in the commentary to Rule 3.2-4 on encouraging compromise or settlement. The Committee proposes that the paragraphs below appear as the second and third paragraphs of the commentary to Rule 3.2-4:

> [1.1] In criminal, quasi-criminal or regulatory complaint proceedings, it is not improper for a lawyer for an accused or potential accused to communicate 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. See also Rule 7.2-6 – Communications with a represented person.
>
> [1.2] 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.

Rule 3.2-5 - Threatening Criminal Proceedings (Law Society Rule 2.02(4))

45. The Model Code rule expands the prohibition against threatening or advising a client to threaten criminal proceedings to include a complaint made to a "regulatory authority".

46. As noted in the Call for Input document, some regulatory authorities are engaged in matters analogous to the civil jurisdiction of the courts while other regulatory authorities are engaged in matters analogous to criminal proceedings.

47. Two of the respondents to the Call for Input suggested that the wording of this rule be amended to refer only to regulatory authorities whose proceedings are criminal or quasi-

criminal in nature. According to one of the respondents, if a distinction is drawn between civil and quasi-criminal regulatory authorities, lawyers are put in a position of having to assess the nature of the jurisdiction of each regulatory authority.

48. The Committee carefully considered the submissions received on this point. While the Committee is generally in agreement with the Model Code approach, the Committee notes that there may be circumstances in which the threat of a regulatory complaint is appropriate. For example, it may be appropriate in some circumstances to threaten a civil claim (e.g. an overtime claim under the *Employment Services Act*).

49. The Committee proposes to add a new rule which provides that "rule 3.2-5(b) does not apply to an application made in good faith to a regulatory authority for a benefit to which a client may be legally entitled". The Committee also proposes the addition of a paragraph in the commentary which begins with the following phrase: "where a regulatory authority exercises a jurisdiction that is essentially civil, it is not improper to threaten to make a complaint pursuant to that authority to achieve a benefit for the client..."

Rule 3.2-7 - Dishonesty, Fraud When Client an Organization (Law Society Rule 2.02(5.1 and (5.2))

50. The Model Code rule combines two existing subrules that deal with a lawyer's obligations when an organizational client is acting fraudulently. The current subrules separately address a lawyer's obligations to report "up the ladder" in the organization when an organizational client *is acting or has acted* fraudulently. The Model Code's rule shortens the rule by one step in the process that the lawyer must follow when the client intends to act fraudulently. The Committee recommends this approach as a better articulation of the requirement.[7]

[7] The Committee proposes to address in future comments received during the Call for Input regarding issues particular to in-house counsel.

Section 3.3 - Confidentiality (Law Society Rule 2.03)

51. A number of changes to the confidentiality rule are proposed by the Committee.

52. The Model Code adds a paragraph to current Law Society rule 2.03(1) that provides another exception to the prohibition on the disclosure of confidential information which would permit a lawyer to disclose required information to the Law Society. In the Committee's view, this adds an important feature consistent with statutory provisions on disclosure of information to the Law Society.[8]

53. The Committee proposes to add the following paragraph from the Model Code to become paragraph 4 of the commentary. This paragraph provides:

> 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.

54. The Committee also proposes that Model Code commentary be added that addresses:
    a. the circumstances that are presented when sole practitioners join together in space-sharing arrangements in one office location, providing guidance on the need to protect confidential client information in such arrangements;
    b. the unique circumstances of disclosure of confidential information when action needs to be taken to protect a person under disability; and
    c. the prohibition on benefiting from confidential information with the example of literary works (now in current rule 2.03(6)).

[8] *Law Society Act*, R.S.O. 1990, c. L.8, s. 49.8.

55. The Model Code also revises current subrule 2.03(3) on justified or permitted disclosure where there is a risk of imminent harm or death. The Committee agrees with this change, which makes the rule more concise and adds new commentary.

56. The Model Code rules reorganize current subrule 2.03(4) to include four paragraphs with separate provisions, noting acts of misconduct and acts of negligence for the purposes of disclosure. The Model Code also adds a rule to permit disclosure to seek legal advice about a proposed course of conduct. The Committee agrees with these changes.

57. With respect to the proposal in Model Code Rule 3.3-1 to add the words "or a court" to the carve-out permitting disclosure of confidential information where required by law, the Committee accepts the suggestion made by one of the respondents to the Call for Input that the words "tribunal of competent jurisdiction" be used instead of "court", as "tribunal" is a defined term in the Rules.

Rule 3.3-6– Disclosure of Confidential Information to Secure Legal Advice (New)

58. The Committee proposes that the Model Code provision be adopted, although the Committee believes the word "ethical" should be removed. The Model Code provision provides that "a lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct". In the Committee's view, when a lawyer gives "legal advice", legal ethics considerations are also taken into account. Further, permitting disclosure to obtain ethical advice that is not legal advice raises privilege issues.

Section 3.4 – Conflicts (Law Society Rules 2.04, 2.05 and 2.06)

59. The Model Code significantly changes the rules on conflict of interest. The changes in this area include:

    a. a new definition of "conflict of interest";

b. a new general rule that prohibits acting where there is a conflict of interest;

c. new commentary that refers to the fiduciary relationship, the duty of loyalty, and conflicting interests;

d. examples of situations in which conflicts of interest commonly arise requiring a lawyer to take particular care to determine whether a conflict of interest exists.

The Committee proposes that the new conflicts rules be adopted, subject to the discussion that follows.

Call for Input

60. The submissions addressing the proposed revisions to the conflict of interest rules generally support updating the Rules in this area. The Committee received a wide range of thoughtful submissions on the proposed changes. The Committee's proposals are discussed in greater detail below.

Section 1.1 - Definitions (Law Society Rule 1.02)

"Client"

61. The current Law Society rule 1.02 definition of "client" reads: " "client" includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work."

62. In the Model Code, "client" means a person who

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf.

63. In the document prepared for the Call for Input, the Committee suggested that the language in the current definition in the Rules remain. Respondents to the Call for Input

were in agreement with this proposal, and the Committee proposes to retain this language. As such, the definition of "client" includes the Model Code language and the language in the current definition.

64. The Committee proposes to amend the third paragraph of the new commentary to the definition of the term "client" added by the Model Code, so that it reads: "for greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual or entity had a reasonable expectation that a lawyer-client relationship would be established".

"Conflict of Interest"

65. Current rule 2.04 of the Rules provides that "a conflict of interest" or a "conflicting interest" means an interest

> (a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or
>
> (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

66. The adoption of the Model Code provision would result in a new definition of conflict of interest in rule 1.1-1. The definition is central to the meaning of the governing rule on conflicts. The commentary to the Model Code's rule refers to the definition and elaborates on the meaning of "substantial risk". Paragraph 1 of the Model Code commentary to rule 3.4-1 reads:

> As defined in these rules, a "conflict of interest" exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's duties to another client, a former client, or a third person. *The risk must be more*

> *than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer*. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.
>
> [emphasis added]

67. For emphasis, the Committee proposes that the second highlighted sentence in the above commentary be moved into the definition of the term "conflict of interest" in Rule 1.1-1.

"Disclosure"

68. The Model Code includes the following definition, which is new to the Rules:

> "disclosure" means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary to this Model 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.

69. As noted in the Committee's Call for Input document, this definition appears to have relevance only to the Model Code's rule on conflicts of interest and does not fit well with other rules that use the term "disclosure". For example, current rule 2.03 (now rule 3.3) on confidentiality prohibits disclosure of client information.

70. The Committee's initial view was that the definition of "disclosure" should not be added to the Rules, but it invited comment on the new definition.

71. After consideration of the submissions received, the Committee is of the view that the definition of the term "disclosure" should not be incorporated into the Rules but that the elements of disclosing a conflict appear in commentary. This has been accomplished in the commentary following Rule 3.4-2, which deals with consent.

Rule 3.4-1 - Duty to Avoid Conflicts of Interest (Law Society Rules 2.04(1) to (3))

72. The Committee proposes to amend the language in the third paragraph of commentary to new Rule 3.4-1 to improve clarity, as follows:

> ~~The general prohibition and permitted activity prescribed by this rule apply to~~ In order to assess whether there is a conflict of interest, the lawyer is required to consider the lawyer's duties to current, former and joint clients, third persons as well as the lawyer's own interests.

73. New paragraphs 5 and 6 of the commentary to Rule 3.4-1 emphasize the fiduciary relationship and the fiduciary duty of loyalty. Paragraph 6 makes specific reference to Supreme Court of Canada case law on current client conflicts. It refers to a duty of a lawyer to not represent a client whose legal interests are directly adverse to the immediate legal interests of another client without consent, and that this duty arises even if the matters are unrelated.

74. Since the Model Code commentary was drafted, the Supreme Court of Canada issued its judgment in *Canadian National Railway Co*. v. *McKercher LLP*. [9] The decision dealt squarely with the bright line test for conflicts first articulated by the Supreme Court in *R. v. Neil.*[10] In McKercher, the Court said:

> The case at hand requires this Court to examine the lawyer's duty of loyalty to his client, and in particular the requirement that a lawyer avoid conflicts of interest. As we held in *R.* v. *Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, the general 'bright line' rule is that a lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without obtaining their consent – regardless of whether the client matters

[9] 2013 SCC 39, online at http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/13154/1/document.do

[10] [2002] 3 SCR 631. online at http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2012/index.do?r=AAAAAQAKUi4gdi4gTmVpbAAAAAAAAAE

> are related or unrelated: paragraph 29. However, when the bright line rule is inapplicable, the question becomes whether the concurrent representation of clients creates a 'substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person': *Neil*, at para 31.

75. It is expected that the Standing Committee of the FLSC will review this decision and consider whether the rule and commentary set out in the Model Code should be amended. Once the FLSC completes this review, any changes the FLSC may propose will be referred to law societies for review.

76. In order to facilitate the implementation of the Model Code in Ontario, the Committee proposes that at present, paragraph 5 of the commentary be adopted but not paragraph 6. Language for paragraph 6 will be added at a later date following the Committee's review of the any changes from the FLSC.

Commentary to Rule 3.4-1 - Examples of Conflict of Interest

77. The commentary to rule 3.4-1 lists factors that assist in determining if a conflict of interest exists and provides examples of situations where conflicts might arise. The Committee proposes that the introductory language be amended to more clearly state the intention of the examples:

> Conflicts of interest can arise in many different circumstances. The following are examples ~~are intended to provide illustrations of conflicts of interest and are not exhaustive~~ <u>of situations in which conflicts of interest commonly arise requiring a lawyer to take particular care to determine whether a conflict of interest exists</u>:

78. The Committee recommends that examples 2 and 7 in the Model Code's list of possible situations of conflict of interest (at paragraph 8 of the commentary) not be adopted. This is supported by a number of respondents to the Call for Input. In example 2 dealing with

positional conflicts, the Committee feels that a lawyer would have difficulty knowing how to apply the language used in the example and that the American approach to positional conflicts related in the example is not yet developed in Canada. The Committee also believes that part of paragraph 7 of the commentary which deals with confidentiality in the context of lawyers who share office space should be removed and that instead a cross-reference be added to the Model Code's rule 3.3 on Confidentiality, as follows:

> Sole practitioners who practice with other licensees in cost sharing or other arrangements represent clients on opposite sides of a dispute. See Rule 3.3, Commentary [7].

Rule 3.4-2 – Consent (Law Society Rule 2.04(3))

79. The Law Society's current general rule on conflicts (Rule 2.04(3)), also addresses the issue of consent. In the Model Code, consent is now the subject of a separate rule (3.4-2).

80. Extensive commentary follows rule 3.4-2, much of which is new when compared to the Law Society's current Rules. There are, however, some minor similarities between the Model Code's commentary and the commentary to current Rule 2.04(3). The concepts of freedom of judgment and action, appearing in the current commentary, also appear in the Model Code's commentary. Some of the examples in the Model Code's commentary of situations in which conflicts may arise reflect portions of commentary to the current rule, but much of the text in the Model Code's commentary is new and newly formatted.

81. Generally, the Committee agrees with the content and structure of the Model Code's rule. Some proposed changes are discussed below.

82. Rule 3.4-2 provides an exception to the prohibition against acting in a conflict of interest where there is "express or implied consent" from all clients, and the lawyer "reasonably believes" that there will be no "material adverse effect" on the representation of or

loyalty to the clients. Some changes, discussed below, are proposed by the Committee.

83. The Committee proposes that the words "reasonably believes" in the first paragraph of the Rule be replaced with "it is reasonable for the lawyer to conclude" as a more appropriate threshold for this rule.

84. The Committee proposes that a paragraph be added as the first paragraph of commentary, as follows:

> Rule 3.4-2 permits a client to accept a risk of material impairment of representation or loyalty. However, the lawyer would be unable to act where it is reasonable to conclude that representation or loyalty will be materially impaired even with client consent. Possible material impairment may be waived but actual material impairment cannot be waived.

85. The Committee proposes that the second sentence of the now second paragraph of commentary to Rule 3.4-2 be changed to provide that " "However, the lawyer would be unable to act where it is reasonable to conclude that representation or loyalty will be materially impaired even with client consent."

86. The Committee agrees with the suggestion from a respondents to the Call for Input to replace the words in the last sentence of rule 3.4-2(b)(iii) (that is, "the lawyer has no relevant confidential information from one client that could affect the other client) with "the lawyer has no relevant confidential information from one client that might reasonably affect <u>the representation of</u> the other <u>client</u>".

87. The new rule, unlike the current Law Society rules, explains what constitutes express and implied consent, and prescribes the circumstances in which consent may be implied.

88. Some respondents indicated that the references to both "implied" and "inferred" consent

in the Model Code created confusion and should be changed. To avoid confusion, the Committee proposes that all references to the term "inferred" be in Rule 3.4 be replaced with the term "implied".

Rule 3.4-3 – Dispute (Law Society Rule 2.04(2)

89. The Model Code Rule prohibits the representation of opposing parties in a dispute. The equivalent Law Society rule is similar, but uses the words "advise or represent more than one side" of a dispute.

90. The Committee proposes that the Model Code's rule be adopted, together with the new commentary that appears below the rule.

Rule 3.4-5 Commentary [4] – Retainers for Separate Clients Competing for an Opportunity with Protection of Confidential Client Information (New)

91. The Model Code adds a new rule (3.4-4), permitting different lawyers in a law firm to act in a matter for different current clients with "competing" interests as long as there is no dispute among the clients about the matter. The Model Code does not define "competing interests". In such a case, the rule states the lawyers may treat information received from each client as confidential and not disclose it to the other clients.

92. The rule sets out a number of requirements to be met, including disclosure of the risk of the such representation to each client, consent by the clients after having received independent legal advice on those risks, representation of each client by a different lawyer of the firm, screening mechanisms to protect confidential information and withdrawal of all lawyers in the law firm from the matter if a dispute that cannot be resolved develops among the clients. The commentary that follows the rule emphasizes that these retainers are intended in cases where all the clients are equally sophisticated.

93. In the Committee's view, the rule as drafted deals with matters that are more appropriately found in a commentary rather than a rule. The Committee believes that adding a paragraph, like the one below, to the commentary under the joint retainer rule (rule 3.4.5) will provide the appropriate guidance to law firms that accept competing retainers. Adding the following language to explain how such retainers differ from joint retainers will assist:

> Joint retainers should be distinguished from separate retainers in which a law firm is retained to assist two or more clients at the same time competing for the same opportunity such as, for example, by competing bids in a corporate acquisition or competing applications for a single licence. Each client would be represented by different lawyers in the firm. Since competing retainers of this kind are not joint retainers, information received can be treated as confidential and not disclosed to the client in the other competing retainer. However, competing retainers to pursue the same opportunity require express consent pursuant to rule 3.4-2 because a conflict of interest will exist and the retainers will be related. With consent, confidentiality screens as described in rules 3.4-17 to 3.4-26 would be permitted between competing retainers to pursue the same opportunity. But confidentiality screens are not permitted in a joint retainer because rule 3.4(5)(b) does not permit treating information received in connection with the joint retainer as confidential as far as any of the joint clients are concerned.

94. While some respondents to the Call for Input agreed with the view that there should be a separate rule for these types of retainers, the Committee has concluded that adding a paragraph to the commentary under the joint retainer rule is sufficient.

95. The Committee also reviewed suggestions from respondents that the current wording of the rule ("where one of the clients is less sophisticated or more vulnerable than the other") was too restrictive. The Committee has concluded that because these retainers are a new concept in the Rules, this language should remain in the commentary.

96. However, the Committee proposes that a sentence from the Model Code rule be added to the commentary to provide that where a law firm assists two or more clients who have competing interests, each client should be represented by a different lawyer. This is included in the text above.

Rules 3.4-5 to 3.4-8 – Joint Retainers (Law Society Rules 2.04(6) to (10))

97. Other than some variations in the wording and organization of the rule, the Model Code's rule and the current joint retainer rules are generally the same. The Model Code breaks out the duties in this rule in a different way, although the substance of the current rule remains. The Model Code adds a new requirement in rule 3.4-8(b) which requires the lawyer to withdraw if the contentious issues are not resolved. The Committee agrees with this addition.

98. The commentaries following the rules are largely identical. The minor differences are as follows:

    a. The current commentary following unlike the Model Code in rule 3.4-5, refers to the *Substitute Decisions Act, 1992,* S.O. 1992 c. 30.

    b. The Model Code adds a sentence to the commentary now under Law Society rule 2.04(6) that specifies that the consent of each client to the joint retainer should be in a separate written communication. This reiterates what is already required in the definition of "consent" in the current rules.

99. The Committee proposes that the Model Code's version of this rule be adopted except that

    a. The reference to the *Substitute Decisions Act* should remain in the Law Society's rules in the commentary to Rule 3.4-5; and

    b. To ensure clarity, the Committee proposes that Law Society Rule 3.4-8 read as follows:

> Except as provided by this rule, if a contentious issue arises between clients who have consented to a joint retainer, the lawyer must not advise either of them on the contentious issue and the following rules apply:
>
> (a) The lawyer shall
>
> (i) refer the clients to other lawyers for that purpose; or
>
> (ii) if no legal advice is required and the clients are sophisticated, advise them that they have the option to settle the contentious issue by direct negotiation in which the lawyer does not participate;
>
> (b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

Rules 3.4-10 and 3.4-11 - Acting Against Former Clients (Law Society Rules 2.04(4) and (5))

100. During the Committee's deliberations, it was suggested that commentary be added that distinguishes the rules on current client conflicts and former client conflicts. The Committee proposes that the following be the first sentence in the commentary that follows Rule 3.4-10:

> Unlike rules 3.4.1 through 3.4-9, which deal with current client conflicts, rules 3.4-10 and 3.4-11 address conflicts where the lawyer acts against a former client.

101. The Model Code rule prohibits a lawyer from acting against a former client unless the former client consents. The wording is similar to current rule 2.04(4), except that, unlike the Model Code, the current rule includes "persons who were involved in or associated with the client". The Committee proposes that the Model Code's version of the rule be adopted.

102. The Model Code adds the following sentence to the commentary under this rule:

> This rule prohibits a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer.

103. The Committee proposes that this sentence be deleted and replaced with the following:

> Rule 3.4-10 guards against the misuse of confidential information from a previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client's position on a matter that was central to a previous retainer.

104. The Model Code's rule 3.4-11 is very similar to current rule 2.04(5) and deals with situations where a lawyer has acted for a former client and obtained confidential information relevant to a new matter. In such cases, another lawyer in the lawyer's firm may act in the new matter against the former client if certain conditions are satisfied.

105. The commentary that follows the Model Code provision restates the substance of the current commentary to current rule 2.04(5), but does not include the comment on the definition of "client" that it is in the current commentary. The current commentary reiterates the definition of "client" to reinforce that the rule applies to clients of the firm and not just clients of the lawyer.

106. The Committee, based on submissions received and its review of the form of the rule, is making two changes to this rule.

107. First, rules 3.4-10 and Rule 3.4-11 should be linked through the words "save as provided by Rule 3.4-11 at the start of 3.4-10(c). Second, the Committee proposes that Rule 3.4-11 be revised as follows:

> When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer (the "other lawyer") in the lawyer's firm may act against the former client in the new matter

provided that:

a. the former client consents to the other lawyer acting; or

b. the law firm establishes that it has taken adequate measures on a timely basis to ensure that there will be no risk of disclosure of the former client's confidential information to the other lawyer having carriage of the new matter.

Rules 3.4-12 to 3.4-16 - Acting for Borrower and Lender (Law Society Rules 2.04(8.1), (8.2), (11) and (12))

108. Except for minor variations, the rules in the Model Code mirror the current Law Society rules. However, the Model Code reorganizes some of the rules relating to mortgage and loan transactions.

109. In the existing rules, the rules on acting for borrower and lender are located in the joint retainers section, but the Model Code includes them under the "Acting for Borrower and Lender" heading. The rules include a definition of "lending client" currently in Law Society subrule 2.04(8.1), applicable to rules 3.4-14 through 3.4-16. The Model Code rule also includes the provisions on consent for a joint retainer with a lending client currently found in Law Society subrule 2.04(8.1). The Committee agrees with these changes.

110. The Model Code does not include a limit of $50,000 for the consideration of the mortgage or loan where a lawyer acts jointly for the borrower and lender. The Committee proposes to keep that limit, which is in current Law Society rule 2.04(12).

Rules 3.4-17 to 3.4-26 - Conflicts From Transfer Between Law Firms (Law Society Rule 2.05)

111. The Model Code's transferring lawyer rules are virtually identical to current Law Society

rule 2.05 and commentaries, except for some very minor language variations.

112. The FLSC Standing Committee is currently reviewing proposed changes to the Model Code provisions on this subject and as part of the review has asked all Canadian Law Societies for comment.

113. As the FLSC review in this area is not yet completed, any amendments to these rules will be reported separately to Convocation at a future date.

Rules 3.4-27 to 3.4-41 - Doing Business with a Client (Law Society Rule 2.06)

114. Currently, rules on doing business with a client are located in Rule 2.06, which is separate from the conflicts rules. The Model Code includes them in the conflicts chapter. The Model Code's rules 3.4-27 to 41 generally reorganize the Law Society's rules.

115. The definitions of "independent legal advice" and "independent legal representation" are imported into the Model Code rule itself, whereas the current Law Society rules rely on the same definitions in new rule Rule 1.1-1. In the Committee's view, those definitions should remain in Rule 1.1-1.

116. There is no definition of "syndicated mortgage" in the Model Code's rule, as the rules that include these words are not included in the Model Code, as discussed below. The Law Society's current subrule 2.06(1) provides that a "syndicated mortgage" means a mortgage having more than one investor). The Committee proposes that this definition remain in the rules.

117. Rule 3.4-28 and commentary is new based on the Model Code. It provides a general rule and guidance respecting a lawyer's transactions with clients. The second paragraph of the new commentary includes language regarding the fiduciary relationship which appears in the current commentary under current rule 2.06(4). The following sentence is

new: "The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest". In the Committee's view, the rule and commentary add some clarity to the subject and agree that they should be adopted.

118. The Model Code adds a new rule 3.4-28 that addresses the obligations where a lawyer lends money to a client.

119. As mentioned above, the Model Code does not include the equivalent of subrules (6) through (8) of Law Society rule 2.06. These rules deal in some detail with a lawyer holding mortgages in which clients invest, a lawyer arranging mortgages for clients, disclosure obligations, and advertising restrictions. These rules appear to be unique to Ontario and the Committee is proposing that they remain.

120. Based on consideration of the Call for Input submissions, the Committee recommends the following amendments to the Model Code rules:
    a. the words "subject to this rule" at the beginning of rule 3.4-28 should be removed; and
    b. the heading for Rules 3.4-29 to 3.4-36 should be "Transactions with Clients" rather than "Investment by Client when Lawyer has an Interest" as this heading is more descriptive of the subject.

Rule 3.4-37 to 3.4-39 - Testamentary Instruments and Gifts (New)

121. The Model Code includes new rules on testamentary instruments and gifts. These rules prohibit a lawyer from including in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate. They also prohibit a lawyer from preparing an instrument giving the lawyer or an associate a gift or benefit from the client, unless the client is the lawyer's family member or partner or associate.

122. Several submissions received by the Committee in response to the Call for Input cautioned against implementing the Model Code Rules in this area. It was suggested that the rules would restrict a testator's ability to communicate wishes concerning their choice of counsel to administer the estate. The views expressed were that clients benefit from using a lawyer who is already familiar with their family background, assets, and other relevant matters. The respondents said that this rule, if implemented in its current form, would make it difficult for the client to make use of the lawyer's knowledge. They indicated that clients might find it more cost-effective if the drafter of a will were also permitted to execute it in accordance with the testator's intentions. They urged that for these public policy reasons, including the importance of testamentary freedom, the rules should not be adopted as drafted.

123. The Committee agrees with the approach suggested by the respondents and is recommending the following wording to address these concerns:

> 3.4-37 If a will contains a clause directing that the lawyer who drafted the will be retained to provide services in the administration of the client's estate, the lawyer shall, before accepting that retainer, provide the trustees with advice, in writing, that the clause is a non-binding direction and the trustees can decide to retain other counsel.

124. Comment was also received on Model Code rule 3.4-38 which reads:

> Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

125. One respondent suggested that the rule should use the term "related persons" rather than "family member". In the Committee's view, the intent of the Rule is to permit a lawyer to draft a will for a parent, grandparent etc. leaving a gift to the lawyer (or his children, for example). The ordinary definition of "family" would be broad enough to include

these individuals but would not include the breadth of "related person". Further, defining "family member" is not necessary and might inadvertently damage the principle that is clearly enunciated in the rule. Moreover, if the lawyer has taken advantage of a "family" member, then the law with respect to undue influence and duress ought to address those situations. As such, the Committee proposes that "family member" be used.

126. Finally, the Committee does not propose to adopt Model Code rule 3.4-39 which would prohibit a lawyer from accepting more than a "nominal" gift from a client unless the client has received independent legal advice. The Committee's view is that it was not necessary to include a rule on this subject.

Rules 3.4-40 and 3.4-41 - Judicial Interim Release (New)

127. The Model Code adds new rules on Judicial Interim Release.

128. During the Call for Input, it was suggested that as drafted, the Model Code provisions could create ambiguity regarding partnership moneys. To address this, the Committee proposes the following amendments based on a suggestion provided during the call for input, to address the circumstances of lawyers who practice in partnership:

> 3.4-40 Subject to Rule 3.4-41, a lawyer shall not in respect to any accused person for whom the lawyer acts
>
> (a) act as a surety for the accused;
>
> (b) deposit with a court the lawyer's own money or that of any firm in which the lawyer is a partner to secure the accused's release;
>
> (c) deposit with any court any other valuable security to secure the accused's release; or
>
> (d) act in a supervisory capacity to the accused.

> 3.4-41 A lawyer may do any of the things referred to in Rule 3.4-40 if the accused is in a family relationship with the lawyer and the accused is represented by the lawyer's partner or associate.

Law Society Ontario-Specific Rules

129. The Committee proposed that the following Law Society rules be retained as part of the conflicts chapter, as there are no equivalent Model Code provisions:

a. Affiliations Between Lawyers and Affiliated Entities (3.4-11.1 to 3.4-11.3);

b. Multi-Discipline Practice (3.4-16.1);

c. Short-term Limited Legal Services (3.4-16.2 to 3.4-16.6); and

d. Lawyers Acting For Transferor and Transferee in Transfers of Title (3.4-16.7 to 3.4-16.9)

Section 3.6 - Fees and Disbursements (Law Society Rule 2.08)

130. The Model Code makes a number of helpful additions and some amendments to the Fees and Disbursements Rule, with which the Committee agrees. The commentary following current subrule (2) respecting what constitutes a fair and reasonable fee is enhanced. The Code reorganizes the second half of the commentary under current subrule 2.08(2) that follows the individual paragraphs, and makes some deletions. The additions include providing information in writing on fees and disbursements and the substance of all fee discussions.

131. The Model Code moves the last paragraph of the commentary under current subrule 2.08(2) to the rule dealing with making legal services available (now Rule 4.1).

132. The Model Code adds new commentary to current subrule 2.08(7) to elaborate on matters related to division of fees and referral fees, with some examples that illustrate some permitted activities.

133. The Model Code adds commentary to current subrule 2.08(10) that elaborates on the rule prohibiting appropriation of funds except in accordance with the by-laws that govern trust funds. The commentary indicates that refusal to refund advance fees for work not carried out when the retainer terminates is a breach of integrity.

134. The Model Code adds a new rule that requires a lawyer to repay funds owing as a result of a reduction of a fee at assessment.

135. The Committee proposes the adoption of these Model Code changes.

136. There are two changes included in Model Code Rule 3.8 that the Committee has decided not to recommend.

137. The first change is the last paragraph of commentary to rule 3.6-2 added by the Model Code discussing the on the termination of a contingency fee arrangement. The Model Code provides that

> 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 3.7-1, 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 3.7-7 (Mandatory 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.

138. As currently drafted, a lawyer with a contingent fee arrangement could not withdraw services for any reason other than those enumerated under the mandatory withdrawal rule, unless the contingency arrangement specifically states that the lawyer has the right to do so, and sets out the circumstances in which this may occur. The Committee does

not agree with this approach as in its view, it is too restrictive.

139. The second change relates to commentary under rule 3.6-7. One of the respondents to the Call for Input suggested that the proposed final paragraph of this Model Code commentary ("occasionally entertaining potential referral sources by purchasing meals, providing tickets to, or attending at, sporting or other activities or sponsoring client functions") was not helpful, since it was vague and insufficiently inclusive. The Committee agreed with this view.

140. The Committee proposes that the commentary to Rule 3.6-7 be modified and re-ordered, as follows:

> This rule prohibits lawyers from entering into arrangements to compensate or reward non-licensees for the referral of clients. However, 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 as 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.

141. In rule 3.6-11, the Model Code provides that "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 practicable". Since the meaning of the term "review" is unclear, the Committee proposes that it be removed. The proposed rule would provide that "if the amount of fees or disbursements charged by a lawyer is reduced on an assessment, the lawyer must repay the monies to the client as soon as is practicable".

Section 3.7 - Withdrawal from Representation (Law Society Rule 2.09)

142. The Model Code in rule 3.7-1 makes a number of amendments to the commentary that followed current subrule 2.09(1) including additional information about appropriate

notice of withdrawal and the effect on the retainer of the dissolution of a law firm. A commentary is added to advise that sufficient time should be allowed for the client to obtain another lawyer's advice. The Committee agrees with these changes.

143. The Committee proposes that the commentary to the Model Code rule 3.7-2 regarding optional withdrawal from representation be adopted but amended by adding the words "a material breakdown in communications" as another example of the circumstances in which an optional withdrawal may be permitted.

144. The Committee proposes that the Model Code rule 3.7-7 on mandatory withdrawal be adopted but with modification to paragraph (b), so that it would provide: "Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if the client's instructions require the lawyer to act contrary to these rules or by-laws of the Society".

145. The Model Code in rules 3.7-8 and 3.7-9 amends the language of current subrule 2.09(9) regarding the manner of withdrawal by adding a requirement to notify the client, and by adding some additional descriptive or clarifying language to other provisions that do not change the substance of the guidance. A minor addition is also made to the commentary following these rules respecting the withdrawal of a lawyer who is part of a law firm. The Committee agrees with these changes.

Section 4.1 - Making Legal Services Available (Law Society Rule 3.01)

146. The Model Code makes a number of amendments to the current commentary in the Law Society's Rules and which now follows rule 3.1-1, including some wording changes, comment on *pro bono* service and the availability of legal aid. The Model Code also amends the commentary following existing subrule 3.01(2) to indicate that a lawyer may offer assistance to a person whose relative or friend contacts the lawyer for this purpose. The Committee agrees with these changes.

Current Law Society Rule 3.04 – Interprovincial Law Firms

147. The Model Code does not include the equivalent of current Law Society Rule 3.04 that deals with compliance with Law Society rules, including books, records and accounts. The Committee acknowledges that the requirements set out in that rule are already covered elsewhere in the rules and the by-laws, including Law Society By-Law 4, Part VII (Interprovincial Practice of Law) that governs such practice. The Committee therefore proposes that a rule dealing with this subject not be included in the amended Rules.

Section 5.1 - The Lawyer as Advocate (Law Society Rule 4.01)

148. The Model Code reorganizes the commentary under current subrule 4.01(1) and moves one paragraph to follow rule 5.1-2. The Model Code also clarifies and amends the list of items in the paragraphs under current subrule 4.01(2) which describe what an advocate must not do.

149. In addition to the change to the commentary described above, the Model Code amends the wording and adds two short paragraphs to the commentary that deal with the withdrawal of a criminal charge to gain a civil advantage and pursuing a hypothesis with a witness that is not honestly advanced.

150. The Committee agrees with the changes described above.

151. Paragraph 4 of the commentary to Model Code rule 5.1-1 currently provides that "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". One respondent to the Call for Input recommended replacing this phrase with the following mandatory wording: "in adversarial proceedings that could impact the health, welfare or security of a

child, directly or indirectly, a lawyer shall advise the client to take into account the best interests of the child" (emphasis added).

152. The Committee, following staff research, does not recommend this wording change on the basis that mandatory language should not appear in the commentary.[11]

153. The Model Code deletes the existing commentary under current subrule 4.01(7) on undertakings and instead provides a cross-reference to the undertakings and trust conditions in the Model Code rule 7.2-11 (current Law Society subrule 6.03(10)). The Committee believes that the existing commentary that highlights the "personal promise and responsibility" character of an undertaking, should remain but that the cross-reference above should be added.

154. In response to a suggestion from a respondent to the Call for Input on the undertaking rule, the Committee proposes the addition of the words "by her or him" to the wording of Model Code Rule 5.1-6 (Undertakings) to clarify that the obligation is clearly directed at personal undertakings given by the lawyer only and not, for example, undertakings given at discovery.

155. The Model Code re-organizes current subrule 4.01(9) on agreement on guilty plea, (now rules 5.1-7 and 5.1-8) without affecting the substance. The Committee considers this to be a useful change.

Section 5.2 - The Lawyer as Witness (Law Society Rule 4.02)

156. The Model Code amalgamates current subrules 4.02(1) and (2) into one rule (5.2-1) that

[11] As stated in the *Final Report of the Task Force on Review of the Rules of Professional Conduct*, "rules should be expressed in mandatory language, and explanatory and advisory language should appear in the commentaries." *Final Report of the Task Force on Review of the Rules of Professional Conduct*, Report to Convocation, April 28, 2000, p. 16, paragraph 20.

covers submission of affidavit and testimony. The Model Code also adds the phrase "unless the matter about which he or she testified is purely formal or uncontroverted" to the rule dealing with a lawyer who is a witness not appearing as an advocate in an appeal from the decision. The Committee agrees with these changes.

Section 5.5 - Relations with Jurors (Law Society Rule 4.05)

157. The Model Code modifies current subrule 4.05(3) on disclosure of information about improper conduct by a jury panel or juror, setting out a reasonable belief test that the improper conduct has occurred. The Committee agrees with this change.

158. The Model Code adds a new rule 5.5-5 that prohibits a lawyer's discussion after trial with a member of the jury about its deliberations. The rule reads: "A lawyer who is not connected with a case before the court shall not communicate with or cause another to communicate with any member of the jury about the case". Because the Committee is of the view that this subject is already covered in the *Criminal Code*, the Committee does not propose to include it.

Section 6.2 - Students (Law Society Rule 5)

159. The Model Code adds new commentary regarding the duties of principals to provide that the principal/supervising lawyer is responsible for the actions of students acting under the lawyer's direction. The Committee agrees that this commentary should be adopted.

Section 6.3 – Harassment and Discrimination (Law Society Rules 5.03 and 5.04)

160. The Model Code makes significant changes to the Law Society's current rules on these subjects. It reduces the two rules and their extensive commentary to four brief rules that reference the application of human rights laws, definitions in human rights legislation and prohibitions on any form of harassment, including sexual harassment and discrimination.

161. The Committee considered the submissions it received on these proposed changes during the Call for Input. Some of the participants noted that if the definition of the term

"harassment" is expanded as proposed by the Model Code to include forms of harassment not based on the grounds in the *Human Rights Code*, the role of the Law Society's Discrimination and Harassment Counsel would be expanded considerably to include personal harassment allegations.

162. After considerable reflection and based on the concerns described above, the Committee has concluded that the Model Code provisions should not be adopted in this area. The Committee is recommending that the Law Society's current rules on these subjects be retained.

Section 7.1 – Responsibility to the Profession, the Law Society and Others (Law Society Rule 6.01)

163. Language which previously appeared in the Law Society's Rule 6.01 on the subject of integrity has now been moved to new rule 2.1 under the heading "Integrity", as previously noted. The Committee is in agreement with these changes.

164. The Model Code makes a minor, but important, wording change to this rule, now 7.1-3, replacing the word "severely" in paragraph (d) with "materially" to describe the threshold for prejudice that would invoke the rule in the circumstances described. The Committee recommends that this change be made.

Rule 7.2-9 – Communications with an Unrepresented Person (Law Society Rule 2.04(14))

165. The substance of rule 7.2-9 appeared in current 2.04(14) within the conflicts rule. While the content of the Model Code rule is similar to the Law Society rule, the Model Code does not place this rule within the conflicts chapter of the Rules; rather, it appears in Chapter 7 on Relationship to the Society and Other Lawyers.

166. The Committee is proposing generally that the Model Code provisions be adopted and included in Chapter 7. The Committee is proposing that the first paragraph of the Model

Code rule (currently paragraph 2.04(14)(a)), which provides that when a lawyer deals on a client's behalf with an unrepresented person, the lawyer shall urge the unrepresented person to obtain independent legal representation, not be adopted. The Committee was of the view that this obligation, which is mandatory in the rule, may be onerous for lawyers or not necessary in every situation.

Rule 7.2-10 - Inadvertent Communications (New)

167. The Model Code adds a new rule 7.2-10 and commentary which requires a lawyer who receives a document that they know or reasonably ought to know was sent inadvertently to notify the sender. The Committee proposes the adoption of this rule, although it does not propose to adopt the second paragraph of the Model Code commentary.[12]

Rule 7.2-11 - Undertakings and Trust Conditions (Law Society Rule 6.03(10))

168. The Model Code adds a requirement to current subrule 6.03(10) on undertakings to also require that a lawyer honour every trust condition once accepted. Extensive commentary is also added to accompany the new rule.

169. The Committee proposes that a paragraph of commentary under this rule that does not appear in the Model Code remain in the Rules, as it deals with electronic registration of title documents. In the Committee's view, this guidance is important for Ontario practice.

Section 7.3 - Outside Interests and the Practice of Law (Law Society Rule 6.04)

170. The Model Code adds new commentary to current subrule 6.04(1) that cautions against the effect outside interests may have on the practice of law. The commentary advises the lawyer to avoid a conflict or circumstances in which it is difficult to distinguish the law

[12] This paragraph reads: "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."

practice from the outside interest. The Committee agrees with this addition.

Section 7.4 -The Lawyer in Public Office (Law Society Rule 6.05)

171. The Model Code deletes current subrules 6.05(2) through (5) which deal with conflicts while in public office. Rule 7.4-1 would remain. The Committee agrees with these changes.

Section 7.7 - Judges Returning to Practice (Law Society Rule 6.08)

172. Rule 6.08(3) currently provides that a retired appellate judge (that is, a lawyer who was formerly a judge of the Supreme Court of Canada, Ontario Court of Appeal or Federal Court of Appeal) who has retired, resigned or been removed from the Bench and has returned to practice shall not appear as counsel in any court or administrative board or tribunal without the express approval of a committee of Convocation appointed for this purpose.

173. Rule 6.08(4) further provides that a lawyer who was formerly a judge of the Federal Court, the Tax Court of Canada, the Supreme Court of Ontario, Trial Division, a County or District Court, the Ontario Court of Justice or the Superior Court of Justice shall not appear as counsel or advocate either in the court in which the judge served, a lower court, or before an administrative tribunal over which the court exercised a judicial review function for a period of two years from the date of retirement, resignation or removal without the express approval of a Committee of Convocation appointed for this purpose.

174. The Model Code reduces the four subrules in the Rules on this subject into one rule, as follows:

> 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 in which the former judge was a member or before

> any courts of inferior jurisdiction to that court or before any administrative tribunal or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the court exercised judicial functions.

175. The Call for Input prompted some interesting comment on this rule. The Committee also noted that this issue forms part of an argument in a case before the Supreme Court of Canada this year.[13]

176. The Committee carefully considered the submissions it received and is of the view that the Model Code three year proposal be adopted but that it be incorporated in the current rule, which would otherwise remain unchanged. In other words, the distinction between retired appellate judges and retired judges would remain in the Rules.

177. Accordingly, in order to appear as counsel in any court, a retired appellate judge would continue to require express approval from a Committee of Convocation appointed for this purpose. With respect to retired judges, the Committee is recommending a three-year prohibition on appearing before the court in which the former judge served, or before a court or administrative tribunal over which the court exercised jurisdiction, unless the governing body approves that the judge appear on the basis of exceptional circumstances.

[13] On May 16, 2013, the Supreme Court of Canada considered an appeal in the matter of *Telecommunications Employees Association of Manitoba Inc*. v. *Manitoba Telecom Services* (2012 MBCA 13) In this decision, several unions are appealing the Manitoba Court of Appeal's 2012 decision to overturn a trial judgment that awarded a $43 million pension surplus to the 7000 employees of Manitoba Telecom Services, rather than to the company. It is also argued that the appearance by a retired Manitoba Court of Appeal judge three years after he retired from the bench created an appearance of bias. The Court of Appeal decision may be found on the Canadian Legal Information Institute site at http://www.canlii.org/en/mb/mbca/doc/2012/2012mbca13/2012mbca13.pdf.

Tab 3.1.1

BACKGROUND TO THE DEVELOPMENT OF THE FLSC MODEL CODE OF PROFESSIONAL CONDUCT

In November 2004, the Federation of Law Societies of Canada ("the Federation") created the Model Code of Professional Conduct Committee ("the Model Code Committee"). The Model Code Committee was tasked with drafting a Model Code containing, as much as possible, uniform ethical and professional conduct standards for the legal profession in Canada.

The primary impetus for the project was three-fold:

- the increased mobility of lawyers between jurisdictions and an expectation that, with the advent of the Federation's National Mobility Agreement, that trend would continue;
- a belief that there are national, and international, ethical standards for the practice of law which should be reflected in consistent conduct rules across the country; and
- the presence of a number of external factors (for example, legislation in respect of anti-money laundering) that brought the core values of the profession under scrutiny.

The Federation Committee's Process

The Model Code Committee was chaired by Allan T. Snell, Q.C., then co-executive director of the Law Society of Saskatchewan. The Model Code Committee brought together a wealth of knowledge and experience with representatives from virtually every law society in the country.[1]

[1] The members of the Committee were:
Allan T. Snell, Chair, Saskatchewan (staff)
Sylvie Champagne, Barreau du Quebec (staff)
Claire Moffet, Barreau du Quebec (staff)
Michael W. Milani, Saskatchewan (volunteer)
Bradley G. Nemetz, Alberta (volunteer)
Jack Olsen, British Columbia (staff)
David A. Zacks, British Columbia (volunteer)
C. Kristin Dangerfield, Manitoba (staff)
Marc L. Richard, New Brunswick (staff)
Phyllis E. Weir, Newfoundland (staff)
Susanne Boucher, Nunavut (volunteer)
Susan M. Robinson, PEI (staff)
Sheldon Toner, NWT (volunteer)

From 2004 to 2007, the Model Code Committee met approximately 25 times.

To ensure that it had a comprehensive understanding of the issues and possible approaches, the Model Code Committee reviewed the rules of professional conduct from the different jurisdictions in Canada, the Canadian Bar Association (CBA) *Code of Professional Conduct* and the American Bar Association *Model Rules of Professional Conduct*.

Early in its deliberations, the Model Code Committee decided to use the Law Society of Upper Canada's *Rules of Professional Conduct* as the basis for the Model Code. The Model Code Committee favoured the Law Society's emphasis on relationships between lawyers and those with whom lawyers deal in their practices and employment.

In drafting the Model Code, the first consideration for Model Code Committee members was what they believed was ethically correct. They also considered what they believed would be acceptable to the law societies as matters of professional regulation.

In the spring of 2007, a draft document was completed. After review by the Federation Council, it was circulated to law societies for comment. In his transmission to law societies with the draft Model Code, the then Federation president, Michael Milani, said:

> We believe that the ethical rules for lawyers should be as consistent as possible across the country. There are a number of reasons for this. Members of the public should be able to expect that lawyers serving them will adhere to common ethical standards no matter where they are in the country. Members of the profession, more and more of who practise law in more than one jurisdiction would also benefit from knowing that substantially the same rules of conduct apply regardless of where they practise. We believe that the confidence of both the public and the profession in the law societies as regulators would be enhanced by the adoption of a common set of conduct rules.

Jim Varro, Ontario (staff)
Gary Whittle, Yukon (volunteer)
Victoria Rees, Nova Scotia (staff)

Comments received were then referred to a special implementation committee ("Implementation Committee") formed by the Federation. The Implementation Committee was chaired by Mona Duckett, a former president of the Law Society of Alberta and included representatives from a number of law societies. Zeynep Onen, Naomi Bussin and Jim Varro from the Law Society participated on this committee. The Implementation Committee, which met from March 2008 to early 2009, carefully considered every comment and recommendation made by member law societies to determine what amendments should be made to the 2007 draft. The Implementation Committee also reviewed the draft for consistency, organization and ease of reading.

The Implementation Committee considered two external reports, a report from the Competition Bureau on regulation of the legal profession and the report of the CBA Task Force on Conflicts of Interest.

The Implementation Committee then made a series of amendments to the Model Code. In considering whether to change, delete or add to the provisions in the draft Model Code, the Implementation Committee was mindful of the goal to create a model of the ethical and professional conduct standards that lawyers in Canada should be expected to meet. As a result, a number of provisions in the 2007 draft were deleted and suggested additions relating to matters unique to a single jurisdiction were not incorporated.

Following detailed review and editing by the rules editor/drafter chosen by the Implementation Committee[2], a final draft (including a French version) was presented to and adopted by the Federation Council at its November 2009 meeting.

The Model Code Committee prepared a chapter in the Model Code on conflicts of interest, which consolidated all rules dealing with conflicts. It was during the implementation phase that the CBA released its conflicts report (August 2008) mentioned earlier. Although the Implementation Committee considered the report, the Federation Executive decided that a more focused consideration of the differences between the recommendations in the report and the provisions of

[2] Jeffrey G. Hoskins, General Counsel and Director of Policy and Legal Services for the Law Society of British Columbia.

the Model Code on conflicts was required. The Special Advisory Committee on Conflicts of Interest ("Advisory Committee") was established for that purpose.

A report from the Advisory Committee was submitted to the March 2011 meeting of the Federation Council. The matter was then referred to the Federation's Standing Committee on the Model Code[3], which revised the rule on conflicts. That rule was approved by the Council in December 2011 and was included in the Model Code.

A revised version of the Model Code with a new numbering scheme was adopted in December 2012.

[3] Gavin Hume (British Columbia) was appointed the Chair and Jim Varro was appointed as a member of the Committee. Other committee members are Gérald Tremblay (Barreau), Mona Duckett (Alberta), Susanne Boucher (Nunavut), Darrel Pink (Nova Scotia) and Kristin Dangerfield (Manitoba).

PROPOSED AMENDMENTS ARISING FROM IMPLEMENTATION OF THE FEDERATION OF LAW SOCIETIES OF CANADA'S MODEL CODE OF PROFESSIONAL CONDUCT

BLACKLINE VERSION

Rules of Professional Conduct

~Effective November 1, 2000~

Adopted by Convocation June 22, 2000

Guide to the *Rules of Professional Conduct*
Amended by Convocation October 24, 2013
Amendments Effective October 1, 2014

IN THESE RULES:

a. Chapters are assigned a single digit, as in **Chapter 1 – Citation and Interpretation**

b. Sections are assigned two digits separated by a decimal point, the second number beginning with 1 (subject to paragraph g.) as in **Section 3.1 – Competence**

c. Rules include the section number and are assigned an additional number, beginning with 1 (subject to paragraph g.) preceded by a dash, as in **Reasonable Fees and Disbursements 3.6-1**

d. Paragraphs of commentary are assigned a number in square brackets, beginning with 1 (subject to paragraph g.) as in **[6].**

e. Rules or paragraphs of commentary in the Federation of Law Societies of Canada Model Code of Professional Conduct ("Model Code") not adopted in these rules are assigned the phrase **[FLSC - not in use]**

f. Sections, rules or paragraphs of commentary in these rules that do not appear in the Model Code are assigned a numerical suffix preceded by a decimal point, as in **Section 7.8.1, rule 3.4-11.1 and commentary [4.1].**

g. If a section, rule or paragraph of commentary described in paragraph f. is, at a given location, the first section, rule or paragraph of commentary, it is assigned the number 0, as in **Section 1.0 or rule 4.2-0.**

h. New sections, rules or commentaries as a result of amendments to the Model Code are assigned the appropriate capital letter suffix, for example, **rule 4.1-2A or commentary [6B].**

i. Deletions are assigned the word "deleted" in square brackets following the relevant section, rule or commentary number, for example, **6.4-1 [deleted].**

Chapter 1 Citation and Interpretation

SECTION 1.0 CITATION

1.0-1 These rules may be cited as the *Rules of Professional Conduct.*

SECTION 1.1 DEFINITIONS

1.1-1 In these rules, unless the context requires otherwise,

"affiliated entity" means any person or group of persons other than a person or group authorized to practice law in or outside Ontario;

[New – May 2001]

"affiliation" means the joining on a regular basis of a lawyer or group of lawyers with an affiliated entity in the delivery or promotion and delivery of the legal services of the lawyer or group of lawyers and the non-legal services of the affiliated entity;

[New – May 2001]

"associate" includes:

(a) a licensee who ~~is an employee of the law firm in which the licensee practices law;~~ practises law in a law firm through an employment or other contractual relationship, and

(b) a non-licensee employee of a multi-discipline practice providing services that support or supplement the practice of law; ~~in which the non-licensee provides his or her services.~~

[Amended – September 2010]

"client" means a person who:

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf

and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work;

Commentary

[1] A solicitor and client relationship may be established ~~is often established~~ without formality.

[2] When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing.

[3] For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established.

~~For example, an express retainer or remuneration is not required for a solicitor and client relationship to arise. Also, in some circumstances, a lawyer may have legal and ethical responsibilities similar to those arising from a solicitor and client relationship. For example, a lawyer may meet with a prospective client in circumstances that impart confidentiality, and, although no solicitor and 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 solicitor and client relationship.~~

"conduct unbecoming a barrister or solicitor" means conduct, including conduct in a lawyer's personal or private capacity, that tends to bring discredit upon the legal profession including, for example,

(a) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer,

(b) taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of another, or

(c) engaging in conduct involving dishonesty or conduct which undermines the administration of justice;

[Amended – May 2008]

Commentary

~~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. If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair the 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.~~

"conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

Commentary

[1] In this context, "substantial risk" means that the risk is significant and plausible, even if it is not certain or even probable that the material adverse effect will occur.

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, where more than one person consents, each signs the same or a separate document recording the~~his or her~~ consent, or

(b) orally, provided that each person consenting~~giving the oral consent~~ receives a separate written communication recording their consent as soon as practicable.~~;~~

"independent legal advice" means a retainer where

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,

(b) the client's transaction involves doing business with

(i) another lawyer,

(ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or

(iii) a client of the other lawyer,

(c) the retained lawyer has advised the client that the client has the right to independent legal representation,

(d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer,

(e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and

(f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view;

"independent legal representation" means a retainer where

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction, and

(b) the retained lawyer will act as the client's lawyer in relation to the matter;

Commentary

[1] Where a client elects to waive independent legal representation but to rely on independent legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged.

"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 *Legal Aid Services Act 1998*,

(d) in a government, a Crown corporation, or any other public body, or

(e) in a corporation or other body;

"lawyer" means a person licensed by the Law Society to practise law as a barrister and solicitor in Ontario and includes a candidate enrolled in the Law Society's Licensing Process for lawyers;

"legal practitioner" means a person

(a) who is a licensee; or

(b) who is not a licensee but who is a member of the bar of a Canadian jurisdiction, other than Ontario, and who is authorized to practise law as a barrister and solicitor in that other jurisdiction;

[New – June 2009]

"licensee" means a lawyer or a paralegal;

"paralegal" means a person licensed by the Law Society to provide legal services in Ontario;

"professional misconduct" means conduct in a lawyer's professional capacity that tends to bring discredit upon the legal profession including

(a) violating or attempting to violate one of these rules, ~~in the *Rules of Professional Conduct* or~~ a requirement of the *Law Society Act* or its regulations or by-laws,

(b) knowingly assisting or inducing another legal practitioner to violate or attempt to violate the rules in these rules ~~*Rules of Professional Conduct*~~, the *Paralegal Rules of Conduct* or a requirement of the *Law Society Act* or its regulations or by-laws,

(c) knowingly assisting or inducing a non-licensee partner or associate of a multi-discipline practice to violate or attempt to violate the rules in ~~these~~ rules~~*Rules of Professional Conduct*~~ or a requirement of the *Law Society Act* or its regulations or by-laws,

(d) misappropriating or otherwise dealing dishonestly with a client's or a third party's money or property,

(e) engaging in conduct that is prejudicial to the administration of justice,

(f) stating or implying an ability to influence improperly a government agency or official, or

(g) knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

[Amended – June 2009]

"Law Society" means The Law Society of Upper Canada;

"tribunal" includes courts, boards, arbitrators, mediators, administrative agencies, and bodies that resolve disputes, regardless of their function or the informality of their procedures.

INTERPRETATION

Standards of the Legal Profession

1.03 (1) These rules shall be interpreted in a way that recognizes that

(a) a lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public, and other legal practitioners honourably and with integrity,

(b) a lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario,

[Amended – June 2009]

Commentary

A lawyer should, where appropriate, advise a client of the client's French language rights relating to the client's matter, including where applicable

(a) subsection 19 (1) of the *Constitution Act*, 1982 on the use of French or English in any court established by Parliament,

(b) section 530 of the *Criminal Code* about an accused's right to a trial before a court that speaks the official language of Canada that is the language of the accused,

(c) section 126 of the *Courts of Justice Act* that requires that a proceeding in which the client is a party be conducted as a bilingual (English and French) proceeding, and

(d) subsection 5(1) of the *French Language Services Act* for services in French from Ontario government agencies and legislative institutions.

[New – June 2001]

(c) 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,

(d) the rules are intended to express to the profession and to the public the high ethical ideals of the legal profession,

(e) the rules are intended to specify the bases on which lawyers may be disciplined, and

~~(f) rules of professional conduct cannot address every situation, and a lawyer should observe the rules in the spirit as well as in the letter.~~

~~General Principles~~

~~(2) In these rules, words importing the singular number include more than one person, party, or thing of the same kind and a word interpreted in the singular number has a corresponding meaning when used in the plural.~~

Chapter 2 Integrity

SECTION 2.1 INTEGRITY

2.1-1 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

[1] 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 their 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.

[2] 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.

[3] 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 Law Society may be justified in taking disciplinary action.

[4] Generally, however, the Law 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.

[4.1] A lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario.

[4.2] A lawyer should, where appropriate, advise a client of the client's French language rights relating to the client's matter, including where applicable

(a) subsection 19(1) of the *Constitution Act*, 1982 on the use of French or English in any court established by Parliament,

(b) section 530 of the *Criminal Code* about an accused's right to a trial before a court that speaks the official language of Canada that the language of the accused,

(c) section 126 of the *Courts of Justice Act* that requires that a proceeding in which the client is a party be conducted as a bilingual (English and French) proceeding,

(d) subsection 5(1) of the *French Language Services Act* for services in French from Ontario government agencies and legislative institution.

2.1- 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

[1] 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 Law 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.

[2] When participating in community activities, lawyers should be mindful of the possible perception that the lawyer is providing legal advice and a lawyer-client relationship has been created.

Chapter 3 Relationship to Clients

SECTION 3.1 COMPETENCE

Definitions

3.1-1 In this rule,

"competent lawyer" means a lawyer who has and applies relevant knowledge, skills~~,~~ and attributes~~, and values~~ in a manner appropriate to each matter undertaken on behalf of a client including

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;

[Amended – June 2007]

(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 ~~ability~~,

(d) communicating at all relevant stages of a matter in a timely and effective manner; ~~that is appropriate to the age and abilities of the client,~~

(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 in spirit with all requirements pursuant to the *Law Society Act*; ~~the Rules of Professional Conduct~~,

(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

3.1-2 A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

[1] 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.

[2] 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.

[3] 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 licensee of established competence in the field in question.

[4] 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.

[5] 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.

[6] A lawyer must ~~be alert to~~ recognize a task for which the lawyer lacks ~~any lack of~~ competence ~~for a particular task~~ and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should

(a) ~~either~~ decline to act;

(b) ~~or~~ obtain the client's instructions to retain, consult, or collaborate with a licensee 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.

[7] The lawyer should ~~may~~ 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, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer, he or she must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement to provide such services does not exempt a lawyer from the duty to provide competent representation. As in any retainer, the lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rules 3.2-10 to 3.2-12.

[8] 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.

[8.1] What is effective communication with the client 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 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.~~

~~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. This is an ethical consideration and is to be distinguished from the standard of care that a tribunal would invoke for purposes of determining negligence.~~

~~A lawyer must be alert to recognize any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task. If consulted in such circumstances, the lawyer should either decline to act or obtain the client's instructions to retain, consult, or collaborate with a lawyer who is competent for that task. The lawyer may 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, in such a situation, the lawyer should not hesitate to seek the client's instructions to consult experts.~~

~~A lawyer should clearly specify the facts, circumstances, and assumptions upon which an opinion is based. 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. If the circumstances do not justify an exhaustive investigation with consequent expense to the client, the lawyer should so state in the opinion.~~

[9] 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.

[10] In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy, or social ~~implications~~ 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, ~~where and to the extent~~ 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.

[11] In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be ~~be particularly alert to ensure that the client understands that he or she is receiving legal advice from a lawyer~~ supplemented by advice or services from a non-licensee. Advice or services from non-licensee 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. ~~If other advice or service is sought from non-licensee members of the firm, it must be sought and provided independently of and outside the scope of the retainer for the provision of legal services and will~~ The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the relevant by-laws and regulations governing multi-discipline practices. ~~In particular, the lawyer should ensure that such advice or service of non-licensees is provided from a location separate from the premises of the multi-discipline practice.~~

~~Whenever it becomes apparent that the client has misunderstood or misconceived the position or what is really involved, the lawyer should explain, as well as advise, so that the client is apprised of the true position and fairly advised about the real issues or questions involved.~~

[12] 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, so that the client can make an informed choice about their options, such as whether to retain new counsel.

[13] The lawyer should refrain from conduct that may interfere with or compromise their capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

[14] 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.

[15] 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 in the rule. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

~~Commentary~~

~~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.~~

~~Incompetent professional practice may give rise to disciplinary action under this rule.~~

~~In addition to this rule, the *Law Society Act* provides that the Society may conduct a review of a lawyer's practice to determine if the lawyer is meeting standards of professional competence. A review will be conducted in circumstances defined in the by-laws under the *Law Society Act*.~~

~~A lawyer may also be subject to a hearing at which it will be determined whether the lawyer is failing or has failed to meet standards of professional competence.~~

[15.1] The *Law Society Act* provides that a lawyer fails to meet standards of professional competence if there are deficiencies in

(a) the lawyer's knowledge, skill, or judgment,

(b) the lawyer's attention to the interests of clients,

(c) the records, systems, or procedures of the lawyer's professional business, or

(d) other aspects of the lawyer's professional business, and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

[Amended - June 2009]

SECTION 3.2 QUALITY OF SERVICE

Quality of Service

3.2-1 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

[1] This rule should be read and applied in conjunction with the rules in Section 3.1 regarding competence.

[2] An ordinarily or otherwise competent lawyer may still occasionally fail to provide an adequate quality of service.

[3] 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.

Legal Services Under a Limited Scope Retainer

3.2-1A Before providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client.

3.2-1A.1 When providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.

Commentary

[1] Reducing to writing the discussions and agreement with the client about the limited scope retainer assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer.

[1.1] In certain circumstances, such as when the client is in custody, it may not be possible to give him or her a copy of the document. In this type of situation, the lawyer should keep a record of the limited scope retainer in the client file and, when practicable, provide a copy of the document to the client.

[2] A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting such that it appears that the lawyer is providing services to the client under a full retainer.

[3] [FLSC – not in use]

[4] A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed. See rule 7.2-6A and rules 7.2-8 to 7.2-8.2.

[5] [FLSC – not in use]

3.2-1A.2 Rule 3.2-1A.1 does not apply to a lawyer if the legal services are

(a) legal services or summary advice provided as a duty counsel under the *Legal Aid Services Act, 1998* or through any other duty counsel or other advisory program operated by a not-for-profit organization;

(b) summary advice provided in community legal clinics, student clinics or under the *Legal Aid Services Act, 1998*;

(c) summary advice provided through a telephone-based service or telephone hotline operated by a community-based or government funded program;

(d) summary advice provided by the lawyer to a client in the context of an introductory consultation, where the intention is that the consultation, if the client so chooses, would develop into a retainer for legal services for all aspects of the legal matter; or

(e) *pro bono* summary legal services provided in a non-profit or court-annexed program.

[New – September 2011]

Commentary

[1] The consultation referred to in rule 3.2-1A.2(d) may include advice on preventative, protective, pro-active or procedural measures relating to the client's legal matter, after which the client may agree to retain the lawyer.

[New – September 2011]

Honesty and Candour

3.2-2 When advising clients, a lawyer shall be honest and candid.

Commentary

[1] [FLSC – not in use]

[1.1] A lawyer has a duty of candour with the client on matters relevant to the retainer. This arises out of the rules and the lawyer's fiduciary obligations to the client. The duty of candour requires a lawyer to inform the client of information known to the lawyer that may affect the interests of the client in the matter.

[1.2] In some limited circumstances, it may be appropriate to withhold information from a client. For example, with client consent, a lawyer may act where the lawyer receives information on a "for counsel's eyes only" basis. However, it would not be appropriate to act for a client where the lawyer has relevant material information about that client received through a different retainer. In those circumstances the lawyer cannot be honest and candid with the client and should not act.

[2] The lawyer's duty to the 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.

[2.1] A lawyer who is acting for both the borrower and the lender in a mortgage or loan transaction should also refer to rule 3.4-15 regarding the lawyer's duty of disclosure to their clients.

[3] [FLSC – not in use]

When Client an Organization

3.2-3 Notwithstanding that the instructions may be received from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising the lawyer's duties and in providing professional services, the lawyer shall act for the organization.

Commentary

[1] 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 will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon 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.

[2] In addition to acting for the organization, the lawyer may also accept a joint retainer and act for a person associated with the organization. An example might be a lawyer advising about liability insurance for an officer of an organization. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interest and should comply with the rules about the avoidance of conflicts of interest (Section 3.4, Conflicts).

[New – March 2004]

Encouraging Compromise or Settlement

3.2-4 A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

Commentary

[1] It is important to ~~The lawyer shall~~ consider the use of alternative dispute resolution (ADR). ~~for every dispute, and, if~~ When appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

[1.1] In criminal, quasi-criminal or regulatory complaint proceedings, it is not improper for a lawyer for an accused or potential accused to communicate 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. See also rule 7.2-6

[1.2] 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.

Threatening Criminal Proceedings

~~(4) A lawyer shall not advise, threaten, or bring a criminal or quasi-criminal prosecution in order to secure a civil advantage for the client~~.

3.2-5 A lawyer shall 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.

3.2-5.1 Rule 3.2-5(b) does not apply to an application made in good faith to a regulatory authority for a benefit to which a client may be legally entitled.

Commentary

[1] 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.

[2] 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 Law Society. The impropriety stems from threatening to use, or actually using, criminal or quasi-criminal proceedings to gain a civil advantage.

[2.1] Where a regulatory authority exercises a jurisdiction that is essentially civil, it is not improper to threaten to make a complaint pursuant to that authority to achieve a benefit for the client. For example, where the regulatory authority of the office dealing with employment standards covers non-payment of wages, it is not improper to threaten to make a complaint pursuant to the relevant provincial statute for an order that wages be paid failing payment of unpaid wages.

3.2-6 [FLSC - not in use]

Dishonesty, Fraud etc. by Client or Others

3.2-7 A lawyer shall not

~~(a)~~ knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct~~;~~

~~(b) advise~~ or instruct a client or any other person on how to violate the law and avoid punishment.

3.2-7.1 A lawyer shall not act or do anything or omit to do anything in circumstances where he or she ought to know that, by acting, doing the thing or omitting to do the thing, he or she is being used by a client, by a person associated with a client or by any other person to facilitate dishonesty, fraud, crime or illegal conduct.

[New – April 2012]

3.2-7.2 When retained by a client, a lawyer shall make reasonable efforts to ascertain the purpose and objectives of the retainer and to obtain information about the client necessary to fulfill this obligation.

3.2-7.3 A lawyer shall not use their trust account for purposes not related to the provision of legal services.

[Amended – April 2011]

Commentary

[1] Rule 3.2-7 which states that a lawyer must not knowingly assist in or encourage dishonesty, fraud, crime or illegal conduct, applies whether the lawyer's knowledge is actual or in the form of wilful blindness or recklessness. A lawyer should also be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client or any other person. Rules 3.2-7.1 to 3.2-7.3 speak to these issues.

[2] A lawyer should be alert to and avoid unwittingly becoming involved with a client or any other person who is engaged in criminal activity 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

(a) establishing, purchasing or selling business entities;

(b) arranging financing for the purchase or sale or operation of business entities;

(c) arranging financing for the purchase or sale of business assets; and

(d) purchasing and selling real estate.

[3] To obtain information about the client and about the subject matter and objectives of the retainer, the lawyer may, for example, need to verify who are the legal or beneficial owners of property and business entities, verify who has the control of business entities, and clarify 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. It is especially important to obtain this information where a lawyer has suspicions or doubts about whether he or she might be assisting a client or any other person in dishonesty, fraud, crime or illegal conduct.

[3.1] Lawyers should be vigilant in identifying the presence of "red flags" in their areas of practice and make inquiries to determine whether a proposed retainer relates to a *bona fide* transaction. Information on "Red Flags in Real Estate Transactions" appears below.

[3.2] A client or another person may attempt to use a lawyer's trust account for improper purposes, such as hiding funds, money laundering or tax sheltering. These situations highlight the fact that when handling trust funds, it is important for a lawyer to be aware of their obligations under these rules and the Law Society's By-laws that regulate the handling of trust funds.

[4] A *bona fide* test case is not necessarily precluded by rule 3.2-7 and, so long as no injury to the 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.

Red Flags in Real Estate Transactions

[4.1] A lawyer representing any party in a real estate transaction should be vigilant in identifying the presence of "red flags" and make inquiries to determine whether it is a *bona fide* transaction. Red flags

include such things as

(a) purchase price manipulations (revealed by, for example, deposits purportedly paid directly to the vendor, price escalations and "flips" in which a property is sold and re-sold within a short period of time for a substantially higher price, reductions in the balance due on closing in consideration of extra credits or deposits not required by the purchase agreement, amendments to the purchase price not disclosed to the mortgage lender, the acceptance on closing of an amount less than the balance due, a mortgage advance which approximates or exceeds the balance due resulting in surplus mortgage proceeds, and so on);

(b) a nominal role for one or more parties (fraud is sometimes effected through the use of "straw people", who may not exist or whose identities have either been purchased or stolen, as well as through the suspicious use of powers of attorney);

(c) the purchaser contributes no funds or only a nominal amount towards the purchase price or the balance due on closing;

(d) signs that the parties are concealing a non-arm's length relationship or are colluding with respect to the purchase price;

(e) suspicious or repeated third-party involvement (for example, giving instructions, supplying client directions or identification, and providing or receiving funds on closing); and

(f) the proceeds of sale are disbursed or directed to be paid to parties who are unrelated to the transaction.

[4.2] The red flags listed above are not an exhaustive list. Further information regarding red flags is available from many sources, including the "Fighting Real Estate Fraud" page within the "Practice Resources" section of the website of the Law Society. Fraudulent real estate schemes and the red flags associated with such schemes are numerous and evolving. Lawyers who practise real estate law have a professional obligation therefore to educate themselves on an ongoing basis regarding the red flags of real estate fraud.

[New – October 2012]

Dishonesty, Fraud, etc. when Client an Organization

~~(5.1) When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization intends to act dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall~~

~~(a) advise the person from whom the lawyer takes instructions that the proposed conduct would be dishonest, fraudulent, criminal, or illegal,~~

~~(b) if necessary because the person from whom the lawyer takes instructions refuses to cause the proposed wrongful conduct to be abandoned, advise the organization's chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct would be dishonest, fraudulent, criminal or illegal,~~

~~(c) if necessary because the chief legal officer or the chief executive officer of the organization refuses to cause the proposed conduct to be abandoned, 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 would be dishonest, fraudulent, criminal, or illegal, and~~

~~(d) if the organization, despite the lawyer's advice, intends to pursue the proposed course of conduct, withdraw from acting in the matter in accordance with rule 2.09.~~

~~(5.2) When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization has acted or is acting dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall~~

~~(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 conduct was or is 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 wrongful 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 conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped, and~~

~~(c) if the organization, despite the lawyer's advice, continues with the wrongful conduct, withdraw from acting in the matter in accordance with rule 2.09.~~

3.2-8 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, shall do the following, in addition to their obligations under rule 3.2-7:

(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 rules in Section 3.7.

Commentary

[1] 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. ~~Rules 2.02 (5.1) and (5.2)~~ 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 (Section 3.3)

[2] This rule ~~Rules 2.02 (5.1) and (5.2)~~ speaks of conduct that is dishonest, fraudulent, criminal or illegal.

[3] Such conduct includes acts of omission ~~as well as acts of commission~~. 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 thisese rules.

[4] In determining~~considering~~ their responsibilities under this rule, a lawyer should consider whether it is feasible and appropriate to give any advice in writing.

[5] ~~Once a~~ A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner ~~then the lawyer~~ may advise the chief executive officer and shall advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, ~~then~~ the lawyer shall report~~s~~ 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, ~~then~~ the lawyer shall withdraw from acting in the particular matter in accordance with rule 3.7-1. In some but not all cases, withdrawal ~~would~~ means resigning from their position or relationship with the organization and not simply withdrawing from acting in the particular matter.

[6] ~~These~~ This rule~~s~~ 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 organizations' 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.

Client ~~Under a Disability~~ with Diminished Capacity

3.2-9 When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about their legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as their age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time.

[1.1] When a client is or comes to be under a disability that impairs their ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

[2] [FLSC – not in use]

[3] A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

[3.1] A lawyer who is asked to provide legal services under a limited scope retainer to a client under a disability should carefully consider and assess in each case how, under the circumstances, it is possible to render those services in a competent manner.

[Amended – September 2011]

[4] [FLSC – not in use]

[5] 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 3.3-1 (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.

~~Legal Services Under a Limited Scope Retainer~~

~~2.02 (6.1) Before providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client.~~

[New - September 2011]

(6.2) When providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.

[New - September 2011]

Commentary

Reducing to writing the discussions and agreement with the client about the limited scope retainer assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer. In certain circumstances, such as when the client is in custody, it may not be possible to give him or her a copy of the document. In this type of situation, the lawyer should keep a record of the limited scope retainer in the client file and, when practicable, provide a copy of the document to the client. A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting such that it appears that the lawyer is providing services to the client under a full retainer.

A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed. See rule 6.03(7.1)

[New - September 2011]

(6.3) Subrule (6.2) does not apply to a lawyer if the legal services are

(a) legal services or summary advice provided as a duty counsel under the *Legal Aid Services Act, 1998* or through any other duty counsel or other advisory program operated by a not-for-profit organization;

(b) summary advice provided in community legal clinics, student clinics or under the *Legal Aid Services Act, 1998*;

(c) summary advice provided through a telephone-based service or telephone hotline operated by a community-based or government-funded program;

(d) summary advice provided by the lawyer to a client in the context of an introductory consultation, where the intention is that the consultation, if the client so chooses, would develop into a retainer for legal services for all aspects of the legal matter; or

(e) *pro bono* summary legal services provided in a non-profit or court-annexed program.

[New - September 2011]

~~Commentary~~

~~The consultation referred to in subrule (6.3)(d) may include advice on preventative, protective, pro-active or procedural measures relating to the client's legal matter, after which the client may agree to retain the lawyer.~~

~~*[New - September 2011]*~~

Medical-Legal Reports

3.2-9.1 A lawyer who receives a medical-legal report from a physician or health professional that is accompanied by a proviso that it not be shown to the client shall return the report immediately to the physician or health professional unless the lawyer has received specific instructions to accept the report on this basis.

Commentary

[1] The lawyer can avoid some of the problems anticipated by the rule by having a full and frank discussion with the physician or health professional, preferably in advance of the preparation of a medical-legal report, which discussion will serve to inform the physician or health professional of the lawyer's obligation respecting disclosure of medical-legal reports to the client.

3.2-9.2 A lawyer who receives a medical-legal report from a physician or health professional containing opinions or findings that if disclosed might cause harm or injury to the client shall attempt to dissuade the client from seeing the report, but if the client insists, the lawyer shall produce the report.

3.2-9.3 Where a client insists on seeing a medical-legal report about which the lawyer has reservations for the reasons noted in rule 3.2-9.2, the lawyer shall suggest that the client attend at the office of the physician or health professional to see the report in order that the client will have the benefit of the expertise of the physician or health professional in understanding the significance of the conclusion contained in the medical-legal report.

Title Insurance in Real Estate Conveyancing

3.2-9.4 A lawyer shall assess all reasonable options to assure title when advising a client about a real estate conveyance and shall advise the client that title insurance is not mandatory and is not the only option available to protect the client's interests in a real estate transaction.

Commentary

[1] A lawyer should advise the client of the options available to protect the client's interests and minimize the client's risks in a real estate transaction. The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risks, it is not a substitute for a lawyer's services in a real estate transaction.

[2] The lawyer should be knowledgeable about title insurance and discuss with the client the advantages, conditions, and limitations of the various options and coverages generally available to the client through title insurance. Before recommending a specific title insurance product, the lawyer should be knowledgeable about the product and take such training as may be necessary in order to acquire the knowledge.

3.2-9.5 A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to their client.

3.2-9.6 A lawyer shall disclose to the client that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer with respect to any title insurance coverage.

Commentary

[1] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance of any hidden fees by the lawyer, including the lawyer's law firm, any employee or associate of the firm, or any related entity.

3.2-9.7 If discussing TitlePLUS insurance with a client, a lawyer shall fully disclose the relationship between the legal profession, the Law Society, and the Lawyers' Professional Indemnity Company (LawPRO).

Reporting on Mortgage Transactions

3.2-9.8 Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 60 days of the registration of the mortgage, or within such other time period as instructed by the lender.

3.2-9.9 The final report required by rule 3.2-9.8 must be delivered within the times set out in that rule even if the lawyer has paid funds to satisfy one or more prior encumbrances to ensure the priority of the mortgage as instructed and the lawyer has obtained an undertaking to register a discharge of the encumbrance or encumbrances but the discharge remains unregistered.

[New - February 2007]

SECTION 3.3 CONFIDENTIALITY

Confidential Information

3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless

(a) expressly or impliedly authorized by the client;

(b) ~~or~~ required by law or by order of a tribunal of competent jurisdiction to do so;

(c) required to provide the information to the Law Society; or

(d) otherwise permitted by rules 3.3-2 to 3.3-6.

Commentary

[1] A lawyer cannot render effective professional service to the 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.

[2] 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.

[3] 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.

[4] 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 Section 3.4 Conflicts.)

~~Generally, the lawyer should not disclose having been consulted or retained by a particular person about a particular matter unless the nature of the matter requires such disclosure.~~

[5] 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.

[6] 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.

[7] Sole practitioners who practise in association with other licensees 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 licensee 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 licensees' practices are integrated, physically and administratively, in the association.

[8] A lawyer should avoid indiscreet conversations, 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 shop-talk between 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.

[8.1]Although the rule may not apply to facts that are public knowledge, nevertheless, the lawyer should guard against participating in or commenting on speculation concerning the client's affairs or business.

[9] In some situations, the authority of the client to disclose may be ~~implied~~ inferred. For example, some disclosure may be necessary in court proceedings, 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 ~~non-legal staff, such as secretaries and filing clerks~~ 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, and students and other licensees 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.

[10] 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 that 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 to 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.

[11] A lawyer may have an obligation to disclose information under rules 5.5-2, 5.5-3 and 5.6-3 (Security of Court Facilities). If client information is involved in those situations, the lawyer should be guided by the provisions of this rule. ~~.2.03~~

~~The rule prohibits disclosure of confidential information because confidentiality and loyalty are fundamental to the relationship between a lawyer and client and 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, there are some very exceptional situations identified in the following subrules where 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, and, even in these situations, the lawyer should not disclose more information than is required.~~

[11.1] 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.

Justified or Permitted Disclosure

3.3-1.1 When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.

~~(3) Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required~~.

3.3-2 [FLSC - not in use]

3.3-3 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

[1] 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 rule, 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.

[2] 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.

[3] In assessing whether disclosure of confidential information is justified to prevent death or serious bodily harm, a lawyer should consider a number of factors, including

(a) the likelihood that the potential injury will occur and its imminence;

(b) the apparent absence of any other feasible way to prevent the potential injury; and

(c) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

[4] How and when disclosure should be made under this rule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should seek legal advice. When practicable, a judicial order may be sought for disclosure.

[5] If confidential information is disclosed under rule 3.3-3, 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.

[5.1] 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 their employer or client. Although the rules ~~*Rules of Professional Conduct*~~ make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 3.2-7) 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 (rule 3.2-8), 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 their duties are owed to the organization and not to the officers, employees, or agents of the organization (rule 3.2-3)) and the lawyer should comply with rule 3.2-8, which sets out the steps the lawyer should take in response to proposed, past or continuing misconduct by the organization.

[Amended – March 2004]

3.3-4 ~~Where~~ If it is alleged that a lawyer or the lawyer's associates or employees ~~are~~

(a) ~~guilty of~~ have committed a criminal offence involving a client's affairs;

(b) are civilly liable with respect to a matter involving a client's affairs; ~~or~~

(c) ~~guilty of malpractice or misconduct~~.

(c) have committed acts of professional negligence; or

(d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

~~a~~ the lawyer may disclose confidential information in order to defend against the allegations, but ~~the lawyer~~ shall not disclose more information than is required.

3.3-5 A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required.

3.3-6 A lawyer may disclose confidential information to another lawyer to secure legal advice about the lawyer's proposed conduct.

~~**Literary Works**~~

~~(6) If a lawyer engages in literary works, such as a memoir or an autobiography, the lawyer shall not disclose confidential information without the client's or former client's consent.~~

~~Commentary~~

~~The fiduciary relationship between lawyer and client forbids the lawyer from using any confidential information covered by the ethical rule for the benefit of the lawyer or a third person or to the disadvantage of the client.~~

2.04 AVOIDANCE OF CONFLICTS OF INTEREST

Definition

2.04 (1) In this rule

A "conflict of interest" or a "conflicting interest" means an interest

(a) that would be likely to affect adversely a lawyer's judgment on behalf of, or loyalty to, a client or prospective client, or

(b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

Commentary

Conflicting interests include, but are not limited to, the financial interest of a lawyer or an associate of a lawyer, including that which may exist where lawyers have a financial interest in a firm of non-lawyers in an affiliation, and the duties and loyalties of a lawyer to any other client, including the obligation to communicate information. For example, there could be a conflict of interest if a lawyer, or a family member, or a law partner had a personal financial interest in the client's affairs or in the matter in which the lawyer is requested to act for the client, such as a partnership interest in some joint business venture with the client. The definition of conflict of interest, however, does not capture financial interests that do not compromise a lawyer's duties to the client. For example, a lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest, because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

Where a lawyer is acting for a friend or family member, the lawyer may have a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.

[Amended - May 2001, March 2004, October 2004]

Avoidance of Conflicts of Interest

(2) A lawyer shall not advise or represent more than one side of a dispute.

(3) A lawyer shall not act or continue to act in a matter when there is or is likely to be a conflicting interest unless, after disclosure adequate to make an informed decision, the client or prospective client consents.

Commentary

A client or the client's affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflict of interest.

~~A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.~~

~~As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties, or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs. In some instances, each client's case may gather strength from joint representation. In the result, the client's interests may sometimes be better served by not engaging another lawyer, for example, when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.~~

~~A conflict of interest may arise when a lawyer acts not only as a legal advisor but in another role for the client. For example, there is a dual role when a lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation. Lawyers may also serve these dual roles for partnerships, trusts, and other organizations. A dual role may raise a conflict of interest because it may affect the lawyer's independent judgment and fiduciary obligations in either or both roles, it may obscure legal advice from business and practical advice, it may invalidate the protection of lawyer and client privilege, and it has the potential of disqualifying the lawyer or the law firm from acting for the organization. Before accepting a dual role, a lawyer should consider these factors and discuss them with the client. The lawyer should also consider rule 6.04 (Outside Interests and Practice of Law).~~

~~If a lawyer has a sexual or intimate personal relationship with a client, this may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. Before accepting a retainer from or continuing a retainer with a person with whom the lawyer has such a relationship, a lawyer should consider the following factors:~~

~~a. The vulnerability of the client, both emotional and economic;~~

~~b. The fact that the lawyer and client relationship may create a power imbalance in favour of the lawyer or, in some circumstances, in favour of the client;~~

~~c. Whether the sexual or intimate personal relationship will jeopardize the client's right to have all information concerning the client's business and affairs held in strict confidence. For example, the existence of the relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship;~~

~~d. Whether such a relationship may require the lawyer to act as a witness in the proceedings;~~

~~e. Whether such a relationship will interfere in any way with the lawyer's fiduciary obligations to the client, his or her ability to exercise independent professional judgment, or his or her ability to fulfill obligations owed as an officer of the court and to the administration of justice.~~

~~There is no conflict of interest if another lawyer of the firm who does not have a sexual or intimate personal relationship with the client is the lawyer handling the client's work.~~

While subrule 2.04(3) does not require that a lawyer advise the client to obtain independent legal advice about the conflicting interest, in some cases, especially those in which the client is not sophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine, and uncoerced.

[Amended – March 2004, October 2004]

Acting Against Client

(4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter

(a) in the same matter,

(b) in any related matter, or

(c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information unless the client and those involved in or associated with the client consent.

Commentary

It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter.

(5) Where a lawyer has acted for a former client and obtained confidential information relevant to a new matter, the lawyer's partner or associate may act in the new matter against the former client if

(a) the former client consents to the lawyer's partner or associate acting, or

(b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur,

(ii) the extent of prejudice to any party,

(iii) the good faith of the parties,

(iv) the availability of suitable alternative counsel, and

(v) issues affecting the public interest.

Commentary

The term "client" is defined in rule 1.02 to include a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. Therefore, if a member of a law firm has obtained from a former client confidential information that is relevant to a new matter, no member of the law firm may act against the former client in the new matter unless the requirements of subrule (5) have been satisfied. In its effect, subrule (5) extends with necessary modifications the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a former client.

Joint Retainer

(6) Except as provided in subrule (8.2), where a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,

(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

[Amended February 2007]

Commentary

Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992* S.O. 1992 c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but

(c) the lawyer would have a duty to decline the new retainer, unless;

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

[Amended February, 2005]

(6.1) Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer shall disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip" where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

[New February 2007]

(7) Except as provided in subrule (8.2), where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

[Amended February 2007]

Commentary

Although all the parties concerned may consent, a lawyer should avoid acting for more than one client when it is likely that an issue contentious between them will arise or their interests, rights, or obligations will diverge as the matter progresses.

(8) Except as provided in subrule (8.2), where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

[Amended February 2007]

(8.1) In subrule (8.2), "lending client" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

(8.2) If a lawyer is jointly retained by a client and by a lending client in respect of a mortgage or loan from the lending client to that client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to

(a) provide the advice described in subrule (6) to the lending client before accepting the employment,

(b) provide the advice described in subrule (7) if the lending client is the other client as described in that subrule, or

(c) obtain the consent of the lending client as described in subrule (8), including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

Subrules (8.1) and (8.2) are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.

Subrule (8.2) applies to all loans where a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

[New February 2007]

(9) Save as provided by subrule (10), where clients have consented to a joint retainer and an issue contentious between them or some of them arises, the lawyer shall

(a) not advise them on the contentious issue, and

(b) refer the clients to other lawyers, unless

(i) no legal advice is required, and

(ii) the clients are sophisticated,

in which case, the clients may settle the contentious issue by direct negotiation in which the lawyer does not participate.

Commentary

The rule does not prevent a lawyer from arbitrating or settling or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer. Where, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

(10) Where clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them and a contentious issue does arise, the lawyer may advise the one client about the contentious matter and shall refer the other or others to another lawyer.

Affiliations Between Lawyers and Affiliated Entities

(10.1) Where there is an affiliation, before accepting a retainer to provide legal services to a client jointly with non-legal services of an affiliated entity, a lawyer shall disclose to the client

(a) any possible loss of solicitor and client privilege because of the involvement of the affiliated entity, including circumstances where a non-lawyer or non-lawyer staff of the affiliated entity provide services, including support services, in the lawyer's office,

(b) the lawyer's role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be,

(c) any financial, economic or other arrangements between the lawyer and the affiliated entity that may affect the independence of the lawyer's representation of the client, including whether the lawyer shares in the revenues, profits or cash flows of the affiliated entity; and

(d) agreements between the lawyer and the affiliated entity, such as agreements with respect to referral of clients between the lawyer and the affiliated entity, that may affect the independence of the lawyer's representation of the client.

(10.2) Where there is an affiliation, after making the disclosure as required by subrule (10.1), a lawyer shall obtain the client's consent before accepting a retainer under subrule (10.1).

(10.3) Where there is an affiliation, a lawyer shall establish a system to search for conflicts of interest of the affiliation.

Commentary

Lawyers practising in an affiliation are required to control the practice through which they deliver legal services to the public. They are also required to address conflicts of interest in respect of a proposed retainer by a client as if the lawyer's practice and the practice of the affiliated entity were one where the lawyers accept a retainer to provide legal services to that client jointly with non-legal services of the affiliated entity. The affiliation is subject to the same conflict of interest rules as apply to lawyers and law firms. This obligation may extend to inquiries of offices of affiliated entities outside of Ontario where those offices are treated economically as part of a single affiliated entity.

In reference to clause (a) of subrule (10.1), see also subsection 3(2) of By-Law 7.1 (Operational Obligations and Responsibilities).

[Amended – January 2008]

Prohibition Against Acting for Borrower and Lender

(11) Subject to subrule (12), a lawyer or two or more lawyers practising in partnership or association shall not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

(12) Provided that there is no violation of this rule, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction if

(a) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction,

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price,

(c) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business,

(d) the consideration for the mortgage or loan does not exceed $50,000, or

(e) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act (Canada)*.

[Amended – May 2001]

Multi-discipline Practice

(13) A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates observe this rule for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

[Amended – June 2009]

Unrepresented Persons

(14) When a lawyer is dealing on a client's behalf with an unrepresented person, the lawyer shall

(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 clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client and accordingly his or her comments may be partisan.

Short-term limited legal services

(15) In this subrule and subrules (16) to (19)

"*pro bono* client" means a client to whom a lawyer provides short-term limited legal services;

"short-term limited legal services" means *pro bono* summary legal services provided by a lawyer to a client under the auspices of Pro Bono Law Ontario's Law Help Ontario program for matters in the Superior Court of Justice or in Small Claims Court, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

(16) A lawyer engaged in the provision of short-term limited legal services may provide legal services to a *pro bono* client unless

(a) the lawyer knows or becomes aware that the interests of the *pro bono* client are directly adverse to the immediate interests of another current client of the lawyer, the lawyer's firm or Pro Bono Law Ontario; or

(b) the lawyer has or, while providing the short-term limited legal services, obtains confidential information relevant to a matter involving a current or former client of the lawyer, the lawyer's firm or Pro Bono Law Ontario whose interests are adverse to those of the *pro bono* client.

(17) A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a *pro bono* client may act for other clients of the law firm whose interests are adverse to the *pro bono* client so long as adequate and timely measures are in place to ensure that no disclosure of the *pro bono* client's confidential information is made to the lawyer acting for the other clients.

(18) A lawyer who is unable to provide short-term limited legal services to a *pro bono* client because of the operation of subrule (16) (a) or (b) shall cease to provide short-term limited legal services to the *pro bono* client as soon as the lawyer actually becomes aware of the adverse interest or as soon as he or she has or obtains the confidential information referred to in subrule (16) and the lawyer shall not seek the *pro bono* client's waiver of the conflict.

~~(19) In providing short-term limited legal services, a lawyer shall~~

~~(a) ensure, before providing the legal services, that the appropriate disclosure of the nature of the legal services has been made to the client; and~~

~~(b) determine whether the client may require additional legal services beyond the short-term limited legal services and if additional services are required or advisable, encourage the client to seek further legal assistance.~~

~~Commentary~~

~~Short term limited legal service programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of Pro Bono Law Ontario (PBLO) and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the *pro bono* services described in subrule (15) are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.~~

~~Subrules (15) to (19) apply in circumstances in which the limited nature of the legal services being provided by a lawyer significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term limited legal services only if the lawyer has actual knowledge of a conflict of interest between the *pro bono* client and an existing or former client of the lawyer, the lawyer's firm or PBLO. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term limited legal services.~~

~~The lawyer's knowledge would be based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consultation and in the client's application to PBLO for legal assistance.~~

~~The personal disqualification of a lawyer participating in PBLO's program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.~~

~~Confidential information obtained by a lawyer representing a *pro bono* client, as defined in subrule (15), will not be imputed to the lawyer's licensee partners, associates and employees or non-licensee partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services, and may act in future for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services.~~

Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Subrule (17) extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rule 2.05) to the situation of a law firm acting against a current client of the firm in providing short term limited legal services. Measures that the lawyer providing the short-term limited legal services should take to ensure the confidentiality of information of the client's information include:

- having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the *pro bono* client;

- identifying relevant files, if any, of the *pro bono* client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and

- ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

Subrule (18) precludes a lawyer from obtaining a waiver in respect of conflicts of interest that arise in providing short-term legal services.

[New – April 22, 2010]

2.04.1 LAWYERS ACTING FOR TRANSFEROR AND TRANSFEREE IN TRANSFERS OF TITLE

2.04.1 (1) Subject to subrule (3), an individual lawyer shall not act for or otherwise represent both the transferor and the transferee in a transfer of title to real property.

(2) Subrule (1) does not prevent a law firm of two or more lawyers from acting for or otherwise representing a transferor and a transferee in a transfer of title to real property so long as the transferor and transferee are represented by different lawyers in the firm and there is no violation of rule 2.04.

(3) So long as there is no violation of rule 2.04, an individual lawyer may act for or otherwise represent both the transferor and the transferee in a transfer of title to real property if

(a) the Land Registration Reform Act permits the lawyer to sign the transfer on behalf of the transferor and the transferee,

(b) the transferor and transferee are "related persons" as defined in section 251 of the Income Tax Act (Canada), or

(c) the lawyer practices law in a remote location where there are no other lawyers that either the transferor or the transferee could without undue inconvenience retain for the transfer.

[Effective March 31, 2008]

SECTION 3.4 CONFLICTS

Duty to Avoid Conflicts of Interest

3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

Commentary

[1] As defined in ~~these~~ rule 1.1-1, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. In this context, "substantial risk" means that the risk is significant and plausible, even if it is not certain or even probable that the material adverse effect will occur. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

[2] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

[3] ~~The general prohibition and permitted activity prescribed by this rule apply to a~~ In order to assess whether there is a conflict of interest, the lawyer is required to consider the lawyer's duties to current, former and joint clients, third persons, as well as the lawyer's own interests.

Representation

[4] Representation means acting for a client and includes the lawyer's advice to and judgment on behalf of the client.

The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests

[5] The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Aspects of the duty of loyalty owed to a current client are the ~~Arising from the duty of loyalty are other duties, such as a~~ duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests ~~not to act against the interests of the client~~. Current ~~This obligation is premised on an established or ongoing lawyer client relationship in which the~~ clients must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

[6] [FLSC - not in use]

[7] Accordingly, factors for the lawyer's consideration in determining whether a conflict of interest exists include

(a) the immediacy of the legal interests;

(b) whether the legal interests are directly adverse;

(c) whether the issue is substantive or procedural;

(c) the temporal relationship between the matters;

(d) the significance of the issue to the immediate and long-term interests of the clients involved; and

(e) the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of Conflicts of Interest

[8] Conflicts of interest can arise in many different circumstances. The following are examples of situations in which conflicts of interest commonly arise requiring a lawyer to take particular care to determine whether a conflict of interest exists: ~~examples are intended to provide illustrations of conflicts of interest and are not exhaustive~~.

(a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.

(b) ~~A lawyer's position on behalf of one client leads to a precedent likely to seriously weaken the position being taken on behalf of another client, thereby creating a substantial risk that the lawyer's action on behalf of the one client will materially limit the lawyer's effectiveness in representing the other client~~.

(b) A lawyer provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.

(c) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

(i) A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

(d) A lawyer has a sexual or close personal relationship with a client.

(i) Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning their affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by their lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's

work.

(e) A lawyer or their law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

These two roles may result in a conflict of interest or other problems because they may

(i) affect the lawyer's independent judgment and fiduciary obligations in either or both roles,

(ii) obscure legal advice from business and practical advice,

(iii) jeopardize the protection of lawyer and client privilege, and

(iv) disqualify the lawyer or the law firm from acting for the organization.

(f) Sole practitioners who practise with other licensees in cost-sharing or other arrangements represent clients on opposite sides of a dispute. See rule 3.3-1, Commentary [7].

~~The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association~~.

Consent

3.4-2 A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and ~~the lawyer reasonably believes~~ it is reasonable for the lawyer to conclude that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

(a) Express consent must be fully informed and voluntary after disclosure.

(b) Consent may be ~~inferred~~ implied and need not be in writing where all of the following apply:

(i) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel,

(ii) the matters are unrelated,

(iii) the lawyer has no relevant confidential information from one client that might reasonably affect the representation of the other client, and

(iv) the client has commonly consented to lawyers acting for and against it in unrelated matters.

Commentary

[0.1] Rule 3.4-2 permits a client to accept the risk of material impairment of representation or loyalty. However, the lawyer would be unable to act where it is reasonable to conclude that representation or loyalty will be materially impaired even with client consent. Possible material impairment may be waived but actual material impairment cannot be waived.

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in advance

[4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

[5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Implied consent

[6] In some cases consent may be implied, rather than expressly granted. As the Supreme Court held in *R.* v. *Neil* and in *Strother v. 3464920 Canada Inc*, however, the concept of implied consent is applicable in exceptional cases only. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a

consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the representation of the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

Dispute

3.4-3 Despite rule 3.4-2, a lawyer shall not represent opposing parties in a dispute.

Commentary

[1] A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules in Section 3.4.

~~**Concurrent Representation with protection of confidential client information**~~

~~**2.04 (4)** Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:~~

- ~~(a) disclosure of the risks of the lawyers so acting has been made to each client;~~
- ~~(b) each client consents after having received independent legal advice, including on the risks of concurrent representation;~~
- ~~(c) the clients each determine that it is in their best interests that the lawyers so act;~~
- ~~(d) each client is represented by a different lawyer in the firm;~~
- ~~(e) appropriate screening mechanisms are in place to protect confidential information; and~~
- ~~(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.~~

~~**Commentary**~~

~~This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs.~~

~~An example is a law firm acting for a number of sophisticated clients in a matter such as competing bids in a corporate acquisition in which, although the clients' interests are divergent and may conflict, the~~

~~clients are not in a dispute. Provided that each client is represented by a different lawyer in the firm and there is no real risk that the firm will not be able to properly represent the legal interests of each client, the firm may represent both even though the subject matter of the retainers is the same. Whether or not a risk of impairment of representation exists is a question of fact.~~

~~The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other.~~

~~In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see Rule 2.04 (26)).~~

3.4-4 [FLSC - not in use]

Joint Retainers

3.4-5 Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

[1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

[2] A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with this rule. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with rules 3.3-1 to 3.3-6 (Confidentiality), the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

[3] After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-7.

[3.1] Joint retainers should be distinguished from separate retainers in which a law firm is retained to assist two or more clients competing at the same time for the same opportunity such as, for example, by competing bids in a corporate acquisition or competing applications for a single license. Each client would be represented by different lawyers in the firm. Since competing retainers of this kind are not joint retainers, information received can be treated as confidential and not disclosed to the client in the competing retainer. However, competing retainers to pursue the same opportunity require express consent pursuant to rule 3.4-2 because a conflict of interest will exist and the retainers will be related. With consent, confidentiality screens as described in rules 3.4-17 to 3.4-26 would be permitted between competing retainers to pursue the same opportunity. But confidentiality screens are not permitted in a joint retainer because rule 3.4-5(b) does not permit treating information received in connection with the joint retainer as confidential so far as any of the joint clients are concerned.

3.4-6 If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

3.4-7 When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer shall obtain their consent.

Commentary

[1] Consent in writing, or a record of the consent in a separate written communication to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that a contentious issue will arise between them or their interests, rights or obligations will diverge as the matter progresses.

3.4-8 Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer, the lawyer shall not advise either of them on the contentious issue and the following rules apply:

(a) The lawyer shall

~~(a)~~(i) refer the clients to other lawyers for that purpose; or

~~(b)~~ (ii) if no legal advice is required and the clients are sophisticated, advise them ~~clients~~ of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, ~~provided~~:

~~(i) no legal advice is required; and~~

~~(ii) the clients are sophisticated~~ and

~~(c)~~(b) If the contentious issue is not resolved, the lawyer shall withdraw from the joint representation.

Commentary

[1] This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

[2] If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

3.4-9 ~~Subject to~~ Despite rule 3.4-8, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and shall refer the other or others to another lawyer for that purpose.

~~**Commentary**~~

~~[1]This rule does not relieve the lawyer of the obligation when the contentious issue arises to obtain the consent of the clients when there is or is likely to be a conflict of interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients.~~

~~[2] When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.~~

Acting Against Former Clients

3.4-10 Unless the former client consents, a lawyer shall not act against a former client in

(a) the same matter,

(b) any related matter, or

(c) save as provided by rule 3.4-11, any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary

[1] ~~This rule prohibits a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer.~~ Unlike rules 3.4-1 through 3.4-9, which deal with current client conflicts, rules 3.4.10 and 3.4-11 address conflicts where the lawyer acts against a former client. Rule 3.4-10 guards against the misuse of confidential information from a previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client's position on a matter that was central to a previous retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client provided that ~~if~~:

(a) the former client consents to the other lawyer acting; or

~~(b)~~ the law firm establishes that it has taken adequate measures on a timely basis to ensure that there will be no risk of disclosure of the former client's confidential information to the other lawyer having carriage of the new matter. ~~it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including:~~

~~(i) the adequacy of assurances that no disclosure of the former client's confidential information to the other lawyer having carriage of the new matter has occurred;~~

~~(ii) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the other lawyer having carriage of the new matter will occur;~~

~~(iii) the extent of prejudice to any party;~~

~~(iv) the good faith of the parties;~~

~~(v) the availability of suitable alternative counsel; and~~

(vi) ~~issues affecting the public interest~~.

Commentary

[1] The guidelines at the end of the Commentary to rule 3.4-26 regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for another lawyer in the lawyer's firm to act against the former client.

Affiliations Between Lawyers and Affiliated Entities

3.4-11.1 Where there is an affiliation, before accepting a retainer to provide legal services to a client jointly with non-legal services of an affiliated entity, a lawyer shall disclose to the client

(a) any possible loss of solicitor and client privilege because of the involvement of the affiliated entity, including circumstances where a non-lawyer or non-lawyer staff of the affiliated entity provide services, including support services, in the lawyer's office;

(b) the lawyer's role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be;

(c) any financial, economic or other arrangements between the lawyer and the affiliated entity that may affect the independence of the lawyer's representation of the client, including whether the lawyer shares in the revenues, profits or cash flows of the affiliated entity; and

(d) agreements between the lawyer and the affiliated entity, such as agreements with respect to referral of clients between the lawyer and the affiliated entity, that may affect the independence of the lawyer's representation of the client.

3.4-11.2 Where there is an affiliation, after making the disclosure as required by rule 3.4-11.1, the lawyer shall obtain the client's consent before accepting a retainer under rule 3.4-11.1.

3.4-11.3 Where there is an affiliation, a lawyer shall establish a system to search for conflicts of interest of the affiliation.

Commentary

[1] Lawyers practising in an affiliation are required to control the practice through which they deliver legal services to the public. They are also required to address conflicts of interest in respect of a proposed retainer by a client as if the lawyer's practice and the practice of the affiliated entity were one where the lawyers accept a retainer to provide legal services to that client jointly with non-legal services of the affiliated entity. The affiliation is subject to the same conflict of interest rules as apply to lawyers and law firms. This obligation may extend to inquiries of offices of affiliated entities outside of Ontario where those offices are treated economically as part of a single affiliated entity.

[2] In reference to paragraph (a) of rule 3.4-11.1, see also subsection 3(2) of By-Law 7.1 (Operational Obligations and Responsibilities).

[Amended – January 2008]

Acting for Borrower and Lender

3.4-12 Subject to rule 3.4-14, a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

3.4-13 In rules 3.4-14 to 3.4-16 "lending client" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

3.4-14 Provided there is compliance with this rule and rules 3.4-15 to 3.4-19, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

(a) the lender is a lending client;

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;

(c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction;

~~(d)~~ (c.1) the consideration for the mortgage or loan does not exceed $50,000; or

~~(e)~~(d) the lender and borrower are not at "arm's length" as defined in section 251 of the *Income Tax Act* (Canada).

3.4 -15 When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

[1] What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

3.4-16 If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to

(a) provide the advice described in rule 3.4-5 to the lending client before accepting the retainer**;**

(b) provide the advice described in rule 3.4-6; or

(c) obtain the consent of the lending client as required by rule 3.4-7, including confirming

the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

[1] Rules 3.4-13 and 3.4-16 are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.

[2] Rule 3.4-16 applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

Multi-discipline Practice

3.4-16.1 A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates observe the rules in Section 3.4 for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

[Amended - June 2009]

Short-term Limited Legal Services

3.4-16.2 In this rule and rules 3.4-16.3 to 3.4-16.6,

"*pro bono* client" means a client to whom a lawyer provides short-term limited legal services;

"short-term limited legal services" means *pro bono* summary legal services provided by a lawyer to a client under the auspices of Pro Bono Law Ontario's Law Help Ontario program for matters in the Superior Court of Justice or in Small Claims Court, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

3.4-16.3 A lawyer engaged in the provision of short-term limited legal services may provide legal services to a *pro bono* client unless

(a) the lawyer knows or becomes aware that the interests of the *pro bono* client are directly adverse to the immediate interests of another current client of the lawyer, the lawyer's firm or Pro Bono Law Ontario; or

(b) the lawyer has or, while providing the short-term limited legal services, obtains confidential information relevant to a matter involving a current or former client of the lawyer, the lawyer's firm or Pro Bono Law Ontario whose interests are adverse to those of the *pro bono* client.

3.4-16.4 A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a *pro bono* client may act for other clients of the law firm whose interests are adverse to the *pro bono* client so long as adequate and timely measures are in place to ensure that no disclosure of the *pro bono* client's confidential information is made to the lawyer acting for the other clients.

3.4-16.5 A lawyer who is unable to provide short-term limited legal services to a *pro bono* client because of the operation of rules 3.4-16.3(a) or 3.4-16.3(b) shall cease to provide short term limited legal services to the *pro bono* client as soon as the lawyer actually becomes aware of the adverse interest or as soon as he or she has or obtains the confidential information referred to in rule 3.4-16.3 and the lawyer shall not seek the *pro bono* client's waiver of the conflict.

3.4-16.6 In providing short-term limited legal services, a lawyer shall

(a) ensure, before providing the legal services, that the appropriate disclosure of the nature of the legal services has been made to the client; and

(b) determine whether the client may require additional legal services beyond the short-term limited legal services and if additional services are required or advisable, encourage the client to seek further legal assistance.

Commentary

[1] Short term limited legal service programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of Pro Bono Law Ontario (PBLO) and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the *pro bono* services described in rule 3.4-16.2 are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

[2] Rules 3.4-16.2 to 3.4-16.6 apply in circumstances in which the limited nature of the legal services being provided by a lawyer significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term limited legal services only if the lawyer has actual knowledge of a conflict of interest between the *pro bono* client and an existing or former client of the lawyer, the lawyer's firm or PBLO. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term limited legal services.

[3] The lawyer's knowledge would be based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consultation and in the client's application to PBLO for legal assistance.

[4] The personal disqualification of a lawyer participating in PBLO's program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

[5] Confidential information obtained by a lawyer representing a *pro bono* client, as defined in rule 3.4-16.2, will not be imputed to the lawyer's licensee partners, associates and employees or non-licensee partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services, and may act in future for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services.

[6] Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Rule 3.4-16.4 extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rules 3.4-17 to 3.4-26) to the situation of a law firm acting against a current client of the firm in providing short term limited legal services. Measures that the lawyer providing the short-term limited legal services should take to ensure the confidentiality of information of the client's information include

(a) having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the *pro bono* client;

(b) identifying relevant files, if any, of the *pro bono* client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and

(c) ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

[7] Rule 3.4-16.5 precludes a lawyer from obtaining a waiver in respect of conflicts of interest that arise in providing short-term legal services.

[New – April 22, 2010]

Lawyers Acting for Transferor and Transferee in Transfers of Title

3.4-16.7 Subject to rule 3.4-16.8, an individual lawyer shall not act for or otherwise represent both the transferor and the transferee in a transfer of title to real property.

3.4-16.8 Rule 3.4-16.7 does not prevent a law firm of two or more lawyers from acting for or otherwise representing a transferor and a transferee in a transfer of title to real property so long as the transferor and transferee are represented by different lawyers in the firm and there is no violation of rule 3.4.

3.4-16.9 So long as there is no violation of the rules in Section 3.4, an individual lawyer may act for or otherwise represent both the transferor and the transferee in a transfer of title to real property if

(a) the *Land Registration Reform Act* permits the lawyer to sign the transfer on behalf of the transferor and the transferee;

(b) the transferor and transferee are "related persons" as defined in section 251 of the *Income Tax Act (Canada);* or

(c) the lawyer practices law in a remote location where there are no other lawyers that either the transferor or the transferee could without undue inconvenience retain for the transfer.

[Effective March 31, 2008]

Conflicts from Transfer Between Law Firms

Interpretation and Application of Rule

3.4-17 In rules 3.4-17 to 3.4-26

"client", includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them, and those defined as a client in the definitions part of this Code;

"confidential information" means information that is not generally known to the public obtained from a client; and

"matter" means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

Commentary

[1] The duties imposed by rules 3.4-18 to 3.4-26 concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

3.4-18 Rules 3.4-17 to 3.4-26 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client ("former client");

(b) the interests of those clients in that matter conflict; and

(c) the transferring lawyer actually possesses relevant information respecting that matter.

3.4-19 Rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial attorney general or department of justice who, after transferring from one department, ministry or agency to another, continues to be employed by that attorney general or department of justice.

Commentary

[1] The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.

[2] Lawyers and support staff — This rule is intended to regulate lawyers and ~~articled~~ articling law students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.

[3] Government employees and in-house counsel — The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

[4] Law firms with multiple offices — This rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public interest that it continue to represent its client in the matter.

Law Firm Disqualification

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter referred to in rule 3.4-18(a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur,

(ii) the extent of prejudice to any party,

(iii) the good faith of the parties,

(iv) the availability of suitable alternative counsel, and

(v) issues affecting the public interest.

Commentary

[1] The circumstances enumerated in rule 3.4-20(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While subparagraphs (ii) to (iv) are self-explanatory, subparagraph (v) includes governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.

3.4-21 For greater certainty, rule 3.4-20 is not intended to interfere with the discharge by an Attorney General or their counsel or agent (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.

3.4-22 If the transferring lawyer actually possesses information relevant to a matter referred to in rule 3.4-18(a) respecting the former client that is not confidential information but that may prejudice the former client if disclosed to a member of the new law firm

(a) the lawyer must execute an affidavit or solemn declaration to that effect; and

(b) the new law firm must

(i) notify its client and the former client or, if the former client is represented in the matter, the former client's lawyer, of the relevant circumstances and the firm's intended action under rules 3.4-17 to 3.4-26, and

(ii) deliver to the persons notified under subparagraph (i) a copy of any affidavit or solemn declaration executed under paragraph (a).

Transferring Lawyer Disqualification

3.4-23 Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 or 3.4-22 must not

(a) participate in any manner in the new law firm's representation of its client in the matter; or

(b) disclose any confidential information respecting the former client.

3.4-24 Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in rule 3.4-20 or 3.4-22.

Determination of Compliance

3.4-25 Anyone who has an interest in, or who represents a party in, a matter referred to in rules 3.4-17 to 3.4-26 may apply to a tribunal of competent jurisdiction for a determination of any aspect of those rules.

Due Diligence

3.4-26 A lawyer must exercise due diligence in ensuring that each member and employee of the lawyer's law firm, and each other person whose services the lawyer has retained

(a) complies with rules 3.4-17 to 3.4-26, and

(b) does not disclose confidential information of

(i) clients of the firm, and

(ii) any other law firm in which the person has worked.

Commentary

MATTERS TO CONSIDER

[1] When a law firm ("new law firm") considers hiring a lawyer or an ~~articled law~~ articling student ("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. The transferring lawyer and the new law firm need to identify, first, all cases in which

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client;

(b) the interests of the clients of the two law firms conflict; and

(c) the transferring lawyer actually possesses relevant information.

[2] The new law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the client of the former law firm ("former client") that is confidential and that may prejudice the former client if disclosed to a member of the new law firm. If this element exists, the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the interests of justice, based on relevant circumstances.

[3] In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences.

MATTERS TO CONSIDER BEFORE HIRING A POTENTIAL TRANSFEREE

[4] After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

A. If a conflict exists

[5] If the transferring lawyer actually possesses relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless

(a) the new law firm obtains the former client's consent to its continued representation of its client in that matter; or

(b) the new law firm complies with rule 3.4-20(b) and, in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

[6] If the new law firm seeks the former client's consent to the new law firm continuing to act, it will in all likelihood be required to satisfy the former client that 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. The former client's consent must be obtained before the transferring lawyer is hired.

[7] Alternatively, if the new law firm applies under rule 3.4-25 for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of rule 3.4-20(b). Ideally, this process should be completed before the transferring person is hired.

B. If no conflict exists

[8] Although the notice required by rule 3.4-22 need not necessarily be made in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given or its timeliness and content.

[9] The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client because, in the absence of such consent, the transferring lawyer may not act.

[10] If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information that may prejudice the former client if disclosed.

[11] A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client. A former client who disputes the allegation of no such confidential information may apply under rule 3.4-25 for a determination of that issue.

C. If the new law firm is not sure whether a conflict exists

[12] There may be some cases in which the new law firm is not sure whether the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm. In such circumstances, it would be prudent for the new law firm to seek guidance from the Law Society before hiring the transferring lawyer.

REASONABLE MEASURES TO ENSURE NON-DISCLOSURE OF CONFIDENTIAL INFORMATION

[13] As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure of the former client's confidential information will occur to any member of the new law firm:

(a) when the transferring lawyer actually possesses confidential information respecting a former

client that may prejudice the former client if disclosed to a member of the new law firm, and

(b) when the new law firm is not sure whether the transferring lawyer actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

[14] It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information."

[15] In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, 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 other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

[16] The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled "Conflict of Interest Disqualification: Martin v. Gray and Screening Methods" (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

[17] When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new "law firm", the interests of the new client (Her Majesty or the corporation) must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the 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 rule 3.4-20(b), particularly subparagraph (v). Only when the entire firm must be disqualified under rule 3.4-20 will it be necessary to refer conduct of the matter to outside counsel.

[18] GUIDELINES

(a) The screened lawyer should have no involvement in the new law firm's representation of its client.

(b) The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

(c) No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.

(d) The current matter should be discussed only within the limited group that is working on the matter.

(e) The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers

and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

(f) No member of the new law firm should show the screened lawyer any documents relating to the current representation.

(g) The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

(h) Appropriate law firm members should provide undertakings setting out that they have adhered to and will continue to adhere to all elements of the screen.

(i) The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised

(i) that the screened lawyer is now with the new law firm, which represents the current client; and

(ii) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

(j) The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.

(k) The screened lawyer should use associates and support staff different from those working on the current matter.

(l) In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

Doing Business with A Client

~~**Definitions**~~

~~**3.4-27** In rules 3.4-27 to 3.4-41,~~

~~"**independent legal advice"** means a retainer in which:~~

~~(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,~~

~~(b) the client's transaction involves doing business with~~

~~(i) another lawyer, or~~

~~(ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded,~~

~~(c) the retained lawyer has advised the client that the client has the right to independent legal representation,~~

~~(d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from another lawyer,~~

~~(e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and~~

~~(f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of a proposed investment from a business point of view~~;

~~"independent legal representation"~~ ~~means a retainer in which~~

~~(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction, and~~

~~(b) the retained lawyer will act as the client's lawyer in relation to the matter~~;

~~Commentary~~

~~[1] If a client elects to waive independent legal representation and to rely on independent legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged~~.

~~"related persons" means related persons as defined in the *Income Tax Act* (Canada); and~~

~~"syndicated mortgage" means a mortgage having more than one investor.~~

3.4-28 ~~Subject to this rule, a~~ A lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

Commentary

[1] This provision applies to any transaction with a client, including

(a) lending or borrowing money;

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift;

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

(e) recommending an investment; and

(f) entering into a common business venture.

[2] The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give

rise to a conflicting interest.

~~**Investment by Client when Lawyer has an Interest**~~

Transactions with Clients

3.4-29 Subject to rule 3.4-30, if a client intends to enter into a transaction with their lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

(b) recommend and require that the client receive independent legal advice and

(c) if the client requests the lawyer to act, obtain the client's consent.

Commentary

[1] If the lawyer does not choose to disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

[2] A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

[3] Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

[4] If the investment is by borrowing from the client, the transaction may fall within the requirements of rule 3.4-31.

3.4-30 When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Borrowing from Clients

3.4-31 A lawyer must not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or

(b) the client is a related person as defined in section 251 of ~~by~~ the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary

[1] Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Certificate of Independent Legal Advice

3.4-32 A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

3.4-33 Subject to rule 3.4-31, if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

3.4-34 If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must:

(a) disclose and explain the nature of the conflicting interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

"related persons" means related persons as defined in section 251 of the *Tax Act* (Canada); and

"syndicated mortgage" means a mortgage having more than one investor.

3.4-34.1 A lawyer engaged in the private practice of law in Ontario shall not directly, or indirectly through a corporation, syndicate, partnership, trust, or other entity in which the lawyer or a related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities

(a) hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives

(i) a complete reporting letter on the transaction,

(ii) a trust declaration signed by the person in whose name the mortgage or any security instrument is registered, and

(iii) a copy of the duplicate registered mortgage or security instrument,

(b) arrange or recommend the participation of a client or other person as an investor in a syndicated mortgage or loan where the lawyer is an investor unless the lawyer can demonstrate that the client or other person had independent legal advice in making the investment, or

(c) sell mortgages or loans to, or arrange mortgages or loans for, clients or other persons except in accordance with the skill, competence, and integrity usually expected of a lawyer in dealing with clients.

Commentary

ACCEPTABLE MORTGAGE OR LOAN TRANSACTIONS

[1] A lawyer may engage in the following mortgage or loan transactions in connection with the practice of law

(a) a lawyer may invest in mortgages or loans personally or on behalf of a related person or a combination thereof;

(b) a lawyer may deal in mortgages or loans as an executor, administrator, committee, trustee of a testamentary or inter vivos trust established for purposes other than mortgage or loan investment or under a power of attorney given for purposes other than exclusively for mortgage or loan investment; and

(c) a lawyer may collect, on behalf of clients, mortgage or loan payments that are made payable in the name of the lawyer under a written direction to that effect given by the client to the mortgagor or borrower provided that such payments are deposited into the lawyer's trust account.

[2] A lawyer may introduce a borrower (whether or not a client) to a lender (whether or not a client) and the lawyer may then act for either, and when rule 3.4-14 applies, the lawyer may act for both.

Disclosure

3.4-34.2 Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer that would be of concern to a proposed investor.

No Advertising

3.4-34.3 A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities.

Guarantees by a Lawyer

3.4-35 Except as provided by rule 3.4-36, a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

3.4-36 A lawyer may give a personal guarantee in the following circumstances

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and

(i) the lawyer has complied with the rules in Section 3.4 (Conflicts), in particular, rules 3.4-27 to 3.4-36 (Doing Business with a Client), and

(ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Testamentary Instruments and Gifts

3.4-37 ~~A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate~~**.** If a will contains a clause directing that the lawyer who drafted the will be retained to provide services in the administration of the client's estate, the lawyer should, before accepting that retainer, provide the trustees with advice, in writing, that the clause is a non-binding direction and the trustees can decide to retain other counsel.

3.4-38 Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

3.4-39 [FLSC - not in use] ~~A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice~~.

Judicial Interim Release

3.4-40 Subject to Rule 3.4-41, a~~A~~ lawyer shall not in respect of any accused person for whom the lawyer acts

(a) ~~must not~~ act as a surety for the accused;~~,~~

(b) deposit with a court the lawyer's ~~their~~ own money or that of any firm in which the lawyer is a partner to secure the accused's release; ~~or other valuable security for or act in a supervisory capacity to an accused person for whom the lawyer acts~~.

(c) deposit with any court any other valuable security to secure the accused's release; or

(d) act in a supervisory capacity to the accused.

3.4-41 A lawyer may ~~act as a surety for, deposit their own money or other valuable security for or act in a supervisory capacity~~ do any of the things referred to in Rule 3.4-40 if the ~~to an~~ accused ~~who~~ is in a family relationship with the lawyer ~~when~~ and the accused is represented by the lawyer's partner or associate.

2.05 CONFLICTS FROM TRANSFER BETWEEN LAW FIRMS

Definitions

2.05 (1) In this rule

"client" includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them,

[Amended - June 2007]

"confidential information" means information obtained from a client that is not generally known to the public, and

> Commentary
>
> The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

"matter" means a case or client file but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

Application of Rule

(2) This rule applies where a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client ("former client"),

(b) the interests of those clients in that matter conflict, and

(c) the transferring lawyer actually possesses relevant information respecting that matter.

(3) Subrules (4) to (7) do not apply to a lawyer employed by the federal, a provincial, or a territorial Attorney General or Department of Justice who, after transferring from one department, ministry, or agency to another, continues to be employed by that Attorney General or Department of Justice.

~~Commentary~~

~~The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.~~

~~Lawyers and support staff - This rule is intended to regulate lawyers and articled students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff, to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.~~

~~Government employees and in-house counsel - The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body, and a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.~~

~~Law firms with multiple offices - The rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm, and a legal aid program with many community law offices. The more autonomous each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public interest that it continue to represent its client in the matter.~~

~~*[Amended - June 2007]*~~

~~Law Firm Disqualification~~

~~(4) Where the transferring lawyer actually possesses relevant information respecting the former client that is confidential and that, if disclosed to a member of the new law firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter unless~~

~~*[Amended - June 2007]*~~

~~(a) the former client consents to the new law firm's continued representation of its client, or~~

~~(b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including,~~

~~(i) 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,~~

~~(ii) the extent of prejudice to any party,~~

~~(iii) the good faith of the parties,~~

~~(iv) the availability of suitable alternative counsel, and~~

(v) issues affecting the public interest.

Commentary

The circumstances enumerated in subrule (4)(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (ii) to (iv) are self-explanatory, clause (v) addresses governmental concerns respecting issues of national security, cabinet confidences, and obligations incumbent on Attorneys General and their agents in the administration of justice.

(5) For greater certainty, subrule (4) is not intended to interfere with the discharge by an Attorney General or his or her counsel or agent (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.

(6) Where the transferring lawyer actually possesses relevant information respecting the former client but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client,

(a) the lawyer shall execute an affidavit or solemn declaration to that effect, and

(b) the new law firm shall

(i) notify its client and the former client, or if the former client is represented in that matter by a lawyer, notify that lawyer of the relevant circumstances and its intended action under this rule, and

(ii) deliver to the persons referred to in (i) a copy of any affidavit or solemn declaration executed under (a).

[Amended - June 2007]

Transferring Lawyer Disqualification

(7) A transferring lawyer described in the opening clause of subrule (4) or (6) shall not, unless the former client consents,

(a) participate in any manner in the new law firm's representation of its client in that matter, or

(b) disclose any confidential information respecting the former client.

[Amended - June 2007]

(8) No member of the new law firm shall, unless the former client consents, discuss with a transferring lawyer described in the opening clause of subrule (4) or (6) the new law firm's representation of its client or the former law firm's representation of the former client in that matter.

[Amended - June 2007]

Determination of Compliance

(9) Anyone who has an interest in, or who represents a party in, a matter referred to in this rule may apply to a tribunal of competent jurisdiction for a determination of any aspect of this rule.

Due Diligence

(10) A lawyer shall exercise due diligence in ensuring that each member and employee of the lawyer's law firm, each non-lawyer partner and associate, and each other person whose services the lawyer has retained

[Amended - June 2007]

(a) complies with this rule, and

(b) does not disclose

(i) confidential information of clients of the firm, and

(ii) confidential information of clients of another law firm in which the person has worked.

Commentary

MATTERS TO CONSIDER

When a law firm considers hiring a lawyer or articled student ("transferring lawyer") from another law firm, the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. The transferring lawyer and the new law firm need to identify, first, all cases in which

(a) the new law firm represents a client in a matter that is the same as or related to a matter in respect of which the former law firm represents its client,

(b) the interests of these clients in that matter conflict, and

(c) the transferring lawyer actually possesses relevant information respecting that matter.

[Amended - June 2007]

The law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the former client that is confidential and that, if disclosed to a member of the new law firm, may prejudice the former client. If this element exists, the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the interests of justice, based on relevant circumstances.

[Amended - June 2007]

In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm need to be very careful to ensure that they do not, during the interview process itself, disclose client confidences.

MATTERS TO CONSIDER BEFORE HIRING A POTENTIAL TRANSFEREE

After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

A. Where a conflict does exist

If the new law firm concludes that the transferring lawyer does actually possess relevant information respecting a former client that is confidential and that, if disclosed to a member of the new law firm, may prejudice the former client if the transferring lawyer is hired, the new law firm will be prohibited from continuing to represent its client in the matter unless

(a) the new law firm obtains the former client's consent to its continued representation of its client in that matter, or

(b) the new law firm complies with subrule (4)(b), and, in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

If the new law firm seeks the former client's consent to the new law firm continuing to act, it will in all likelihood be required to satisfy the former client that 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. The former client's consent must be obtained before the transferring lawyer is hired.

Alternatively, if the new law firm applies under subrule (9) for a determination that it may continue to act, it bears the onus of establishing the matters referred to in subrule (4)(b). Ideally, this process should be completed before the transferring person is hired.

[Amended – June 2007]

B. Where no conflict exists

Although subrule 2.05(6) does not require that the notice required by that subrule be in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given and about its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client in the matter because, in the absence of such consent, the transferring lawyer may not act.

If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information which, if disclosed, may prejudice the former client.

A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client. A former client who disputes the allegation of no such confidential information may apply under subrule (9) for a determination of that issue.

C. Where the new law firm is not sure whether a conflict exists

There may be some cases where the new law firm is not sure whether the transferring lawyer actually possesses confidential information respecting a former client that, if disclosed to a member of the new law firm, may prejudice the former client. In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.

REASONABLE MEASURES TO ENSURE NON-DISCLOSURE OF CONFIDENTIAL INFORMATION

As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information:

(a) where the transferring lawyer actually possesses confidential information respecting a former client that, if disclosed to a member of the new law firm, may prejudice the former client, and

[Amended – June 2007]

(b) where the new law firm is not sure whether the transferring lawyer actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information."

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, 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 other lawyers in other units, offices or departments, this shall be taken into account in the determination of what screening measures are "reasonable."

The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled Conflict of Interest Disqualification: Martin v. Gray and Screening Methods (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

In cases where a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that, if disclosed to a member of the new "law firm," may prejudice the former client, the interests of the new client (Her Majesty or the corporation) must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the 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 (v). Only in those situations where the entire firm must be disqualified pursuant to subrule (4) will it be necessary to refer conduct of the matter to outside counsel.

GUIDELINES

1. The screened lawyer should have no involvement in the new law firm's representation of its client.

[Amended June 2007]

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.

4. The current matter should be discussed only within the limited group that is working on the matter.

5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.

7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

8. Undertakings should be provided by the appropriate law firm members setting out that they have adhered to and will continue to adhere to all elements of the screen.

9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised

(a) that the screened lawyer is now with the new law firm, which represents the current client, and

(b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

~~10. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.~~

~~11. The screened lawyer should use associates and support staff different from those working on the current matter.~~

~~12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.~~

~~*[Amended June 2007]*~~

~~2.06~~

DOING BUSINESS WITH A CLIENT

Definitions

2.06 (1) In this rule

"related persons" means related persons as defined in the *Income Tax Act (Canada)* and "related person" has a corresponding meaning, and

"syndicated mortgage" means a mortgage having more than one investor.

Investment by Client where Lawyer has an Interest

(2) Subject to subrule (2.1), where a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, the lawyer, before accepting any retainer

(a) shall disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later,

(b) shall recommend independent legal representation and shall require that the client receive independent legal advice, and

(c) where the client requests the lawyer to act, the lawyer shall obtain the client's written consent.

[Amended - May 2001]

(2.1) When a client intends to pay for legal services by transferring to his, her or its lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer shall recommend but need not require that the client receive independent legal advice before accepting a retainer.

[New - May 2001; Amended - March 2004]

Commentary

If the lawyer does not choose to make disclosure of the conflicting interest or cannot do so without breaching a confidence, the lawyer must decline the retainer.

The lawyer should not uncritically accept the client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

If the investment is by borrowing from the client, the transaction may fall within the requirements of subrules 2.06(4) or (6).

Certificate of Independent Legal Advice

(3) A lawyer retained to give independent legal advice shall, before any advance of funds has been made by the client,

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

Borrowing from Clients

(4) A lawyer shall not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or

(b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the case and by independent legal advice or independent legal representation.

Commentary

The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted.

Whether a person lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is to be considered a client within this rule is to be determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the loan or investment, the lawyer will be considered bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

(5) In any transaction, other than a transaction within the provisions of subrule (4), in which money is borrowed from a client by a lawyer's spouse or by a corporation, syndicate, or partnership in which either the lawyer or the lawyer's spouse has, or both of them together have, directly or indirectly, a substantial interest, the lawyer shall ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

(6) A lawyer engaged in the private practice of law in Ontario shall not directly, or indirectly through a corporation, syndicate, partnership, trust, or other entity in which the lawyer or a related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities

(a) hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives

(i) a complete reporting letter on the transaction,

(ii) a trust declaration signed by the person in whose name the mortgage or any security instrument is registered, and

(iii) a copy of the duplicate registered mortgage or security instrument,

(b) arrange or recommend the participation of a client or other person as an investor in a syndicated mortgage or loan where the lawyer is an investor unless the lawyer can demonstrate that the client or other person had independent legal advice in making the investment, or

(c) sell mortgages or loans to, or arrange mortgages or loans for, clients or other persons except in accordance with the skill, competence, and integrity usually expected of a lawyer in dealing with clients.

Commentary

ACCEPTABLE MORTGAGE OR LOAN TRANSACTIONS

A lawyer may engage in the following mortgage or loan transactions in connection with the practice of law:

(a) a lawyer may invest in mortgages or loans personally or on behalf of a related person or a combination thereof,

(b) a lawyer may deal in mortgages or loans as an executor, administrator, committee, trustee of a testamentary or inter vivos trust established for purposes other than mortgage or loan investment or under a power of attorney given for purposes other than exclusively for mortgage or loan investment, and

(c) a lawyer may collect, on behalf of clients, mortgage or loan payments that are made payable in the name of the lawyer under a written direction to that effect given by the client to the mortgagor or borrower provided that such payments are deposited into the lawyer's trust account.

A lawyer may introduce a borrower (whether or not a client) to a lender (whether or not a client) and the lawyer may then act for either, and when rule 3.4-17 applies, the lawyer may act for both.

Disclosure

(7) Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer that would be of concern to a proposed investor.

No Advertising

(8) A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities.

Guarantees by a Lawyer

(9) Except as provided by subrule (10), a lawyer shall not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

(10) A lawyer may give a personal guarantee in the following circumstances:

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent, or child,

(b) the transaction is for the benefit of a non-profit or charitable institution where the lawyer as a member or supporter of such institution is asked, either individually or together with other members or supporters of the institution, to provide a guarantee, or

(c) the lawyer has entered into a business venture with a client and the lender requires personal guarantees from all participants in the venture as a matter of course and

(i) the lawyer has complied with rule 2.04 (Avoidance of Conflicts of Interest) and this rule (Doing Business with a Client), and

(ii) the lender and participants in the venture who are or were clients of the lawyer have received independent legal representation.

~~*[Amended - June 2007]*~~

SECTION 3.5 PRESERVATION OF CLIENTS' PROPERTY

Preservation of Clients' Property

3.5-1 [FLSC - not in use]

3.5-2 A lawyer shall care of a client's property as a careful and prudent owner would when dealing with like property and shall observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

Commentary

[1] The duties concerning safekeeping, preserving, and accounting for clients' monies and other property are set out in the by-laws made under the *Law Society Act*.

[2] 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. The 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 and should, subject to any rights of lien, promptly return them to the client upon request or at the conclusion of the lawyer's retainer.

[3] [FLSC - not in use]

[4] If the lawyer withdraws from representing a client, the lawyer is required to comply with the rules in Section 3.7 (Withdrawal from Representation).

Notification of Receipt of Property

3.5-3 A lawyer shall promptly notify the 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 Client's Property

3.5-4 A lawyer shall clearly label and identify the client's property and place it in safekeeping distinguishable from the lawyer's own property.

3.5-5 A lawyer shall maintain such records as necessary to identify a client's property that is in the lawyer's custody.

Accounting and Delivery

3.5-6 A lawyer shall account promptly for a client's property that is in the lawyer's custody and upon request shall deliver it to the order of the client or, if appropriate, at the conclusion of the retainer.

3.5-7 ~~Where~~ If a lawyer is unsure of the proper person to receive a client's property, the lawyer shall apply to a tribunal of competent jurisdiction for direction.

Commentary

[1] The 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 such as ~~are~~ those found in the *Income Tax Act (Canada)*,and the *Criminal Code*.

[2], [3] and [4] [FLSC - not in use]

SECTION 3.6 FEES AND DISBURSEMENTS

Reasonable Fees and Disbursements

3.6-1 A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

3.6-1.1 A lawyer shall not charge a client interest on an overdue account save as permitted by the *Solicitors Act* or as otherwise permitted by law.

Commentary

[1] What is a fair and reasonable fee will depend upon 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,

(c.1) the amount involved or the value of the subject-matter,

(d) the results obtained,

(e) fees authorized by statute or regulation,

(f) special circumstances, such as the loss of other retainers, 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.

[2] 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, 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.

[3] 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.

[4] ~~Breach of this rule and misunderstandings about fees and financial matters bring the legal profession into disrepute and reflect adversely upon the general administration of justice~~. A lawyer ~~should try to avoid controversy with a client about fees and~~ should be ready to explain the basis of the fees and disbursement ~~for the~~ charged to the client. ~~(especially if the client is unsophisticated or uninformed about how a fair and reasonable fee is determined)~~. 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. ~~Where possible to do so, a lawyer should give the client a fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make an informed decision~~. 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.

[l 4.1] A lawyer should inform a client about ~~his or her~~ their rights to have an account assessed under the *Solicitors Act*.

~~It is in keeping with the best traditions of the legal profession to provide services pro bono and to reduce or waive a fee where there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. A lawyer should provide public interest legal services and should support organizations that provide services to persons of limited means.~~

Contingency Fees and Contingency Fee Agreements

3.6-2 Subject to rule 3.6-1, except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the *Solicitors Act* and the regulations thereunder, that provides that the lawyer's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer's services are to be provided.

[Amended – November 2002, October 2004]

Commentary

[1] In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the 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 written 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~~ Such agreement under the *Solicitors Act* must receive judicial approval. 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.

[New - October 2002, Amended October 2004]

[2] [FLSC - not in use]

Statement of Account

3.6-3 In a statement of an account delivered to a client, a lawyer shall clearly and separately detail the amounts charged as fees and as disbursements.

Joint Retainer

3.6-4 Where a lawyer is acting for two or more clients in the same matter, the lawyer shall divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

Division of Fees and Referral Fees

3.6-5 With ~~Where~~ the client's consent~~s~~, fees for a matter may be divided between licensees who are not in the same firm, ~~provided that~~ if the fees are divided in proportion to the work done and the responsibilities assumed.

3.6-6 ~~Where~~ A ~~a~~ lawyer who refers a matter to another licensee because of the expertise and ability of the other licensee to handle the matter and the referral was not made because of a conflict of interest, the referring lawyer may accept and the other licensee 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.

3.6-7 A lawyer shall not

(a) directly or indirectly share, split, or divide their fees with any person who is not a licensee, or

(b) give any financial or other reward to any person who is not a licensee for the referral of clients or client matters.

[Amended - April 2008]

Commentary

~~This rule does not prohibit 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.~~

[1] This rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. However, 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.

(d) [FLSC - not in use]

[New - May 2001]

Exception for Multi-discipline Practices and Interprovincial and International Law Firms

3.6-8 Rule 3.8-7 does not apply to

(a) multi-discipline practices of lawyer and non-licensee partners where the partnership agreement provides for the sharing of fees, cash flows or profits among 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 Ontario and non-Canadian lawyers who otherwise comply with the rules in Section 3.6.

[Amended – June 2009]

Commentary

[1] An affiliation is different from a multi-discipline practice established in accordance with the by-laws under the *Law Society Act*, an interprovincial law partnership or a partnership between Ontario lawyers and foreign lawyers. An affiliation is subject to rule 3.6-7. 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.

[New - May 2001]

~~Appropriation of Funds~~ Payment and Appropriation of Funds

3.6-9 [FLSC - not in use]

3.6-10 ~~The~~ A lawyer shall not appropriate any funds of the client held in trust or otherwise under the lawyer's control for or on account of fees except as permitted by the by-laws under the *Law Society Act*.

Commentary

[1] 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 by-laws of the Law Society.

[2] 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.

3.6-11 If the amount of fees or disbursements charged by a lawyer is reduced on ~~a review or~~ an assessment, the lawyer must repay the monies to the client as soon as is practicable.

3.6-12 [FLSC - not in use]

SECTION 3.7 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

3.7-1 A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client ~~upon notice to the client appropriate in the circumstances~~.

Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, the 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.

[2] 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 about what will constitute reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. Where 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.

[3] 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.

[4] 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

3.7-2 Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

[1] ~~A lawyer who is deceived by the client will have justifiable cause for withdrawal, and the refusal of the client to accept and act upon the lawyer's advice on a significant point might indicate a loss of confidence justifying withdrawal.~~A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by their 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, there is a material breakdown in communications, 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

3.7-3 Subject to the rules about criminal proceedings and the direction of the tribunal, where, 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.

Withdrawal from Criminal Proceedings

3.7-4 ~~Where~~ A ~~a~~ lawyer who has agreed to act in a criminal case may withdraw ~~and~~ because the client has not paid the agreed fee or for other adequate cause if ~~where~~ the interval between a withdrawal and the date set for the trial of the case is sufficient to enable the client to obtain another licensee to act in the case and to allow the ~~such~~ other licensee 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

[Amended – June 2007]

(a) notifies the client, preferably 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

[1] 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.

3.7-5 A ~~Where a~~ lawyer who has agreed to act in a criminal case may not withdraw because of non payment of fees if ~~and where~~ the date set for the trial of the case is not far enough removed to enable the client to obtain another licensee or to enable the other ~~another~~ licensee 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~~.

3.7-6 In circumstances ~~W~~where ~~the~~ 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 when the case is to be tried to enable the client to obtain another licensee and to enable such licensee to prepare adequately for trial:~~,~~

(a) the ~~first~~ lawyer should, unless instructed otherwise by the client, ~~should~~ attempt to have the trial date adjourned;

(b) the lawyer ~~and~~ may withdraw from the case only with the permission of the court before which the case is to be tried.

[Amended – June 2007]

Commentary

[1] Where 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.

Mandatory Withdrawal

3.7-7 Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

(a) discharged by the client,

(b) the client's instructions require the lawyer to act contrary these rules ~~*Rules of Professional Conduct*~~ or by-laws under the *Law Society Act;*

~~(b) the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the tribunal and, following explanation, the client persists in such instructions,~~

~~(c) the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another,~~

~~(d) it becomes clear that the lawyer's continued employment will lead to a breach of these rules,~~

~~(d.1) the lawyer is required to do so pursuant to subrules 2.02 (5.1) or (5.2) (dishonesty, fraud, etc. when client an organization), or~~

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

[Amended – March 2004]

~~Commentary~~

~~When a law firm is dissolved it will usually result 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 will prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the dissolution. 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 here set out, and, in particular, should try to minimize expense and avoid prejudice to the client.~~

Manner of Withdrawal

3.7-8 When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor legal practitioner.

3.7-9 Upon discharge or withdrawal, a lawyer shall

(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 a new legal practitioner 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 information that may be required 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; and

(f) co-operate with the successor legal practitioner so as to minimize expense and avoid prejudice to the client; and.

(g) comply with the applicable rules of court.

[Amended – June 2009]

Commentary

[1] 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.

[2] ~~Where upon the discharge or withdrawal of the lawyer,~~ 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 upon the client's position. Generally speaking, the lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter.

[3] 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.

[4] Co-operation with the successor legal practitioner 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.

[5] 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 legal practitioner or practitioners to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

[Amended – June 2009]

Duty of Successor Licensee

3.7-10 Before agreeing to represent a client, a successor licensee shall be satisfied that the former licensee approves, has withdrawn, or has been discharged by the client.

[Amended – June 2007]

Commentary

[1] It is quite proper for the successor licensee to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former licensee, 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 licensee acting for the client.

[Amended – June 2007]

Chapter 4 The Practice of Law

SECTION 4.1 MAKING LEGAL SERVICES AVAILABLE

Making Services Available

4.1-1 A lawyer shall make legal services available to the public in an efficient and convenient way.

Commentary

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

[2] 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.

[3] 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.

[4] Right to Decline Representation - A lawyer may decline a particular representation (except when assigned as counsel by a tribunal), but that discretion should 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 decline representation 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 licensee qualified in the particular field and able to act. When a lawyer offers assistance to a client or prospective client in finding another licensee, the assistance should be given willingly and, except where a referral fee is permitted by rule 3.8-6, without charge.

Restrictions

4.1-2 In offering legal services, a lawyer shall not use means

(a) that are false or misleading;

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

(c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover;

(d) that are intended to influence a person who has retained another lawyer for a particular matter to change their lawyer for that matter, unless the change is initiated by the person or the other lawyer; or

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

Commentary

[1] A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering their 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. ~~Rather,~~ The rule prohibits the lawyer from using unconscionable or exploitive or other means that bring the profession or the administration of justice into disrepute.

SECTION 4.2 MARKETING

~~Marketing Legal Services~~ Marketing of Professional Services

4.2-0 In this rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

4.2-1 A lawyer may market legal services if the marketing

(a) is demonstrably true, accurate and verifiable;

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

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

Commentary

[1] 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 which contain emotional appeals.

Advertising of Fees

4.2-2 A lawyer may advertise fees charged by the lawyer for legal services if

(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.

SECTION 4.3 ADVERTISING NATURE OF PRACTICE

Certified Specialist

4.3-1 A lawyer ~~may~~ shall not advertise that the lawyer is a specialist in a specified field ~~only if~~ unless the lawyer has been so certified by the Law Society.

Commentary

[1] Lawyer's 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.

[2] In accordance with s. 20(1) of the Law Society's By-law 15 on Certified Specialists, the 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.

[3] In a case where a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm which makes reference to the status of a firm member as a specialist, in media circulated concurrently in the other jurisdiction(s) and the certifying jurisdiction, shall not be considered as offending this rule if the certifying authority or organization is identified.

[4] A lawyer may advertise areas of practice, including preferred areas of practice or that their practice is restricted 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.

3.04 Interprovincial Law Firms

Interprovincial Law Firms

3.04 (1) Lawyers may enter into agreements with lawyers in other Canadian jurisdictions to form an interprovincial law firm, so long as they comply with the requirements of this rule.

Requirements

(2) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall comply with all the requirements of the Society.

(3) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall ensure that the books, records, and accounts pertaining to the practice in Ontario are available in Ontario on demand by the Society's auditors or their designated agents.

(4) A lawyer who is a member of an interprovincial law firm and qualified to practise in Ontario shall ensure that his or her partners, associates, or employees who are not qualified to practise in Ontario are not held out as and do not represent themselves as qualified to practise in Ontario.

[Amended - November 2008]

Chapter 5 Relationship to the Administration of Justice

SECTION 5. 1 THE LAWYER AS ADVOCATE

Advocacy

5.1-1 When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary

~~The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which 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 where 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.~~

~~Role in Adversary Proceedings - In adversary proceedings the lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (save 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 derogatory to the client's case.~~

~~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.~~

~~When acting as an advocate, a lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case.~~

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

~~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, or to the form of the indictment, or to the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence which, 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.~~

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

~~In civil matters, it is desirable that the lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, or from attempts to gain advantage from slips or oversights not going to the merits, or from 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~~.

[1] 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.

[2] 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.

[3] 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.

[4] 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.

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

[6] 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.

[7] 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.

[8] 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.

[9] 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.

[10] 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.

~~In civil proceedings, the lawyer has a duty not to mislead the tribunal about the position of the client in the adversary process. Thus, a lawyer representing a party to litigation who has made an agreement 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~~.

5.1-2 When acting as an advocate, a lawyer shall not

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, 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 the 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 the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent;

(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; ~~and~~

(o) needlessly inconvenience a witness; or

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

Commentary

[1] 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.

[2] 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, where the complainant or potential complaint is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. Where 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 ~~and, accordingly, the lawyer's comments may be partisan~~. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

[3] 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 secure a civil advantage for the client. See also rules 3.2-5 and 3.2-5.1 and accompanying commentary.

[4] 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

5.1-3 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

[1] 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 defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

Discovery Obligations

5.1-3.1 Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate

(a) shall explain to their client

(i) the necessity of making full disclosure of all documents relating to any matter in issue, and

(ii) the duty to answer to the best of their knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal;

(b) shall assist the client in fulfilling their obligations to make full disclosure; and

(c) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

Disclosure of Error or Omission

5.1-4 A lawyer who has unknowingly done or failed to do something that if done or omitted knowingly would have been in breach of the rules in Section 5.1 and who discovers it, shall, subject to the rules in Section 3.3 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Commentary

[1] If the client desires that a course be taken that would involve a breach of the rules in Section 5.1, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done the lawyer should, subject to the rules in Section 3.7 (Withdrawal from Representation), withdraw or seek leave to do so.

Courtesy

5.1-5 A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings ~~in the course of litigation~~.

Commentary

[1] Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative, or disruptive conduct by the lawyer, even though unpunished as contempt, ~~might well merit discipline~~ may constitute professional misconduct.

Undertakings

5.1-6 ~~A lawyer shall strictly and scrupulously carry out an undertaking given to the tribunal or to another legal practitioner in the course of litigation~~. A lawyer must strictly and scrupulously fulfill any undertakings given by him or her and honour any trust conditions accepted in the course of litigation.

[Amended – June 2009]

Commentary

[0.1] Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility.

[1] A lawyer should also be guided by the provisions of rule 7.2-11 (Undertakings and Trust Conditions).

Agreement on Guilty Plea

5.1-7 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.

5.1-8 A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation, ~~Where, following investigation~~,

(a) the lawyer advises 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.

~~the lawyer may enter into an agreement with the prosecutor about a guilty plea~~.

Commentary

[1] The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

SECTION 5.2 THE LAWYER AS WITNESS

Submission of Evidence ~~Affidavit~~

5.2-1 ~~Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not submit his or her own affidavit to the tribunal.~~ A lawyer who appears as advocate shall not testify or submit their 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.

~~Submission of Testimony~~

~~(2) Subject to any contrary provisions of the law or the discretion of the tribunal before which a lawyer is appearing, a lawyer who appears as advocate shall not testify before the tribunal unless permitted to do so by the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.~~

Commentary

[1] 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 to receive special treatment because of professional status.

Appeals

5.2-2 A lawyer who is a witness in proceedings shall 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.

SECTION 5.3 INTERVIEWING WITNESSES

Interviewing Witnesses

5.3-1 Subject to the rules on communication with a represented party set out in rules 7.2-4 to 7.2-8.2, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer shall 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.

[Amended – November 2007]

SECTION 5.4 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

Communication with Witnesses Giving Evidence

5.4-1 [FLSC - not in use]

5.4-2 Subject to the direction of the tribunal, the lawyer shall 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 that has not been covered in the examination up to that point;

~~(b)~~ (a.1) during examination-in-chief by another legal practitioner of a witness who is unsympathetic to the lawyer's cause, the lawyer not conducting the examination-in-chief may discuss the evidence with the witness;

~~(c)~~ (a.2) between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness, the lawyer ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

~~(d)~~ (b) during cross-examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding;

(c) [FLSC - not in use]

~~(e)~~ (c.1) between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination;

~~(f)~~ (c.2) during cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause, the lawyer may discuss the witness's evidence with the witness;

~~(g)~~ (c.3) during cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness; and

~~(h)~~ (c.4) during re-examination of a witness called by an opposing legal practitioner, if the witness is sympathetic to the lawyer's cause the lawyer ought not to discuss the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.

[Amended – June 2009]

Commentary

[0.1] If any question arises whether the lawyer's behaviour may be in violation of this rule, it will often be appropriate to obtain the consent of the opposing legal practitioner or leave of the tribunal before engaging in conversations that may be considered improper.

[1] through [6] [FLSC - not in use]

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

[Amended – June 2009]

SECTION 5.5 RELATIONS WITH JURORS

Communications Before Trial

5.5-1 When acting as an advocate, before the trial of a case, a lawyer shall 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

[1] 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 juror or with any member of the 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

5.5-2 ~~When acting as an advocate, a lawyer shall disclose to the judge and opposing counsel any information of which the lawyer is aware that a juror or prospective juror~~ Unless the judge and opposing counsel have previously been made aware of the information, a lawyer acting as an advocate shall 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.

~~unless the judge and opposing counsel have previously been made aware of the information.~~

~~(3) A lawyer should promptly disclose to the court any information that the lawyer has about improper conduct by a member of a jury panel or by a juror toward another member of the jury panel, another juror, or to the members of a juror's famil~~y.

5.5-3 A lawyer shall 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

5.5-4 Except as permitted by law, when acting as an advocate, a lawyer shall not during a trial of a case communicate with or cause another to communicate with any member of the jury.

5.5-5 and 5.5-6 [FLSC - not in use]

Commentary

[1] The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of members of their family.

SECTION 5.6 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

5.6-1 A lawyer shall encourage public respect for and try to improve the administration of justice.

Commentary

[1] The obligation set out ~~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.

[2] The 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 maintain public respect for it.

[3] Criticizing Tribunals - Although proceedings and decisions of tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, 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, bearing in mind that 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, where 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 is contributing to greater public understanding of and therefore respect for the legal system.

[4] 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

5.6-2 A lawyer who seeks legislative or administrative changes shall disclose the interest being advanced, whether the lawyer's interest, the client’s interest, or the public interest.

Commentary

[1] 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

5.6-3 A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility shall inform ~~the local police force~~ the persons having responsibility for security at the facility and give particulars.

Commentary

[1] Where possible, the lawyer should suggest solutions to the anticipated problem such as (a) the necessity for further security, and (b) that judgment ought to be reserved.

[2] Where 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.

[3] If client information is involved in those situations, the lawyer should be guided by the provisions of the rules 3.3-1 to 3.3-6 (Confidentiality).

SECTION 5.7 LAWYERS AS MEDIATORS

Role of Mediator

5.7-1 A lawyer who acts as a mediator shall, 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 the solicitor-client privilege.

Commentary

[1] 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 information on the consequences if the mediation fails.

[2] 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 the rules in Section 3.4 (Conflicts) and its commentaries and the common law authorities.

[3] Generally a lawyer-mediator should suggest and encourage the parties to seek the advice of separate counsel before and during the mediation process if they have not already done so.

[4] Where 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 6 Relationship to Students, Employees, and Others

SECTION 6.1 SUPERVISION

~~**Application**~~

~~**6.1-0** In this rule, a non-lawyer does not include an articled student~~.

Direct Supervision Required

6.1-1 A lawyer shall in accordance with the By-Laws

(a) assume complete professional responsibility for their practice of law, and

(b) shall directly supervise non-lawyers to whom particular tasks and functions are assigned.

Commentary

[1] By-Law 7.1 governs the circumstances in which a lawyer may assign certain tasks and functions to a non-lawyer within a law practice. Where a non-lawyer is competent to do work under the supervision of a lawyer, a lawyer may assign work to the non-lawyer. The non-lawyer must be directly supervised by the lawyer. A lawyer is required to review the non-lawyer's work at frequent intervals to ensure its proper and timely completion.

[1.1] A lawyer may permit a non-lawyer to perform tasks assigned and supervised by the lawyer as long as the lawyer maintains a direct relationship with the client or, if the lawyer is in a community legal clinic funded by Legal Aid Ontario, as long as the lawyer maintains a direct supervisory relationship with each client's case in accordance with the supervision requirements of Legal Aid Ontario and assumes full professional responsibility for the work.

[2] A lawyer who practices alone or operates a branch or part-time office should ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work and that legal advice is not given by unauthorized persons, weather in the lawyer's name or otherwise.

[3] to **[5]** [FLSC - not in use]

[5.1] A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, licensees, public officials, or with the public generally whether within or outside the offices of the law practice.

[5.2] The following examples, which are not exhaustive, illustrate situations where it may be appropriate to assign work to non-lawyers subject to direct supervision.

[5.3] Real Estate – A lawyer may permit a non-lawyer to attend to all matters of routine administration, assist in more complex transactions, draft statements of account and routine documents and correspondence and attend to registrations. The lawyer must not assign to a non-lawyer the ultimate responsibility for review of a title search report or of documents before signing or for review and signing of a letter of requisition, review and signing of a title opinion or review and signing of a reporting letter to the client.

[5.4] In real estate transactions using the system for the electronic registration of title documents ("e-reg" TM), only a lawyer may sign for completeness of any document that requires compliance with law statements.

[5.5] Corporate and Commercial – A lawyer may permit a non-lawyer to attend to all matters of routine administration and to assist in more complex matters and to draft routine documents and correspondence relating to corporate, commercial, and securities matters such as drafting corporate minutes and documents pursuant to corporation statutes, security instruments, security registration documents and contracts of all kinds, closing documents and statements of account, and to attend on filings.

[5.6] Wills, Trusts and Estates – A lawyer may permit a non-lawyer to attend to all matters of routine administration, to assist in more complex matters, to collect information, draft routine documents and correspondence, to prepare income tax returns, to calculate such taxes, to draft executors' accounts and statements of account, and to attend to filings.

[New- November 2007]

6.1-2 to 6.1-4 [FLSC - not in use.]

Electronic Registration of Title Documents

6.1-5 When a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents ("e-reg" TM), the lawyer

(a) shall not permit others, including a non-lawyer employee, to use the lawyer's diskette; and

(b) shall not disclose their personalized e-reg TM pass phrase to others.

6.1-6 When a non-lawyer employed by a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents, the lawyer shall ensure that the non-lawyer

(a) does not permit others to use the diskette; and

(b) does not disclose their personalized e-reg TM pass phrase to others.

Commentary

[1] The implementation across Ontario of a system for the electronic registration of title documents imposes special responsibilities on lawyers and others using the system. Each person in a law office who accesses the e-reg ™ system must have a personalized specially encrypted diskette and personalized e-reg ™ pass phrase. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Moreover, under the system, only lawyers entitled to practise law may make certain prescribed statements. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. Only lawyers entitled to practise law may approve electronic documents containing these statements. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized specially encrypted diskette used to access the system and the personalized electronic registration pass phrase. When in a real estate practice it is permissible for a lawyer to delegate responsibilities to a non-lawyer who has a personalized specially encrypted diskette and a personalized electronic registration pass phrase, the lawyer should ensure that the non-lawyer maintains and understands the importance of maintaining the security of the personalized specially encrypted diskette and the pass phrase.

[2] In real estate transactions using the e-reg ™ system, a lawyer who approves the electronic registration of title documents by a non-lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

[Amended – November 2007]

Title Insurance

6.1-6.1 A lawyer shall not permit a non-lawyer to

(a) provide advice to the client concerning any insurance, including title insurance, without supervision;

(b) present insurance options or information regarding premiums to the client without supervision;

(c) recommend one insurance product over another without supervision; and

(d) give legal opinions regarding the insurance coverage obtained.

[New - March 31, 2008]

Signing E-Reg™ Documents

6.1-6.2 A lawyer who electronically signs a document using ~~the system for the electronic registration of title documents –~~ e-reg™ – assumes complete professional responsibility for the document.

[New - March 31, 2008]

SECTION 6.2 STUDENTS

Recruitment and Engagement Procedures

6.2-1 A lawyer shall observe the procedures of the Law Society about the recruitment of articling students and the engagement of summer students.

Duties of Principal

6.2-2 A lawyer acting as a principal to a student shall 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

[1] A principal or supervising lawyer is responsible for the actions of students acting under their direction.

Duties of Articling Student

6.2-3 An articling student shall act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

SECTION 6.3 SEXUAL HARASSMENT

Definition

6.3-0 In rules 6.3-1 and 6.3-3, sexual harassment is one incident or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature

(a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the recipient(s) of the conduct;

(b) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services;

(c) when submission to such conduct is made implicitly or explicitly a condition of employment;

(d) when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, allocation of files, matters of promotion, raise in salary, job security, and benefits affecting the employee); or

(e) 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.

Commentary

[1] Types of behaviour that constitute sexual harassment include, but are not limited to,

(a) sexist jokes causing embarrassment or offence, or that are by their nature clearly embarrassing or offensive;

[Amended - January 2009]

(b) leering;

(c) the display of sexually offensive material;

(d) sexually degrading words used to describe a person;

(e) derogatory or degrading remarks directed towards members of one sex or one’s sexual orientation;

(f) sexually suggestive or obscene comments or gestures;

(g) unwelcome inquiries or comments about a person's sex life;

(h) unwelcome sexual flirtations, advances, or propositions;

(i) persistent unwanted contact or attention after the end of a consensual relationship;

(j) requests for sexual favours;

(k) unwanted touching;

(l) verbal abuse or threats; and

(m) sexual assault.

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

6.3-1 to 6.3-2 [FLSC - not in use]

Prohibition on Sexual Harassment

6.3-3 A lawyer shall not sexually harass a colleague, a staff member, a client, or any other person.

6.3-4 and 6.3-5 [FLSC - not in use]

6.3.1 DISCRIMINATION

Special Responsibility

6.3.1-1 A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the *Ontario Human Rights Code*), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

[Amended – June 2007]

Commentary

[1] The Law Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

[2] This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

[3] Rule 6.3.1 will be interpreted according to the provisions of the Ontario Human Rights Code and related case law.

[4] The Ontario Human Rights Code defines a number of grounds of discrimination listed in rule 6.3.1. For example,

[5] Age is defined as an age that is eighteen years or more.

[Amended - January 2009]

[6] Disability is broadly defined in s. 10 of the Code to include both physical and mental disabilities.

[Amended - January 2009]

[7] Family status is defined as the status of being in a parent-and-child relationship.

[8] Marital status is defined as the status of being married, single, widowed, divorced, or separated and includes the status of living with a person in a conjugal relationship outside marriage.

[Amended - January 2009]

[9] Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the *Criminal Records Act* (Canada) and not revoked) or provincial offences.

[10] The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

[11] There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including

(a) Differentiation on prohibited grounds that creates a disadvantage. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.

[Amended - January 2009]

(b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 6.3.1, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement should only be imposed if driving a vehicle is an essential requirement for the position. Such a requirement may have the effect of excluding from employment persons with disabilities that prevent them from obtaining a licence.

[Amended - January 2009]

[12] Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Ontario Human Rights Code requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

[13] A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

[14] Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the Code.

[15] In addition to prohibiting discrimination, rule 6.3.1 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited.

[Amended - January 2009]

[16] Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in rule 6.3.1. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

Services

6.3.1-2 A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

Employment Practices

6.3.1-3 A lawyer shall ensure that their employment practices do not offend rule 6.3.1-1 and 6.3.1-2.

Commentary

[1] Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario Human Rights Code and related equity legislation.

[2] In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the Ontario Human Rights Code, such questions may be raised at an interview. For example, if an employer has an anti-nepotism policy, the employer may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital status should not be asked.

[Amended - January 2009]

[3] An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex or of a particular creed, ethnic origin, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches rule 6.3.1 unless changing or eliminating the rule would cause undue hardship.

[4] If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the *Ontario Human Rights Code*, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

[5] The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in rule 6.3.1.

[6] The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. However, the following principles are well established.

[7] If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 6.3.1, the rule, requirement or expectation must be examined to determine whether it is "reasonable and *bona fide*". The following must be taken into account ~~obligations arise~~:

(a) if ~~T~~the rule, requirement or expectation ~~must be examined to determine whether it is "reasonable and *bona fide*." If the rule, requirement, or expectation~~ is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement, or expectation with the operation of the business; and~~.~~

(b) ~~I~~if the rule, requirement, or expectation is imposed in good faith and is strongly logically connected to a business necessity, then the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.

[8] The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered to the point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is "undue," that accommodation need not be made.

Chapter 7 Relationship to the Law Society and Other Lawyers

SECTION 7.1 RESPONSIBILITY TO THE PROFESSION, THE LAW SOCIETY AND OTHERS ~~GENERALLY~~

~~**Integrity**~~

~~6.01(1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.~~

~~Commentary~~

~~Integrity is the fundamental quality of any person who seeks to practise as a lawyer. 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 credit on the legal profession, inspire the confidence, respect and trust of clients and the community, and avoid even the appearance of impropriety.~~

[Amended – June 2007]

Communications from the Law Society

7.1-1 A lawyer shall reply promptly and completely to any communication from the Law Society in which a response is requested.

Meeting Financial Obligations

7.1-2 A lawyer shall promptly meet financial obligations incurred in the course of practice on behalf of clients unless, before incurring such an obligation, the lawyer clearly indicates in writing to the person to whom it is to be owed that it is not to be a personal obligation.

[Amended - January 2009]

Commentary

[1] 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, the lawyer clearly indicates otherwise in advance.

[Amended - January 2009]

[2] 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.

[3] 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 e-mail address of the new lawyer.

Duty to Report Misconduct

7.1-3 A lawyer shall report to the Law Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege,

(a) the misappropriation or misapplication of trust monies;

(b) the abandonment of a law or legal services practice;

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

(d) the mental instability of a licensee of such a serious nature that the licensee's clients are likely to be ~~severely~~ materially prejudiced; and

(e) [FLSC - not in use]

(f) any other situation where a licensee's clients are likely to be severely prejudiced.

[Amended – June 2007]

Commentary

[1] Unless a licensee 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 Law Society any instance involving a breach of these rules or the rules governing paralegals. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Law Society directly or indirectly (e.g., through another lawyer).

[2] Nothing in this rule~~paragraph~~ is meant to interfere with the traditional solicitor-client relationship. In all cases the report must be made *bona fide* without malice or ulterior motive.

[Amended – June 2007]

[3] 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 Law Society supports Homewood Human Solutions (HHS) and similar support services that are committed to the provision of confidential counselling for licensees. Therefore, lawyers acting in the capacity of peer counsellors for HHS, the Ontario Lawyers Assistance Program (OLAP) or corporations providing similar support services will not be called by the Law 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 Law Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice. The Law Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

[Amended – January 2013]

Encouraging Client to Report Dishonest Conduct

7.1-4 In addition to other advice appropriate in the circumstances, ~~A~~ a lawyer shall ~~attempt to persuade~~ encourage a client who has a claim or complaint against an apparently dishonest licensee to report the facts to the Law Society as soon as reasonably practicable ~~before pursuing private remedies~~.

7.1-4.1 If the client refuses to report their claim against an apparently dishonest licensee to the Law Society, the lawyer shall inform the client of the policy of the Compensation Fund and shall obtain instructions in writing to proceed with the client's claim without notice to the Law Society.

7.1-4.2 A lawyer shall inform a client of the provision of the *Criminal Code of Canada* dealing with the concealment of an indictable offence in return for an agreement to obtain valuable consideration (section 141).

7.1-4.3 If the client wishes to pursue a private agreement with the apparently dishonest lawyer, the lawyer shall not continue to act if the agreement constitutes a breach of section 141 of the *Criminal Code of Canada.*

Duty to Report Certain Offences

7.1-4.4 If a lawyer is charged with an offence described in By-law 8 of the Law Society, he or she shall inform the Law Society of the charge and of its disposition in accordance with the By-law.

[Amended – June 2007]

Commentary

[1] By-law 8 relates to the reporting of serious criminal charges under the *Criminal Code* and charges under other Acts that bring into question the honesty of a lawyer or that relate to a lawyer's practice of law. Such a charge may be a red flag that clients may need protection. The Law Society must be in a position to determine what, if any, action is required by it if a lawyer is charged with an offence described in By-law 8 and what, if any, action is required if the lawyer is found guilty.

[Amended - June 2007]

~~**6.02 RESPONSIBILITY TO THE SOCIETY**~~

~~**Communications from the Society**~~

~~6.02 A lawyer shall reply promptly~~ and completely ~~to any communication from the Society in which a response is requested~~.

SECTION 7.2 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

7.2-1 A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice.

Commentary

[1] 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 function properly.

[2] 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 other legal practitioners or the parties. The presence of personal animosity between legal practitioners 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.

[3] A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice, or charges of other legal practitioners, but should be prepared, when requested, to advise and represent a client in a complaint involving another legal practitioner.

[4] [FLSC - not in use]

[Amended – June 2009]

7.2-1.1 A lawyer shall 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.

7.2-2 A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights.

7.2-3 A lawyer shall not use ~~a tape recorder or other~~ any device to record a conversation between the lawyer and a client or another legal practitioner, even if lawful, without first informing the other person of the intention to do so.

[Amended - June 2009]

Communications

7.2-4 A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, 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.

7.2-5 A lawyer shall answer with reasonable promptness all professional letters and communications from other legal practitioners that require an answer, and a lawyer shall be punctual in fulfilling all commitments.

Communications with a Represented Person

7.2-6 Subject to rules 7.2-6A and 7.2-7, if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner

[Amended – September 2011]

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

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

[Amended – June 2009]

7.2-6A Subject to rule 7.2-7, if a person is receiving legal services from a legal practitioner under a limited scope retainer on a particular matter, a lawyer may, without the consent of the legal practitioner, approach, communicate or deal directly with the person on the matter, unless the lawyer receives written notice of the limited nature of the legal services being provided by the legal practitioner and the approach, communication or dealing falls within the scope of the limited scope retainer.

[New – September 2011]

Second Opinions

7.2-7 A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a legal practitioner with respect to that matter.

[Amended - June 2009]

Commentary

[1] Rule 7.2-6 applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by a legal practitioner concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This rule does not prevent parties to a matter from communicating directly with each other.

[2] 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 where 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 legal practitioner by closing their eyes to the obvious.

[3] Where notice as described in rule 7.2-6A has been provided to a lawyer for an opposing party, the lawyer is required to communicate with the legal practitioner who is representing the person under a limited scope retainer, but only to the extent of the matter or matters within the scope of the retainer as identified by the legal practitioner. The lawyer may communicate with the person on matters outside of the limited scope retainer.

[New – September 2011]

[4] Rule 7.2-7 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 legal practitioner involved. The lawyer should advise the client accordingly, and if necessary consult the first legal practitioner unless the client instructs otherwise.

[Amended - June 2009]

Communications with a Represented Corporation or Organization

7.2-8 A lawyer retained to act on a matter involving a corporation or organization that is represented by a legal practitioner shall not, without the legal practitioner's consent or unless otherwise authorized or required by law, communicate, facilitate communication with or deal with a person

(a) who is a director or officer, or another person who is authorized to act on behalf of the corporation or organization;

(b) who is likely involved in decision-making for the corporation or organization or who provides advice in relation to the particular matter;

(c) whose act or omission may be binding on or imputed to the corporation or organization for the purposes of its ability; or

(d) who supervises, directs or regularly consults with the legal practitioner and who makes decisions based on the legal practitioner's advice.

7.2-8.1 If a person described in rule 7.2-8(a), (b), (c) or (d) is represented in the matter by a legal practitioner, the consent of the legal practitioner is sufficient to allow a lawyer to communicate, facilitate communication with or deal with the person.

7.2-8.2 In rule 7.2-8, "organization" includes a partnership, limited partnership, association, union, fund, trust, co-operative, unincorporated association, sole proprietorship and a government department, agency, or regulatory body.

Commentary

[1] The purpose of rule 7.2-8 and rules 7.2-8.1 and 7.2-8.2 is to protect the lawyer-client relationship of corporations and other organizations by specifying persons with whom a lawyer may not communicate, facilitate communication or deal if the lawyer represents a client in a matter involving a corporation or organization and the corporation or organization is represented by a legal practitioner. They apply to litigation as well as to transactional and other non-litigious matters. A lawyer may communicate with a person in a corporation or other organization, other than those referred to in rule 7.2-8, even if the corporation or organization is represented by a legal practitioner. These rules are intended to advance the public policy of promoting efficient discovery and favours the revelation of the truth by addressing the circumstances in which a corporation or organization is allowed to prevent the disclosure of relevant evidence. They are not intended to protect a corporation or organization from the revelation of prejudicial facts.

[2] Generally, rule 7.2-8 precludes contact only with those actively involved in a matter. For example, in a litigation matter, it does not preclude contact with mere witnesses. Further, communications with persons within the corporation or organization are not barred merely by virtue of the possibility that their information might constitute "admissions" in the evidentiary sense. To proscribe contact with any person within a corporation or organization on the basis that he or she may make a statement that might be admitted in evidence against the corporation or organization would be overly protective of the corporation or organization and too restrictive of an opposing counsel's ability to contact and interview potential witnesses. Fairness does not require the presence of a corporation's or organization's legal practitioner whenever a person within the corporation or organization may make a statement admissible in evidence against it.

[3] Rule 7.2-8 prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals are so closely identified with the interests of the corporation or organization as to be indistinguishable from it. They would have the authority to commit the corporation or organization to a position with regard to the subject matter of the representation. This person would have such authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making decisions affecting the outcome of the matter, including litigation decisions, or because their duties include answering the type of inquiries posed. These individuals include those to who the organization's legal practitioner looks for decisions with respect to the matter.

[4] Thus, subject to the exceptions set out in it, rule 7.2-8 would prohibit contact with those persons who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

[5] A lawyer is not prohibited from communicating with a person in a litigation matter unless the person's act or omission is believed, on reasonable grounds, to be so central and obvious to a determination of liability that the person's conduct may be imputed to the corporation or organization. If it is not reasonably likely that the person is an active participant for liability purposes or a decision-maker respecting the outcome of the matter, nothing in rule 7.2-8 precludes informal contact with such a person.

[6] An individual who regularly consults with the corporation's or organization's legal practitioner concerning a matter will not necessarily be a person who also directs the legal practitioner. In some large corporations and organizations, some management personnel may direct or control counsel for some matters but not others. The mere fact that a person holds a management position does not trigger the protections of the rule.

[7] A person who is simply interviewed or questioned by a corporation's or organization's legal practitioner about a matter to gather factual information does not "regularly consult" with the legal practitioner. While a person's duties within a corporation or organization may include answering litigation-related inquiries, rules 7.2-8 to 7.2-8.2 do not prohibit an inquiry of this person by opposing counsel that is related to the person's knowledge of the historical aspects leading up to the alleged injury or damage which give rise to the subject matter of the representation.

[8] The prohibition on communications with a represented corporation or organization applies only where the lawyer knows that the entity 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 where it is reasonable to believe that the entity 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 counsel by closing their eyes to the obvious.

[9] Rule 7.2-8 does not prevent a lawyer from communicating with employees or agents concerning matters outside the representation.

[10] As a practical matter, to avoid eliciting privileged or confidential information and ensure that the communications are proper, the lawyer should identify himself or herself as representing an interested party in the matter when approaching a potential witness or other person in the corporation or organization. The lawyer should also advise the person whom he or she is hoping to interview that they are free to decline to respond. See also Section 5.3 (Interviewing Witnesses).

[11] 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 the rules in Section 3.4 (Conflicts), and particularly rule 3.4-5 to rule 3.4-9. A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of the rules in Section 3.4 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

[12] If the representation by the legal practitioner described in rule 7.2-8.1 is only with respect to the personal interests of the individual, consent of the corporation's or organization's counsel would be required with respect to the corporation's or organization's interests.

[13] Unions – Rule 7.2-8 is not intended to prohibit a lawyer for a union from contacting employees of a represented corporation or organization in circumstances where proper representation of the union's interests requires communication with certain employees who are the holders of information. For example, a lawyer retained by a union with respect to a termination grievance in which the union alleges that the employer, who is represented, has breached the collective agreement, is not prohibited from contacting employees who may have information on the termination or events leading up to the termination.

[14] Similarly, a management-side labour lawyer would not offend rule 7.2-8 if the lawyer contacted an employee who is a member of a bargaining unit represented by a legal practitioner.

[15] Governments –The concept of the individual who may "bind the organization" may not apply in the government context in the same way as in the corporate environment. For government departments, ministries and similar groups, rules 7.2-8 to 7.2-8.2 are intended to cover individuals who participate in a significant way in decision-making or who provide advice in relation to a particular matter.

[16] In government, because of its complexity and despite its hierarchy, it may not always be clear to whom a lawyer is authorized to communicate on a particular matter and who is involved in the decision-making process. The roles of these individuals may not be discrete, as different officials at different levels in different departments provide advice and recommendations. For example, in a contract negotiation, employees from one ministry may be directly involved, but those from another ministry may also have sensitive information relevant to the matter that may require protection under rule 7.2-8.

[17] In addition, the legal branch at the particular ministry is usually considered to always be "retained". There may be circumstances where the only appropriate action is to contact the legal branch. In all cases, appropriate judgment must be exercised

[18] In general, rules 7.2-8 to 7.2-8.2 are not intended to

(a) constrain lawyers who wish to contact government officials for a discussion of policy or similar matters on behalf of a client;

(b) affect access to information requests under such legislation as the *Freedom of Information and Protection of Privacy Act* (Ontario) or the federal *Access to Information Act*, including situations where a litigant has named the provincial or federal Crown, respectively, as a defendant; or

(c) affect the exercise of the duties of public servants under the *Public Service of Ontario Act, 2006* with respect to disclosure of information.

[19] Municipalities – Similar to government, in the municipal context, it is recognized that no one individual has the authority to bind the municipality. Each councillor is representative of the entire council for the purposes of decision-making. Rule 7.3-9, for example, would not permit the lawyer for an applicant on a controversial planning matter that is before the Ontario Municipal Board to contact individual members of council on the matter without the consent of the municipal solicitor.

[20] Rules 7.2-8 to 7.2-8.2 are not intended to:

(a) prevent lawyers appearing before council on a client's behalf and making representations to a public meeting held pursuant to the *Planning Act;*

(b) affect access to information requests under such legislation as the *Municipal Freedom of Information and Protection of Privacy Act*, including situations where a litigant has named the municipality as a defendant; or

(c) restrain communications by persons having dealings or negotiations, including lobbying, with municipalities with the elected representatives (councillors) or municipal staff.

[Amended – November 2010]

7.2-9 When a lawyer deals on a client's behalf with an unrepresented person, the lawyer shall:

(a) [FLSC - not in use]

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

(c) take care to see that the unrepresented person understand that the lawyer is acting exclusively in the interests of the client and accordingly their comments may be partisan.

Commentary

[1] If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in these rules about joint retainers.

Inadvertent Communications

7.2-10 A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably ought to know that the document was inadvertently sent shall promptly notify the sender.

Commentary

[1] Lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or legal practitioners acting for them. 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 this rule, 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.

[2] [FLSC - not in use]

Undertakings and Trust Conditions

7.2-11 A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given and honour every trust condition once accepted.

Commentary

[1] 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.

[1.1] In real estate transactions using the system for the electronic registration of title documents ("e-reg" TM), the lawyers acting for the parties (with their consent) will sign and be bound by a Document Registration Agreement that will contain undertakings. When entering into a Document Registration Agreement, a lawyer should have regard to and strictly comply with their obligations under rule 7.2-11.

[2] 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.

[3] 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.

[4] 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.

[5] 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 legal practitioner who has imposed the conditions and the lawyer who has accepted them.

[6] Any trust condition that is accepted is binding upon a lawyer, whether imposed by another legal practitioner or by a lay person. A lawyer may seek to impose trust conditions upon a non-licensee, 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 licensees.

[7] A lawyer should treat money or property that, on a reasonable construction, is subject to trust conditions or an undertaking in accordance with this rule.

[Amended - November 2007]

SECTION 7.3 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

7.3-1 A lawyer who engages in another profession, business, or occupation concurrently with the practice of law shall not allow such outside interest to jeopardize the lawyer's professional integrity, independence, or competence.

Commentary

[1] 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.

[2] 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.

7.3-2 A lawyer shall not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary

[1] 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, for example, 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 Law Society.

[2] Where 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 as, for example, where the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

SECTION 7.4 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

7.4-1 A lawyer who holds public office shall, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

Commentary

[1] 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.

[2] Generally, the Law Society will not be 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.

[3] [FLSC - not in use]

~~**Conflict of Interest**~~

~~(2) A lawyer who holds public office shall not allow professional or personal interests to conflict with the proper discharge of official duties.~~

~~Commentary~~

~~The lawyer holding part-time public office must not accept any private legal business where duty to the client will, or may, conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail. The lawyer who holds a full-time public office will not be faced with this sort of conflict but must nevertheless guard against allowing independent judgment in the discharge of official duties to be influenced either by the lawyer's own interest, that of some person closely related to or associated with the lawyer, that of former or prospective clients, or former or prospective partners or associates.~~

~~Subject to any special rules applicable to the particular public office, the lawyer holding the office who sees that there is a possibility of a conflict of interest should declare the possible conflict at the earliest opportunity, and not take part in any consideration, discussion or vote concerning the matter in question.~~

~~(3) If there may be a conflict of interest, a lawyer who holds or who held public office shall not represent clients or advise them in contentious cases that the lawyer has been concerned with in an official capacity~~.

Appearances before Official Bodies

(4) Subject to the rules of the official body, when a lawyer or any of his or her partners or associates is a member of an official body, the lawyer shall not appear professionally before that body.

Commentary

Subject to the rules of the official body, a partner or associate may appear professionally before a committee of the official body if the partner or associate is not a member of that committee, provided that in respect of matters in which the partner or associate appears, the lawyer does not sit on the committee, take part in the discussions of the committee's recommendations, or vote upon them.

Conduct after Leaving Public Office

(5) A lawyer who has left public office shall not act for a client in connection with any matter for which the lawyer had substantial responsibility before leaving public office.

Commentary

It would not be improper for the lawyer to act professionally in the matter on behalf of the public body in question.

A lawyer who has acquired confidential information by virtue of holding public office should keep the information confidential and not divulge or use it, notwithstanding that the lawyer has ceased to hold such office.

SECTION 7.5 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

7.5-1 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

[1] Lawyers in their public appearances and public statements should conduct themselves in the same manner as with their clients, their fellow legal practitioners, 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.

[2] 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.

[3] 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 the lawyer's real purpose is self-promotion or self-aggrandizement.

[4] 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 will arise where the lawyer should have no contact with the media and other cases where the lawyer is under a specific duty to contact the media to properly serve the client ~~– the latter situation will arise more often in the context of administrative boards and tribunals where a particular tribunal is an instrument of government policy and hence is susceptible to public opinion~~.

[5] A lawyer is often involved in a non-legal setting where contact is made with the media about publicizing such things as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations, or in acting as a spokesperson for organizations that, in turn, represent particular racial, religious, or other special interest groups. This is a well-established and completely proper role for the lawyer to play in view of the obvious contribution it makes to the community.

[6] A lawyer is often called upon to comment publicly on the effectiveness of existing statutory or legal remedies, on 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.

[Amended – June 2009]

[6.1] A lawyer is often involved as advocate for interest groups whose objective is to bring about changes in legislation, governmental policy, or even a heightened public awareness about certain issues. This is also an important role that the lawyer can be called upon to play.

[7] Lawyers should be aware that when they make a public appearance or give a statement they will 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

7.5-2 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.

Commentary

[1] 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.

SECTION 7.6 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

7.6-1 A lawyer shall assist in preventing the unauthorized practice of law and the unauthorized provision of legal services.

[Amended – June 2007]

Commentary

[1] Statutory provisions against the practice of law and provision of legal services by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, regulation, and, in the case of misconduct, from discipline by the Law 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 secrecy, the professional standard of care that the law requires of lawyers, and the authority that the courts exercise over them. Other safeguards include professional liability insurance, rights with respect to the assessment of bills, rules respecting the handling of trust monies, and requirements for the maintenance of compensation funds.

Working With or Employing Unauthorized Persons

7.6-1.1 Without the express approval of a committee of Convocation appointed for the purpose, a lawyer shall 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 or provision of legal services any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, has had their license to practise law or to provide legal services revoked, has been suspended, has had their license to practise law or to provide legal services suspended, has undertaken not to practise law or to provide legal services, or who has been involved in disciplinary action and been permitted to resign or to surrender their license to practise law or to provide legal services, and has not had their license restored.

Practice by Suspended Lawyers Prohibited

7.6-1.2 A lawyer whose license to practise law is suspended shall comply with the requirements of the By-laws and shall not

(a) practise law;

(b) represent or hold himself or herself out as a person entitled to practise law; or

(c) represent or hold himself or herself out as a person entitled to provide legal services.

[New - January 2008]

Commentary

[1] Part II of By-Law 7.1 (Operational Obligations and Responsibilities) and Part II.1 of By-Law 9 (Financial Transactions and Records) set out the obligations of a lawyer whose license to practise law is suspended.

[Amended - May 2008]

Undertakings Not to Practise Law

7.6-1.3 A lawyer who gives an undertaking to the Law Society not to practise law shall not

(a) practise law;

(b) represent or hold himself or herself out as a person entitled to practise law; or

(c) represent or hold himself or herself out as a person entitled to provide legal services.

[New - January 2008]

Undertakings to Practise Law Subject to Restrictions

7.6-1.4 A lawyer who gives an undertaking to the Law Society to restrict their practise shall comply with the undertaking.

[New - January 2008]

SECTION 7.7 RETIRED JUDGES RETURNING TO PRACTICE

7.7-1 [FLSC – not in use]

Definitions

7.7-1.1 In rule 7.7-1.2 "retired appellate judge" means a lawyer

(a) who was formerly a judge of the Supreme Court of Canada, the Court of Appeal for Ontario, or the Federal Court of Appeal;

[Amended - January 2009]

(b) who has retired, resigned, or been removed from the Bench; and

(c) who has returned to practice.

~~**7.7-2** In this rule, "retired judge" means a lawyer~~

~~(a) who was formerly a judge of the Federal Court, the Tax Court of Canada, the Supreme Court of Ontario, Trial Division, a County or District Court, the Ontario Court of Justice, or the Superior Court of Justice;~~

~~*[Amended - January 2009]*~~

~~(b) who has retired, resigned, or been removed from the Bench; and~~

~~(c) who has returned to practice~~.

Appearance as Counsel

7.7-1.2 A retired appellate judge shall not appear as counsel or advocate in any court, or in chambers, or before any administrative board or tribunal without the express approval of a committee of Convocation appointed for the purpose. This approval may only be granted in exceptional circumstances and may be restricted as the committee of Convocation sees fit.

7.7-1.3 In rule 7.7-1.4, "retired judge" means a lawyer

(a) who was formerly a judge of the Federal Court, the Tax Court of Canada, the Supreme Court of Ontario, Trial Division, a County or District Court, the Ontario Court of Justice, or the Superior Court of Justice;

[Amended - January 2009]

(b) who has retired, resigned, or been removed from the Bench; and

(c) who has returned to practice.

7.7-1.4 A retired judge shall not appear as counsel or advocate

(a) before the court on which the judge served or any lower court; and

(b) before any administrative board or tribunal over which the court on which the judge served exercised an appellate or judicial review jurisdiction

for a period of ~~two~~ three years from the date of their retirement, resignation, or removal, without the express approval of a committee of Convocation, appointed for the purpose, which approval may only be granted in exceptional circumstances and may be restricted as the committee of Convocation sees fit.

SECTION 7.8 ERRORS AND OMISSIONS

Informing Client of Error or Omission

7.8-1 When, in connection with a matter for which a lawyer is responsible, the lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer shall

(a) promptly inform the client of the error or omission being 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;

(b) recommend that the client obtain legal advice ~~elsewhere~~ from an independent lawyer concerning any rights the client may have arising from the error or omission; and

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

Notice of Claim

7.8-2 A lawyer shall 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

[1] Compulsory insurance imposes obligations on a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. The insurer's rights must be preserved. There may well be occasions when a lawyer believes that certain actions or the 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 the lawyer's negligence.

[1.1] Many factors will have to be taken into account in assessing the client's claim and damages. As soon as a lawyer becomes aware that an error or omission may have occurred, that may reasonably be expected to involve liability to the client for professional negligence, the lawyer should take the following steps.

[Amended - January 2009]

(a) Immediately arrange an interview with the client and advise the client that an error or omission may have occurred, that may form the basis of a claim by the client against the lawyer.

(b) Advise the client to obtain an opinion from an independent lawyer and that, in the circumstances, the first lawyer might no longer be able to act for the client.

(c) Subject to the rules in Section 3.3 (Confidentiality), inform the insurer of the facts of the situation.

(d) Co-operate fully and as expeditiously as possible with the insurer in the investigation and eventual settlement of the claim.

(e) Make arrangements to pay that portion of the client's claim that is not covered by the insurance immediately upon completion of the settlement of the client's claim. This would include payment of the deductible under a policy of insurance in accordance with By-Law 6 (Professional Liability Insurance).

[Amended - January 2009]

Co-operation

7.8-3 When a claim of professional negligence is made against a lawyer, he or she shall 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

7.8-4 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 shall expeditiously deal with the claim and shall not take unfair advantage that would defeat or impair the client's claim.

7.8-5 In cases where 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.

SECTION 7.8.1 RESPONSIBILITY IN MULTI-DISCIPLINE PRACTICES

Compliance with these Rules

7.8.1-1 A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates comply with these rules and all ethical principles that govern a lawyer in the discharge of their professional obligations.

[Amended - June 2009]

SECTION 7.8.2 DISCIPLINE

Disciplinary Authority

7.8.2-1 A lawyer is subject to the disciplinary authority of the Law Society regardless of where the lawyer's conduct occurs.

Professional Misconduct

7.8.2-2 The Law Society may discipline a lawyer for professional misconduct.

Conduct Unbecoming a Lawyer

7.8.2-3 The Law Society may discipline a lawyer for conduct unbecoming a lawyer.

The Law Society of Upper Canada | Barreau du Haut-Canada

PROPOSED AMENDED RULES IMPLEMENTING THE FEDERATION OF LAW SOCIETIES OF CANADA'S MODEL CODE OF PROFESSIONAL CONDUCT

Rules of Professional Conduct

~Effective November 1, 2000~

Adopted by Convocation June 22, 2000

Table of Contents

Guide to the Rules of Professional Conduct
Amended by Convocation October 24, 2013
Amendments Effective October 1, 2014

IN THESE RULES:

a. Chapters are assigned a single digit, as in **Chapter 1 – Citation and Interpretation**

b. Sections are assigned two digits separated by a decimal point, the second number beginning with 1 (subject to paragraph g.) as in **Section 3.1 – Competence**

c. Rules include the section number and are assigned an additional number, beginning with 1 (subject to paragraph g.) preceded by a dash, as in **Reasonable Fees and Disbursements 3.6-1**

d. Paragraphs of commentary are assigned a number in square brackets, beginning with 1 (subject to paragraph g.) as in **[6].**

e. Rules or paragraphs of commentary in the Federation of Law Societies of Canada Model Code of Professional Conduct ("Model Code") not adopted in these rules are assigned the phrase **[FLSC - not in use]**

f. Sections, rules or paragraphs of commentary in these rules that do not appear in the Model Code are assigned a numerical suffix preceded by a decimal point, as in **Section 7.8.1, rule 3.4-11.1 and commentary [4.1].**

g. If a section, rule or paragraph of commentary described in paragraph f. is, at a given location, the first section, rule or paragraph of commentary, it is assigned the number 0, as in **Section 1.0 or rule 4.2-0.**

h. New sections, rules or commentaries as a result of amendments to the Model Code are assigned the appropriate capital letter suffix, for example, **rule 4.1-2A or commentary [6B].**

i. Deletions are assigned the word "deleted" in square brackets following the relevant section, rule or commentary number, for example, **6.4-1 [deleted].**

Chapter 1 Citation and Interpretation

SECTION 1.0 CITATION

1.0-1 These rules may be cited as the *Rules of Professional Conduct.*

SECTION 1.1 DEFINITIONS

1.1-1 In these rules, unless the context requires otherwise,

"affiliated entity" means any person or group of persons other than a person or group authorized to practice law in or outside Ontario;

[New – May 2001]

"affiliation" means the joining on a regular basis of a lawyer or group of lawyers with an affiliated entity in the delivery or promotion and delivery of the legal services of the lawyer or group of lawyers and the non-legal services of the affiliated entity;

[New – May 2001]

"associate" includes:

(a) a licensee who practises law in a law firm through an employment or other contractual relationship, and

(b) a non-licensee employee of a multi-discipline practice providing services that support or supplement the practice of law;

[Amended – September 2010, October 2014]

"client" means a person who:

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf

and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work;

[Amended – October 2014]

Commentary

[1] A solicitor and client relationship may be established without formality.

[2] When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing.

[3] For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established.

[Amended – October 2014]

"conduct unbecoming a barrister or solicitor" means conduct, including conduct in a lawyer's personal or private capacity, that tends to bring discredit upon the legal profession including, for example,

(a) committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer,

(b) taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of another, or

(c) engaging in conduct involving dishonesty or conduct which undermines the administration of justice;

[Amended – May 2008, October 2014]

"conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

[New – October 2014]

Commentary

[1] In this context, "substantial risk" means that the risk is significant and plausible, even if it is not certain or even probable that the material adverse effect will occur.

[New – October 2014]

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, where 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 written communication recording their consent as soon as practicable.

[Amended – October 2014]

"independent legal advice" means a retainer where

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,

(b) the client's transaction involves doing business with

(i) another lawyer,

(ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or

(iii) a client of the other lawyer,

(c) the retained lawyer has advised the client that the client has the right to independent legal representation,

(d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer,

(e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and

(f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view;

"independent legal representation" means a retainer where

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction, and

(b) the retained lawyer will act as the client's lawyer in relation to the matter;

Commentary

[1] Where a client elects to waive independent legal representation but to rely on independent legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged.

"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 *Legal Aid Services Act 1998*,

(d) in a government, a Crown corporation, or any other public body, or

(e) in a corporation or other body;

"lawyer" means a person licensed by the Law Society to practise law as a barrister and solicitor in Ontario and includes a candidate enrolled in the Law Society's Licensing Process for lawyers;

"legal practitioner" means a person

(a) who is a licensee; or

(b) who is not a licensee but who is a member of the bar of a Canadian jurisdiction, other than Ontario, and who is authorized to practise law as a barrister and solicitor in that other jurisdiction;

[New – June 2009]

"licensee" means a lawyer or a paralegal;

"paralegal" means a person licensed by the Law Society to provide legal services in Ontario;

"professional misconduct" means conduct in a lawyer's professional capacity that tends to bring discredit upon the legal profession including

(a) violating or attempting to violate one of these rules, a requirement of the *Law Society Act* or its regulations or by-laws,

(b) knowingly assisting or inducing another legal practitioner to violate or attempt to violate the rules in these rules, the *Paralegal Rules of Conduct* or a requirement of the *Law Society Act* or its regulations or by-laws,

(c) knowingly assisting or inducing a non-licensee partner or associate of a multi-discipline practice to violate or attempt to violate the rules in rules or a requirement of the *Law Society Act* or its regulations or by-laws,

(d) misappropriating or otherwise dealing dishonestly with a client's or a third party's money or property,

(e) engaging in conduct that is prejudicial to the administration of justice,

(f) stating or implying an ability to influence improperly a government agency or official, or

(g) knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

[Amended – June 2009]

"Law Society" means The Law Society of Upper Canada;

"tribunal" includes courts, boards, arbitrators, mediators, administrative agencies, and bodies that resolve disputes, regardless of their function or the informality of their procedures.

Chapter 2 Integrity

SECTION 2.1 INTEGRITY

2.1-1 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

[1] 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 their 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.

[2] 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.

[3] 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 Law Society may be justified in taking disciplinary action.

[4] Generally, however, the Law 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.

[4.1] A lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario.

[4.2] A lawyer should, where appropriate, advise a client of the client's French language rights relating to the client's matter, including where applicable

(a) subsection 19(1) of the *Constitution Act*, 1982 on the use of French or English in any court established by Parliament,

(b) section 530 of the *Criminal Code* about an accused's right to a trial before a court that speaks the official language of Canada that the language of the accused,

(c) section 126 of the *Courts of Justice Act* that requires that a proceeding in which the client is a party be conducted as a bilingual (English and French) proceeding,

(d) subsection 5(1) of the *French Language Services Act* for services in French from Ontario government agencies and legislative institution.

2.1-2 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

[1] 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 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 Law 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.

[2] When participating in community activities, lawyers should be mindful of the possible perception that the lawyer is providing legal advice and a lawyer-client relationship has been created.

[New – October 2014]

Chapter 3 Relationship to Clients

SECTION 3.1 COMPETENCE

Definitions

3.1-1 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 including

[Amended – October 2014]

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;

[Amended – June 2007]

(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;

[Amended – October 2014]

(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 in spirit with all requirements pursuant to the *Law Society Act*;

[Amended – October 2014]

(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

3.1-2 A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

[1] 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.

[2] 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.

[3] 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 licensee of established competence in the field in question.

[4] 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.

[5] 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.

[6] 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 licensee 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.

[7] 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, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer, he or she must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement to provide such services does not exempt a lawyer from the duty to provide competent representation. As in any retainer, the lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rules 3.2-1A to 3.2-1A.2.

[8] 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.

[8.1] What is effective communication with the client 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.

[9] 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.

[10] In addition to opinions on legal questions, the 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.

[11] 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-licensee. Advice or services from non-licensee 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 relevant by-laws and regulations governing multi-discipline practices.

[12] 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, so that the client can make an informed choice about their options, such as whether to retain new counsel.

[13] The lawyer should refrain from conduct that may interfere with or compromise their capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

[14] 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.

[15] 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 in the rule. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

[15.1] The *Law Society Act* provides that a lawyer fails to meet standards of professional competence if there are deficiencies in

(a) the lawyer's knowledge, skill, or judgment,

(b) the lawyer's attention to the interests of clients,

(c) the records, systems, or procedures of the lawyer's professional business, or

(d) other aspects of the lawyer's professional business, and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

[Amended – June 2009, October 2014]

SECTION 3.2 QUALITY OF SERVICE

Quality of Service

3.2-1 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.

[New – October 2014]

Commentary

[1] This rule should be read and applied in conjunction with the rules in Section 3.1 regarding competence.

[2] An ordinarily or otherwise competent lawyer may still occasionally fail to provide an adequate quality of service.

[3] 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.

[New – October 2014]

Legal Services Under a Limited Scope Retainer

3.2-1A Before providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client.

3.2-1A.1 When providing legal services under a limited scope retainer, a lawyer shall confirm the services in writing and give the client a copy of the written document when practicable to do so.

Commentary

[1] Reducing to writing the discussions and agreement with the client about the limited scope retainer assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer.

[1.1] In certain circumstances, such as when the client is in custody, it may not be possible to give him or her a copy of the document. In this type of situation, the lawyer should keep a record of the limited scope retainer in the client file and, when practicable, provide a copy of the document to the client.

[2] A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting such that it appears that the lawyer is providing services to the client under a full retainer.

[3] [FLSC – not in use]

[4] A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed. See rule 7.2-6A and rules 7.2-8 to 7.2-8.2.

[5] [FLSC – not in use]

3.2-1A.2 Rule 3.2-1A.1 does not apply to a lawyer if the legal services are

(a) legal services or summary advice provided as a duty counsel under the *Legal Aid Services Act, 1998* or through any other duty counsel or other advisory program operated by a not-for-profit organization;

(b) summary advice provided in community legal clinics, student clinics or under the *Legal Aid Services Act, 1998*;

(c) summary advice provided through a telephone-based service or telephone hotline operated by a community-based or government funded program;

(d) summary advice provided by the lawyer to a client in the context of an introductory consultation, where the intention is that the consultation, if the client so chooses, would develop into a retainer for legal services for all aspects of the legal matter; or

(e) *pro bono* summary legal services provided in a non-profit or court-annexed program.

[New – September 2011]

Commentary

[1] The consultation referred to in rule 3.2-1A.2(d) may include advice on preventative, protective, pro-active or procedural measures relating to the client's legal matter, after which the client may agree to retain the lawyer.

[New – September 2011]

Honesty and Candour

3.2-2 When advising clients, a lawyer shall be honest and candid.

Commentary

[1] [FLSC – not in use]

[1.1] A lawyer has a duty of candour with the client on matters relevant to the retainer. This arises out of the rules and the lawyer's fiduciary obligations to the client. The duty of candour requires a lawyer to inform the client of information known to the lawyer that may affect the interests of the client in the matter.

[1.2] In some limited circumstances, it may be appropriate to withhold information from a client. For example, with client consent, a lawyer may act where the lawyer receives information on a "for counsel's eyes only" basis. However, it would not be appropriate to act for a client where the lawyer has relevant material information about that client received through a different retainer. In those circumstances the lawyer cannot be honest and candid with the client and should not act.

[2] The lawyer's duty to the 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.

[2.1] A lawyer who is acting for both the borrower and the lender in a mortgage or loan transaction should also refer to rule 3.4-15 regarding the lawyer's duty of disclosure to their clients.

[3] [FLSC – not in use]

[Amended – October 2014]

When Client an Organization

3.2-3 Notwithstanding that the instructions may be received from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, in exercising the lawyer's duties and in providing professional services, the lawyer shall act for the organization.

Commentary

[1] 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 will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon 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.

[2] In addition to acting for the organization, the lawyer may also accept a joint retainer and act for a person associated with the organization. An example might be a lawyer advising about liability insurance for an officer of an organization. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interest and should comply with the rules about the avoidance of conflicts of interest (Section 3.4, Conflicts).

[New – March 2004]

Encouraging Compromise or Settlement

3.2-4 A lawyer shall advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and shall discourage the client from commencing or continuing useless legal proceedings.

[Amended – October 2014]

Commentary

[1] It is important to consider the use of alternative dispute resolution (ADR). When appropriate, the lawyer shall inform the client of ADR options and, if so instructed, take steps to pursue those options.

[1.1] In criminal, quasi-criminal or regulatory complaint proceedings, it is not improper for a lawyer for an accused or potential accused to communicate 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. See also rule 7.2-6.

[1.2] 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.

[Amended – October 2014]

Threatening Criminal Proceedings

3.2-5 A lawyer shall 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.

[Amended – October 2014]

3.2-5.1 Rule 3.2-5(b) does not apply to an application made in good faith to a regulatory authority for a benefit to which a client may be legally entitled.

[New – October 2014]

Commentary

[1] 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.

[2] 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 Law Society. The impropriety stems from threatening to use, or actually using, criminal or quasi-criminal proceedings to gain a civil advantage.

[2.1] Where a regulatory authority exercises a jurisdiction that is essentially civil, it is not improper to threaten to make a complaint pursuant to that authority to achieve a benefit for the client. For example, where the regulatory authority of the office dealing with employment standards covers non-payment of wages, it is not improper to threaten to make a complaint pursuant to the relevant provincial statute for an order that wages be paid failing payment of unpaid wages.

[New – October 2014]

3.2-6 [FLSC - not in use]

Dishonesty, Fraud etc. by Client or Others

3.2-7 A lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct or instruct a client or any other person on how to violate the law and avoid punishment.

[Amended – October 2014]

3.2-7.1 A lawyer shall not act or do anything or omit to do anything in circumstances where he or she ought to know that, by acting, doing the thing or omitting to do the thing, he or she is being used by a client, by a person associated with a client or by any other person to facilitate dishonesty, fraud, crime or illegal conduct.

[New – April 2012]

3.2-7.2 When retained by a client, a lawyer shall make reasonable efforts to ascertain the purpose and objectives of the retainer and to obtain information about the client necessary to fulfill this obligation.

3.2-7.3 A lawyer shall not use their trust account for purposes not related to the provision of legal services.

[Amended – April 2011]

Commentary

[1] Rule 3.2-7 which states that a lawyer must not knowingly assist in or encourage dishonesty, fraud, crime or illegal conduct, applies whether the lawyer's knowledge is actual or in the form of wilful blindness or recklessness. A lawyer should also be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a client or any other person. Rules 3.2-7.1 to 3.2-7.3 speak to these issues.

[2] A lawyer should be alert to and avoid unwittingly becoming involved with a client or any other person who is engaged in criminal activity 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

(a) establishing, purchasing or selling business entities;

(b) arranging financing for the purchase or sale or operation of business entities;

(c) arranging financing for the purchase or sale of business assets; and

(d) purchasing and selling real estate.

[3] To obtain information about the client and about the subject matter and objectives of the retainer, the lawyer may, for example, need to verify who are the legal or beneficial owners of property and business entities, verify who has the control of business entities, and clarify 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. It is especially important to obtain this information where a lawyer has suspicions or doubts about whether he or she might be assisting a client or any other person in dishonesty, fraud, crime or illegal conduct.

[3.1] Lawyers should be vigilant in identifying the presence of "red flags" in their areas of practice and make inquiries to determine whether a proposed retainer relates to a *bona fide* transaction. Information on "Red Flags in Real Estate Transactions" appears below.

[3.2] A client or another person may attempt to use a lawyer's trust account for improper purposes, such as hiding funds, money laundering or tax sheltering. These situations highlight the fact that when handling trust funds, it is important for a lawyer to be aware of their obligations under these rules and the Law Society's By-laws that regulate the handling of trust funds.

[4] A *bona fide* test case is not necessarily precluded by rule 3.2-7 and, so long as no injury to the 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.

[Amended – October 2014]

Red Flags in Real Estate Transactions

[4.1] A lawyer representing any party in a real estate transaction should be vigilant in identifying the presence of "red flags" and make inquiries to determine whether it is a *bona fide* transaction. Red flags include such things as

(a) purchase price manipulations (revealed by, for example, deposits purportedly paid directly to the vendor, price escalations and "flips" in which a property is sold and re-sold within a short period of time for a substantially higher price, reductions in the balance due on closing in consideration of extra credits or deposits not required by the purchase agreement, amendments to the purchase price not disclosed to the mortgage lender, the acceptance on closing of an amount less than the balance due, a mortgage advance which approximates or exceeds the balance due resulting in surplus mortgage proceeds, and so on);

(b) a nominal role for one or more parties (fraud is sometimes effected through the use of "straw people", who may not exist or whose identities have either been purchased or stolen, as well as through the suspicious use of powers of attorney);

(c) the purchaser contributes no funds or only a nominal amount towards the purchase price or the balance due on closing;

(d) signs that the parties are concealing a non-arm's length relationship or are colluding with respect to the purchase price;

(e) suspicious or repeated third-party involvement (for example, giving instructions, supplying client directions or identification, and providing or receiving funds on closing); and

(f) the proceeds of sale are disbursed or directed to be paid to parties who are unrelated to the transaction.

[4.2] The red flags listed above are not an exhaustive list. Further information regarding red flags is available from many sources, including the "Fighting Real Estate Fraud" page within the "Practice Resources" section of the website of the Law Society. Fraudulent real estate schemes and the red flags associated with such schemes are numerous and evolving. Lawyers who practise real estate law have a professional obligation therefore to educate themselves on an ongoing basis regarding the red flags of real estate fraud.

[New – October 2012]

Dishonesty, Fraud, etc. when Client an Organization

3.2-8 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, shall do the following, in addition to their obligations under rule 3.2-7:

(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 rules in Section 3.7.

[Amended – October 2014]

Commentary

[1] 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 (Section 3.3)

[2] This rule speaks of conduct that is dishonest, fraudulent, criminal or illegal.

[3] 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 this rules.

[4] In determining their responsibilities under this rule, a lawyer should consider whether it is feasible and appropriate to give any advice in writing.

[5] 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 shall advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer shall 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 shall withdraw from acting in the particular matter in accordance with rule 3.7-1. In some but not all cases, withdrawal means resigning from their position or relationship with the organization and not simply withdrawing from acting in the particular matter.

[6] This rules 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 organizations' 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.

[Amended – October 2014]

Client with Diminished Capacity

3.2-9 When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about their legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as their age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time.

[1.1] When a client is or comes to be under a disability that impairs their ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

[2] [FLSC – not in use]

[3] A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage their legal affairs, the lawyer may need to take steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned.

[3.1] A lawyer who is asked to provide legal services under a limited scope retainer to a client under a disability should carefully consider and assess in each case how, under the circumstances, it is possible to render those services in a competent manner.

[Amended – September 2011]

[4] [FLSC – not in use]

[5] 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 3.3-1 (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.

[Amended – October 2014]

Medical-Legal Reports

3.2-9.1 A lawyer who receives a medical-legal report from a physician or health professional that is accompanied by a proviso that it not be shown to the client shall return the report immediately to the physician or health professional unless the lawyer has received specific instructions to accept the report on this basis.

Commentary

[1] The lawyer can avoid some of the problems anticipated by the rule by having a full and frank discussion with the physician or health professional, preferably in advance of the preparation of a medical-legal report, which discussion will serve to inform the physician or health professional of the lawyer's obligation respecting disclosure of medical-legal reports to the client.

3.2-9.2 A lawyer who receives a medical-legal report from a physician or health professional containing opinions or findings that if disclosed might cause harm or injury to the client shall attempt to dissuade the client from seeing the report, but if the client insists, the lawyer shall produce the report.

3.2-9.3 Where a client insists on seeing a medical-legal report about which the lawyer has reservations for the reasons noted in rule 3.2-9.2, the lawyer shall suggest that the client attend at the office of the physician or health professional to see the report in order that the client will have the benefit of the expertise of the physician or health professional in understanding the significance of the conclusion contained in the medical-legal report.

Title Insurance in Real Estate Conveyancing

3.2-9.4 A lawyer shall assess all reasonable options to assure title when advising a client about a real estate conveyance and shall advise the client that title insurance is not mandatory and is not the only option available to protect the client's interests in a real estate transaction.

Commentary

[1] A lawyer should advise the client of the options available to protect the client's interests and minimize the client's risks in a real estate transaction. The lawyer should be cognizant of when title insurance may be an appropriate option. Although title insurance is intended to protect the client against title risks, it is not a substitute for a lawyer's services in a real estate transaction.

[2] The lawyer should be knowledgeable about title insurance and discuss with the client the advantages, conditions, and limitations of the various options and coverages generally available to the client through title insurance. Before recommending a specific title insurance product, the lawyer should be knowledgeable about the product and take such training as may be necessary in order to acquire the knowledge.

3.2-9.5 A lawyer shall not receive any compensation, whether directly or indirectly, from a title insurer, agent or intermediary for recommending a specific title insurance product to their client.

3.2-9.6 A lawyer shall disclose to the client that no commission or fee is being furnished by any insurer, agent, or intermediary to the lawyer with respect to any title insurance coverage.

Commentary

[1] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance of any hidden fees by the lawyer, including the lawyer's law firm, any employee or associate of the firm, or any related entity.

3.2-9.7 If discussing TitlePLUS insurance with a client, a lawyer shall fully disclose the relationship between the legal profession, the Law Society, and the Lawyers' Professional Indemnity Company (LawPRO).

Reporting on Mortgage Transactions

3.2-9.8 Where a lawyer acts for a lender and the loan is secured by a mortgage on real property, the lawyer shall provide a final report on the transaction, together with the duplicate registered mortgage, to the lender within 60 days of the registration of the mortgage, or within such other time period as instructed by the lender.

3.2-9.9 The final report required by rule 3.2-9.8 must be delivered within the times set out in that rule even if the lawyer has paid funds to satisfy one or more prior encumbrances to ensure the priority of the mortgage as instructed and the lawyer has obtained an undertaking to register a discharge of the encumbrance or encumbrances but the discharge remains unregistered.

[*New - February 2007*]

SECTION 3.3 CONFIDENTIALITY

Confidential Information

3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless

(a) expressly or impliedly authorized by the client;

(b) required by law or by order of a tribunal of competent jurisdiction to do so;

(c) required to provide the information to the Law Society; or

(d) otherwise permitted by rules 3.3-2 to 3.3-6.

[Amended – October 2014]

Commentary

[1] A lawyer cannot render effective professional service to the 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.

[2] 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.

[3] 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.

[4] 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 Section 3.4 Conflicts.)

[5] 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.

[6] 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.

[7] Sole practitioners who practise in association with other licensees 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 licensee 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 licensees' practices are integrated, physically and administratively, in the association.

[8] A lawyer should avoid indiscreet conversations, 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 shop-talk between 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.

[8.1]Although the rule may not apply to facts that are public knowledge, nevertheless, the lawyer should guard against participating in or commenting on speculation concerning the client's affairs or business.

[9] In some situations, the authority of the client to disclose may be inferred. For example, some disclosure may be necessary in court proceedings, 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, and students and other licensees 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.

[10] 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 that 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 to 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.

[11] A lawyer may have an obligation to disclose information under rules 5.5-2, 5.5-3 and 5.6-3 (Security of Court Facilities). If client information is involved in those situations, the lawyer should be guided by the provisions of this rule.

[11.1] 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.

[Amended - October 2014]

Justified or Permitted Disclosure

3.3-1.1 When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.

3.3-2 [FLSC - not in use]

3.3-3 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.

[Amended – October 2014]

Commentary

[1] 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 rule, 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.

[2] 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.

[3] In assessing whether disclosure of confidential information is justified to prevent death or serious bodily harm, a lawyer should consider a number of factors, including

(a) the likelihood that the potential injury will occur and its imminence;

(b) the apparent absence of any other feasible way to prevent the potential injury; and

(c) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

[4] How and when disclosure should be made under this rule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should seek legal advice. When practicable, a judicial order may be sought for disclosure.

[5] If confidential information is disclosed under rule 3.3-3, 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.

[Amended – October 2014]

[5.1] 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 their employer or client. Although the rules make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 3.2-7) 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 (rule 3.2-8), 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 their duties are owed to the organization and not to the officers, employees, or agents of the organization (rule 3.2-3)) and the lawyer should comply with rule 3.2-8, which sets out the steps the lawyer should take in response to proposed, past or continuing misconduct by the organization.

[Amended – March 2004]

3.3-4 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 shall not disclose more information than is required.

[Amended – October 2014]

3.3-5 A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required.

3.3-6 A lawyer may disclose confidential information to another lawyer to secure legal advice about the lawyer's proposed conduct.

[New – October 2014]

SECTION 3.4 CONFLICTS

Duty to Avoid Conflicts of Interest

3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

Commentary

[1] As defined in rule 1.1-1, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. In this context, "substantial risk" means that the risk is significant and plausible, even if it is not certain or even probable that the material adverse effect will occur. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

[2] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

[3] In order to assess whether there is a conflict of interest, the lawyer is required to consider the lawyer's duties to current, former and joint clients, third persons, as well as the lawyer's own interests.

Representation

[4] Representation means acting for a client and includes the lawyer's advice to and judgment on behalf of the client.

The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests

[5] The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Aspects of the duty of loyalty owed to a current client are the duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests. Current clients must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

[6] [FLSC - not in use]

[7] Accordingly, factors for the lawyer's consideration in determining whether a conflict of interest exists include

(a) the immediacy of the legal interests;

(b) whether the legal interests are directly adverse;

(c) whether the issue is substantive or procedural;

(d) the temporal relationship between the matters;

(e) the significance of the issue to the immediate and long-term interests of the clients involved; and

(f) the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of Conflicts of Interest

[8] Conflicts of interest can arise in many different circumstances. The following are examples of situations in which conflicts of interest commonly arise requiring a lawyer to take particular care to determine whether a conflict of interest exists:

(a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.

(b) A lawyer provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.

(c) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

(i) A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

(d) A lawyer has a sexual or close personal relationship with a client.

(i) Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning their affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by their lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

(e) A lawyer or their law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

These two roles may result in a conflict of interest or other problems because they may

(i) affect the lawyer's independent judgment and fiduciary obligations in either or both roles,

(ii) obscure legal advice from business and practical advice,

(iii) jeopardize the protection of lawyer and client privilege, and

(iv) disqualify the lawyer or the law firm from acting for the organization.

(f) Sole practitioners who practise with other licensees in cost-sharing or other arrangements represent clients on opposite sides of a dispute. See rule 3.3-1, Commentary [7]

[New and amended – October 2014]

Consent

3.4-2 A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and it is reasonable for the lawyer to conclude that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

(a) Express consent must be fully informed and voluntary after disclosure.

(b) Consent may be implied and need not be in writing where all of the following apply:

(i) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel,

(ii) the matters are unrelated,

(iii) the lawyer has no relevant confidential information from one client that might reasonably affect the representation of the other client, and

(iv) the client has commonly consented to lawyers acting for and against it in unrelated matters.

Commentary

[0.1] Rule 3.4-2 permits a client to accept the risk of material impairment of representation or loyalty. However, the lawyer would be unable to act where it is reasonable to conclude that representation or loyalty will be materially impaired even with client consent. Possible material impairment may be waived but actual material impairment cannot be waived.

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in advance

[4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

[5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Implied consent

[6] In some cases consent may be implied, rather than expressly granted. As the Supreme Court held in *R.* v. *Neil* and in *Strother v. 3464920 Canada Inc*, however, the concept of implied consent is applicable in exceptional cases only. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the representation of the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

[New – October 2014]

Dispute

3.4-3 Despite rule 3.4-2, a lawyer shall not represent opposing parties in a dispute.

Commentary

[1] A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending the rules in Section 3.4.

[Amended – October 2014]

3.4-4 [FLSC - not in use]

Joint Retainers

3.4-5 Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

[1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

[2] A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with this rule. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with rules 3.3-1 to 3.3-6 (Confidentiality), the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

[3] After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-7.

[3.1] Joint retainers should be distinguished from separate retainers in which a law firm is retained to assist two or more clients competing at the same time for the same opportunity such as, for example, by competing bids in a corporate acquisition or competing applications for a single license. Each client would be represented by different lawyers in the firm. Since competing retainers of this kind are not joint retainers, information received can be treated as confidential and not disclosed to the client in the competing retainer. However, competing retainers to pursue the same opportunity require express consent pursuant to rule 3.4-2 because a conflict of interest will exist and the retainers will be related. With consent, confidentiality screens as described in rules 3.4-17 to 3.4-26 would be permitted between competing retainers to pursue the same opportunity. But confidentiality screens are not permitted in a joint retainer because rule 3.4-5(b) does not permit treating information received in connection with the joint retainer as confidential so far as any of the joint clients are concerned.

[Amended – October 2014]

3.4-6 If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

3.4-7 When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer shall obtain their consent.

Commentary

[1] Consent in writing, or a record of the consent in a separate written communication to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that a contentious issue will arise between them or their interests, rights or obligations will diverge as the matter progresses.

3.4-8 Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer, the lawyer shall not advise either of them on the contentious issue and the following rules apply:

(a) The lawyer shall

(i) refer the clients to other lawyers for that purpose; or

(ii) if no legal advice is required and the clients are sophisticated, advise them that they have the option to settle the contentious issue by direct negotiation in which the lawyer does not participate;

(b) If the contentious issue is not resolved, the lawyer shall withdraw from the joint representation.

[Amended – October 2014]

Commentary

[1] This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

[2] If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

3.4-9 Despite rule 3.4-8, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and shall refer the other or others to another lawyer for that purpose.

Acting Against Former Clients

3.4-10 Unless the former client consents, a lawyer shall not act against a former client in

(a) the same matter,

(b) any related matter, or

(c) save as provided by rule 3.4-11, any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary

[1] Unlike rules 3.4-1 through 3.4-9, which deal with current client conflicts, rules 3.4.10 and 3.4-11 address conflicts where the lawyer acts against a former client. Rule 3.4-10 guards against the misuse of confidential information from a previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client's position on a matter that was central to a previous retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

[Amended – October 2014]

3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client provided that:

(a) the former client consents to the other lawyer acting; or

(b) the law firm establishes that it has taken adequate measures on a timely basis to ensure that there will be no risk of disclosure of the former client's confidential information to the other lawyer having carriage of the new matter.

[Amended – October 2014]

Commentary

[1] The guidelines at the end of the Commentary to rule 3.4-26 regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for another lawyer in the lawyer's firm to act against the former client.

Affiliations Between Lawyers and Affiliated Entities

3.4-11.1 Where there is an affiliation, before accepting a retainer to provide legal services to a client jointly with non-legal services of an affiliated entity, a lawyer shall disclose to the client

(a) any possible loss of solicitor and client privilege because of the involvement of the affiliated entity, including circumstances where a non-lawyer or non-lawyer staff of the affiliated entity provide services, including support services, in the lawyer's office;

(b) the lawyer's role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be;

(c) any financial, economic or other arrangements between the lawyer and the affiliated entity that may affect the independence of the lawyer's representation of the client, including whether the lawyer shares in the revenues, profits or cash flows of the affiliated entity; and

(d) agreements between the lawyer and the affiliated entity, such as agreements with respect to referral of clients between the lawyer and the affiliated entity, that may affect the independence of the lawyer's representation of the client.

3.4-11.2 Where there is an affiliation, after making the disclosure as required by rule 3.4-11.1, the lawyer shall obtain the client's consent before accepting a retainer under rule 3.4-11.1.

3.4-11.3 Where there is an affiliation, a lawyer shall establish a system to search for conflicts of interest of the affiliation.

Commentary

[1] Lawyers practising in an affiliation are required to control the practice through which they deliver legal services to the public. They are also required to address conflicts of interest in respect of a proposed retainer by a client as if the lawyer's practice and the practice of the affiliated entity were one where the lawyers accept a retainer to provide legal services to that client jointly with non-legal services of the affiliated entity. The affiliation is subject to the same conflict of interest rules as apply to lawyers and law firms. This obligation may extend to inquiries of offices of affiliated entities outside of Ontario where those offices are treated economically as part of a single affiliated entity.

[2] In reference to paragraph (a) of rule 3.4-11.1, see also subsection 3(2) of By-Law 7.1 (Operational Obligations and Responsibilities).

[Amended – January 2008]

Acting for Borrower and Lender

3.4-12 Subject to rule 3.4-14, a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

3.4-13 In rules 3.4-14 to 3.4-16 "lending client" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

3.4-14 Provided there is compliance with this rule and rules 3.4-15 to 3.4-19, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

(a) the lender is a lending client;

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;

(c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction;

(c.1) the consideration for the mortgage or loan does not exceed $50,000; or

(d) the lender and borrower are not at "arm's length" as defined in section 251 of the *Income Tax Act* (Canada).

3.4 -15 When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

[1] What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

3.4-16 If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to

(a) provide the advice described in rule 3.4-5 to the lending client before accepting the retainer**;**

(b) provide the advice described in rule 3.4-6; or

(c) obtain the consent of the lending client as required by rule 3.4-7, including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

[1] Rules 3.4-13 and 3.4-16 are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.

[2] Rule 3.4-16 applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

Multi-discipline Practice

3.4-16.1 A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates observe the rules in Section 3.4 for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

[Amended - June 2009]

Short-term Limited Legal Services

3.4-16.2 In this rule and rules 3.4-16.3 to 3.4-16.6,

"*pro bono* client" means a client to whom a lawyer provides short-term limited legal services;

"short-term limited legal services" means *pro bono* summary legal services provided by a lawyer to a client under the auspices of Pro Bono Law Ontario's Law Help Ontario program for matters in the Superior Court of Justice or in Small Claims Court, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

3.4-16.3 A lawyer engaged in the provision of short-term limited legal services may provide legal services to a *pro bono* client unless

(a) the lawyer knows or becomes aware that the interests of the *pro bono* client are directly adverse to the immediate interests of another current client of the lawyer, the lawyer's firm or Pro Bono Law Ontario; or

(b) the lawyer has or, while providing the short-term limited legal services, obtains confidential information relevant to a matter involving a current or former client of the lawyer, the lawyer's firm or Pro Bono Law Ontario whose interests are adverse to those of the *pro bono* client.

3.4-16.4 A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a *pro bono* client may act for other clients of the law firm whose interests are adverse to the *pro bono* client so long as adequate and timely measures are in place to ensure that no disclosure of the *pro bono* client's confidential information is made to the lawyer acting for the other clients.

3.4-16.5 A lawyer who is unable to provide short-term limited legal services to a *pro bono* client because of the operation of rules 3.4-16.3(a) or 3.4-16.3(b) shall cease to provide short term limited legal services to the *pro bono* client as soon as the lawyer actually becomes aware of the adverse interest or as soon as he or she has or obtains the confidential information referred to in rule 3.4-16.3 and the lawyer shall not seek the *pro bono* client's waiver of the conflict.

3.4-16.6 In providing short-term limited legal services, a lawyer shall

(a) ensure, before providing the legal services, that the appropriate disclosure of the nature of the legal services has been made to the client; and

(b) determine whether the client may require additional legal services beyond the short-term limited legal services and if additional services are required or advisable, encourage the client to seek further legal assistance.

Commentary

[1] Short term limited legal service programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of Pro Bono Law Ontario (PBLO) and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the *pro bono* services described in rule 3.4-16.2 are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

[2] Rules 3.4-16.2 to 3.4-16.6 apply in circumstances in which the limited nature of the legal services being provided by a lawyer significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term limited legal services only if the lawyer has actual knowledge of a conflict of interest between the *pro bono* client and an existing or former client of the lawyer, the lawyer's firm or PBLO. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term limited legal services.

[3] The lawyer's knowledge would be based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consultation and in the client's application to PBLO for legal assistance.

[4] The personal disqualification of a lawyer participating in PBLO's program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

[5] Confidential information obtained by a lawyer representing a *pro bono* client, as defined in rule 3.4-16.2, will not be imputed to the lawyer's licensee partners, associates and employees or non-licensee partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services, and may act in future for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services.

[6] Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Rule 3.4-16.4 extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rules 3.4-17 to 3.4-26) to the situation of a law firm acting against a current client of the firm in providing short term limited legal services. Measures that the lawyer providing the short-term limited legal services should take to ensure the confidentiality of information of the client's information include

(a) having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the *pro bono* client;

(b) identifying relevant files, if any, of the *pro bono* client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and

(c) ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

[7] Rule 3.4-16.5 precludes a lawyer from obtaining a waiver in respect of conflicts of interest that arise in providing short-term legal services.

[New – April 22, 2010]

Lawyers Acting for Transferor and Transferee in Transfers of Title

3.4-16.7 Subject to rule 3.4-16.8, an individual lawyer shall not act for or otherwise represent both the transferor and the transferee in a transfer of title to real property.

3.4-16.8 Rule 3.4-16.7 does not prevent a law firm of two or more lawyers from acting for or otherwise representing a transferor and a transferee in a transfer of title to real property so long as the transferor and transferee are represented by different lawyers in the firm and there is no violation of rule 3.4.

3.4-16.9 So long as there is no violation of the rules in Section 3.4, an individual lawyer may act for or otherwise represent both the transferor and the transferee in a transfer of title to real property if

(a) the *Land Registration Reform Act* permits the lawyer to sign the transfer on behalf of the transferor and the transferee;

(b) the transferor and transferee are "related persons" as defined in section 251 of the *Income Tax Act (Canada);* or

(c) the lawyer practices law in a remote location where there are no other lawyers that either the transferor or the transferee could without undue inconvenience retain for the transfer.

[Effective March 31, 2008]

Conflicts from Transfer Between Law Firms

Interpretation and Application of Rule

3.4-17 In rules 3.4-17 to 3.4-26

"client", includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them, and those defined as a client in the definitions part of this Code;

"confidential information" means information that is not generally known to the public obtained from a client; and

"matter" means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

Commentary

[1] The duties imposed by rules 3.4-18 to 3.4-26 concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

3.4-18 Rules 3.4-17 to 3.4-26 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client ("former client");

(b) the interests of those clients in that matter conflict; and

(c) the transferring lawyer actually possesses relevant information respecting that matter.

3.4-19 Rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial attorney general or department of justice who, after transferring from one department, ministry or agency to another, continues to be employed by that attorney general or department of justice.

Commentary

[1] The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.

[2] Lawyers and support staff — This rule is intended to regulate lawyers and articling law students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.

[3] Government employees and in-house counsel — The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

[4] Law firms with multiple offices — This rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous

each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public interest that it continue to represent its client in the matter.

Law Firm Disqualification

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter referred to in rule 3.4-18(a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur,

(ii) the extent of prejudice to any party,

(iii) the good faith of the parties,

(iv) the availability of suitable alternative counsel, and

(v) issues affecting the public interest.

Commentary

[1] The circumstances enumerated in rule 3.4-20(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While subparagraphs (ii) to (iv) are self-explanatory, subparagraph (v) includes governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.

3.4-21 For greater certainty, rule 3.4-20 is not intended to interfere with the discharge by an Attorney General or their counsel or agent (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.

3.4-22 If the transferring lawyer actually possesses information relevant to a matter referred to in rule 3.4-18(a) respecting the former client that is not confidential information but that may prejudice the former client if disclosed to a member of the new law firm

(a) the lawyer must execute an affidavit or solemn declaration to that effect; and

(b) the new law firm must

(i) notify its client and the former client or, if the former client is represented in the matter, the former client's lawyer, of the relevant circumstances and the firm's intended action under rules 3.4-17 to 3.4-26, and

(ii) deliver to the persons notified under subparagraph (i) a copy of any affidavit or solemn declaration executed under paragraph (a).

Transferring Lawyer Disqualification

3.4-23 Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 or 3.4-22 must not

(a) participate in any manner in the new law firm's representation of its client in the matter; or

(b) disclose any confidential information respecting the former client.

3.4-24 Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in rule 3.4-20 or 3.4-22.

Determination of Compliance

3.4-25 Anyone who has an interest in, or who represents a party in, a matter referred to in rules 3.4-17 to 3.4-26 may apply to a tribunal of competent jurisdiction for a determination of any aspect of those rules.

Due Diligence

3.4-26 A lawyer must exercise due diligence in ensuring that each member and employee of the lawyer's law firm, and each other person whose services the lawyer has retained

(a) complies with rules 3.4-17 to 3.4-26, and

(b) does not disclose confidential information of

(i) clients of the firm, and

(ii) any other law firm in which the person has worked.

Commentary

MATTERS TO CONSIDER

[1] When a law firm ("new law firm") considers hiring a lawyer or an ~~articled law~~ articling student

("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. The transferring lawyer and the new law firm need to identify, first, all cases in which

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client;

(b) the interests of the clients of the two law firms conflict; and

(c) the transferring lawyer actually possesses relevant information.

[2] The new law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the client of the former law firm ("former client") that is confidential and that may prejudice the former client if disclosed to a member of the new law firm. If this element exists, the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the interests of justice, based on relevant circumstances.

[3] In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences.

MATTERS TO CONSIDER BEFORE HIRING A POTENTIAL TRANSFEREE

[4] After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

A. If a conflict exists

[5] If the transferring lawyer actually possesses relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless

(a) the new law firm obtains the former client's consent to its continued representation of its client in that matter; or

(b) the new law firm complies with rule 3.4-20(b) and, in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

[6] If the new law firm seeks the former client's consent to the new law firm continuing to act, it will in all likelihood be required to satisfy the former client that 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. The former client's consent must be obtained before the transferring lawyer is hired.

[7] Alternatively, if the new law firm applies under rule 3.4-25 for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of rule 3.4-20(b). Ideally, this process should be completed before the transferring person is hired.

B. If no conflict exists

[8] Although the notice required by rule 3.4-22 need not necessarily be made in writing, it would be

prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given or its timeliness and content.

[9] The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client because, in the absence of such consent, the transferring lawyer may not act.

[10] If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information that may prejudice the former client if disclosed.

[11] A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client. A former client who disputes the allegation of no such confidential information may apply under rule 3.4-25 for a determination of that issue.

C. If the new law firm is not sure whether a conflict exists

[12] There may be some cases in which the new law firm is not sure whether the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm. In such circumstances, it would be prudent for the new law firm to seek guidance from the Law Society before hiring the transferring lawyer.

REASONABLE MEASURES TO ENSURE NON-DISCLOSURE OF CONFIDENTIAL INFORMATION

[13] As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure of the former client's confidential information will occur to any member of the new law firm:

(a) when the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm, and

(b) when the new law firm is not sure whether the transferring lawyer actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

[14] It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information."

[15] In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, 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 other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

[16] The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled "Conflict of Interest Disqualification: Martin v. Gray and Screening Methods" (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

[17] When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new "law firm", the interests of the new client (Her Majesty or the corporation) must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the 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 rule 3.4-20(b), particularly subparagraph (v). Only when the entire firm must be disqualified under rule 3.4-20 will it be necessary to refer conduct of the matter to outside counsel.

[18] GUIDELINES

(a) The screened lawyer should have no involvement in the new law firm's representation of its client.

(b) The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

(c) No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.

(d) The current matter should be discussed only within the limited group that is working on the matter.

(e) The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

(f) No member of the new law firm should show the screened lawyer any documents relating to the current representation.

(g) The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

(h) Appropriate law firm members should provide undertakings setting out that they have adhered to and will continue to adhere to all elements of the screen.

(i) The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised

  (i) that the screened lawyer is now with the new law firm, which represents the current client; and

  (ii) of the measures adopted by the new law firm to ensure that there will be no disclosure of

confidential information.

(j) The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.

(k) The screened lawyer should use associates and support staff different from those working on the current matter.

(l) In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

Doing Business with A Client

3.4-27 [FLSC – not in use]

3.4-28 A lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

Commentary

[1] This provision applies to any transaction with a client, including

(a) lending or borrowing money;

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift;

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

(e) recommending an investment; and

(f) entering into a common business venture.

[2] The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Transactions with Clients

3.4-29 Subject to rule 3.4-30, if a client intends to enter into a transaction with their lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

(b) recommend and require that the client receive independent legal advice and

(c) if the client requests the lawyer to act, obtain the client's consent.

Commentary

[1] If the lawyer does not choose to disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

[2] A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

[3] Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

[4] If the investment is by borrowing from the client, the transaction may fall within the requirements of rule 3.4-31.

3.4-30 When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Borrowing from Clients

3.4-31 A lawyer must not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or

(b) the client is a related person as defined in section 251 of the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary

[1] Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Certificate of Independent Legal Advice

3.4-32 A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

3.4-33 Subject to rule 3.4-31, if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

3.4-34 If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must:

(a) disclose and explain the nature of the conflicting interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

"related persons" means related persons as defined in section 251 of the *Tax Act* (Canada); and

"syndicated mortgage" means a mortgage having more than one investor.

3.4-34.1 A lawyer engaged in the private practice of law in Ontario shall not directly, or indirectly through a corporation, syndicate, partnership, trust, or other entity in which the lawyer or a related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities

(a) hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives

(i) a complete reporting letter on the transaction,

(ii) a trust declaration signed by the person in whose name the mortgage or any security instrument is registered, and

(iii) a copy of the duplicate registered mortgage or security instrument,

(b) arrange or recommend the participation of a client or other person as an investor in a syndicated mortgage or loan where the lawyer is an investor unless the lawyer can demonstrate that the client or other person had independent legal advice in making the investment, or

(c) sell mortgages or loans to, or arrange mortgages or loans for, clients or other persons except in accordance with the skill, competence, and integrity usually expected of a lawyer in dealing with clients.

Commentary

ACCEPTABLE MORTGAGE OR LOAN TRANSACTIONS

[1] A lawyer may engage in the following mortgage or loan transactions in connection with the practice of law

(a) a lawyer may invest in mortgages or loans personally or on behalf of a related person or a combination thereof;

(b) a lawyer may deal in mortgages or loans as an executor, administrator, committee, trustee of a testamentary or inter vivos trust established for purposes other than mortgage or loan investment or under a power of attorney given for purposes other than exclusively for mortgage or loan investment; and

(c) a lawyer may collect, on behalf of clients, mortgage or loan payments that are made payable in the name of the lawyer under a written direction to that effect given by the client to the mortgagor or borrower provided that such payments are deposited into the lawyer's trust account.

[2] A lawyer may introduce a borrower (whether or not a client) to a lender (whether or not a client) and the lawyer may then act for either, and when rule 3.4-14 applies, the lawyer may act for both.

Disclosure

3.4-34.2 Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer that would be of concern to a proposed investor.

No Advertising

3.4-34.3 A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities.

Guarantees by a Lawyer

3.4-35 Except as provided by rule 3.4-36, a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

3.4-36 A lawyer may give a personal guarantee in the following circumstances

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and

  (i) the lawyer has complied with the rules in Section 3.4 (Conflicts), in particular, rules 3.4-27 to 3.4-36 (Doing Business with a Client), and

  (ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Testamentary Instruments and Gifts

3.4-37 If a will contains a clause directing that the lawyer who drafted the will be retained to provide services in the administration of the client's estate, the lawyer should, before accepting that retainer, provide the trustees with advice, in writing, that the clause is a non-binding direction and the trustees can decide to retain other counsel.

3.4-38 Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

[New – October 2014]

3.4-39 [FLSC - not in use]

Judicial Interim Release

3.4-40 Subject to Rule 3.4-41, a lawyer shall not in respect of any accused person for whom the lawyer acts

(a) act as a surety for the accused;

(b) deposit with a court the lawyer's own money or that of any firm in which the lawyer is a partner to secure the lawyer's release;

(c) deposit with any court other valuable security to secure the accused's release; or

(d) act in a supervisory capacity to the accused.

3.4-41 A lawyer may do any of the things referred to in rule 3.4-40 if the accused is in a family relationship with the lawyer and the accused is represented by the lawyer's partner or associate.

[New – October 2014]

SECTION 3.5 PRESERVATION OF CLIENTS' PROPERTY

Preservation of Clients' Property

3.5-1 [FLSC - not in use]

3.5-2 A lawyer shall care of a client's property as a careful and prudent owner would when dealing with like property and shall observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

Commentary

[1] The duties concerning safekeeping, preserving, and accounting for clients' monies and other property are set out in the by-laws made under the *Law Society Act*.

[2] 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. The 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 and should, subject to any rights of lien, promptly return them to the client upon request or at the conclusion of the lawyer's retainer.

[3] [FLSC - not in use]

[4] If the lawyer withdraws from representing a client, the lawyer is required to comply with the rules in Section 3.7 (Withdrawal from Representation).

[Amended – October 2014]

Notification of Receipt of Property

3.5-3 A lawyer shall promptly notify the 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 Client's Property

3.5-4 A lawyer shall clearly label and identify the client's property and place it in safekeeping distinguishable from the lawyer's own property.

3.5-5 A lawyer shall maintain such records as necessary to identify a client's property that is in the lawyer's custody.

Accounting and Delivery

3.5-6 A lawyer shall account promptly for a client's property that is in the lawyer's custody and upon request shall deliver it to the order of the client or, if appropriate, at the conclusion of the retainer.

3.5-7 If a lawyer is unsure of the proper person to receive a client's property, the lawyer shall apply to a tribunal of competent jurisdiction for direction.

Commentary

[1] The 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 relevant constitutional and statutory provisions such as those found in the *Income Tax Act (Canada)* and the *Criminal Code.*

[2], [3] and [4] [FLSC - not in use]

[Amended – October 2014]

SECTION 3.6 FEES AND DISBURSEMENTS

Reasonable Fees and Disbursements

3.6-1 A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

3.6-1.1 A lawyer shall not charge a client interest on an overdue account save as permitted by the *Solicitors Act* or as otherwise permitted by law.

Commentary

[1] What is a fair and reasonable fee will depend upon 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,

(c.1) the amount involved or the value of the subject-matter,

(d) the results obtained,

(e) fees authorized by statute or regulation,

(f) special circumstances, such as the loss of other retainers, 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.

[2] 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, 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.

[3] 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.

[4] A lawyer should be ready to explain the basis of the fees and disbursements 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.

[4.1] A lawyer should inform a client about their rights to have an account assessed under the *Solicitors Act*.

[Amended – October 2014]

Contingency Fees and Contingency Fee Agreements

3.6-2 Subject to rule 3.6-1, except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the *Solicitors Act* and the regulations thereunder, that provides that the lawyer's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer's services are to be provided.

[Amended – November 2002, October 2004]

Commentary

[1] In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the 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 written 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. Such agreement under the *Solicitors Act* must receive judicial approval. 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.

[New - October 2002, Amended October 2004, October 2014]

[2] [FLSC - not in use]

Statement of Account

3.6-3 In a statement of an account delivered to a client, a lawyer shall clearly and separately detail the amounts charged as fees and as disbursements.

Joint Retainer

3.6-4 Where a lawyer is acting for two or more clients in the same matter, the lawyer shall divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

Division of Fees and Referral Fees

3.6-5 With the client's consent~~s~~, fees for a matter may be divided between licensees who are not in the same firm, if the fees are divided in proportion to the work done and the responsibilities assumed.

3.6-6 A lawyer who refers a matter to another licensee because of the expertise and ability of the other licensee to handle the matter and the referral was not made because of a conflict of interest, the referring lawyer may accept and the other licensee 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.

3.6-7 A lawyer shall not

(a) directly or indirectly share, split, or divide their fees with any person who is not a licensee, or

(b) give any financial or other reward to any person who is not a licensee for the referral of clients or client matters.

[Amended - April 2008, October 2014]

Commentary

[1] This rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. However, 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.

(d) [FLSC - not in use]

[New - May 2001, Amended – October 2014]

Exception for Multi-discipline Practices and Interprovincial and International Law Firms

3.6-8 Rule 3.8-7 does not apply to

(a) multi-discipline practices of lawyer and non-licensee partners where the partnership agreement provides for the sharing of fees, cash flows or profits among 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 Ontario and non-Canadian lawyers who otherwise comply with the rules in Section 3.6.

[Amended – June 2009]

Commentary

[1] An affiliation is different from a multi-discipline practice established in accordance with the by-laws under the *Law Society Act*, an interprovincial law partnership or a partnership between Ontario lawyers and foreign lawyers. An affiliation is subject to rule 3.6-7. 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.

[New - May 2001]

Payment and Appropriation of Funds

3.6-9 [FLSC - not in use]

3.6-10 A lawyer shall not appropriate any funds of the client held in trust or otherwise under the lawyer's control for or on account of fees except as permitted by the by-laws under the *Law Society Act*.

Commentary

[1] 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 by-laws of the Law Society.

[2] 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.

3.6-11 If the amount of fees or disbursements charged by a lawyer is reduced on an assessment, the lawyer must repay the monies to the client as soon as is practicable.

3.6-12 [FLSC - not in use]

[Amended – October 2014]

SECTION 3.7 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

3.7-1 A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.

[Amended – October 2014]

Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, the 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.

[2] 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 about what will constitute reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. Where 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.

[3] 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.

[4] 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.

[Amended – October 2014]

Optional Withdrawal

3.7-2 Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

[1]A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by their 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, there is a material breakdown in communications, 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.

[Amended – October 2014]

Non-payment of Fees

3.7-3 Subject to the rules about criminal proceedings and the direction of the tribunal, where, 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.

[Amended – October 2014]

Withdrawal from Criminal Proceedings

3.7-4 A lawyer who has agreed to act in a criminal case may withdraw because the client has not paid the agreed fee or for other adequate cause if the interval between a withdrawal and the date set for the trial of the case is sufficient to enable the client to obtain another licensee to act in the case and to allow the other licensee adequate time for preparation, and the lawyer

[Amended – June 2007]

(a) notifies the client, preferably 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.

[Amended – October 2014]

Commentary

[1] 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.

3.7-5 A lawyer who has agreed to act in a criminal case may not withdraw because of non-payment of fees if the date set for the trial of the case is not far enough removed to enable the client to obtain another licensee or to enable the other licensee to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests.

3.7-6 In circumstances where a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees, and there is not sufficient time between a notice to the client of the lawyer's intention to withdraw and the date set for trial to enable the client to obtain another licensee and to enable such licensee to prepare adequately for trial:

(a) the lawyer should, unless instructed otherwise by the client, attempt to have the trial date adjourned;

(b) the lawyer may withdraw from the case only with the permission of the court before which the case is to be tried.

[Amended – June 2007, October 2014]

Commentary

[1] Where 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.

Mandatory Withdrawal

3.7-7 Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

(a) discharged by the client;

(b) the client's instructions require the lawyer to act contrary these rules or by-laws under the *Law Society Act;*

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

[Amended – March 2004, October 2014]

Manner of Withdrawal

3.7-8 When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor legal practitioner.

3.7-9 Upon discharge or withdrawal, a lawyer shall

(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 a new legal practitioner 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 information that may be required 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; and

(f) co-operate with the successor legal practitioner so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

[Amended – June 2009, October 2014]

Commentary

[1] 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.

[2] 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 upon the client's position. Generally speaking, the lawyer should not enforce the lien if to do so would prejudice materially the client's position in any uncompleted matter.

[3] 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.

[4] Co-operation with the successor legal practitioner 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.

[5] 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 legal practitioner or practitioners to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

[Amended – June 2009, October 2014]

Duty of Successor Licensee

3.7-10 Before agreeing to represent a client, a successor licensee shall be satisfied that the former licensee approves, has withdrawn, or has been discharged by the client.

[Amended – June 2007]

Commentary

[1] It is quite proper for the successor licensee to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former licensee, 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 licensee acting for the client.

[Amended – June 2007]

Chapter 4 The Practice of Law

SECTION 4.1 MAKING LEGAL SERVICES AVAILABLE

Making Services Available

4.1-1 A lawyer shall make legal services available to the public in an efficient and convenient way.

Commentary

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

[2] 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.

[3] 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.

[4] Right to Decline Representation - A lawyer may decline a particular representation (except when assigned as counsel by a tribunal), but that discretion should 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 decline representation 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 licensee qualified in the particular field and able to act. When a lawyer offers assistance to a client or prospective client in finding another licensee, the assistance should be given willingly and, except where a referral fee is permitted by rule 3.8-6, without charge.

[Amended – October 2014]

Restrictions

4.1-2 In offering legal services, a lawyer shall not use means

(a) that are false or misleading;

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

(c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover;

(d) that are intended to influence a person who has retained another lawyer for a particular matter to change their lawyer for that matter, unless the change is initiated by the person or the other lawyer; or

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

Commentary

[1] A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering their 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 or exploitive or other means that bring the profession or the administration of justice into disrepute.

[Amended – October 2014]

SECTION 4.2 MARKETING

Marketing of Professional Services

4.2-0 In this rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

4.2-1 A lawyer may market legal services if the marketing

(a) is demonstrably true, accurate and verifiable;

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

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

Commentary

[1] 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;

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

Advertising of Fees

4.2-2 A lawyer may advertise fees charged by the lawyer for legal services if

(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.

[Amended – October 2014]

SECTION 4.3 ADVERTISING NATURE OF PRACTICE

Certified Specialist

4.3-1 A lawyer shall not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Law Society.

[Amended – October 2014]

Commentary

[1] Lawyer's 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.

[2] In accordance with s. 20(1) of the Law Society's By-law 15 on Certified Specialists, the 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.

[3] In a case where a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm which makes reference to the status of a firm member as a specialist, in media circulated concurrently in the other jurisdiction(s) and the certifying jurisdiction, shall not be considered as offending this rule if the certifying authority or organization is identified.

[4] A lawyer may advertise areas of practice, including preferred areas of practice or that their practice is restricted 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 5 Relationship to The Administration of Justice

SECTION 5.1 THE LAWYER AS ADVOCATE

Advocacy

5.1-1 When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary

[1] 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.

[2] 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.

[3] 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.

[4] 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.

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

[6] 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.

[7] 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.

[8] 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.

[9] 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.

[10] 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.

[Amended – October 2014]

5.1-2 When acting as an advocate, a lawyer shall not

(a) abuse the process of the tribunal by instituting or prosecuting proceedings which, 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 the 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 the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,

(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, ~~and~~

(o) needlessly inconvenience a witness; or

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

[Amended – October 2014]

Commentary

[1] 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.

[2] 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, where the complainant or potential complaint is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. Where 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.

[3] 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 secure a civil advantage for the client. See also rules 3.2-5 and 3.2-5.1 and accompanying commentary.

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

[Amended – October 2014]

Duty as Prosecutor

5.1-3 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

[1] 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 defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

Discovery Obligations

5.1-3.1 Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate

(a) shall explain to their client

(i) the necessity of making full disclosure of all documents relating to any matter in issue, and

(ii) the duty to answer to the best of their knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal;

(b) shall assist the client in fulfilling their obligations to make full disclosure; and

(c) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

Disclosure of Error or Omission

5.1-4 A lawyer who has unknowingly done or failed to do something that if done or omitted knowingly would have been in breach of the rules in Section 5.1 and who discovers it, shall, subject to the rules in Section 3.3 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Commentary

[1] If the client desires that a course be taken that would involve a breach of the rules in Section 5.1, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done the lawyer should, subject to the rules in Section 3.7 (Withdrawal from Representation), withdraw or seek leave to do so.

Courtesy

5.1-5 A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings.

[Amended – October 2014]

Commentary

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

[Amended – October 2014]

Undertakings

5.1-6 A lawyer must strictly and scrupulously fulfill any undertakings given by him or her and honour any trust conditions accepted in the course of litigation.

[Amended – June 2009]

Commentary

[0.1] Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility.

[1] A lawyer should also be guided by the provisions of rule 7.2-11 (Undertakings and Trust Conditions).

Agreement on Guilty Plea

5.1-7 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.

5.1-8 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 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.

[Amended – October 2014]

Commentary

[1] The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

SECTION 5.2 THE LAWYER AS WITNESS

Submission of Evidence

5.2-1 A lawyer who appears as advocate shall not testify or submit their 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
(b) the matter is purely formal or uncontroverted.

[Amended – October 2014]

Commentary

[1] 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 to receive special treatment because of professional status.

Appeals

5.2-2 A lawyer who is a witness in proceedings shall 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.

[Amended – October 2014]

SECTION 5.3 INTERVIEWING WITNESSES

Interviewing Witnesses

5.3-1 Subject to the rules on communication with a represented party set out in rules 7.2-4 to 7.2-8.2, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer shall 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.

[Amended – November 2007]

SECTION 5.4 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

Communication with Witnesses Giving Evidence

5.4-1 [FLSC - not in use]

5.4-2 Subject to the direction of the tribunal, the lawyer shall 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 that has not been covered in the examination up to that point;

(a.1) during examination-in-chief by another legal practitioner of a witness who is unsympathetic to the lawyer's cause, the lawyer not conducting the examination-in-chief may discuss the evidence with the witness;

(a.2) between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness, the lawyer ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(b) during cross-examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding;

(c) [FLSC - not in use]

(c.1) between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination;

(c.2) during cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause, the lawyer may discuss the witness's evidence with the witness;

(c.3) during cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness; and

(c.4) during re-examination of a witness called by an opposing legal practitioner, if the witness is sympathetic to the lawyer's cause the lawyer ought not to discuss the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.

[Amended – June 2009]

Commentary

[0.1] If any question arises whether the lawyer's behaviour may be in violation of this rule, it will often be appropriate to obtain the consent of the opposing legal practitioner or leave of the tribunal before engaging in conversations that may be considered improper.

[1] to [6] [FLSC - not in use]

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

[Amended – June 2009]

SECTION 5.5 RELATIONS WITH JURORS

Communications Before Trial

5.5-1 When acting as an advocate, before the trial of a case, a lawyer shall 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

[1] 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 juror or with any member of the 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

5.5-2 Unless the judge and opposing counsel have previously been made aware of the information, a lawyer acting as an advocate shall 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.

5.5-3 A lawyer shall 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.

[Amended – October 2014]

Communication During Trial

5.5-4 Except as permitted by law, when acting as an advocate, a lawyer shall not during a trial of a case communicate with or cause another to communicate with any member of the jury.

5.5-5 and 5.5-6 [FLSC - not in use]

Commentary

[1] The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of members of their family.

SECTION 5.6 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

5.6-1 A lawyer shall encourage public respect for and try to improve the administration of justice.

Commentary

[1] The obligation set out 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.

[2] The 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 maintain public respect for it.

[3] Criticizing Tribunals - Although proceedings and decisions of tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, 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, bearing in mind that 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, where 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 is contributing to greater public understanding of and therefore respect for the legal system.

[4] 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

5.6-2 A lawyer who seeks legislative or administrative changes shall disclose the interest being advanced, whether the lawyer's interest, the client’s interest, or the public interest.

Commentary

[1] 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

5.6-3 A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility shall inform the persons having responsibility for security at the facility and give particulars.

[Amended – October 2014]

Commentary

[1] Where possible, the lawyer should suggest solutions to the anticipated problem such as (a) the necessity for further security, and (b) that judgment ought to be reserved.

[2] Where 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.

[3] If client information is involved in those situations, the lawyer should be guided by the provisions of the rules 3.3-1 to 3.3-6 (Confidentiality).

SECTION 5.7 LAWYERS AS MEDIATORS

Role of Mediator

5.7-1 A lawyer who acts as a mediator shall, 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 the solicitor-client privilege.

Commentary

[1] 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 information on the consequences if the mediation fails.

[2] 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 the rules in Section 3.4 (Conflicts) and its commentaries and the common law authorities.

[3] Generally a lawyer-mediator should suggest and encourage the parties to seek the advice of separate counsel before and during the mediation process if they have not already done so.

[4] Where 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.

[Amended – October 2014]

Chapter 6 Relationship to Students, Employees, and Others

SECTION 6.1 SUPERVISION

Direct Supervision Required

6.1-1 A lawyer shall in accordance with the By-Laws

(a) assume complete professional responsibility for their practice of law, and

(b) shall directly supervise non-lawyers to whom particular tasks and functions are assigned.

Commentary

[1] By-Law 7.1 governs the circumstances in which a lawyer may assign certain tasks and functions to a non-lawyer within a law practice. Where a non-lawyer is competent to do work under the supervision of a lawyer, a lawyer may assign work to the non-lawyer. The non-lawyer must be directly supervised by the lawyer. A lawyer is required to review the non-lawyer's work at frequent intervals to ensure its proper and timely completion.

[1.1] A lawyer may permit a non-lawyer to perform tasks assigned and supervised by the lawyer as long as the lawyer maintains a direct relationship with the client or, if the lawyer is in a community legal clinic funded by Legal Aid Ontario, as long as the lawyer maintains a direct supervisory relationship with each client's case in accordance with the supervision requirements of Legal Aid Ontario and assumes full professional responsibility for the work.

[2] A lawyer who practices alone or operates a branch or part-time office should ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work and that legal advice is not given by unauthorized persons, weather in the lawyer's name or otherwise.

[3] to [5] [FLSC - not in use]

[5.1] A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, licensees, public officials, or with the public generally whether within or outside the offices of the law practice.

[5.2] The following examples, which are not exhaustive, illustrate situations where it may be appropriate to assign work to non-lawyers subject to direct supervision.

[5.3] Real Estate – A lawyer may permit a non-lawyer to attend to all matters of routine administration, assist in more complex transactions, draft statements of account and routine documents and correspondence and attend to registrations. The lawyer must not assign to a non-lawyer the ultimate responsibility for review of a title search report or of documents before signing or for review and signing of a letter of requisition, review and signing of a title opinion or review and signing of a reporting letter to the client.

[5.4] In real estate transactions using the system for the electronic registration of title documents ("e-reg" TM), only a lawyer may sign for completeness of any document that requires compliance with law statements.

[5.5] Corporate and Commercial – A lawyer may permit a non-lawyer to attend to all matters of routine administration and to assist in more complex matters and to draft routine documents and correspondence relating to corporate, commercial, and securities matters such as drafting corporate minutes and documents pursuant to corporation statutes, security instruments, security registration documents and contracts of all kinds, closing documents and statements of account, and to attend on filings.

[5.6] Wills, Trusts and Estates – A lawyer may permit a non-lawyer to attend to all matters of routine administration, to assist in more complex matters, to collect information, draft routine documents and correspondence, to prepare income tax returns, to calculate such taxes, to draft executors' accounts and statements of account, and to attend to filings.

[New- November 2007]

6.1-2 to 6.1-4 [FLSC - not in use.]

Electronic Registration of Title Documents

6.1-5 When a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents ("e-reg" TM), the lawyer

(a) shall not permit others, including a non-lawyer employee, to use the lawyer's diskette; and

(b) shall not disclose their personalized e-reg TM pass phrase to others.

6.1-6 When a non-lawyer employed by a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents, the lawyer shall ensure that the non-lawyer

(a) does not permit others to use the diskette, and

(b) does not disclose their personalized e-reg TM pass phrase to others.

Commentary

[1] The implementation across Ontario of a system for the electronic registration of title documents imposes special responsibilities on lawyers and others using the system. Each person in a law office who accesses the e-reg ™ system must have a personalized specially encrypted diskette and personalized e-reg ™ pass phrase. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Moreover, under the system, only lawyers entitled to practise law may make certain prescribed statements. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. Only lawyers entitled to practise law may approve electronic documents containing these statements. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized specially encrypted diskette used to access the system and the personalized electronic registration pass phrase. When in a real estate practice it is permissible for a lawyer to delegate responsibilities to a non-lawyer who has a personalized specially encrypted diskette and a personalized electronic registration pass phrase, the lawyer should ensure that the non-lawyer maintains and understands the importance of maintaining the security of the personalized specially encrypted diskette and the pass phrase.

[2] In real estate transactions using the e-reg ™ system, a lawyer who approves the electronic registration of title documents by a non-lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

[Amended – November 2007]

Title Insurance

6.1-6.1 A lawyer shall not permit a non-lawyer to

(a) provide advice to the client concerning any insurance, including title insurance, without supervision,

(b) present insurance options or information regarding premiums to the client without supervision,

(c) recommend one insurance product over another without supervision, and

(d) give legal opinions regarding the insurance coverage obtained.

[New - March 31, 2008]

Signing E-Reg™ Documents

6.1-6.2 A lawyer who electronically signs a document using e-reg™ assumes complete professional responsibility for the document.

[New - March 31, 2008, Amended – October 2014]

SECTION 6.2 STUDENTS

Recruitment and Engagement Procedures

6.2-1 A lawyer shall observe the procedures of the Law Society about the recruitment of articling students and the engagement of summer students.

Duties of Principal

6.2-2 A lawyer acting as a principal to a student shall 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

[1] A principal or supervising lawyer is responsible for the actions of students acting under their direction.

[New – October 2014]

Duties of Articling Student

6.2-3 An articling student shall act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

SECTION 6.3 SEXUAL HARASSMENT

Definition

6.3-0 In rules 6.3-1 and 6.3-3, sexual harassment is one incident or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature

(a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the recipient(s) of the conduct;

(b) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services;

(c) when submission to such conduct is made implicitly or explicitly a condition of employment;

(d) when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, allocation of files, matters of promotion, raise in salary, job security, and benefits affecting the employee); or

(e) 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.

Commentary

[1] Types of behaviour that constitute sexual harassment include, but are not limited to,

(a) sexist jokes causing embarrassment or offence, or that are by their nature clearly embarrassing or offensive;

[Amended - January 2009]

(b) leering;

(c) the display of sexually offensive material;

(d) sexually degrading words used to describe a person;

(e) derogatory or degrading remarks directed towards members of one sex or one’s sexual orientation;

(f) sexually suggestive or obscene comments or gestures;

(g) unwelcome inquiries or comments about a person's sex life;

(h) unwelcome sexual flirtations, advances, or propositions;

(i) persistent unwanted contact or attention after the end of a consensual relationship;

(j) requests for sexual favours;

(k) unwanted touching;

(l) verbal abuse or threats; and

(m) sexual assault.

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

6.3-1 to 6.3-2 [FLSC - not in use]

Prohibition on Sexual Harassment

6.3-3 A lawyer shall not sexually harass a colleague, a staff member, a client, or any other person.

6.3-4 and 6.3-5 [FLSC - not in use]

SECTION 6.3.1 DISCRIMINATION

Special Responsibility

6.3.1-1 A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the *Ontario Human Rights Code*), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

[Amended – June 2007]

Commentary

[1] The Law Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

[2] This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

[3] Rule 6.3.1 will be interpreted according to the provisions of the Ontario Human Rights Code and related case law.

[4] The Ontario Human Rights Code defines a number of grounds of discrimination listed in rule 6.3.1. For example,

[5] Age is defined as an age that is eighteen years or more.

[Amended - January 2009]

[6] Disability is broadly defined in s. 10 of the Code to include both physical and mental disabilities.

[Amended - January 2009]

[7] Family status is defined as the status of being in a parent-and-child relationship.

[8] Marital status is defined as the status of being married, single, widowed, divorced, or separated and includes the status of living with a person in a conjugal relationship outside marriage.

[Amended - January 2009]

[9] Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the *Criminal Records Act* (Canada) and not revoked) or provincial offences.

[10] The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

[11] There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including

(a) Differentiation on prohibited grounds that creates a disadvantage. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.

[Amended - January 2009]

(b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 6.3.1, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement should only be imposed if driving a vehicle is an essential requirement for the position. Such a requirement may have the effect of excluding from employment persons with disabilities that prevent them from obtaining a licence.

[Amended - January 2009]

[12] Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Ontario Human Rights Code requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

[13] A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

[14] Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the Code.

[15] In addition to prohibiting discrimination, rule 6.3.1 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited.

[Amended - January 2009]

[16] Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in rule 6.3.1. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

Services

6.3.1-2 A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

Employment Practices

6.3.1-3 A lawyer shall ensure that their employment practices do not offend rule 6.3.1-1 and 6.3.1-2.

Commentary

[1] Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario Human Rights Code and related equity legislation.

[2] In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the Ontario Human Rights Code, such questions may be raised at an interview. For example, if an employer has an anti-nepotism policy, the employer may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital status should not be asked.

[Amended - January 2009]

[3] An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex or of a particular creed, ethnic origin, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches rule 6.3.1 unless changing or eliminating the rule would cause undue hardship.

[4] If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the *Ontario Human Rights Code*, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

[5] The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in rule 6.3.1.

[6] The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. However, the following principles are well established.

[7] If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 6.3.1, the rule, requirement or expectation must be examined to determine whether it is “reasonable and *bona fide*”. The following must be taken into account:

(a) if the rule, requirement or expectation is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement, or expectation with the operation of the business; and

(b) ~~i~~f the rule, requirement, or expectation is imposed in good faith and is strongly logically connected to a business necessity, then the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.

[8] The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered to the point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is "undue," that accommodation need not be made.

[Amended – October 2014]

Chapter 7 Relationship to the Law Society and Other Lawyers

SECTION 7.1 RESPONSIBILITY TO THE PROFESSION, THE LAW SOCIETY AND OTHERS

Communications from the Law Society

7.1-1 A lawyer shall reply promptly and completely to any communication from the Law Society in which a response is requested.

[Amended – October 2014]

Meeting Financial Obligations

7.1-2 A lawyer shall promptly meet financial obligations incurred in the course of practice on behalf of clients unless, before incurring such an obligation, the lawyer clearly indicates in writing to the person to whom it is to be owed that it is not to be a personal obligation.

[Amended - January 2009]

Commentary

[1] 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, the lawyer clearly indicates otherwise in advance.

[Amended - January 2009]

[2] 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.

[3] 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 e-mail address of the new lawyer.

Duty to Report Misconduct

7.1-3 A lawyer shall report to the Law Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege,

(a) the misappropriation or misapplication of trust monies;

(b) the abandonment of a law or legal services practice;

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

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

(e) [FLSC - not in use]

(f) any other situation where a licensee's clients are likely to be severely prejudiced.

[Amended – June 2007, October 2014]

Commentary

[1] Unless a licensee 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 Law Society any instance involving a breach of these rules or the rules governing paralegals. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Law Society directly or indirectly (e.g., through another lawyer).

[2] Nothing in this rule is meant to interfere with the traditional solicitor-client relationship. In all cases the report must be made *bona fide* without malice or ulterior motive.

[Amended – June 2007]

[3] 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 Law Society supports Homewood Human Solutions (HHS) and similar support services that are committed to the provision of confidential counselling for licensees. Therefore, lawyers acting in the capacity of peer counsellors for HHS, the Ontario Lawyers Assistance Program (OLAP) or corporations providing similar support services will not be called by the Law 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 Law Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice. The Law Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

[Amended – January 2013]

Encouraging Client to Report Dishonest Conduct

7.1-4 In addition to other advice appropriate in the circumstances, a lawyer shall encourage a client who has a claim or complaint against an apparently dishonest licensee to report the facts to the Law Society as soon as reasonably practicable.

[Amended – October 2014]

7.1-4.1 If the client refuses to report their claim against an apparently dishonest licensee to the Law Society, the lawyer shall inform the client of the policy of the Compensation Fund and shall obtain instructions in writing to proceed with the client's claim without notice to the Law Society.

7.1-4.2 A lawyer shall inform a client of the provision of the *Criminal Code of Canada* dealing with the concealment of an indictable offence in return for an agreement to obtain valuable consideration (section 141).

7.1-4.3 If the client wishes to pursue a private agreement with the apparently dishonest lawyer, the lawyer shall not continue to act if the agreement constitutes a breach of section 141 of the *Criminal Code of Canada.*

Duty to Report Certain Offences

7.1-4.4 If a lawyer is charged with an offence described in By-law 8 of the Law Society, he or she shall inform the Law Society of the charge and of its disposition in accordance with the By-law.

[Amended – June 2007]

Commentary

[1] By-law 8 relates to the reporting of serious criminal charges under the *Criminal Code* and charges under other Acts that bring into question the honesty of a lawyer or that relate to a lawyer's practice of law. Such a charge may be a red flag that clients may need protection. The Law Society must be in a position to determine what, if any, action is required by it if a lawyer is charged with an offence described in By-law 8 and what, if any, action is required if the lawyer is found guilty.

[Amended - June 2007]

SECTION 7.2 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

7.2-1 A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice.

Commentary

[1] 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 function properly.

[2] 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 other legal practitioners or the parties. The presence of personal animosity between legal practitioners 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.

[3] A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice, or charges of other legal practitioners, but should be prepared, when requested, to advise and represent a client in a complaint involving another legal practitioner.

[4] [FLSC - not in use]

[Amended – June 2009]

7.2-1.1 A lawyer shall 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.

7.2-2 A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights.

7.2-3 A lawyer shall not use any device to record a conversation between the lawyer and a client or another legal practitioner, even if lawful, without first informing the other person of the intention to do so.

[Amended - June 2009, October 2014]

Communications

7.2-4 A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, 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.

7.2-5 A lawyer shall answer with reasonable promptness all professional letters and communications from other legal practitioners that require an answer, and a lawyer shall be punctual in fulfilling all commitments.

Communications with a Represented Person

7.2-6 Subject to rules 7.2-6A and 7.2-7, if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner

[Amended – September 2011]

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

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

[Amended – June 2009]

7.2-6A Subject to rule 7.2-7, if a person is receiving legal services from a legal practitioner under a limited scope retainer on a particular matter, a lawyer may, without the consent of the legal practitioner, approach, communicate or deal directly with the person on the matter, unless the lawyer receives written notice of the limited nature of the legal services being provided by the legal practitioner and the approach, communication or dealing falls within the scope of the limited scope retainer.

[New – September 2011]

Second Opinions

7.2-7 A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a legal practitioner with respect to that matter.

[Amended - June 2009]

Commentary

[1] Rule 7.2-6 applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by a legal practitioner concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This rule does not prevent parties to a matter from communicating directly with each other.

[2] 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 where 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 legal practitioner by closing their eyes to the obvious.

[3] Where notice as described in rule 7.2-6A has been provided to a lawyer for an opposing party, the lawyer is required to communicate with the legal practitioner who is representing the person under a limited scope retainer, but only to the extent of the matter or matters within the scope of the retainer as identified by the legal practitioner. The lawyer may communicate with the person on matters outside of the limited scope retainer.

[New – September 2011]

[4] Rule 7.2-7 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 legal practitioner involved. The lawyer should advise the client accordingly, and if necessary consult the first legal practitioner unless the client instructs otherwise.

[Amended - June 2009]

Communications with a Represented Corporation or Organization

7.2-8 A lawyer retained to act on a matter involving a corporation or organization that is represented by a legal practitioner shall not, without the legal practitioner's consent or unless otherwise authorized or required by law, communicate, facilitate communication with or deal with a person

(a) who is a director or officer, or another person who is authorized to act on behalf of the corporation or organization;

(b) who is likely involved in decision-making for the corporation or organization or who provides advice in relation to the particular matter;

(c) whose act or omission may be binding on or imputed to the corporation or organization for the purposes of its ability; or

(d) who supervises, directs or regularly consults with the legal practitioner and who makes decisions based on the legal practitioner's advice.

7.2-8.1 If a person described in rule 7.2-8(a), (b), (c) or (d) is represented in the matter by a legal practitioner, the consent of the legal practitioner is sufficient to allow a lawyer to communicate, facilitate communication with or deal with the person.

7.2-8.2 In rule 7.2-8, "organization" includes a partnership, limited partnership, association, union, fund, trust, co-operative, unincorporated association, sole proprietorship and a government department, agency, or regulatory body.

Commentary

[1] The purpose of rule 7.2-8 and rules 7.2-8.1 and 7.2-8.2 is to protect the lawyer-client relationship of corporations and other organizations by specifying persons with whom a lawyer may not communicate, facilitate communication or deal if the lawyer represents a client in a matter involving a corporation or organization and the corporation or organization is represented by a legal practitioner. They apply to litigation as well as to transactional and other non-litigious matters. A lawyer may communicate with a person in a corporation or other organization, other than those referred to in rule 7.2-8, even if the corporation or organization is represented by a legal practitioner. These rules are intended to advance the public policy of promoting efficient discovery and favours the revelation of the truth by addressing the circumstances in which a corporation or organization is allowed to prevent the disclosure of relevant evidence. They are not intended to protect a corporation or organization from the revelation of prejudicial facts.

[2] Generally, rule 7.2-8 precludes contact only with those actively involved in a matter. For example, in a litigation matter, it does not preclude contact with mere witnesses. Further, communications with persons within the corporation or organization are not barred merely by virtue of the possibility that their information might constitute "admissions" in the evidentiary sense. To proscribe contact with any person within a corporation or organization on the basis that he or she may make a statement that might be admitted in evidence against the corporation or organization would be overly protective of the corporation or organization and too restrictive of an opposing counsel's ability to contact and interview potential witnesses. Fairness does not require the presence of a corporation's or organization's legal practitioner whenever a person within the corporation or organization may make a statement admissible in evidence against it.

[3] Rule 7.2-8 prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals are so closely identified with the interests of the corporation or organization as to be indistinguishable from it. They would have the authority to commit the corporation or organization to a position with regard to the subject matter of the representation. This person would have such authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making decisions affecting the outcome of the matter, including litigation decisions, or because their duties include answering the type of inquiries posed. These individuals include those to who the organization's legal practitioner looks for decisions with respect to the matter.

[4] Thus, subject to the exceptions set out in it, rule 7.2-8 would prohibit contact with those persons who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

[5] A lawyer is not prohibited from communicating with a person in a litigation matter unless the person's act or omission is believed, on reasonable grounds, to be so central and obvious to a determination of liability that the person's conduct may be imputed to the corporation or organization. If it is not reasonably likely that the person is an active participant for liability purposes or a decision-maker respecting the outcome of the matter, nothing in rule 7.2-8 precludes informal contact with such a person.

[6] An individual who regularly consults with the corporation's or organization's legal practitioner concerning a matter will not necessarily be a person who also directs the legal practitioner. In some large corporations and organizations, some management personnel may direct or control counsel for some matters but not others. The mere fact that a person holds a management position does not trigger the protections of the rule.

[7] A person who is simply interviewed or questioned by a corporation's or organization's legal practitioner about a matter to gather factual information does not "regularly consult" with the legal practitioner. While a person's duties within a corporation or organization may include answering litigation-related inquiries, rules 7.2-8 to 7.2-8.2 do not prohibit an inquiry of this person by opposing counsel that is related to the person's knowledge of the historical aspects leading up to the alleged injury or damage which give rise to the subject matter of the representation.

[8] The prohibition on communications with a represented corporation or organization applies only where the lawyer knows that the entity 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 where it is reasonable to believe that the entity 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 counsel by closing their eyes to the obvious.

[9] Rule 7.2-8 does not prevent a lawyer from communicating with employees or agents concerning matters outside the representation.

[10] As a practical matter, to avoid eliciting privileged or confidential information and ensure that the communications are proper, the lawyer should identify himself or herself as representing an interested party in the matter when approaching a potential witness or other person in the corporation or organization. The lawyer should also advise the person whom he or she is hoping to interview that they are free to decline to respond. See also Section 5.3 (Interviewing Witnesses).

[11] 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 the rules in Section 3.4 (Conflicts), and particularly rule 3.4-5 to rule 3.4-9. A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of the rules in Section 3.4 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

[12] If the representation by the legal practitioner described in rule 7.2-8.1 is only with respect to the personal interests of the individual, consent of the corporation's or organization's counsel would be required with respect to the corporation's or organization's interests.

[13] Unions – Rule 7.2-8 is not intended to prohibit a lawyer for a union from contacting employees of a represented corporation or organization in circumstances where proper representation of the union's interests requires communication with certain employees who are the holders of information. For example, a lawyer retained by a union with respect to a termination grievance in which the union alleges that the employer, who is represented, has breached the collective agreement, is not prohibited from contacting employees who may have information on the termination or events leading up to the termination.

[14] Similarly, a management-side labour lawyer would not offend rule 7.2-8 if the lawyer contacted an employee who is a member of a bargaining unit represented by a legal practitioner.

[15] Governments –The concept of the individual who may "bind the organization" may not apply in the government context in the same way as in the corporate environment. For government departments, ministries and similar groups, rules 7.2-8 to 7.2-8.2 are intended to cover individuals who participate in a significant way in decision-making or who provide advice in relation to a particular matter.

[16] In government, because of its complexity and despite its hierarchy, it may not always be clear to whom a lawyer is authorized to communicate on a particular matter and who is involved in the decision-making process. The roles of these individuals may not be discrete, as different officials at different levels in different departments provide advice and recommendations. For example, in a contract negotiation, employees from one ministry may be directly involved, but those from another ministry may also have sensitive information relevant to the matter that may require protection under rule 7.2-8.

[17] In addition, the legal branch at the particular ministry is usually considered to always be "retained". There may be circumstances where the only appropriate action is to contact the legal branch. In all cases, appropriate judgment must be exercised

[18] In general, rules 7.2-8 to 7.2-8.2 are not intended to

(a) constrain lawyers who wish to contact government officials for a discussion of policy or similar matters on behalf of a client;

(b) affect access to information requests under such legislation as the *Freedom of Information and Protection of Privacy Act* (Ontario) or the federal *Access to Information Act*, including situations where a litigant has named the provincial or federal Crown, respectively, as a defendant; or

(c) affect the exercise of the duties of public servants under the *Public Service of Ontario Act, 2006* with respect to disclosure of information.

[19] Municipalities – Similar to government, in the municipal context, it is recognized that no one individual has the authority to bind the municipality. Each councillor is representative of the entire council for the purposes of decision-making. Rule 7.3-9, for example, would not permit the lawyer for an applicant on a controversial planning matter that is before the Ontario Municipal Board to contact individual members of council on the matter without the consent of the municipal solicitor.

[20] Rules 7.2-8 to 7.2-8.2 are not intended to:

(a) prevent lawyers appearing before council on a client's behalf and making representations to a public meeting held pursuant to the *Planning Act;*

(b) affect access to information requests under such legislation as the *Municipal Freedom of Information and Protection of Privacy Act*, including situations where a litigant has named the municipality as a defendant; or

(c) restrain communications by persons having dealings or negotiations, including lobbying, with municipalities with the elected representatives (councillors) or municipal staff.

[Amended – November 2010]

7.2-9 When a lawyer deals on a client's behalf with an unrepresented person, the lawyer shall:

(a) [FLSC - not in use]

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

(c) take care to see that the unrepresented person understand that the lawyer is acting exclusively in the interests of the client and accordingly their comments may be partisan.

[Amended – October 2014]

Commentary

[1] If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in these rules about joint retainers.

[New – October 2014]

Inadvertent Communications

7.2-10 A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably ought to know that the document was inadvertently sent shall promptly notify the sender.

Commentary

[1] Lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or legal practitioners acting for them. 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 this rule, 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.

[2] [FLSC - not in use]

[New – October 2014]

Undertakings and Trust Conditions

7.2-11 A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given and honour every trust condition once accepted.

[Amended – October 2014]

Commentary

[1] 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.

[1.1] In real estate transactions using the system for the electronic registration of title documents ("e-reg" ™), the lawyers acting for the parties (with their consent) will sign and be bound by a Document Registration Agreement that will contain undertakings. When entering into a Document Registration Agreement, a lawyer should have regard to and strictly comply with their obligations under rule 7.2-11.

[2] 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.

[3] 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.

[4] 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.

[5] 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 legal practitioner who has imposed the conditions and the lawyer who has accepted them.

[6] Any trust condition that is accepted is binding upon a lawyer, whether imposed by another legal practitioner or by a lay person. A lawyer may seek to impose trust conditions upon a non-licensee, 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 licensees.

[7] A lawyer should treat money or property that, on a reasonable construction, is subject to trust conditions or an undertaking in accordance with this rule.

[Amended - November 2007, October 2014]

SECTION 7.3 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

7.3-1 A lawyer who engages in another profession, business, or occupation concurrently with the practice of law shall not allow such outside interest to jeopardize the lawyer's professional integrity, independence, or competence.

Commentary

[1] 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.

[2] 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.

[New – October 2014]

7.3-2 A lawyer shall not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary

[1] 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, for example, 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 Law Society.

[2] Where 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 as, for example, where the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

SECTION 7.4 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

7.4-1 A lawyer who holds public office shall, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

Commentary

[1] 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.

[2] Generally, the Law Society will not be 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.

[3] [FLSC - not in use]

[Amended – October 2014]

SECTION 7.5 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

7.5-1 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

[1] Lawyers in their public appearances and public statements should conduct themselves in the same manner as with their clients, their fellow legal practitioners, 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.

[2] 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.

[3] 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 the lawyer's real purpose is self-promotion or self-aggrandizement.

[4] 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 will arise where the lawyer should have no contact with the media and other cases where the lawyer is under a specific duty to contact the media to properly serve the client.

[Amended – October 2014]

[5] A lawyer is often involved in a non-legal setting where contact is made with the media about publicizing such things as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations, or in acting as a spokesperson for organizations that, in turn, represent particular racial, religious, or other special interest groups. This is a well-established and completely proper role for the lawyer to play in view of the obvious contribution it makes to the community.

[6] A lawyer is often called upon to comment publicly on the effectiveness of existing statutory or legal remedies, on 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.

[Amended – June 2009]

[6.1] A lawyer is often involved as advocate for interest groups whose objective is to bring about changes in legislation, governmental policy, or even a heightened public awareness about certain issues. This is also an important role that the lawyer can be called upon to play.

[7] Lawyers should be aware that when they make a public appearance or give a statement they will 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

7.5-2 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.

Commentary

[1] 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.

SECTION 7.6 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

7.6-1 A lawyer shall assist in preventing the unauthorized practice of law and the unauthorized provision of legal services.

[Amended – June 2007]

Commentary

[1] Statutory provisions against the practice of law and provision of legal services by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, regulation, and, in the case of misconduct, from discipline by the Law 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 secrecy, the professional standard of care that the law requires of lawyers, and the authority that the courts exercise over them. Other safeguards include professional liability insurance, rights with respect to the assessment of bills, rules respecting the handling of trust monies, and requirements for the maintenance of compensation funds.

Working With or Employing Unauthorized Persons

7.6-1.1 Without the express approval of a committee of Convocation appointed for the purpose, a lawyer shall 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 or provision of legal services any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, has had their license to practise law or to provide legal services revoked, has been suspended, has had their license to practise law or to provide legal services suspended, has undertaken not to practise law or to provide legal services, or who has been involved in disciplinary action and been permitted to resign or to surrender their license to practise law or to provide legal services, and has not had their license restored.

Practice by Suspended Lawyers Prohibited

7.6-1.2 A lawyer whose license to practise law is suspended shall comply with the requirements of the By-laws and shall not

(a) practise law;

(b) represent or hold himself or herself out as a person entitled to practise law; or

(c) represent or hold himself or herself out as a person entitled to provide legal services.

[New - January 2008]

Commentary

[1] Part II of By-Law 7.1 (Operational Obligations and Responsibilities) and Part II.1 of By-Law 9 (Financial Transactions and Records) set out the obligations of a lawyer whose license to practise law is suspended.

[Amended - May 2008]

Undertakings Not to Practise Law

7.6-1.3 A lawyer who gives an undertaking to the Law Society not to practise law shall not

(a) practise law;

(b) represent or hold himself or herself out as a person entitled to practise law; or

(c) represent or hold himself or herself out as a person entitled to provide legal services.

[New - January 2008]

Undertakings to Practise Law Subject to Restrictions

7.6-1.4 A lawyer who gives an undertaking to the Law Society to restrict their practise shall comply with the undertaking.

[New - January 2008]

SECTION 7.7 RETIRED JUDGES RETURNING TO PRACTICE

7.7-1 [FLSC – not in use]

Definitions

7.7-1.1 In rule 7.7-1.2 "retired appellate judge" means a lawyer

(a) who was formerly a judge of the Supreme Court of Canada, the Court of Appeal for Ontario, or the Federal Court of Appeal;

[Amended - January 2009]

(b) who has retired, resigned, or been removed from the Bench; and

(c) who has returned to practice.

Appearance as Counsel

7.7-1.2 A retired appellate judge shall not appear as counsel or advocate in any court, or in chambers, or before any administrative board or tribunal without the express approval of a committee of Convocation appointed for the purpose. This approval may only be granted in exceptional circumstances and may be restricted as the committee of Convocation sees fit.

7.7-1.3 In rule 7.7-1.4, "retired judge" means a lawyer

(a) who was formerly a judge of the Federal Court, the Tax Court of Canada, the Supreme Court of Ontario, Trial Division, a County or District Court, the Ontario Court of Justice, or the Superior Court of Justice;

[Amended - January 2009]

(b) who has retired, resigned, or been removed from the Bench; and

(c) who has returned to practice.

7.7-1.4 A retired judge shall not appear as counsel or advocate

(a) before the court on which the judge served or any lower court; and

(b) before any administrative board or tribunal over which the court on which the judge served exercised an appellate or judicial review jurisdiction

for a period of three years from the date of their retirement, resignation, or removal, without the express approval of a committee of Convocation, appointed for the purpose, which approval may only be granted in exceptional circumstances and may be restricted as the committee of Convocation sees fit.

[Amended – October 2014]

SECTION 7.8 ERRORS AND OMISSIONS

Informing Client of Error or Omission

7.8-1 When, in connection with a matter for which a lawyer is responsible, the lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer shall

(a) promptly inform the client of the error or omission being 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;

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

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

[Amended – October 2014]

Notice of Claim

7.8-2 A lawyer shall 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

[1] Compulsory insurance imposes obligations on a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. The insurer's rights must be preserved. There may well be occasions when a lawyer believes that certain actions or the 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 the lawyer's negligence.

[1.1] Many factors will have to be taken into account in assessing the client's claim and damages. As soon as a lawyer becomes aware that an error or omission may have occurred, that may reasonably be expected to involve liability to the client for professional negligence, the lawyer should take the following steps.

[Amended - January 2009]

(a) immediately arrange an interview with the client and advise the client that an error or omission may have occurred, that may form the basis of a claim by the client against the lawyer.

(b) advise the client to obtain an opinion from an independent lawyer and that, in the circumstances, the first lawyer might no longer be able to act for the client;

(c) subject to the rules in Section 3.3 (Confidentiality), inform the insurer of the facts of the situation.

(d) co-operate fully and as expeditiously as possible with the insurer in the investigation and eventual settlement of the claim; and

(e) make arrangements to pay that portion of the client's claim that is not covered by the insurance immediately upon completion of the settlement of the client's claim. This would include payment of the deductible under a policy of insurance in accordance with By-Law 6 (Professional Liability Insurance).

[Amended - January 2009]

Co-operation

7.8-3 When a claim of professional negligence is made against a lawyer, he or she shall 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

7.8-4 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 shall expeditiously deal with the claim and shall not take unfair advantage that would defeat or impair the client's claim.

7.8-5 In cases where 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.

SECTION 7.8.1 RESPONSIBILITY IN MULTI-DISCIPLINE PRACTICES

Compliance with these Rules

7.8.1-1 A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates comply with these rules and all ethical principles that govern a lawyer in the discharge of their professional obligations.

[Amended - June 2009]

SECTION 7.8.2 DISCIPLINE

Disciplinary Authority

7.8.2-1 A lawyer is subject to the disciplinary authority of the Law Society regardless of where the lawyer's conduct occurs.

Professional Misconduct

7.8.2-2 The Law Society may discipline a lawyer for professional misconduct.

Conduct Unbecoming a Lawyer

7.8.2-3 The Law Society may discipline a lawyer for conduct unbecoming a lawyer.

Tab 3.1.4

Table of Concordance

This Table of Concordance sets out changes to the Rules of Professional Conduct that will come into effect on October 1, 2014 only. The heading "Former Rules of Professional Conduct" refers to the rules that are in force up to and including September 30, 2014.

Rules of Professional Conduct	**Former Rules of Professional Conduct**	**Federation of Law Societies of Canada Model Code of Professional Conduct**
Chapter 1 Citation and Interpretation	Rule 1 Citation and Interpretation	Chapter 1 Interpretation and Definitions
1.0 Citation	1.01 Citation	No equivalent
1.0-1	1.01	No equivalent
1.1 Definitions	1.02 Definitions	1.1 Definitions
Chapter 2 Integrity	No equivalent	Chapter 2 Integrity
2.1 Integrity	6.01(1) Integrity	2.1 Integrity
2.1-1	1.03(1)(a), 6.01, commentary following 6.01, commentary following definition of "conduct unbecoming" in 1.02.	2.1-1
2.1-2	1.03(1)(c) Standards of the Legal Profession	2.1-2
Chapter 3 Relationship to Clients	Rule 2 Relationship to Clients	Chapter 3 Relationship to Clients
3.1 Competence	2.01 Competence	3.1 Competence
3.1-1 Definitions	2.01(1) Definitions	3.1-1 Definitions
3.1-2 Competence	2.01(2) Competence	3.1-2 Competence
3.2 Quality of Service	2.02 Quality of Service	3.2 Quality of Service
3.2-1 Quality of Service	No equivalent except see commentary to 2.01(1)	3.2-1 Quality of Service
3.2-1A Legal Services under a Limited Scope Retainer	2.02(6.1) Legal Services under a Limited Scope Retainer	3.2-1A Limited Scope Retainers
3.2-1A.1 Legal Services Under a Limited Scope Retainer	2.02(6.2)	3.2-1A Commentary [1]
3.2-1A.2	2.02(6.3)	3.2-1A Commentary [5]
3.2-2 Honesty and Candour	2.02(1) Honesty and Candour	3.2-2 Honesty and Candour
3.2-3 When Client an Organization	2.02(1.1) When Client an Organization	3.2-3 When the Client is an Organization
3.2-4 Encouraging	2.02(2) Encouraging	3.2-4 Encouraging

Rules of Professional Conduct	**Former Rules of Professional Conduct**	**Federation of Law Societies of Canada Model Code of Professional Conduct**
Compromise or Settlement	Compromise or Settlement and 2.02(3)	Compromise or Settlement
3.2-5 Threatening Criminal Proceedings	2.02(4) Threatening Criminal Proceedings	3.2-5 Threatening Criminal or Regulatory Proceedings
3.2-5.1	No equivalent	No equivalent
3.2-6 [FLSC – not in use]	No equivalent	3.2-6 Inducement for Withdrawal of Criminal or Regulatory Proceedings
3.2-7 Dishonesty, Fraud etc. by Client or Others	2.02(5), Dishonesty, Fraud etc. by Client or Others	3.2-7 Dishonesty, Fraud by Client
3.2-7.1 Dishonesty, Fraud etc. by Client or Others	2.02(5.0.1)	No equivalent but see Rule 3.2-7 Commentary [2]
3.2-7.2	2.02 (5.0.2)	3.2-7 Dishonesty, Fraud by Client Commentary [3].
3.2-7.3	2.02(5.0.3)	No equivalent
3.2-8 Dishonesty, Fraud, etc. when Client an Organization	2.02(5.1) and 2.02(5.2) Dishonesty, Fraud when Client an Organization	3.2-8 Dishonesty, Fraud when Client an Organization
3.2-9 Client with Diminished Capacity	2.02(6) Client under a Disability	3.2-9 Clients with Diminished Capacity
3.2-9.1 Medical-Legal Reports	2.02(7) Medical-Legal Reports	No equivalent
3.2-9.2	2.02(8)	No equivalent
3.2-9.3	2.02(9)	No equivalent
3.2-9.4 Title Insurance in Real Estate Conveyancing	2.02(10) Title Insurance in Real Estate Conveyancing	No equivalent
3.2-9.5	2.02(11)	No equivalent
3.2-9.6	2.02(12)	No equivalent
3.2-9.7	2.02(13)	No equivalent
3.2-9.8 Reporting on Mortgage Transactions	2.02(14) Reporting on Mortgage Transactions	No equivalent
3.2-9.9	2.02(15)	No equivalent
3.3 Confidentiality	2.03 Confidentiality	3.3 Confidentiality
3.3-1 Confidential Information	2.03(1) Confidential Information	3.3-1 Confidential Information
3.3-1.1 Justified or Permitted Disclosure	2.03(2) Justified or Permitted Disclosure	No equivalent
3.3-2 [FLSC – not in use]	No equivalent	3.3-2 Use of Confidential Information
3.3-3	2.03(3)	3.3-3 Future Harm/Public

Rules of Professional Conduct	Former Rules of Professional Conduct	Federation of Law Societies of Canada Model Code of Professional Conduct
		Safety Exception
3.3-4	2.03(4)	3.3-4
3.3-5	2.02(5)	3.3-5
3.3-6	No equivalent	3.3-6
3.4 Conflicts	2.04 Avoidance of Conflicts of Interest	3.4 Conflicts
3.4-1 Duty to avoid conflicts of interest	No equivalent	3.4-1 Duty to Avoid Conflicts of Interest
3.4-2 Consent	2.04-2 Avoidance of Conflicts of Interest	3.4-2 Consent
3.4-3 Dispute	2.04(2)	3.4-3 Dispute
3.4-4 [FLSC – not in use]	No equivalent	3.4-4 Concurrent Representation with Protection of Confidential Client Information
3.4-5 Joint Retainers	2.04(6) Joint Retainer	3.4-5 Joint Retainers
3.4-6	2.04(7)	3.4-6
3.4-7	2.04(8)	3.4-7
3.4-8	2.04(9)	3.4-8
3.4-9	2.04(10)	3.4-9
3.4-10 Acting Against Former Clients	2.04(4) Acting Against Client	3.4-10 Acting Against Former Clients
3.3-11	2.04(5)	3.4-11
3.4-11.1 Affiliations Between Lawyers and Affiliated Entities	2.04(10.1) Affiliations between Lawyers and Affiliated Entities	No equivalent
3.4-11.2	2.04(10.2)	No equivalent
3.4-11.3	2.04(10.3)	No equivalent
3.4-12 Acting for Borrower and Lender	2.04(11) Prohibition Against Acting for Borrowers and Lender	3.4-12 Acting for Borrower and Lender
3.4-13	No equivalent	3.4-13
3.4-14	2.04(12)	3.4-14
3.4-15	2.04(6.1) Joint Retainer	3.4-15
3.4-16	2.04(8.1) and 2.04(8.2)	3.4-16
3.4-16.1 Multi-discipline Practice	2.04(13) Multi-discipline Practice	No equivalent
3.4-16.2 Short-term limited legal services	2.04(15) Short-term limited legal services	No equivalent
3.4-16.3	2.04(16)	No equivalent
3.4-16.4	2.04(17)	No equivalent

Rules of Professional Conduct	Former Rules of Professional Conduct	Federation of Law Societies of Canada Model Code of Professional Conduct
3.4-16.5	2.04(18)	No equivalent
3.4-16.6	2.04(19)	No equivalent
3.4-16.7 Lawyers Acting for Transferor and Transferee in Transfers of Title	2.04.1(1) Lawyers Acting for Transferor and Transferee in Transfers of Title	No equivalent
3.4-16.8 Lawyers Acting for Transferor and Transferee in Transfers of Title	2.04.1(2)	No equivalent
3.4-16.9 Lawyers Acting for Transferor and Transferee in Transfers of Title	2.04.1(3)	No equivalent
3.4-17 Conflicts from Transfer Between Law Firms Interpretation and Application of Rule	2.05 Conflicts From Transfer Between Law Firms 2.05(1) Definitions	3.4-17 Conflicts from Transfer Between Law Firms Application of Rule
3.4-18 Interpretation and Application of Rule	2.05(2) Application of Rule	3.4-18
3.4-19 Interpretation and Application of Rule	2.05(3)	3.4-19
3.4-20 Law Firm Disqualification	2.05(4) Law Firm Disqualification	3.4-20 Law Firm Disqualification
3.4-21	2.05(5)	3.4-21
3.4-22	2.05(6)	3.4-22
3.4-23 Transferring Lawyer Disqualification	2.05(7) Transferring Lawyer Disqualification	3.4-23 Transferring Lawyer Disqualification
3.4-24	2.05(8)	3.4-24
3.4-25 Determination of Compliance	2.05(9) Determination of Compliance	3.4-25 Determination of Compliance
3.4-26 Due Diligence	2.05(10) Due Diligence	3.4-26 Due Diligence
3.4-27 [FLSC – not in use]	2.06(1) Doing Business with a Client Definitions	3.4-27 Doing Business with a Client Definitions
3.4-28 Doing Business with a Client	No equivalent	3.4-28
3.4-29 Transactions with Clients	2.06(2) Investment by Client where Lawyer has an Interest	3.4-29 Investment by Client when Lawyer has an Interest
3.4-30	2.06(2.1)	3.4-30
3.4-31 Borrowing from Clients	2.06(4) Borrowing from Clients	3.4-31 Borrowing from Clients
3.4-32 Certificate of	2.06(3) Certificate of	3.4-32 Certificate of

Rules of Professional Conduct	Former Rules of Professional Conduct	Federation of Law Societies of Canada Model Code of Professional Conduct
Independent Legal Advice	Independent Legal Advice	Independent Legal Advice
3.4-33	2.06(5) Borrowing from Clients	3.4-33
3.4-34 Lawyers in Loan or Mortgage Transactions	No equivalent	3.4-34 Lawyers in Loan or Mortgage Transactions
3.4-34.1 Lawyers in Loan or Mortgage Transactions	2.06(6) Lawyers in Loan or Mortgage Transactions	No equivalent
3.4-34.2 Disclosure	2.06(7) Disclosure	No equivalent
3.4-34.3 No Advertising	2.06(8) No advertising	No equivalent
3.4-35 Guarantees by a Lawyer	2.06(9) Guarantees by a Lawyer	3.4-35 Guarantees by a Lawyer
3.4-36	2.06(10)	3.4-36
3.4-37 Testamentary Instruments and Gifts	No equivalent	3.4-37 Testamentary Instruments and Gifts
3.4-38	No equivalent	3.4-38
3.4-39 [FLSC – Not in Use].	No equivalent	3.4-39
3.4-40 Judicial Interim Release	No equivalent	3.4-40 Judicial Interim Release
3.4-41	No equivalent	3.4-41
3.5 Preservation of Clients' Property	2.07 Preservation of Client's Property	3.5 Preservation of Client's Property
3.5-1 [FLSC – not in use]	No equivalent	3.5-1
3.5-2 Preservation of Clients' Property	2.07(1) Preservation of Client's Property	3.5-2
3.5-3 Notification of Receipt of Property	2.07(2) Notification of Receipt of Property	3.5-3 Notification of Receipt of Property
3.5-4 Identifying Client's Property	2.07(3) Identifying Client's Property	3.5-4 Identifying Client's Property
3.5-5 Identifying Client's Property	2.07(4)	3.5-5
3.5-6 Accounting and Delivery	2.07(5) Accounting and Delivery	3.5-6 Accounting and Delivery
3.5-7	2.07(6)	3.5-7
3.6 Fees and Disbursements	2.08 Fees and Disbursements	3.6 Fees and Disbursements
3.6-1 Reasonable Fees and Disbursements	2.08(1) Reasonable Fees and Disbursements	3.6-1 Reasonable Fees and Disbursements

Rules of Professional Conduct	Former Rules of Professional Conduct	Federation of Law Societies of Canada Model Code of Professional Conduct
3.6-1.1	2.08(2) Reasonable Fees and Disbursements	No equivalent
3.6-2 Contingency Fees and Contingency Fee Arrangements	2.08(3) Contingency Fees and Contingency Fee Agreements	3.6-2 Contingent Fees and Contingent Fee Agreements
3.6-3 Statement of Account	2.08(4) Statement of Account	3.6-3 Statement of Account
3.6-4 Joint Retainer	2.08(5) Joint Retainer	3.6-4 Joint Retainer
3.6-5 Division of Fees and Referral Fees	2.08(6) Division of Fees and Referral Fees	3.6-5 Division of Fees and Referral Fees
3.6-6	2.08(7)	3.6-6
3.6-7	2.08(8)	3.6-7
3.6-8 Exception for Multi-discipline Practices and Interprovincial and International Law Firms	2.08(9) Exception for Multi-discipline Practices and Interprovincial and International Law Firms	3.6-8 Exception for Multi-discipline Practices and Interjurisdictional Law Firms
3.6-9 [FLSC – not in use]	No equivalent	3.6-9 Payment and Appropriation of Funds
3.6-10 Payment and Appropriation of Funds	2.08(10) Appropriation of Funds	3.6-10
3.6-11 Payment and Appropriation of Funds	No equivalent	3.6-11
3.6-12 [FLSC – not in use]	No equivalent	3.6-12 Prepaid Legal Services Plan
Section 3.7 Withdrawal from Representation	2.09 Withdrawal from Representation	3.7 Withdrawal from Representation
3.7-1 Withdrawal from Representation	2.09(1) Withdrawal from Representation	3.7-1
3.7-2 Optional Withdrawal	2.09(2) Optional Withdrawal	3.7-2 Optional Withdrawal
3.7-3 Non-payment of Fees	2.09(3) Non-payment of Fees	3.7-3 Non-payment of fees
3.7-4 Withdrawal from Criminal Proceedings	2.09(4) Withdrawal from Criminal Proceedings	3.7-4 Withdrawal from Criminal Proceedings
3.7-5	2.09(5)	3.7-5
3.7-6	2.09(6)	3.7-6
3.7-7 Mandatory Withdrawal	2.09(7) Mandatory Withdrawal	3.7-7 Obligatory Withdrawal
3.7-8 Manner of Withdrawal	2.09(8) Manner of Withdrawal	3.7-8 Manner of Withdrawal
3.7-9	2.09(9)	3.7-9

Rules of Professional Conduct	Former Rules of Professional Conduct	Federation of Law Societies of Canada Model Code of Professional Conduct
3.7-10 Duty of Successor Licensee	2.09(10) Duty of Successor Licensee	3.7-10 Duty of Successor Lawyer
Chapter 4 The Practice of Law	Rule 3 The Practice of Law	Chapter 4 - Marketing of Legal Services
4.1 Making Legal Services Available	3.01 Making Legal Services Available	4.1 Making Legal Services Available
4.1-1 Making Services Available	3.01(1) Making Legal Services Available	4.1-1
4.1-2 Restrictions	3.01(2) Restrictions	4.1-2 Restrictions
4.2 Marketing	3.02 Marketing	4.2 Marketing
4.2-0 Marketing of Professional Services	3.02(1) Marketing Legal Services	No equivalent
4.2-1 Marketing of Professional Services	3.02(2)	4.2-1 Marketing of Professional Services
4.2-2 Advertising of Fees	3.02(3) Advertising of Fees	4.2-2 Advertising of Fees
4.3 Advertising Nature of Practice	3.03 Advertising Nature of Practice	4.3 Advertising Nature of Practice
4.3-1 Certified Specialist	3.03(1) Certified Specialist	4.3-1
No equivalent	3.04 Interprovincial Law Firms 3.04(1), 3.04(2)	No equivalent
Chapter 5 Relationship to the Administration of Justice	Rule 4 Relationship to the Administration of Justice	Chapter 5 Relationship to the Administration of Justice
5.1 The Lawyer as Advocate	4.01 The Lawyer as Advocate	5.1 The Lawyer as Advocate
5.1-1 Advocacy	4.01(1) Advocacy	5.1-1 Advocacy
5.1-2	4.01(2)	5.1-2
5.1-3 Duty as Prosecutor	4.01(3) Duty as Prosecutor	5.1-3 Duty as Prosecutor
5.1-3.1 Discovery Obligations	4.01(4) Discovery Obligations	No equivalent
5.1-4 Disclosure of Error or Omission	4.01(5) Disclosure of Error or Omission	5.1-4 Disclosure of Error or Omission
5.1-5 Courtesy	4.01(6) Courtesy	5.1-5 Courtesy
5.1-6 Undertakings	4.01(7) Undertakings	5.1-6 Undertakings
5.1-7 Agreement on Guilty Plea	4.01(8) Agreement on Guilty Plea	5.1-7 Agreement on Guilty Plea
5.1-8	4.01(9)	5.1-8
5.2 The Lawyer as Witness	4.02 The Lawyer as Witness	5.2 The Lawyer as Witness
5.2-1 Submission of Evidence	4.02(1) Submission of Affidavit 4.02(2) Submission of Testimony	5.2-1 Submission of Evidence
5.2-2 Appeals	4.02(3) Appeals	5.2-2 Appeals

Rules of Professional Conduct	Former Rules of Professional Conduct	Federation of Law Societies of Canada Model Code of Professional Conduct
5.3-1 Interviewing Witnesses	4.03 Interviewing Witnesses	5.3 Interviewing Witnesses
5.3 Interviewing Witnesses	4.03 Interviewing Witnesses	5.3
5.4 Communication with Witnesses Giving Evidence	4.04 Communication with Witnesses Giving Evidence	5.4 Communication with Witnesses Giving Evidence
5.4-1 [FLSC – not in use]	4.04	5.4-1
5.4-2 Communication with Witnesses Giving Evidence	4.04	5.4-2
5.5 Relations with Jurors	4.05 Relations with Jurors	5.5 Relations with Jurors
5.5-1 Communications Before Trial	4.05(1) Communications Before Trial	5.5-1 Communications before Trial
5.5-2 Disclosure of Information	4.05(2) Disclosure of Information	5.5-2 Disclosure of Information
5.5-3	4.05(3)	5.5-3
5.5-4 Communication During Trial	4.05(4) Communication During Trial	5.5-4 Communication During Trial
5.6 The Lawyer and the Administration of Justice	4.06 The Lawyer and the Administration of Justice	5.6 The Lawyer and the Administration of Justice
5.6-1 Encouraging Respect for the Administration of Justice	4.06(1) Encouraging Respect for the Administration of Justice	5.6-1 Encouraging Respect for the Administration of Justice
5.6-2 Seeking Legislative or Administrative Changes	4.06(2) Seeking Legislative or Administrative Changes	5.6-2 Seeking Legislative or Administrative Changes
5.6-3 Security of Court Facilities	4.06(3) Security of Court Facilities	5.6-3 Security of Court Facilities
5.7 Lawyers as Mediators	4.07 Lawyers as Mediators	5.7 Lawyers and Mediators
5.7-1 Role of Mediator	4.07 Role of Mediator	5.7 Role of Mediator
Chapter 6 Relationship to Students, Employees, and Others	Rule 5 Relationship to Students, Employees, and Others	Chapter 6 Relationship to Students, Employees and Others
Section 6.1 Supervision	5.01 Supervision	6.1 Supervision
No equivalent	5.01(1) Application	No equivalent
6.1-1 Direct Supervision required	5.01(2) Direct Supervision required	6.1-1 Direct Supervision Required
6.1-2 [FLSC – not in use]	No equivalent	6.1-2 Application
6.1-3 [FLSC – not in use]	No equivalent	6.1-3 Delegation
6.1-4 [FLSC – not in use] (see 7.6-1.1)	6.07(2) Working With or Employing Unauthorized Persons	6.1-4 Suspended or Disbarred Lawyers

Rules of Professional Conduct	Former Rules of Professional Conduct	Federation of Law Societies of Canada Model Code of Professional Conduct
6.1-5 Electronic Registration of Title Documents	5.01(3) Electronic Registration of Title Documents	6.1-5 Electronic Registration of Documents
6.1-6	5.01(4)	6.1-6
6.1-6.1 Title Insurance	5.01(5) Title Insurance	No equivalent
6.1-6.2 Signing E-Reg Documents	5.01(6) Signing E-Reg Documents	No equivalent
6.2 Students	5.02 Students	6.2 Students
6.2-1 Recruitment and Engagement Procedures	5.02(1) Recruitment Procedures	6.2-2 Recruitment and Engagement Procedures
6.2-2 Duties of Principal	5.02(2) Duties of Principal	6.2-2 Duties of Principal
6.2-3 Duties of Articling Student	5.02(3) Duties of Articling Student	6.2-3 Duties of Articling Student
6.3 Sexual Harassment	5.03 Sexual Harassment	6.3 Harassment and Discrimination
6.3-0 Definition	5.03(1) Definition	No equivalent
6.3-1 [FLSC – not in use]	No equivalent	6.3-1
6.3-2 [FLSC – not in use]	No equivalent	6.3-2
6.3-3 Prohibition on Sexual Harassment	5.03(2) Prohibition on Sexual Harassment	6.3-3
6.3-4 [FLSC – not in use]	No equivalent	6.3-4
6.3-5 [FLSC – not in use]	No equivalent	6.3-5
6.3.1 Discrimination	5.04 Discrimination	no equivalent
6.3.1-1 Special Responsibility	5.04(1) Special Responsibility	6.3 Commentary [1]
6.3.1-2 Services	5.04(2) Services	No equivalent
6.3-1-3 Employment Practices	5.04(3) Employment Practices	No equivalent
Chapter 7 Relationship to the Law Society and Other Lawyers	Rule 6 Relationship to the Society and Other Lawyers	Chapter 7 – Relationship to the Society and Other Lawyers
7.1 Responsibility to the Profession, the Law Society and Others	6.01 Responsibility to the Profession Generally	7.1 Responsibility to the Society and Profession Generally
7.1-1 Communications from the Law Society	6.02 Responsibility to the Society	7.1-1 Communications from the Society
7.1-2 Meeting Financial Obligations	6.01(2) Meeting Financial Obligations	7.1-2 Meeting Financial Obligations
7.1-3 Duty to Report	6.01(3) Duty to Report	7.1-3 Duty to Report

Rules of Professional Conduct	Former Rules of Professional Conduct	Federation of Law Societies of Canada Model Code of Professional Conduct
Misconduct	Misconduct	Misconduct
7.1-4 Encouraging Client to Report Dishonest Conduct	6.01(4) Encouraging Client to Report Dishonest Conduct	7.1-4 Encouraging Client to Report Dishonest Conduct
7.1-4.1 Encouraging Client to Report Dishonest Conduct	6.01(5)	No equivalent
7.1-4.2 Encouraging Client to Report Dishonest Conduct	6.01(6)	No equivalent
7.1-4.3 Encouraging Client to Report Dishonest Conduct	6.01(7)	No equivalent
7.1-4.4 Duty to Report Certain Offences	6.01(8) Duty to Report Certain Offences	No equivalent
7.2 Responsibility to Lawyers and Others	6.03 Responsibility to Lawyers and Others	7.2 Responsibility to Lawyers and Others
7.2-1 Courtesy and Good Faith	6.03(1) Courtesy and Good Faith	7.2-1 Courtesy and Good Faith
7.2-1.1	6.03(2)	No equivalent
7.2-2	6.03(3)	7.2-2 Courtesy and Good Faith
7.2-3	6.03(4)	7.2-3
7.2-4 Communications	6.03(5) Communications	7.2-4 Communications
7.2-5	6.03(6)	7.2-5
7.2-6 Communications with a represented person	6.03(7)	7.2-6
7.2-6A Communications with a represented person	6.03(7.1)	7.2-6A
7.2-7 Second Opinions	6.03(8) Second Opinions	7.2-7
7.2-8 Communications with a represented Corporation or Organization	6.03(9) Communications with a represented corporation or organization	7.2-8
7.2-8.1	6.03(9.1)	No equivalent
7.2-8.2	6.03(9.2)	7.2-8 Commentary [1]
7.2-9 Unrepresented Persons	Rule 2.04(14) Unrepresented Persons	7.2-9 Communications
7.2-10 Inadvertent Communications	No equivalent	7.2-10 Inadvertent Communications
7.2-11 Undertakings and Trust Conditions	6.03(10) Undertakings	7.2-11 Undertakings and Trust Conditions
7.3 Outside Interests and the	6.04 Outside Interests and the	7.3 Outside Interests and the

Rules of Professional Conduct	**Former Rules of Professional Conduct**	**Federation of Law Societies of Canada Model Code of Professional Conduct**
Practice of Law	Practice of Law	Practice of Law
7.3-1 Maintaining Professional Integrity and Judgement	6.04(1) Maintaining Professional Integrity and Judgment	7.3-1 Maintaining Professional Integrity and Judgment
7.3-2 Maintaining Professional Integrity and Judgment	6.04(2)	7.3-2
7.4 The Lawyer in Public Office	6.05 The Lawyer in Public Office	7.4 The Lawyer in Public Office
7.4-1 Standard of Conduct	6.05(1) Standard of Conduct	7.4 Standard of Conduct
7.5 Public Appearances and Public Statements	6.06 Public Appearances and Public Statements	7.5 Public Appearances and Public Statements
7.5-1 Communication with the Public	6.06(1) Communication with the Public	7.5-1 Communication with the Public
7.5-2 Interference with Right to Fair Trial or Hearing	6.06(2) Interference with Right to Fair Trial or Hearing	7.5-2 Interference with Right to Fair Trial or Hearing
7.6 Preventing Unauthorized Practice	6.07 Preventing Unauthorized Practice	7.6 Preventing Unauthorized Practice
7.6-1 Preventing Unauthorized Practice	6.07(1) Preventing Unauthorized Practice	7.6
7.6-1.1 Working with or Employing Unauthorized Persons	6.07(2) Working with or Employing Unauthorized Persons	See 6.1-4 (Suspended or Disbarred Lawyers)
7.6-1.2 Practice by Suspended Lawyers Prohibited	6.07(3) Practice by Suspended Lawyers Prohibited	No equivalent
7.6-1.3 Undertakings not to Practice Law	6.07(4) Undertakings not to Practise Law	No equivalent
7.6-1.4 Undertakings to Practice Law Subject to Restrictions	6.07(5) Undertakings to Practise Law Subject to Restrictions	No equivalent
7.7 Retired Judges Returning to Practice	6.08 Retired Judges Returning to Practice	7.7 Retired Judges Returning to Practice
7.7 [FLSC – not in use]	6.08	7.7
7.7-1.1 Definitions	6.08(1) Definitions	No equivalent
7.7-1.2 Appearance as Counsel	6.08(3) Appearance as Counsel	7.7
7.7-1.3 Definition	6.08(2) Definitions	7.7
7.7-1.4 Appearance as Counsel	6.08(4) Appearance as Counsel	7.7
7.8 Errors and Omissions	6.09 Errors and Omissions	7.8 Errors and Omissions
7.8-1 Informing Client of Error or Omission	6.09(1) Informing Client of Error or Omission	7.8-1 Informing Client of Errors or Omissions

Rules of Professional Conduct	**Former Rules of Professional Conduct**	**Federation of Law Societies of Canada Model Code of Professional Conduct**
7.8-2 Notice of Claim	6.09(2) Notice of Claim	7.8-2 Notice of Claim
7.8-3 Co-operation	6.09(3) Co-operation	7.8-3 Co-operation
7.8-4 Responding to Client's Claim	6.09(4) Responding to Client's Claim	7.8-4 Responding to Client's Claim
7.8-5 Responding to Client's Claim	6.09(5)	7.8-5
7.7-1 Responsibility in Multi-Discipline Practices	6.10 Responsibility in Multi-Discipline Practices	No equivalent
7.8-1.1 Compliance with these Rules	6.10 Compliance with these Rules	No equivalent
7.8.2 Discipline	6.11 Discipline	No equivalent
7.8-2-1 Disciplinary Authority	6.11(1) Disciplinary Authority	No equivalent
7.8-2-2 Professional Misconduct	6.11(2) Professional Misconduct	No equivalent

Tab 3.1.5

SUMMARY OF RESPONSES TO THE CALL FOR INPUT ON AMENDMENTS TO THE *RULES OF PROFESSIONAL CONDUCT*

OVERVIEW OF SUBMISSIONS

1. The Law Society received a total of 34 submissions from individuals, government, legal organizations, equality-seeking groups, and academia[1], which were based on the material published in the call for input documents.[2] The following summary follows the order of the Rules. The rule numbers are based on the original numbering system in the Law Society's Rules and the Model Code.

PROPOSED RULE 1.01: INTEGRITY

PROPOSED RULE 1.01(1): HONOUR AND INTEGRITY

2. Several respondents strongly support the recommendation to maintain the protections for language rights currently found in the commentary to current rule 1.03 within the commentary to proposed rule 1.01.

3. Some respondents were concerned about the recommendation to move the words "recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario" found in current rule 1.03 to the commentary in the proposed rule 1.01, concerned that moving this wording from the rule to the commentary diminishes their importance.

4. One respondent took issue with what it deems broad and vague language in the commentary regarding "questionable conduct" in a lawyer's private life.

PROPOSED RULE 1.01(2): UPHOLDING THE STANDARDS OF THE LEGAL PROFESSION

5. One respondent endorsed the Commentary to Rule 1.01(2) inclusion of a list of activities and organizations in which lawyers may participate.

[1] Copies of the responses are available to benchers upon request.
[2] The material published for the call for input can be accessed at http://www.lsuc.on.ca/rule-consultation/

6. Another respondent recommended adding further cautionary language to remind lawyers of the risks of potential claims arising out of providing legal advice through activities, and suggested the following draft addition for the Commentary:

   "When participating in the various community activities listed in this rule, lawyers should keep in mind their professional obligations in respect of current, past or potential clients. To reduce their exposure to malpractice claims they should avoid giving legal advice, in particular in circumstances where it could be alleged that legal advice was provided and the lawyer had no intention of creating a lawyer-client relationship."

7. One respondent was concerned by an inconsistency between the Rule (""A lawyer has a duty to … assist in the advancement of its goals, organizations and institutions") and the Commentary ("lawyers are encouraged to enhance the profession through activities…"), and submited that the non-mandatory language of the Commentary is preferable. In contrast, one individual recommends rewording the sub-rule to "A lawyer shall uphold the standards…"

PROPOSED RULE 2.01(1): DEFINITION OF "COMPETENT LAWYER"

8. Some respondents opposed deleting the words "that is appropriate to the age and abilities of the client" in proposed Rule 2.01(1)(d) regarding client communications, on the basis that such tailored communications recognizing the client's position is necessary. They submitted that the rule enhances respect for diversity and human rights, which is essential to maintaining the integrity of the legal profession.

PROPOSED RULE 2.01(2): COMPETENCE

9. One respondent strongly endorsed the proposed additions to the Commentary, which it sees in support of efforts to hold lawyers who show a pattern of neglect more accountable.

PROPOSED RULE 2.02(1): HONESTY AND CANDOUR

10. Several respondents raised concerns regarding the possible overly broad, unrealistic or vague language of the proposed Rule 2.02(1) regarding honesty and candour.

11. One respondent recommended adding an element of materiality to the proposed rule, as follows:

"When advising clients, a lawyer shall be honest and candid and shall inform the client of all information known to the lawyer that may materially affect the interests of the client in the matter".

12. Several respondents expressed concern that the proposal that a lawyer be required to "inform the client of all information known to the lawyer that may affect the interests of the client in the matter" is overly broad and vague:

    a. One respondent submitted that the new language is "onerous and unrealistic" which would require a "legal information dump" on clients which could be unhelpful to clients. Moreover, it makes "Lawyers' Eyes Only" confidentiality agreements impossible. They recommended revising the language to require that a lawyer must "inform the client of all material information reasonably required to assist the client in making an informed decision about the matters in issue."

    b. Another respondent submitted that the proposal that a lawyer be required to "inform the client of all information known to the lawyer that may affect the interests of the client in the matter" is overly broad and vague. They recommended revising this phrase to "... and shall inform the client of all information known to the lawyer that might reasonably influence the client's decision whether to select or continue to retain the lawyer."

    c. Similarly, another respondent submitted that the rule is overly broad. They suggested, for example, that the rule would require a lawyer to disclose information to a client even if it is privileged, and would prohibit a lawyer from reviewing confidential information sealed by another party on the basis that once reviewed, the lawyer would have to disclose the information contained therein to the client. They recommended deleting the proposed change entirely, but leaving the commentary.

    d. Another respondent maintained that the Model Code addition of language to Rule 2.02(1) is unnecessary and vague, and the new wording should not be included.

13. One individual recommended including express provisions in the Rules regarding Crown counsel civility, candour, respect and consents which may be granted in criminal proceedings.

PROPOSED RULE 2.02(2): ENCOURAGING COMPROMISE OR SETTLEMENT

14. One respondent supported the proposed change to the commentary away from requiring informing a client of ADR options ("shall"). Another recommended strengthening the Commentary at Rule 2.02(2) regarding alternate dispute resolution mechanisms to create a

positive duty on lawyers to consider means of avoiding continued litigation, by adding the following:

"Encouraging settlement goes beyond advising on the merits of the case; it includes weighing the merits and potential outcomes against the monetary and non-monetary consequences of increased and/or continued litigation."

RULES REGARDING THREATENING CRIMINAL PROCEEDINGS AND INDUCING WITHDRAWAL OF CRIMINAL OR REGULATORY PROCEEDINGS

PROPOSED RULE 2.02(4): THREATENING CRIMINAL PROCEEDINGS

15. One respondent agreed with the proposed expansion of the prohibition on threatening proceedings to include a complaint to a regulatory authority, subject to the condition that it be restricted to complaints invoking criminal or quasi-criminal jurisdiction of regulatory authorities.

16. Two other respondents opposed the inclusion of the Rule or Commentary prohibiting advising a client to threaten a regulatory complaint. They questioned whether there is any rationale behind the rule. They also maintained as an alternative position that if new commentary is deemed necessary, it should expressly restrict "regulatory authority" to professional authorities and those entities whose proceedings are quasi-criminal in nature.

MODEL CODE RULE 2.02(6): INDUCEMENT FOR WITHDRAWAL OF CRIMINAL OR REGULATORY PROCEEDINGS

17. As with Rule 2.02(4), one respondent said the term "regulatory authority" should be restricted to professional authorities and those entities whose proceedings are quasi-criminal.

18. Some respondents questioned why the consent of the Crown is required under the Commentary to Model Code 2.02(6). They maintain that the proposed amendment is unnecessary, and notes, *inter alia*, that there are already *Criminal Code* prohibitions that adequately address the concern of influencing criminal proceedings.

19. One individual expressed concern that the Commentary to Model Code 2.02(6) would affect the nature of standard civil releases and asks whether Crown consent would now be necessary for releases where there is a potential for a criminal or quasi-criminal charge, or where a release includes matters with potential tax implications (on the hypothesis that this might be considered as an attempt to "influence a…potential complainant not to

communicate…with the Crown".) The respondent recommended clarifying the rule to the extent that confidentiality provisions in full and final mutual releases would be excluded, unless there is explicit reference to an ongoing or proposed criminal or quasi-criminal proceeding.

RULES REGARDING DISHONESTY, FRAUD, ETC. BY CLIENT OR OTHERS

MODEL CODE RULE 2.02(8): DISHONESTY, FRAUD ETC. WHEN CLIENT AN ORGANIZATION

20. Respondents raised issues of particular concern to in-house lawyers:

    a. Rule 2.02(8) of the Model Code (currently Rules 2.02(5.1) and 2.02(5.2)) may conflict with an organization's whistleblower policies. Where a lawyer employed by an organization chooses to report anonymously or through appropriate channels in accordance with his or her employer organization's policies, he or she should not be required to report through the Chief Legal Officer or the President and CEO as contemplated under this Rule.

    b. Regarding the reference to "dishonesty" in Model Code 2.02(8) and the commentary, not all dishonest conduct gives rise to fraudulent, criminal or illegal activities. There are times when it is legally and commercially acceptable for an organization to withhold information or conduct itself in a manner which could be considered dishonest e.g. commercial contractual negotiations.

    c. There should be a more flexible approach to the reporting of potential compliance problems to superiors. It submits that a 'one size fits all' solution is not advisable, and that there should be some degree of proportionality between the severity of the problem and the appropriate response. In-house counsel should have with "latitude to determine the most befitting escalation for reporting up the chain of command depending on the seriousness of the possible infraction, the size of the legal department, and the size of the company."

    d. Requiring resignation by an in-house counsel if the in-house counsel has already withdrawn from a matter and reported up the chain is overly burdensome on in-house counsel in particular.

    e. The Rule regarding withdrawing from matters should also be clarified as to whether a withdrawing lawyer must or may engage in a "noisy withdrawal" (i.e. where the lawyer speaks up to courts, administrative tribunals or others).

f. The rule does not provide clear guidance for lawyers where it is not clear whether the conduct at issue amounts to dishonestly, fraud, crime or illegal conduct. For example, it is not clear whether the Rule applies in a situation where the lawyer is of the view that a transaction is lawful, but where there is some risk that it is or could be found to be unlawful. Define the word "knows" to address this concern, "so as to make clear that the lawyer only has “knowledge” in circumstances where it is his or her legal opinion that the proposed transaction is likely dishonest, fraudulent, criminal, or illegal."

PROPOSED RULE 2.02(6): CLIENT WITH DIMINISHED CAPACITY

21. Regarding the proposal to amend the current rule regarding clients “under a disability” to address clients with “diminished capacity”, one respondent submitted that this change in language should be maintained consistently throughout Rule 2.02(6), and that a discussion regarding the duty to accommodate pursuant to the Human Rights Code should be provided in accompanying commentary. They also suggested alternate wording for the commentary to Rule 2.02(6), regarding client capacity issues and the ability for a client to enter into a limited scope retainer.

PROPOSED RULE 2.03: CONFIDENTIALITY

22. Respecting rule 2.03(1)(b):

    a. With respect to the proposal to add the words “or a court” to the carve-out permitting disclosure of confidential information “where required by law”, one respondent submitted that the “or a court” language is redundant, but that if an addition is to be made, the broader "or by order of a tribunal of competent jurisdiction" is preferable.

    b. Another respondent endorses permitting disclosure of confidential information “where required by law or written order of a court to do so”.

23. Respecting rule 2.03(1)(c):

    a. One respondent submitted that the rule should make it clear that a lawyer cannot be required to disclose information to the Law Society when the Law Society has an interest that is or is potentially in conflict with the client’s interest. Otherwise, this Rule would severely limit a lawyer’s ability to provide clients with appropriate advice when dealing with Law Society regulatory matters or public policy matters that affect the Law Society.

b. Another respondent opposes a requirement to disclose information to the Court or the Law Society without further express wording, and recommends the following changes:

(b) ~~or~~ required by law or written order of a court to do so;
(c) required to provide the information to the Law Society in accordance with established policies for the protection of confidential or privileged information, or…

24. Respecting rule 2.03(2):
One respondent submits that the carve-out permitting disclosure of confidential information where required "by order of a tribunal of competent jurisdiction" is redundant, but accepts this wording if an addition is deemed necessary.

25. Commentary:

a. Respecting the proposed commentary to Rule 2.03 which addresses the risk facing sole practitioners of inadvertent disclosure of confidential information when practicing in association, one respondent recommends that the proposed commentary under Rule 2.03 "be clarified about the extent of risk involved in practicing in association, and explicitly address the situation where discussions can and should occur between colleagues in a confidential setting to provide quality legal services". They submitted that confidentiality issues raised in proposed Rule 2.03 can be adequately addressed through the informed consent of a client, and provided for within a written retainer agreement.

b. A question was raised as to whether the commentary to this rule with respect to a lawyer engaging in literary works adds anything new given the rules related to privilege and confidentiality.

PROPOSED RULE 2.08: FEES AND DISBURSEMENTS

26. One respondent submitted that if a reference to an estimate is to be included, then the reference should be revised to "any estimate or revised estimate of fees" so as to highlight that estimates may change in the course of a matter.

27. Many criminal lawyers do not have written fee arrangements with clients, and the requirement for "as much information as is reasonable" is vague. This respondent opposed a written retainer requirement for all cases.

28. Some respondents say that the proposed restrictions in the Commentary to Rule 2.08(3) regarding the termination of a professional relationship when the retainer is pursuant to a contingency agreement are too restrictive. The proposed rule would prohibit a lawyer acting pursuant to a contingency fee arrangement from withdrawing for any reason other than those enumerated in the Mandatory Withdrawal section of the rules, unless the written contingency agreement specifically states that the lawyer has a right to do so, and sets out the circumstances under which this may occur. Under the proposed new rule, a personal injury lawyer would not be permitted to withdraw from a file even if the client acts unreasonably, lies to the lawyer, and rejects the lawyer's advice. It would be unjust to require a personal injury lawyer to continue to work on, as well as finance a case in which another lawyer would be permitted to withdraw. If the purpose of the proposed change is to shield clients from unexpected legal fees, the commentary could be revised as follows:

    "A lawyer withdrawing from a contingency contract under Rule 2.09 cannot charge for legal fees unless the written contract specifically states the lawyer has a right to do so and sets out the circumstances under which this may occur."

RULES 2.08(10)

29. One respondent notes that the subrule likely supports the provision of written retainers.

RULES 2.08(18) and (19): FEES AND DISBURSEMENTS

30. One respondent recommended that community legal clinics be considered separate from "law firms".

RULE 2.09: WITHDRAWAL FROM REPRESENTATION

RULE 2.09(2): OPTIONAL WITHDRAWAL

31. One respondent recommended adding the term "material breakdown in communications" as a further example of when an optional withdrawal may be permitted.

32. Another respondent focussed on the difficulties presented by departing associates. Associates are increasingly compensated in small firm settings on a percentage fee basis. When the associate decides to depart, the owners of the law firm may take the position that the associate must give several months' notice. Although the proposed Rule 2.09 would put the client's interest first upon departure, there is a risk that the law firm lawyers and departing lawyer would be involved in an "unsavoury" dispute regarding client fees, and the client could be called as a witness to testify during the dispute. The suggestion is:

a. Regulating that there should be no set-off of amounts owing to associates;

b. Providing that no lawyer should be required to give a law firm more than one month notice of an intention to depart the firm; and,

c. Prohibiting lawyer from commencing legal actions against each other in circumstances where clients are put in an impossible position between their former and present counsel.

RULE 2.09(7): MANDATORY WITHDRAWAL

33. A question was raised about whether Law Society practice guidelines have the force of law, take the position that contravention of a "published practice guideline" should not be an automatic trigger for withdrawal from representation, and recommend removing the words "published practice guidelines" from Rule 2.09(7).

CONFLICTS OF INTEREST

GENERAL COMMENTS

34. The submissions addressing the proposed revisions to the conflict of interest rules generally support updating the *Rules of Professional Conduct* in this area.

35. However, a wide range of submissions were received aimed at improving the proposed changes to these rules.

36. Many submissions note that there are places where the conflict of interest rules are ambiguous and require further clarification. One respondent spoke to a lack of clarity stems from two factors: the disconnect between a rule based on subjective factors which are not clear to clients, and its related commentary, which is based on objective factors which are transparent to clients; and, the rule being framed with respect to conflicts which most likely would arise for sole practitioners (the lawyer seeking to act against a client for whom that lawyer is acting in an unrelated matter), rather than focusing attention on the law firm context, and the more frequent situation of the lawyer in a firm seeking to act on an unrelated matter that is against the interest of a current client of the firm whose work is handled by another lawyer (or lawyers).

37. One respondent said that the conflicts rule should make it expressly clear that there are certain instances, most notably in the negotiation of complex commercial transactions,

where a solicitor cannot represent multiple parties, regardless of what steps to inform the client of the risks associated with the transaction.

38. One respondent suggested that conflicts rules should prohibit a lawyer from acting in Ontario in certain cases where there is a "reasonable apprehension of conflict" *or* appearance of impropriety, even if there is no actual conflict.

DEFINITION OF "CLIENT"

39. Several respondents opposed any subjective element in the definition of "client", such as is found in the proposed definition at sub (b). Some would remove sub (b) of the proposed definition of "client", while some suggested modifying clause (b) to make the test more objective. Similarly, the definition of "client" as someone who consulted a lawyer and "reasonably concludes that the client agreed to render legal services" is overly broad.

40. One respondent recommended a minor revision to the Commentary to make it clear that a "client" does not include a business's affiliated entities, directors and shareholders without objective evidence that there was a reasonable expectation that such a relationship would exist, as follows:

> "For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual or entity had a reasonable expectation that a lawyer-client relationship would be established…"

41. One respondent recommended reconsidering references in the current definition to "partners and associates" of a firm, noting that these terms do not align with the current realities of practice structures. There are numerous other types of firm working arrangements, including "of counsel", temporary or contract lawyers, outsourced lawyers etc. Consideration should be given to whether the "contractual relationship" language adequately covers all types of lawyer working relationships. Consider whether explicit reference to other types of lawyers commonly practicing at firms should be noted in this definition and elsewhere.

DEFINITION OF "CONFLICT OF INTEREST"

42. One respondent suggests that the words "substantial risk" and "materially and adversely" may be too broad, although the commentary provides clarification.

DEFINITION OF "DISCLOSURE"

43. The Committee received mixed submissions regarding the definition of "disclosure". Some supported the Committee's view that this definition should not be included in the rules. However, some expressly supported its inclusion. One respondent suggested that, given the importance of disclosure in conflicts of interest rules, the definition could be placed within Rule 2.04 on condition that it be clear that the definition only applies within that rule.

MODEL CODE RULE 2.04(1): COMMENTARY REGARDING THE DUTY OF LOYALTY

44. Respecting the proper scope of the duty of loyalty, one respondent says that the current debate turns on the weight assigned to the concern to protect the quality of the relationship between clients and their lawyers, which focuses on objective factors that are transparent to clients and that errs on the side of requiring disclosure, consent and disqualification of lawyers in a broader range of circumstances, and the concern to maximize client access to counsel of choice (and, correspondingly, counsel's freedom to act), which focuses on the risk of actual prejudice to the client and that would require disclosure to and consent from clients, and the disqualification of lawyers, in a narrower range of circumstances.

45. They say that it is difficult to reconcile, on the one hand, the concern expressed in the commentary about protecting the lawyer client relationship from damage and guarding against client feelings of betrayal, with rule 2.04(1), on the other hand, which appears to permit a lawyer to work in secret against the legal interests of a client for which the lawyer is the trusted legal advisor, based solely on the lawyer's own assessment of whether the lawyer's loyalty to or representation of the client would be materially and adversely affected.

46. On a practical level, sophisticated clients tend to already include provisions requiring outside counsel to make disclosure to and obtain consent from the client before accepting a matter which involves actual or potential adversity to the client.

47. Another respondent disputed that there is any "generalized" duty to not act against the interest of a client, or that the lawyers' duty of confidentiality is, as suggested in the Commentary, "arising from" the duty of loyalty. They recommended deleting "the duty of confidentiality" from the list of duties in the sentence related to the duties "arising from" the duty of loyalty, and deleting the sentence "Current clients must be assured of the lawyer's undivided loyalty [...]"

48. They also take the position that a lawyer's duty of loyalty to a client is not absolute, and recommended revising the sentence in the Commentary that reads "This rule reflects the

general rule that a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent even if the matters are unrelated" to:

"The lawyer will require consent to take on a retainer directly adverse to the immediate interests of a current client, even though having a subject matter unrelated to the retainer from that current client, if in all the circumstances the current client could reasonably be concerned that the conflicting interests would temper the lawyer's zealousness in representing the current client."

49. They also recommended that the revised Rules expressly encourage the use of retainer letters to modify the professional duties set out in the Rules.

MODEL CODE RULE 2.04(1): COMMENTARY: EXAMPLES OF CONFLICTS OF INTEREST

50. While there was overall support for the general duty to avoid conflicts expressed in Model Code Rule 2.04(1), respondents provided the following comments on the seven examples of conflicts of interest contained in the Commentary to Model Code Rule 2.04(1):

    a. the commentary be amended to state that the examples are "non-exhaustive".

    b. the "examples" should be treated as examples of situations requiring caution by lawyers rather than as conflicts per se.

    c. Example #2: supporting the Committee's view, remove the second illustration of "positional" conflict of interest, as the concept of "issue conflicts" is previously unknown in Canadian law, risks "tying a litigator's hands long after he or she had been retained", and could lead to gross unfairness and additional costs to clients. It was suggested that rather than amounting to a conflict, this is just a part of the advocate's role.

    d. Example #3: this is unnecessarily limited to a "small business" and should either include all businesses or be removed. Example 3 is ambiguous, and should read:

        "A lawyer provides legal advice on a series of commercial transactions to a small business and at the same time provides legal advice to an employee of the business on an employment matter".

e. Remove the phrase in the Commentary to #3 “thereby acting for clients whose legal interests are directly adverse” as it presupposes the result, and there may be situations where a lawyer may still be permitted to act for one of the parties.

f. Example #6 should be removed as it is too broad.

g. Example #7: delete example 7 of conflicts.

MODEL CODE RULE 2.04(2): CONSENT

51. One respondent said that it seems unlikely, as a practical matter, that a lawyer who reasonably believes that he or she can represent each client without a material and adverse effect relative to the other – i.e., that a conflict is consentable – would ever conclude that he or she had a conflict in the first place and therefore needed a consent. Rather, the circumstances on the basis of which the lawyer reasonably believed that he or she could represent both clients without a material and adverse effect on loyalty or representation would equally allow the lawyer reasonably to conclude that there was no substantial risk of such material and adverse effect and therefore no conflict of interest or need for consent. It follows that rule 2.04(2) is unlikely to have much practical application.

52. They also submitted that the last sentence of the Model Code Commentary that currently states that “the lawyer must not possess confidential information from one client that could affect the other client” should be revised to be consistent with proposed revised wording proposed for rule 2.04(2)(iii): “the lawyer has no relevant confidential information from one client that might reasonably affect <u>the representation of</u> the other client”.

53. With respect to Model Code Rule 2.04(2)(b) on inferred consent, one respondent says that this rule is too narrow and should be removed, noting that a client’s one-time consent does not mean that the client will always consent.

54. Other respondents recommended changes to the Commentary for implied consent. The Large Firm Comment recommends revising the last sentence of the Commentary to:

> “... the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the representation of the other client, and there must be a reasonable basis upon which to conclude...”.

55. One respondent submitted that the references to both “implied” and "inferred" consent creates confusion and should be changed. The reference to "implied consent" within the Commentary "does not dovetail with the already-defined "Consent" from the preamble.

MODEL CODE RULES 2.04(4) TO 2.04(9): CONCURRENT AND JOINT RETAINERS

56. The Committee received several submissions regarding whether the concurrent retainer rule and joint retainer rule should be combined or separately maintained.

57. Several respondents said that separate rules for concurrent retainers (Rule 2.04(4)) and joint retainers (Rule 2.04(5)) should be maintained.

58. Others said that rather than having a separate rule on concurrent representation, it should form commentary under the Joint Retainer Rule.

59. With respect to Model Code Rule 2.04(4), regarding concurrent retainers, some respondents said that the rule is overly restrictive in requiring clients to receive independent legal advice ("ILA"), rather than being advised to obtain ILA. If the ILA requirement is maintained in some form, the Commentary should make it clear that advice provided by in-house counsel constitutes ILA for these purposes.

60. Requiring the firm to withdraw altogether if there is a contentious dispute arising between clients is too contentious, as there may be situations where the firm could continue to represent one of the clients, as could be specified in retainer agreements.

61. The Commentary suggesting that a concurrent retainer should be refused "where one of the clients is less sophisticated or more vulnerable than the other" creates an unjustifiable restriction when both clients are sophisticated. It would be sufficient to state that "before accepting a concurrent retainer a law firm should consider whether the client appears to be especially unsophisticated or vulnerable and, if so, refrain from accepting it on a concurrent basis."

62. Another respondent that that Rule 2.04(6) is overly broad, and questions whether ILA is necessary under the Rule.

63. Other respondents took issue with Rule 2.04(9). For Model Code Rule 2.04(9) to operate, the only "relevant information" available at the time that the clients enter into a retainer agreement would be the possibility that if the two clients get into a serious dispute in the course of the matter, the jointly retained lawyer will be free to act for client A against client B." Revise Model Code Rule 2.04(8) to include Rule 2.04(9) and to delete the Commentary to Rule 2.04(9) as follows:

> (a) Except as otherwise provided in paragraph (b) of this rule, if a contentious issue arises between clients who have consented to a

joint retainer, the lawyer must not advise either of them on the contentious issue and must:

i. refer the clients to other lawyers to deal with the contentious issue; or
ii. advise the clients of their opinion to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:

1. no legal advice is required; and
2. the clients are sophisticated; and

iii. if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

(b) If clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

64. Another respondent said that the requirement for consent at the time a contentious issue arises if a lawyer is to continue to act for one of the joint clients is problematic, noting that up front assurances usually sought by a client seeking to retain a lawyer jointly with another party could not be given if consents may only be obtained at the time of the conflict; parties will rarely grant consent at the time of the conflict; and the above factors significantly reduce the availability of joint engagements. They recommended referencing the commentary to rule 2.04(2) (re advance consents) instead.

65. Another respondent submitted that the proposed commentary should not "disparage" consent in advance, although it is acknowledged that the lawyer has a high onus to ensure that advance consent is fully informed.

RULES 2.04(10) AND 2.04(11): ACTING AGAINST FORMER CLIENTS

66. Some respondents were concerned that these rules relating to acting against former clients are flawed. The "laundry list" of factors to consider found at Rule 2.04(11) does not reflect the processes of "reputable law firms in determining whether they can appropriately act against former clients. A law firm cannot act against a former client in the same, or even a related, matter as that in which it represented the former client because to do so would, certainly in the first case and probably in the second, undermine the representation given to

the former client. There is a limited ongoing duty of loyalty, not just confidentiality, owed to former clients, namely, a duty not to derogate from the representation given. However, where the "relatedness" factor is not present, provided sufficient firewalls are in place, then, it is submitted, the firm should be permitted to act.

67. They recommended linking Rule 2.04(10) and Rule 2.04(11) through the words "save as provided by Rule 2.04(11)" at the start of 2.04(10)(c).

68. They also recommended revising Rule 2.04(11) as follows:

When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer (the "other lawyer") in the lawyer's firm may act against the former client in the new matter provided that:

(a) the former client consents to the other lawyer acting; or

(b) the law firm establishes that it has taken adequate measures on a timely basis to ensure that there will be no risk of disclosure of the former client's confidential information to the other lawyer having carriage of the new matter.

69. Some respondents suggested that the word "rare" in Commentary Rule 2.04(11) should be removed as being both inaccurate and unnecessary.

MODEL CODE RULE 2.04(17) TO 2.04(26): TRANSFERRING LAWYER RULES

70. One respondent said that further consideration should be given as to whether the proposed amendments would unduly restrict movement of lawyers from large firms to companies, or between companies.

71. Other respondents recommended simplifying the transferring lawyer rule as was done in British Columbia, and not adopting the special definition of "client" for the transferring lawyer rule. Rule 2.04(20) of the Model Code should be simplified for Ontario as follows:

"If the transferring lawyer actually possesses confidential information relevant to a matter referred to in subrule 18(a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm may continue its representation of its client in that matter provided that:

(a) the former client consents to the new law firm's continued representation of its client; or

(b) (i) adequate measures are taken by the new law firm to ensure that there will be no risk of disclosure of the former client's confidential information to any member of the new law firm, and

(ii) the transferring lawyer does not work on the matter in question or on any other matter for the new law firm's client to which any confidential information of the former client could be relevant, and

(iii) there exists no other reason to believe that the continued representation would be prejudicial to the former client or the public interest."

MODEL CODE RULE 2.04(22)

72. Some respondents recommended deleting the requirements in Model Code Rule 2.04(22) related to "solemn declarations" as it is not clear what mischief this requirement is seeking to address.

MODEL CODE RULE 2.04(26): DUE DILIGENCE

73. Some respondents suggested that Rule 2.04(26) has been rendered unclear due to a formatting error, and recommends following the corrections adopted in Nova Scotia, as follows:

"A lawyer must exercise due diligence to ensure that each lawyer and employee of the lawyer's law firm, each non-lawyer partner and associate, and each other person whose services the lawyer has retained complies with subrules (17) to (26), including not disclosing confidential information of clients of the firm or any other law firm in which the person has worked."

MODEL CODE RULES 2.04(27-41): LAWYERS DOING BUSINESS WITH A CLIENT

74. A respondent recommended expanding this proposed Model Code Rule to address partnership money, as follows:

"A lawyer shall not act as a surety for, deposit <u>his or her own</u> money <u>or that of any firm in which the lawyer is a partner</u> or other valuable security [...]"

MODEL CODE RULE 2.04(34): LAWYERS IN LOAN OR MORTGAGE TRANSACTIONS

75. A respondent quested whether the rule is only intended to cover where the lawyer receives a benefit (as opposed to interest free loans, for example), and suggests that if so, it should be more narrowly worded.

MODEL CODE RULES 2.04(35) AND 2.04(36): GUARANTEES BY A LAWYER

76. One respondent questions whether there is any conflict in a lawyer guaranteeing a loan where the lawyer's client is the borrower. They note that as a lawyer may lend money to a client outright (subject to conditions), there appears to be no basis for prohibiting a lawyer from guaranteeing a client's loan.

MODEL CODE RULES 2.04(37)-(3): TESTAMENTARY INSTRUMENTS AND GIFTS

77. Several submissions cautioned against implementing Model Rules 2.04(37)-(39) in their present form.

78. One respondent raised the following issues.

79. Sub-rule 2.04(37) would restrict a testator's ability to communicate wishes concerning his or her choice of counsel to administer his estate." Clients benefit from using a lawyer already familiar with the family background, assets and other relevant matters, but this rule would make it difficult to leverage this knowledge. The respondent is unaware of any public policy rationale for the proposed changes, but note that there are public policy reasons why the rules should not be adopted, namely the importance of testamentary freedom, the value of client choice, including maintaining affordability of advice and continuity by permitting the drafter of a will assist in executing it in accordance with the intentions of the testator.

80. Rule 2.04(38) as presently drafted could have the unintended consequence of prohibiting a lawyer from drafting a will under which the testator wishes to appoint the lawyer as executor. This would restrict the client's freedom, and force the client to choose whether to retain the lawyer as executor or to draft the will. This proposed sub-rule should be tightened to prohibit receiving a bequest under a will that the lawyer drafted.

81. The substance of Rule 2.04(39) is acceptable; however, it would be equally applicable to those acting outside the context of testamentary-document preparation, and the sub-rule's inclusion in the testamentary section may cause confusion.

82. It assumes that the new rules would be prospective only.

83. The following changes to the Rules were proposed:

    a. **Testamentary Instruments and Gifts**

    b. ~~**2.04 (37)** A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.~~

    c. or, if there is a evidence that a rule of this nature is necessary

    d. 2.04(37) If a testator has included in a will a clause directing that the lawyer who drafted the will be retained to provide services in the administration of the client's estate, the lawyer should, before accepting that retainer, provide the trustees with advice, in writing, that the clause is precatory and the trustees can decide to retain other counsel.

    e. **2.04 (38)** Unless the client and lawyer are "related persons" (as that term is defined in ss. 251 (2) of the *Income Tax Act* (Canada)), a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift ~~or benefit~~ from the client, including a testamentary gift.

    f. **[move to more appropriate section] 2.04 (39)** A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

84. Another respondent noted the absence of reasons given for the inclusion of Rule 2.04(37), and is concerned that this rule is contrary to the practice applied by some clients to direct their solicitor to assist in ensuring that their final wishes are carried out. Clarification is needed on the reasons for this rule, and what should be done in situations where wills currently have a clause to this effect.

85. Another respondent cautioned that these Rules as currently drafted could reintroduce the prohibition against a lawyer drafting a will where that same lawyer is also the executor. They supposed that this may now be an issue due to the characterization of executors' compensation in certain judicial decisions as being tantamount to a gift, which causes the executor who witnessed the will to be unable to reply upon the compensation clause within the will. However, the author notes that the proposed Rule goes beyond this concern, and prohibits "a gift or benefit". As a Power of Attorney is also an "Instrument", if a Power of Attorney provides Compensation to the lawyer who drafted it, would similarly be caught

by the proposed rule. Given the lack of clarity as to what is intended by the rule change, the respondent said that if a policy change was not intended, and the phrase "gift or benefit" was not supposed to apply to Executors' Compensation, this should be explicit. If change was intended to attain this policy objective, it should be clearly expressed. Changes should address possible Power of Attorney implications at the same time.

86. Another respondent warned against adopting Model Code Rules 2.04(37) and (38) suggested that if Committee intends to maintain the rule, an exception should be provided so that if such a gift or benefit is included in a testamentary instrument, a separate affidavit must be provided by the testator, and kept on file by the lawyer, which expressly permits the gift/benefit or direction, and acknowledges having been advised of the nature and consequences of the gift/benefit or direction.

PROPOSED RULE 3: THE PRACTICE OF LAW

87. Respondents supported additional language to encourage the provision of pro bono and public interest legal services, to reduce fees in cases of financial hardship, and to support organizations serving persons of limited means. Commentary could be amended to create greater awareness around access to Legal Aid as follows:

"A lawyer who knows or has reasonable grounds to believe that a client is <u>eligible</u> for Legal Aid should advise the client of the right to apply for Legal Aid and <u>should assist with this application process where appropriate</u>, unless the circumstances indicate that the client has waived or does not need such assistance."

PROPOSED RULE 4.01: THE LAWYER AS ADVOCATE

PROPOSED RULE 4.01(1)

88. One respondent recommended the following amendments to bring the Commentary into line with international and domestic law:

"In adversarial proceedings that could impact the health, welfare or security of a child, directly or indirectly, a lawyer shall advise the client to take into account the best interests of the child."

PROPOSED RULE 4.01(2)

89. One respondent submitted that the Commentary regarding threatening an action or to offer to seek to withdraw a criminal charge in order to secure a civil advantage is overly broad,

and recommends deleting the words "to threaten to bring an action or". The provision regarding withdrawal of a criminal charge to gain a civil advantage is unnecessary.

90. One respondent raised concerns with Rule 4.01(2)(c) as it relates to “lawyer’s associates”. The sub-rule applies if the lawyer’s associates “... have business or personal relationships with.....give rise to pressure, influence or...” They submitted that this provision is overbroad and unworkable for multi lawyer firms. It would be impossible for a lawyer appearing on a matter to know of all of the relationships of the lawyer's “associates”. The “lawyer's associates” part of the rule is unnecessary, and may lead to unintended consequences.

PROPOSED RULE 4.01(7): UNDERTAKINGS

91. With respect to this rule, respondents said the following:

    a. the proposed wording could include undertakings given at discovery which he assumes was not the intent. The writer suggests adding after the word “undertakings given” “by her or him” so the obligation is clearly directed at personal undertakings given by the lawyer only.

    b. expand the wording to make it clear that the rule applies to all lawyers in all settings, and not just in litigation, as follows:

        “A lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of his or her rendering professional services.”

RULE 4.02: THE LAWYER AS WITNESS

92. One respondent supported both the current and proposed Rule 4.02, and notes that the rule has led to added administrative efficiencies.

93. Another respondent submitted that the Rule or related Commentary should provide direction on whether a lawyer can submit an affidavit on a motion from a partner or associate in his or her firm, including whether this can be done when the affidavit contains evidence that goes to a controversial point in the motion.

RULE 4.04: COMMUNICATION WITH WITNESSES GIVING EVIDENCE

94. One respondent recommended the following definition, which it views as consistent with the Model Code:

> "For this Rule, the term "cross-examination" means the examination of a witness or a party adverse in interest to the client of the lawyer conducting the examination. It therefore includes an examination for discovery, examination on affidavit, examination in aid of execution, and questioning under the Family Law Rules."

MODEL CODE RULE 4.05(6): PROHIBITION AGAINST DISCUSSION AFTER TRIAL WITH A MEMBER OF THE JURY

95. One respondent indicated that although this rule is not recommended for the Law Society's rules, given the existence of a Criminal Code prohibition against having discussions after trial with a jury member about the jury's deliberations, it could be beneficial to cross-reference to the Criminal Code provision within the Commentary to draw the provision to the attention of lawyers.

RULE 5.03: HARASSMENT AND DISCRIMINATION

96. One respondent said that it may not be necessary to expand these rules given the presence of provincial and federal human rights legislation which lawyers must follow.

97. Another respondent expressed serious concern with the significant downsizing of the rules related to discrimination and harassment. They recommended an expanded commentary section, and that portions of the commentary either be maintained or be developed into guidelines referred to in the Rule or Commentary. The new Rule 5.03 expansion of the definition of "harassment" to include actions outside the Code should lead to an expansion of the role of the Discrimination and Harassment Counsel's mandate to include personal harassment cases.

98. Another respondent said that the proposed changes are unclear, and that the Rules must set out the legal definitions and human rights principles applicable to the legal profession. Keep the current Commentary or, in the alternative, if converted into Practice Guidelines, such Guidelines should be expressly referenced in Rules 5.03 and 5.04.

99. Another respondent saw no value added through adding guidelines outside the Rules, and submits that the rules are straight forward. The rule should be restricted to human rights as applicable in Ontario, including federal legislation, as an expanded reference to human rights laws would add ambiguity.

MODEL CODE RULE 6.02(9): DEALING WITH SELF-REPRESENTED PERSONS

100. One respondent submitted that the Commentary should be more cautionary in tone regarding dealing with unrepresented persons, and noted that it would be rare for a lawyer to potentially become jointly retained by the current client and an unrepresented person.

101. Another respondent generally supported the inclusion of the proposed new rule, but recommended removing the "take care to see" language and replacing it with the mandatory requirement that a lawyer "shall advise in writing that his or her interests will not be protected by the lawyer" or words to this effect.

MODEL CODE RULE 6.02(10): INADVERTENT COMMUNICATIONS

102. Several respondents supported this new rule.

PROPOSED RULE 6.05: THE LAWYER IN PUBLIC OFFICE

103. One respondent said that current rules 6.05(2)-(5) should remain.

PROPOSED RULE 6.08: RETIRED JUDGES RETURNING TO PRACTICE

104. One respondent is of the view that the proposed rule is inadequate. They proposed a detailed rule on the subject based on his recent scholarship in the area.

105. Another respondent recommended adding a prohibition on recently retired judges acting as expert witnesses for a three year period on the same policy basis that led to prohibiting a recently retired judge from appearing as counsel.

Federation of Law Societies of Canada

Fédération des ordres professionnels de juristes du Canada

Model Code of Professional Conduct

As amended December 12, 2012

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PREFACE

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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 rules 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 rules 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 rule 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 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

CHAPTER 1 – INTERPRETATION AND DEFINITIONS

MODEL CODE OF PROFESSIONAL CONDUCT

1.1 DEFINITIONS

1.1-1 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" means a person who:

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf.

Commentary

[1] A lawyer-client relationship may be established without formality.

[2] When an individual consults a lawyer in a representative capacity, the client is the corporation, partnership, organization, or other legal entity that the individual is representing;

[3] For greater clarity, a client does not include a near-client, such as an affiliated entity, director, shareholder, employee or family member, unless there is objective evidence to demonstrate that such an individual had a reasonable expectation that a lawyer-client relationship would be established.

A **"conflict of interest"** means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

"**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 written communication recording the consent as soon as practicable;

"**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;

"**limited scope retainer**" means the provision of legal services for part, but not all, of a client's legal matter by agreement with the client;

"**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.

MODEL CODE OF PROFESSIONAL CONDUCT

CHAPTER 2 – STANDARDS OF THE LEGAL PROFESSION

2.1 INTEGRITY

2.1-1 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

[1] 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.

[2] 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.

[3] 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.

[4] 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.

2.1-2 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.

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Commentary

[1] 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.

MODEL CODE OF PROFESSIONAL CONDUCT

CHAPTER 3 – RELATIONSHIP TO CLIENTS

MODEL CODE OF PROFESSIONAL CONDUCT

3.1 COMPETENCE

Definitions

3.1-1 1 In this section,

"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

3.1-2 A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

Commentary

[1] 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.

[2] 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.

[3] 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.

[4] 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.

[5] 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.

[6] 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.

[7] A 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.

[7.1] When a lawyer considers whether to provide legal services under a limited scope retainer the lawyer must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement for such services does not exempt a lawyer from the duty to provide competent representation. The lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rule 3.2-1.1.

[8] 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.

[9] 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.

[10] 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.

[11] 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.

[12] 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.

[13] 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.

[14] 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.

[15] 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.

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3.2 QUALITY OF SERVICE

Quality of Service

3.2-1 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

[1] This rule should be read and applied in conjunction with section 3.1 regarding competence.

[2] 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.

[3] 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.

[4] 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

[5] 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.

[6] 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.

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Limited Scope Retainers

3.2-1.1 Before undertaking a limited scope retainer the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.

Commentary
[1] Reducing to writing the discussions and agreement with the client about the limited scope retainer assists the lawyer and client in understanding the limitations of the service to be provided and any risks of the retainer. **[2]** A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting in a way that suggests that the lawyer is providing full services to the client. **[3]** Where the limited services being provided include an appearance before a tribunal a lawyer must be careful not to mislead the tribunal as to the scope of the retainer and should consider whether disclosure of the limited nature of the retainer is required by the rules of practice or the circumstances. **[4]** A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed (See rule 7.2-6.1) **[5]** This rule does not apply to situations in which a lawyer is providing summary advice, for example over a telephone hotline or as duty counsel, or to initial consultations that may result in the client retaining the lawyer.

Honesty and Candour

3.2-2 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
[1] 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.

[2] 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.

[3] 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

3.2-3 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

[1] 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.

[2] 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 (section 3.4).

Encouraging Compromise or Settlement

3.2-4 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.

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Commentary
[1] 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

3.2-5 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
[1] 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. [2] 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

3.2-6 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

[1] "Regulatory authority" includes professional and other regulatory bodies.

[2] 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.

[3] 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.

[4] 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

3.2-7 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.

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Commentary

[1] 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.

[2] 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.

[3] 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.

[4] A bona fide test case is not necessarily precluded by this rule 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

3.2-8 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 rule 3.2-7*:*

(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 the rules in section 3.7.

Commentary

[1] 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 (section 3.3).

[2] This rule speaks of conduct that is dishonest, fraudulent, criminal or illegal.

[3] 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.

[4] 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.

[5] 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 3.7-1. 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.

[6] 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

3.2-9 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

[1] 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.

[2] 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.

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[3] 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.

[4] 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.

[5] 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 3.3-1 (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.

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3.3 CONFIDENTIALITY

Confidential Information

3.3-1 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

[1] 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.

[2] 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.

[3] 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.

[4] 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 3.4-1 Conflicts).

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[5] 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.

[6] 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.

[7] 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.

[8] 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.

[9] 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.

[10] 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.

[11] A lawyer may have an obligation to disclose information under Rules 5.5-2, 5.5-3 and 5.6-3 If client information is involved in those situations, the lawyer should be guided by the provisions of this rule.

Use of Confidential Information

3.3-2 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

[1] 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

3.3-3 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.

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Commentary

[1] 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 rule, 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.

[2] 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.

[3] In assessing whether disclosure of confidential information is justified to prevent death or serious bodily harm, a lawyer should consider a number of factors, including:

(a) the likelihood that the potential injury will occur and its imminence;

(b) the apparent absence of any other feasible way to prevent the potential injury; and

(c) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

[4] How and when disclosure should be made under this rule 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.

[5] If confidential information is disclosed under rule 3.3-3, 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.

3.3-4 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.

3.3-5 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.

3.3-6 A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct.

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3.4 CONFLICTS

Duty to Avoid Conflicts of Interest

3.4-1 A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

Commentary

[1] As defined in these rules, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

[2] A lawyer should examine whether a conflict of interest exists not only from the outset, but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

[3] The general prohibition and permitted activity prescribed by this rule apply to a lawyer's duties to current, former, concurrent and joint clients as well as to the lawyer's own interests.

Representation

[4] Representation means acting for a client and includes the lawyer's advice to and judgment on behalf of the client.

The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests

[5] The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the

client's cause, the duty of confidentiality, the duty of candour and the duty not to act against the interests of the client. This obligation is premised on an established or ongoing lawyer-client relationship in which the client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

[6] The rule reflects the principle articulated by the Supreme Court of Canada in the cases of *R. v. Neil* 2002 SCC 70 and *Strother v. 3464920 Canada Inc.* 2007 SCC 24, regarding conflicting interests involving current clients, that a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent. This duty arises even if the matters are unrelated. The lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests. The prohibition on acting in such circumstances except with the consent of the clients guards against such outcomes and protects the lawyer-client relationship.

[7] Accordingly, factors for the lawyer's consideration in determining whether a conflict of interest exists include:

(a) the immediacy of the legal interests;

(b) whether the legal interests are directly adverse;

(c) whether the issue is substantive or procedural;

(d) the temporal relationship between the matters;

(e) the significance of the issue to the immediate and long-term interests of the clients involved; and

(f) the client's reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of Conflicts of Interest

[8] Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of conflicts of interest and are not exhaustive.

(a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.

(b) A lawyer's position on behalf of one client leads to a precedent likely to seriously weaken the position being taken on behalf of another client, thereby creating a

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substantial risk that the lawyer's action on behalf of the one client will materially limit the lawyer's effectiveness in representing the other client.

(c) A lawyer provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.

(d) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

i. A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

(e) A lawyer has a sexual or close personal relationship with a client.

i. Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.

(f) A lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

i. These two roles may result in a conflict of interest or other problems because they may

A. affect the lawyer's independent judgment and fiduciary obligations in either or both roles,

B. obscure legal advice from business and practical advice,

C. jeopardize the protection of lawyer and client privilege, and

D. disqualify the lawyer or the law firm from acting for the organization.

(g) Sole practitioners who practise with other lawyers in cost-sharing or other

arrangements represent clients on opposite sides of a dispute.

i. The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

Consent

3.4-2 A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

(a) Express consent must be fully informed and voluntary after disclosure.

(b) Consent may be inferred and need not be in writing where all of the following apply:

i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

ii. the matters are unrelated;

iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

iv. the client has commonly consented to lawyers acting for and against it in unrelated matters.

Commentary

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest

in or connection with the matter.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in Advance

[4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

[5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

Implied consent**[6]** In some cases consent may be implied, rather than expressly granted. As the Supreme Court held in *Neil* and in *Strother*, however, the concept of implied consent is applicable in exceptional cases only. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume

implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

Dispute

3.4-3 Despite rule 3.4-2, a lawyer must not represent opposing parties in a dispute.

Commentary

[1] A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending these rules.

Concurrent Representation with Protection of Confidential Client Information

3.4-4 Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

(a) disclosure of the risks of the lawyers so acting has been made to each client;

(b) each client consents after having received independent legal advice, including on the risks of concurrent representation;

(c) the clients each determine that it is in their best interests that the lawyers so act;

(d) each client is represented by a different lawyer in the firm;

(e) appropriate screening mechanisms are in place to protect confidential information; and

(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary

[1] This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting

representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs.

[2] An example is a law firm acting for a number of sophisticated clients in a matter such as competing bids in a corporate acquisition in which, although the clients' interests are divergent and may conflict, the clients are not in a dispute. Provided that each client is represented by a different lawyer in the firm and there is no real risk that the firm will not be able to properly represent the legal interests of each client, the firm may represent both even though the subject matter of the retainers is the same. Whether or not a risk of impairment of representation exists is a question of fact.

[3] The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other.

[4] In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see Rule 3.4-26).

Joint Retainers

3.4-5 Before a lawyer acts in a matter or transaction for more than one client, the lawyer must advise each of the clients that:

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

[1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint

retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

[2] A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with rule 3.4-5. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with Rule 3.3-1, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

[3] After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-7.

3.4-6 If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

3.4-7 When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer must obtain their consent.

Commentary

[1] Consent in writing, or a record of the consent in a separate written communication to each client is required. Even if all the parties concerned consent, a lawyer should

avoid acting for more than one client when it is likely that a contentious issue will arise between them or their interests, rights or obligations will diverge as the matter progresses.

3.4-8 Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer,

(a) the lawyer must not advise them on the contentious issue and must:

i. refer the clients to other lawyers; or

ii. advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:

A. no legal advice is required; and

B. the clients are sophisticated.

(b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

Commentary

[1] This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

[2] If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

3.4-9 Subject to this rule, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary

[1] This rule does not relieve the lawyer of the obligation when the contentious issue arises to obtain the consent of the clients when there is or is likely to be a conflict of interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients.

[2] When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the

time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

Acting Against Former Clients

3.4-10 Unless the former client consents, a lawyer must not act against a former client in:

(a) the same matter,

(b) any related matter, or

(c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary

[1] This rule prohibits a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client if:

(a) the former client consents to the other lawyer acting; or

(b) the law firm establishes that it is in the interests of justice that it act in the new matter, having regard to all relevant circumstances, including:

(i) the adequacy of assurances that no disclosure of the former client's confidential information to the other lawyer having carriage of the new matter has occurred;

(ii) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the other lawyer having carriage of the new matter will occur;

(iii) the extent of prejudice to any party;

(iv) the good faith of the parties;

(v) the availability of suitable alternative counsel; and

(vi) issues affecting the public interest.

Commentary
[1] The guidelines at the end of the Commentary to rule 3.4-26 regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for another lawyer in the lawyer's firm to act against the former client.

Acting for Borrower and Lender

3.4-12 Subject to rule 3.4-14, a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

3.4-13 In rules 3.4-14 to 3.4-16, **"lending client"** means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

3.4-14 Provided there is compliance with this rule, and in particular rules 3.4-5 to 3.4-9, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

(a) the lender is a lending client;

(b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;

(c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or

(d) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act* (Canada).

3.4-15 When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary
[1] What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or

borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

3.4-16 If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to:

(a) provide the advice described in rule 3.4-5 to the lending client before accepting the retainer,

(b) provide the advice described in rule 3.4-6, or

(c) obtain the consent of the lending client as required by rule 3.4-7, including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

[1] Rules 3.4-15 and 3.4-16 are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.

[2] Rule 3.4-16 applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

Conflicts from Transfer Between Law Firms

Application of Rule

3.4-17 In rules 3.4-17 to 3.4-26,

(a) **"client"**, includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them, and those defined as a client in the definitions part of this Code;

(b) **"confidential information"** means information that is not generally known to the public obtained from a client; and

(c) **"matter"** means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case.

Commentary
[1] The duties imposed by this rule concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

3.4-18 Rules 3.4-17 to 3.4-26 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client ("former client");

(b) the interests of those clients in that matter conflict; and

(c) the transferring lawyer actually possesses relevant information respecting that matter.

3.4-19 Rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial attorney general or department of justice who, after transferring from one department, ministry or agency to another, continues to be employed by that attorney general or department of justice.

Commentary
[1] The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.
[2] **Lawyers and support staff** — This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that

they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.

[3] Government employees and in-house counsel — The definition of "law firm" includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

[4] Law firms with multiple offices — This rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public interest that it continue to represent its client in the matter.

Law Firm Disqualification

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter referred to in rule 3.4-18(a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including:

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur;

(ii) the extent of prejudice to any party;

(iii) the good faith of the parties;

(iv) the availability of suitable alternative counsel; and

(v) issues affecting the public interest.

Commentary

[1] The circumstances enumerated in rule 3.4-20(b) are drafted in broad terms to

ensure that all relevant facts will be taken into account. While clauses (ii) to (iv) are self-explanatory, clause (v) includes governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.

3.4-21 For greater certainty, rule 3.4-20 is not intended to interfere with the discharge by an Attorney General or his or her counsel or agent (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.

3.4-22 If the transferring lawyer actually possesses information relevant to a matter referred to in rule 3.4-18(a) respecting the former client that is not confidential information but that may prejudice the former client if disclosed to a member of the new law firm:

(a) the lawyer must execute an affidavit or solemn declaration to that effect, and

(b) the new law firm must

(i) notify its client and the former client or, if the former client is represented in the matter, the former client's lawyer, of the relevant circumstances and the firm's intended action under this rule, and

(ii) deliver to the persons notified under subparagraph (i) a copy of any affidavit or solemn declaration executed under clause (a).

Transferring Lawyer Disqualification

3.4-23 Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 or 3.4-22 must not:

(a) participate in any manner in the new law firm's representation of its client in the matter; or

(b) disclose any confidential information respecting the former client.

3.4-24 Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in rule 3.4-20 or 3.4-22.

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Determination of Compliance

3.4-25 Anyone who has an interest in, or who represents a party in, a matter referred to in rules 3.4-17 to 3.4-26 may apply to a tribunal of competent jurisdiction for a determination of any aspect of those rules.

Due Diligence

3.4-26 A lawyer must exercise due diligence in ensuring that each member and employee of the lawyer's law firm, and each other person whose services the lawyer has retained

a) complies with rules 3.4-17 to 3.4-26, and

b)

i. does not disclose confidential information of clients of the firm and

ii. any other law firm in which the person has worked.

Commentary

MATTERS TO CONSIDER

[1] When a law firm ("new law firm") considers hiring a lawyer or an articled law student ("transferring lawyer") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. The transferring lawyer and the new law firm need to identify, first, all cases in which:

(a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client;

(b) the interests of the clients of the two law firms conflict; and

(c) the transferring lawyer actually possesses relevant information.

[2] The new law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the client of the former law firm ("former client") that is confidential and that may prejudice the former client if disclosed to a member of the new law firm. If this element exists, the new law firm is disqualified unless the former client consents or the new law firm establishes that its

continued representation is in the interests of justice, based on relevant circumstances.

[3] In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences.

Matters to Consider Before Hiring a Potential Transferee

[4] After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether a conflict exists.

[5] **If a conflict exists** If the transferring lawyer actually possesses relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless:

(a) the new law firm obtains the former client's consent to its continued representation of its client in that matter; or

(b) the new law firm complies with rule 3.4-20(b) and, in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

[6] If the new law firm seeks the former client's consent to the new law firm continuing to act, it will in all likelihood be required to satisfy the former client that 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. The former client's consent must be obtained before the transferring lawyer is hired.

[7] Alternatively, if the new law firm applies under rule 3.4-25 for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of rule 3.4-20(b). Ideally, this process should be completed before the transferring person is hired.

[8] **If no conflict exists** Although the notice required by rule 3.4-22 need not necessarily be made in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given or its timeliness and content.

[9] The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client because, in the absence of such consent, the transferring lawyer may not act.

[10] If the former client does not consent to the transferring lawyer acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure will occur to any member of the new law firm of the former client's confidential information. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring lawyer did in fact possess confidential information that may prejudice the former client if disclosed.

[11] A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client. A former client who disputes the allegation of no such confidential information may apply under rule 3.4-25 for a determination of that issue.

[12] **If the new law firm is not sure whether a conflict exists** There may be some cases in which the new law firm is not sure whether the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm. In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring lawyer.

Reasonable Measures to Ensure Non-Disclosure of Confidential Information

[13] As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure of the former client's confidential information will occur to any member of the new law firm:

(a) when the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm, and

(b) when the new law firm is not sure whether the transferring lawyer actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

[14] It is not possible to offer a set of "reasonable measures" that will be appropriate or adequate in every case. Instead, the new law firm that seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure will occur to any member of the new law firm

of the former client's confidential information."

[15] In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, 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 other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

[16] The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled "Conflict of Interest Disqualification: Martin v. Gray and Screening Methods" (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

[17] When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new "law firm", the interests of the new client (Her Majesty or the corporation) must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the 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 rule 3.4-20(b), particularly clause (v). Only when the entire firm must be disqualified under rule 3.4-20 will it be necessary to refer conduct of the matter to outside counsel.

GUIDELINES

1. The screened lawyer should have no involvement in the new law firm's representation of its client.
2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.

4. The current matter should be discussed only within the limited group that is working on the matter.
5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.
6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.
7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
8. Appropriate law firm members should provide undertakings setting out that they have adhered to and will continue to adhere to all elements of the screen.
9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised
   (a) that the screened lawyer is now with the new law firm, which represents the current client, and
   (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.
10. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.
11. The screened lawyer should use associates and support staff different from those working on the current matter.
12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

Doing Business with a Client

Definitions

3.4-27 In rules 3.4-27 to 3.4-41,

"**independent legal advice**" means a retainer in which:

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,

(b) the client's transaction involves doing business with

(i) another lawyer, or

(ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded,

(c) the retained lawyer has advised the client that the client has the right to independent legal representation,

(d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from another lawyer,

(e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and

(f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of a proposed investment from a business point of view;

"independent legal representation" means a retainer in which

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction, and

(b) the retained lawyer will act as the client's lawyer in relation to the matter;

Commentary
[1] If a client elects to waive independent legal representation and to rely on independent legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged.

"related persons" means related persons as defined in the *Income Tax Act* (Canada).

3.4-28 Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

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Commentary

[1] This provision applies to any transaction with a client, including:

(a) lending or borrowing money;

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift;

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

(e) recommending an investment; and

(f) entering into a common business venture.

[2] The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

Investment by Client when Lawyer has an Interest

3.4-29 Subject to rule 3.4-30, if a client intends to enter into a transaction with his or her lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

(b) recommend and require that the client receive independent legal advice; and

(c) if the client requests the lawyer to act, obtain the client's consent.

Commentary

[1] If the lawyer does not choose to disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

[2] A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

[3] Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

[4] If the investment is by borrowing from the client, the transaction may fall within the requirements of rule 3.4-32.

3.4-30 When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Borrowing from Clients

3.4-31 A lawyer must not borrow money from a client unless

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or

(b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary

[1] Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Certificate of Independent Legal Advice

3.4-32 A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

(a) provide the client with a written certificate that the client has received independent legal advice, and

(b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

3.4-33 Subject to rule 3.4-31, if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

Lawyers in Loan or Mortgage Transactions

3.4-34 If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must

(a) disclose and explain the nature of the conflicting interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

Guarantees by a Lawyer

3.4-35 Except as provided by rule 3.4-36, a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

3.4-36 A lawyer may give a personal guarantee in the following circumstances:

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:

(i) the lawyer has complied with this section (Conflicts), in particular, rules 3.4-27 to 3.4-36 (Doing Business with a Client); and

(ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Testamentary Instruments and Gifts

3.4-37 A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

3.4-38 Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

3.4-39 A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

Judicial Interim Release

3.4-40 A lawyer must not act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused person for whom the lawyer acts.

3.4-41 A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused who is in a family relationship with the lawyer when the accused is represented by the lawyer's partner or associate.

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3.5 PRESERVATION OFCLIENTS' PROPERTY

Preservation of Clients' Property

3.5-1 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.

3.5-2A 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

[1] 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].

[2] 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.

[3] 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.

[4] If the lawyer withdraws from representing a client, the lawyer is required to comply with Rule 3.7-1 (Withdrawal from Representation).

Notification of Receipt of Property

3.5-3 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

3.5-4 A lawyer must clearly label and identify clients' property and place it in safekeeping distinguishable from the lawyer's own property.

3.5-5 A lawyer must maintain such records as necessary to identify clients' property that is in the lawyer's custody.

Accounting and Delivery

3.5-6 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.

3.5-7 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

[1] 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*.

[2] 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.

[3] 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.

[4] 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.

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3.6 FEES AND DISBURSEMENTS

Reasonable Fees and Disbursements

3.6-1 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

[1] 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.

[2] 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.

[3] 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.

[4] 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

3.6-2 Subject to rule 3.6-1, 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

[1] 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.

[2] 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 3.7-1, 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 3.7-7 (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.

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Statement of Account

3.6-3 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
[1] 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. **[2]** 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

3.6-4 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

3.6-5 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.

3.6-6 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.

3.6-7 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

[1] 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

3.6-8 Rule 3.6-7 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

[1] 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 3.6-7. 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

3.6-9 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.

3.6-10 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

[1] 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.

[2] 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.

3.6-11 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.

1 This issue is currently specific to Ontario.

Prepaid Legal Services Plan

3.6-12 A lawyer who accepts a client referred by a prepaid legal services plan must advise the client in writing of:

(a) the scope of work to be undertaken by the lawyer under the plan; and

(b) the extent to which a fee or disbursement will be payable by the client to the lawyer.

MODEL CODE OF PROFESSIONAL CONDUCT

3.7 WITHDRAWAL FROM REPRESENTATION

Withdrawal from Representation

3.7-1 A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

Commentary

[1] 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.

[2] 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 rule 3.7-8 Manner of Withdrawal).

[3] 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.

[4] 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

3.7-2 If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

[1] 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

3.7-3 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

[1] 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

3.7-4 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
[1] 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.

3.7-5 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.

3.7-6 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
[1] 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

3.7-7 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

3.7-8 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.

3.7-9 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

[1] 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.

[2] 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.

[3] 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.

[4] 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.

[5] 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

3.7-10 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

[1] 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.

MODEL CODE OF PROFESSIONAL CONDUCT

CHAPTER 4 – MARKETING OF LEGAL SERVICES

MODEL CODE OF PROFESSIONAL CONDUCT

4.1 MAKING LEGAL SERVICES AVAILABLE

Making Legal Services Available

4.1-1 A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 4.1-2, may offer legal services to a prospective client by any means.

Commentary

[1] 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.

[2] 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.

[3] 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.

[4] **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 section 3.6-6, without charge.

Restrictions

4.1-2 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

[1] 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.

MODEL CODE OF PROFESSIONAL CONDUCT

4.2 MARKETING

Marketing of Professional Services

4.2-1 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

[1] 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

4.2-2 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.

MODEL CODE OF PROFESSIONAL CONDUCT

4.3 ADVERTISING NATURE OF PRACTICE

4.3-1 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

[1] 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.

[2] 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.

[3] 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.

[4] 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.

MODEL CODE OF PROFESSIONAL CONDUCT

CHAPTER 5 - RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

MODEL CODE OF PROFESSIONAL CONDUCT

5.1 THE LAWYER AS ADVOCATE

Advocacy

5.1-1 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

[1] 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.

[2] 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.

[3] 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.

[4] 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.

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

[6] 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.

[7] 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.

[8] 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.

[9] **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.

[10] 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.

5.1-2 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

[1] 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.

[2] 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.

[3] 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 3.2-5 and 3.2-6 and accompanying commentary.

[4] 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

5.1-3 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

[1] 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

5.1-4 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 section 3.3 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Commentary

[1] 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 3.7-1 (Withdrawal from Representation), withdraw or seek leave to do so.

Courtesy

5.1-5 A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.

[1] 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

5.1-6 A lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation.

Commentary

[1] A lawyer should also be guided by the provisions of rule 7.2-11 (Undertakings and Trust Conditions).

Agreement on Guilty Plea

5.1-7 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.

5.1-8 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
[1] The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

MODEL CODE OF PROFESSIONAL CONDUCT

5.2 THE LAWYER AS WITNESS

Submission of Evidence

5.2-1 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

[1] 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

5.2-2 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.

MODEL CODE OF PROFESSIONAL CONDUCT

5.3 INTERVIEWING WITNESSES

Interviewing Witnesses

5.3 Subject to the rules on communication with a represented party set out in rules 7.2-4 to 7.2-8, 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.

MODEL CODE OF PROFESSIONAL CONDUCT

5.4 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

5.4-1 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

5.4-2 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

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

[2] 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.

[3] 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.

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[4] 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.

[5] 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.

[6] 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.**[7]** This rule applies with necessary modifications to examinations out of court.

MODEL CODE OF PROFESSIONAL CONDUCT

5.5 RELATIONS WITH JURORS

Communications before Trial

5.5-1 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

[1] 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

5.5-2 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.

5.5-3 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

5.5-4 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.

5.5-5 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.

5.5-6 A lawyer must not have any discussion after trial with a member of the jury about its deliberations.

Commentary
[1] 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.

MODEL CODE OF PROFESSIONAL CONDUCT

5.6 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

5.6-1 A lawyer must encourage public respect for and try to improve the administration of justice.

Commentary

[1] 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.

[2] 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.

[3] **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.

[4] 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

5.6-2 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

[1] 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

5.6-3 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

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

(a) further security, or

(b) reserving judgment.

[2] 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.

[3] If client information is involved in those situations, the lawyer should be guided by the provisions of section 3.3 (Confidentiality).

MODEL CODE OF PROFESSIONAL CONDUCT

5.7 LAWYERS AND MEDIATORS

Role of Mediator

5.7 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

[1] 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.

[2] 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 section 3.4 (Conflicts) and its commentaries and the common law authorities.

[3] 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.

[4] 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.

MODEL CODE OF PROFESSIONAL CONDUCT

CHAPTER 6 - RELATIONSHIP TO STUDENTS, EMPLOYEES, AND OTHERS

MODEL CODE OF PROFESSIONAL CONDUCT

6.1 SUPERVISION

Direct Supervision Required

6.1-1 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

[1] 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.

[2] 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.

[3] 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.

[4] 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.

[5] 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

6.1-2 In this rule, a non-lawyer does not include a student-at-law.

Delegation

6.1-3 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

[1] 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.

[2] 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.

[3] 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.

MODEL CODE OF PROFESSIONAL CONDUCT

Suspended or Disbarred Lawyers

6.1-4 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

6.1-5 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.

6.1-6 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

[1] 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.

[2] 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.

6.2 STUDENTS

Recruitment and Engagement Procedures

6.2-1 A lawyer must observe any procedures of the Society about the recruitment and engagement of articling or other students.

Duties of Principal

6.2-2 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
[1] A principal or supervising lawyer is responsible for the actions of students acting under his or her direction.

Duties of Articling Student

6.2-3 An articling student must act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

6.3 HARASSMENT AND DISCRIMINATION

6.3-1 The principles of human rights laws and related case law apply to the interpretation of this rule.

6.3-2 A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.

6.3-3 A lawyer must not sexually harass any person.

6.3-4 A lawyer must not engage in any other form of harassment of any person.

6.3-5 A lawyer must not discriminate against any person.

Commentary
[1] 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.

MODEL CODE OF PROFESSIONAL CONDUCT

CHAPTER 7 - RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

MODEL CODE OF PROFESSIONAL CONDUCT

7.1 RESPONSIBILITY TO THE SOCIETY AND THE PROFESSION GENERALLY

Communications from the Society

7.1-1 A lawyer must reply promptly and completely to any communication from the Society.

Meeting Financial Obligations

7.1-2 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

[1] 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.

[2] 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.

[3] 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

7.1-3 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

[1] 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).

[2] 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.

[3] 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.

MODEL CODE OF PROFESSIONAL CONDUCT

Encouraging Client to Report Dishonest Conduct

7.1-4 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.

MODEL CODE OF PROFESSIONAL CONDUCT

7.2 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

7.2-1 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

[1] 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.

[2] 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.

[3] 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.

[4] 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.

7.2-2 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.

7.2-3 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.

MODEL CODE OF PROFESSIONAL CONDUCT

Communications

7.2-4 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.

7.2-5 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.

7.2-6 Subject to rules 7.2-6.1 and 7.2-7, 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.

7.2-6.1 Where a person is represented by a lawyer under a limited scope retainer on a matter, another lawyer may, without the consent of the lawyer providing the limited scope legal services, approach, communicate or deal with the person directly on the matter unless the lawyer has been given written notice of the nature of the legal services being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer.

Commentary

[1] Where notice as described in rule 7.2-6.1 has been provided to a lawyer for an opposing party, the opposing lawyer is required to communicate with the person's lawyer, but only to the extent of the limited representation as identified by the lawyer. The opposing lawyer may communicate with the person on matters outside of the limited scope retainer.

7.2-7 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

[1] Rule 7.2-6 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 rule does not prevent parties to a matter from communicating directly with each other.

[2] 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.

[3] Rule 7.2-7 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.

7.2-8 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

[1] This rule 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.

[2] 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 section 3.4 (Conflicts), and particularly rules 3.4-5 to 3.4-9. A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of section 3.4 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

7.2-9 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

[1] 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

7.2-10 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

[1] 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.

[2] 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

7.2-11 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

[1] 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.

[2] 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.

[3] 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.

[4] 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.

[5] 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.

[6] 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.

[7] 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.

MODEL CODE OF PROFESSIONAL CONDUCT

7.3 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

7.3-1 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

[1] 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.

[2] 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.

7.3-2 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

[1] 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.

[2] When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

MODEL CODE OF PROFESSIONAL CONDUCT

7.4 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

7.4 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

[1] 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.

[2] 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.

[3] Lawyers holding public office are also subject to the provisions of section 3.4 (Conflicts) when they apply.

MODEL CODE OF PROFESSIONAL CONDUCT

7.5 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

7.5-1 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

[1] 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.

[2] 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.

[3] 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.

[4] 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.

[5] 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.

[6] 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.

[7] 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

7.5-2 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

[1] 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.

MODEL CODE OF PROFESSIONAL CONDUCT

7.6 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

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

Commentary
[1] 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.

MODEL CODE OF PROFESSIONAL CONDUCT

7.7 RETIRED JUDGES RETURNING TO PRACTICE

7.7 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.

MODEL CODE OF PROFESSIONAL CONDUCT

7.8 ERRORS AND OMISSIONS

Informing Client of Errors or Omissions

7.8-1 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

7.8-2 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

[1] 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

7.8-3 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

7.8-4 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.

7.8-5 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 7.1-2).

TAB 3.2

PROFESSIONAL REGULATION DIVISION

QUARTERLY REPORT

178. The Professional Regulation Division's Quarterly Report (third quarter 2013), provided to the Committee by Zeynep Onen, the Director of Professional Regulation, appears on the following pages. The report includes information on the Division's activities and responsibilities, including file management and monitoring, for the period July to September 2013.

The Law Society of Upper Canada | Barreau du Haut-Canada

The Professional Regulation Division

Quarterly Report

July – September 2013

The Law Society of Upper Canada
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Quarterly Report (July 1 – September 30, 2013)

The Quarterly Report

The Quarterly Report provides a summary of the Professional Regulation Division's activities and achievements during the past quarter, July 1 to September 30, 2013. The purpose of the Quarterly Report is to provide information on the production and work of the Division during the quarter, to explain the factors that may have influenced the Division's performance, and to provide a description of exceptional or unusual projects or events in the period.

The Professional Regulation Division

Professional Regulation is responsible for responding to complaints against licensees, including the resolution, investigation and prosecution of complaints which are within the jurisdiction provided under the *Law Society Act*. In addition the Professional Regulation provides trusteeship services for the practices of licensees who are incapacitated by legal or health reasons. Professional Regulation also includes the Compensation Fund which compensates clients for losses suffered as a result of the wrongful acts of licensees.

See Appendices for a case flow chart describing the complaints process as well as a description of the Professional Regulation division processes and organization.

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SECTION 1

REPORT HIGHLIGHTS

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Highlights of Quarterly Performance

The Division

In 2013 the Law Society continues to experience an increase in the number of complaints when compared to 2011 or 2012. During the first three quarters of 2013, Professional Regulation received almost 7% more complaints than in 2011 and 8.5% more than was received in 2012. The division received a total of 3941 complaints during this period. It is worth noting that in 2012 the Law Society received fewer complaints than in 2011. Consequently the following analysis will refer to 2011 as a comparator as well as 2012 to demonstrate recent trends accurately.

During the first three quarters Professional Regulation closed a total of 4018 cases, reducing its inventory of cases marginally to 3,225 in total.

Complaints Resolution

Complaints Resolution responds to complaints that, if there was evidence to support the allegations, would be unlikely to attract a formal response such a discipline. During the first three quarters of 2013, the department received a significantly higher number of complaint cases (1516) than in 2011 or 2012. The 2013 input was 9% higher than in 2011 and 18% higher than in 2012.

During the third quarter the department closed more cases than it received, with the result that its inventory reduced to 1055 cases by September 30th. During the first three quarters of 2013 the department completed 1404 complaint cases with the result that it is carrying a small backlog of cases. The department continues to have a number of older cases in its inventory, with 7% of cases older than 12 months. These cases are monitored closely. Generally they consist of cases which have taken longer to complete due to factors beyond the control of the Law Society.

Investigations

This department also experienced an increase in the number of new cases in the first three quarters of 2013. When compared with 2011, which was the most recent year in which higher numbers of cases were received, the increase was 3% (1102 cases in 2013 compared with 1072 cases in 2011). By the end of the third quarter, the department completed 1022 cases. As a result, the department's inventory has increased by 80 cases since the beginning of the year. The department continues to have a number of older cases in its inventory which are being closely managed. At the end of the third quarter 14% of the cases in the inventory were older than 18 months. The timing on many of these cases is not within the Law Society's control. To the extent that the cases can proceed, they are the subject of special focus by staff and managers.

The mortgage fraud caseload aging decreased significantly during this period. At the beginning of 2013 27% of the case inventory was older than 18 months. This has now reduced to 7%, and these cases are expected to complete within a short time period.

Unauthorized Practice (UAP)

During 2011 and 2012 the Law Society received approximately 250 UAP complaints. In 2013 to date, the intake of new complaints alleging unauthorized practice has increased by 14% when compared with the same period in 2012. Case completions have exceeded the input of new cases with the result that the inventory of cases declined during the period.

Discipline and Hearings

More Notices of Hearing were issued in 2013 than the comparable periods in 2011 and 2012. 118 Notices were issued in the first three quarters compared with 93 in 2012 and 92 in 2011. Similarly, more hearings were completed, with 91 decisions and orders by Hearing Panels compared to 84 in 2012. During 2013 a total of 15 appeals have been commenced to the Appeal Panel, mirroring the experience in 2011 and 2012. The inventory of cases in the Discipline department continues to remain at around 200 during 2013.

SECTION 2

DIVISIONAL PERFORMANCE DURING THE QUARTER

The Law Society of Upper Canada
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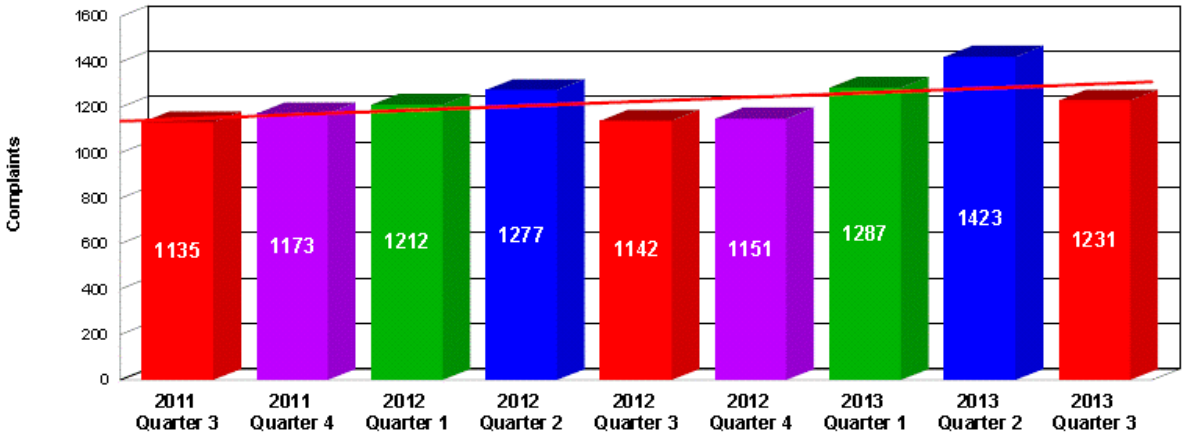
PERFORMANCE IN THE PROFESSIONAL REGULATION DIVISION

Graph 2A: Complaints[1] Received in the Division



The number of new complaints received in the third quarter of 2013 decreased by approximately 13% when compared to the number received in the second quarter of 2013. An analysis of new complaints received (below) shows that, in Q3 2013, complaints against lawyers, licensed paralegals, lawyer applicants and paralegal applicants decreased while the number of complaints against non-licensees/non-applicants increased slightly from the number received in Q2 2013.

Detailed Analysis of Complaints Received in the Division

	Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Complaints against Lawyers	942	937	1015	1026	969
Lawyer Applicant Cases★	27	8	18	67	21
Complaints against Licensed Paralegals	118	109	160	152	143
Paralegal Applicant Cases★	20	26	29	121	34
Complaints against Non-Licensees/Non-Applicants*	35	71	65	57	64
TOTAL	1142	1151	1287	1423	1231

★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP complaints see section 3.4.

[1] Includes all complaints received in PRD from Complaints Services.

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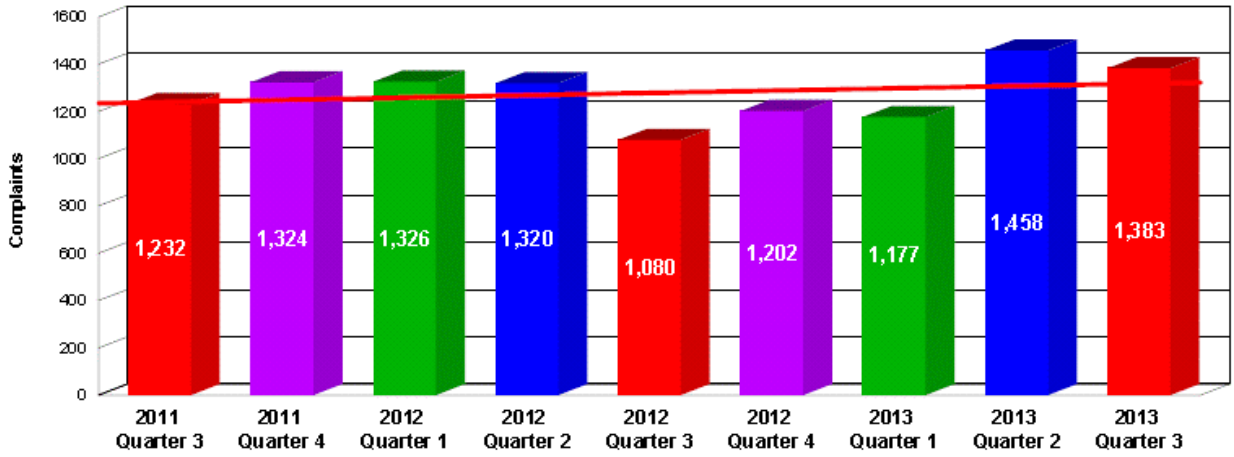
Graph 2B: Complaints Closed[2] in the Division (by Quarters)



The number of cases closed in the Division in Q2 2013 decreased by 5% from the number of cases closed in Q2 2013.

Detailed Analysis of Complaints Closed in the Division

	Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Complaints against Lawyers	827	981	946	1118	1101
Lawyer Applicant Cases★	16	11	13	64	31
Complaints against Licensed Paralegals	139	116	105	127	124
Paralegal Applicant Cases★	39	32	37	83	53
Complaints against Non-Licensees/Non-Applicants*	59	62	76	66	74
TOTAL	1080	1202	1177	1458	1383

★ Applicant cases include good character cases and UAP complaints
* For a complete analysis of UAP ccomplaints see section 3.4.

[2] This graph includes all complaints closed in Intake, Complaints Resolution, Investigations and Discipline.

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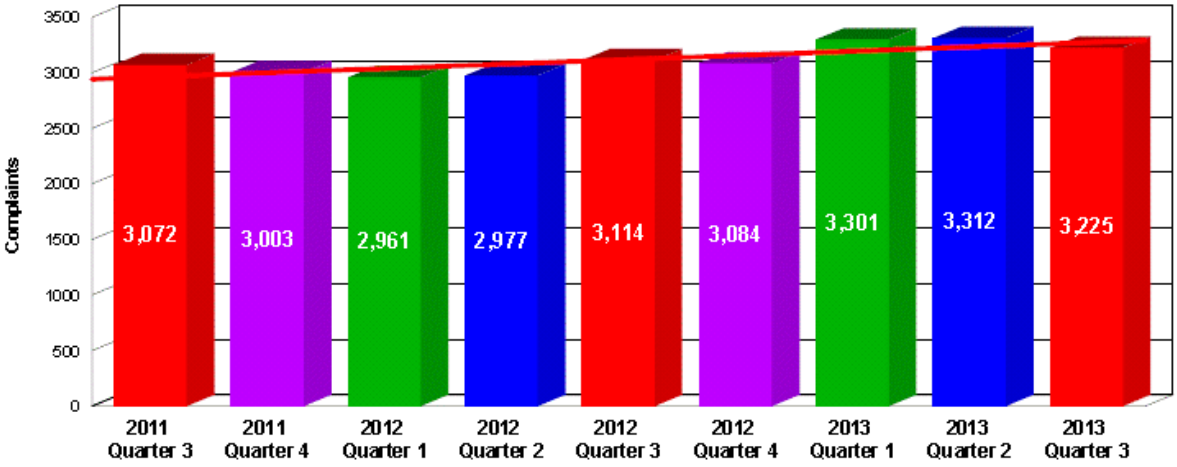
Graph 2C: Total Inventory[3]



The inventory in the Division at the end of Q3 2013 was lower than the inventory at the end of Q1 and Q2 2013 (by approximately 2.5%). The breakdown of the inventory in the chart below demonstrates that during the last quarter, the inventory of complaints against all groups except licensed paralegals decreased.

Detailed Analysis of Division Inventory

	Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Complaints against Lawyers	2571	2546	2711	2656	2575
Lawyer Applicant Cases★	34	31	37	39	29
Complaints against Licensed Paralegals	331	322	378	404	427
Paralegal Applicant Cases★	66	60	55	91	77
Complaints against Non-Licensees/Non-Applicants*	112	125	120	122	117
TOTAL	3114	3084	3301	3312	3225

★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP ccomplaints see section 3.4.

[3] This graph does not include active complaints in the Monitoring & Enforcement Department.

SECTION 3

DEPARTMENTAL PERFORMANCE DURING THE QUARTER

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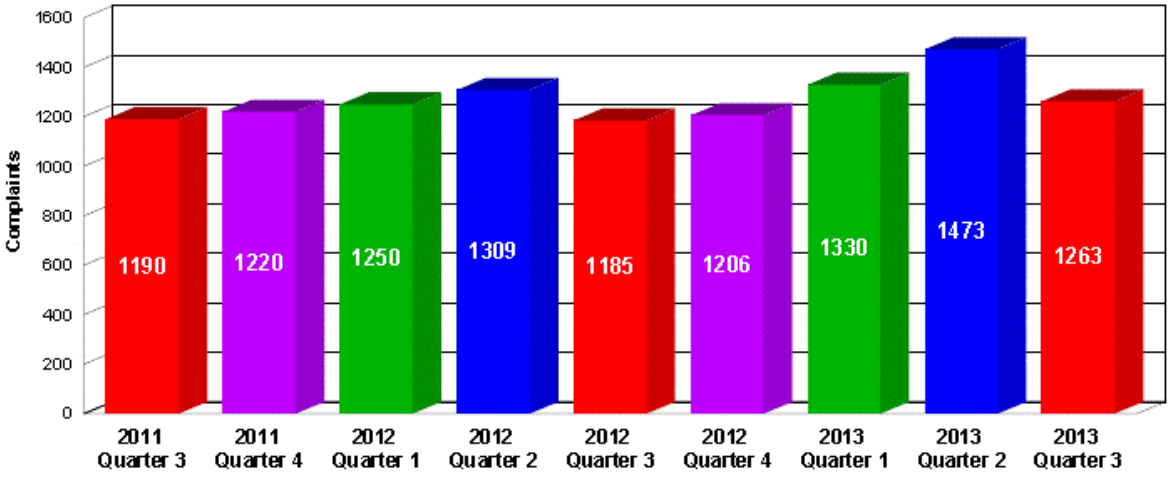
3.1 – Intake

Graph 3.1A: Intake - Input[4]



The Intake department processes all new regulatory complaints. In Q3 2013, in addition to the 1231 new cases, Intake re-opened 32 complaints which met the threshold for re-opening a closed matter.

[4] Includes new complaints received and re-opened complaints

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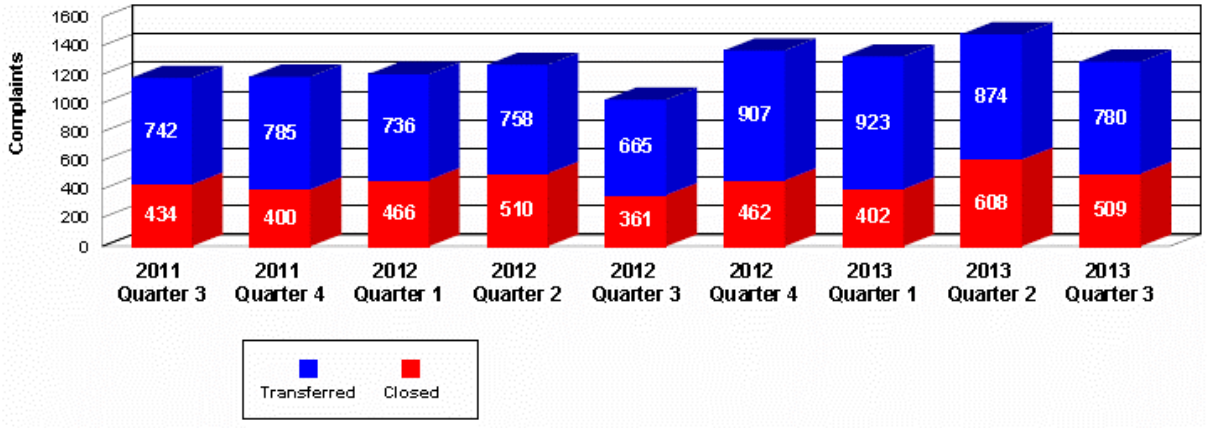
3.1 – Intake

Graph 3.1B: Intake - Complaints Closed and Transferred Out



In Q3 2013, Intake completed 1289 cases, which represents a 13% decrease over the number of cases completed by the department in Q2 2013 (1482) but a 26% increase over the number of cases completed by the department in the same period in 2012 (Q3 2012 – 1026) and a 9.6% increase over the number completed in the same period in 2011 (Q3 2011 – 1176).

Detailed Analysis of Complaints Closed and Transferred From Intake

		Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Complaints against Lawyers	Closed	278	386	327	425	404
	Transferred	549	734	737	639	605
Lawyer Applicant Cases★	Closed	10	3	2	45	15
	Transferred	19	4	17	18	11
Complaints against Licensed Paralegals	Closed	42	32	28	39	40
	Transferred	62	116	108	127	111
Paralegal Applicant Cases★	Closed	14	8	13	69	22
	Transferred	19	18	15	45	18
Complaints against Non-Licensees/Non-Applicants*	Closed	17	33	32	30	28
	Transferred	16	35	46	45	35
TOTAL	Closed	361	462	402	608	509
	Transferred	665	907	923	874	780

★ Applicant cases include good character cases and UAP complaints
* For a complete analysis of UAP ccomplaints see section 3.4.

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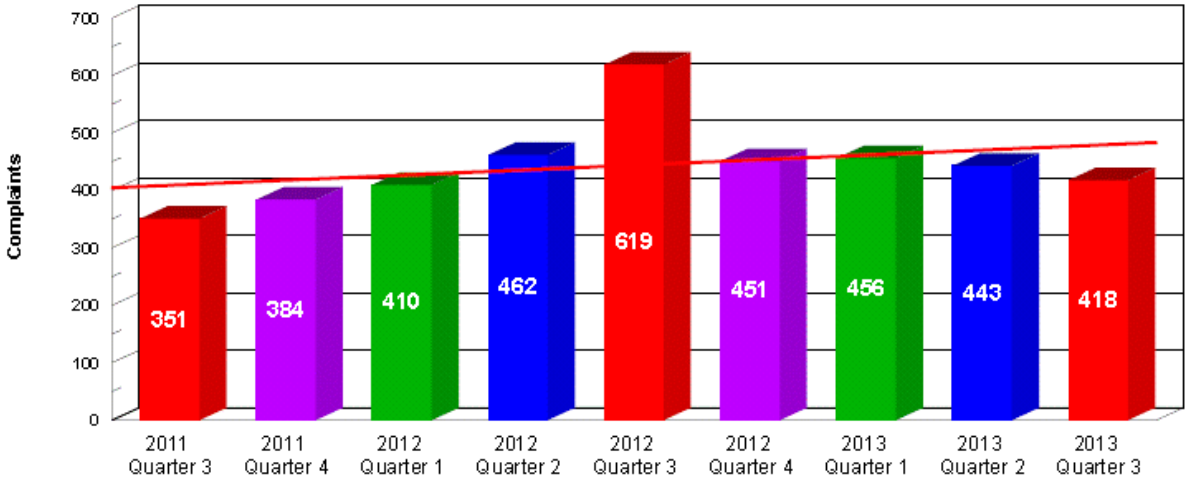
3.1 – Intake

Graph 3.1 C: Intake - Department Inventory



The department's inventory decreased by approximately 6% over the past quarter, however the graph demonstrates an increase in inventory over the past two years. As noted in the chart below, Intake's inventory at the end of the quarter consisted mostly of complaints against lawyers.

Detailed Analysis of Intake Inventory

	Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Complaints against Lawyers	541	399	387	384	369
Lawyer Applicant Cases★	1	2	1	5	0
Complaints against Licensed Paralegals	66	32	56	44	36
Paralegal Applicant Cases★	0	0	1	6	2
Complaints against Non-Licensees/Non-Applicants*	11	18	11	4	11
TOTAL	619	451	456	443	418

★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP complaints see section 3.4.

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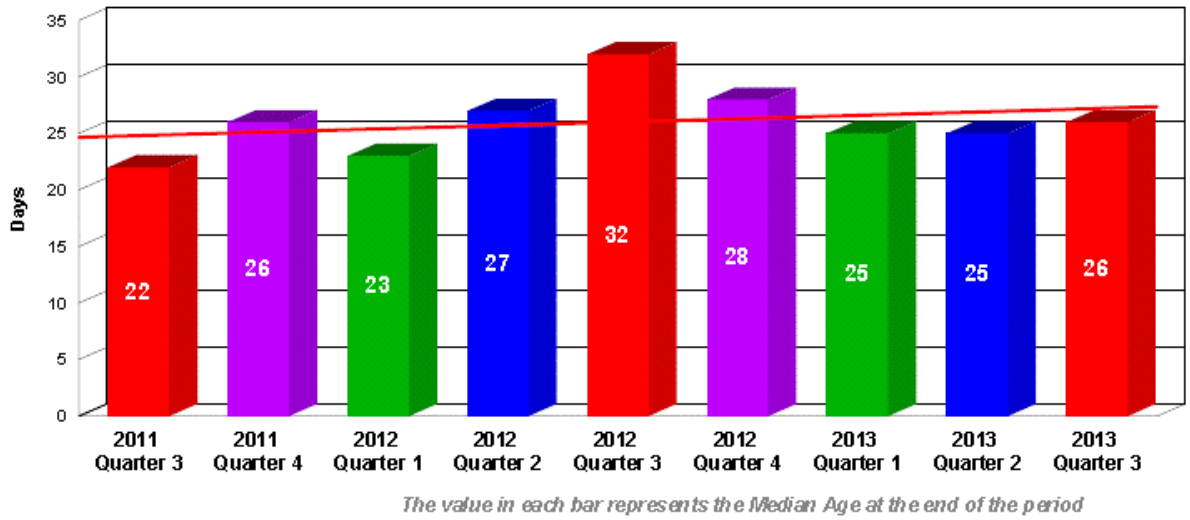
3.1 – Intake

Graph 3.1D: Intake - Median Age of Complaints



Intake's median age is below the department's 30-day target, indicating a timely case process.

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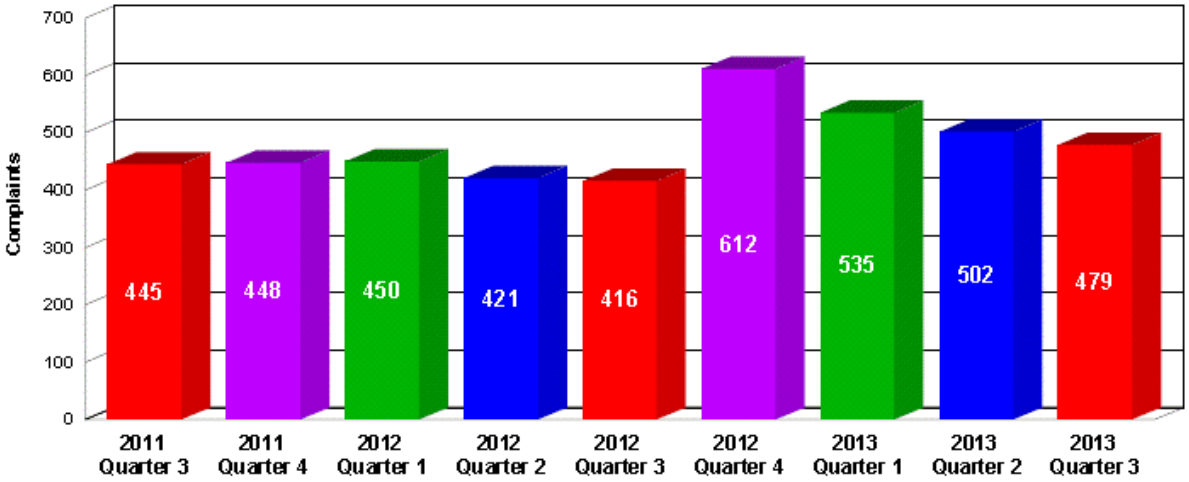
3.2 – Complaints Resolution

Graph 3.2A: Complaints Resolution – Input[5]



The input of cases into Complaints Resolution in Q3 2013 decreased by approximately 5% from the number received in Q2 2013 (502). When compared to the same period in the previous 2 years, the department's input in Q3 2013 increased by 13% compared to Q3 2012 and by 7% compared to Q3 2011.

Detailed Analysis of New and Re-opened Complaints in Complaints Resolution

	Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Complaints against Lawyers	377	548	492	443	418
Lawyer Applicant Cases★	0	0	0	0	0
Complaints against Licensed Paralegals	39	64	43	59	60
Paralegal Applicant Cases★	0	0	0	0	0
Complaints against Non-Licensees/Non-Applicants*	0	0	0	0	1
TOTAL	416	612	535	502	479

★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP complaints see section 3.4.

[5] Includes new complaints received into the department as well as complaints re-opened during the Quarter.

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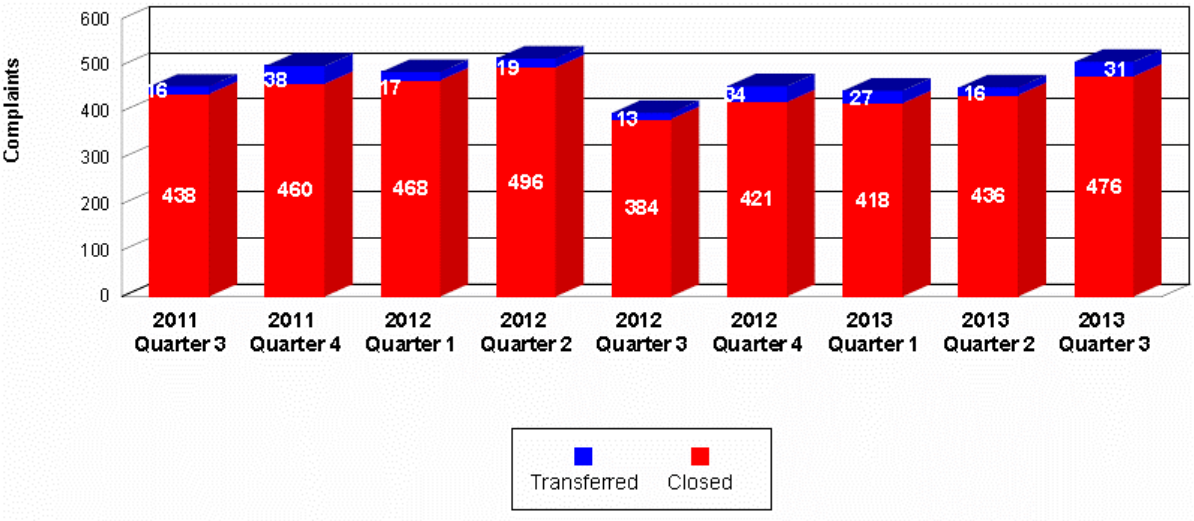
3.2 – Complaints Resolution

Graph 3.2B: Complaints Resolution - Complaints Closed and Transferred Out



The number of cases completed in Q3 2013 by Complaints Resolution (507) increased by 12% over the number of cases completed in Q2 2013 (452).

Detailed Analysis of Complaints Closed and Transferred From Complaints Resolution

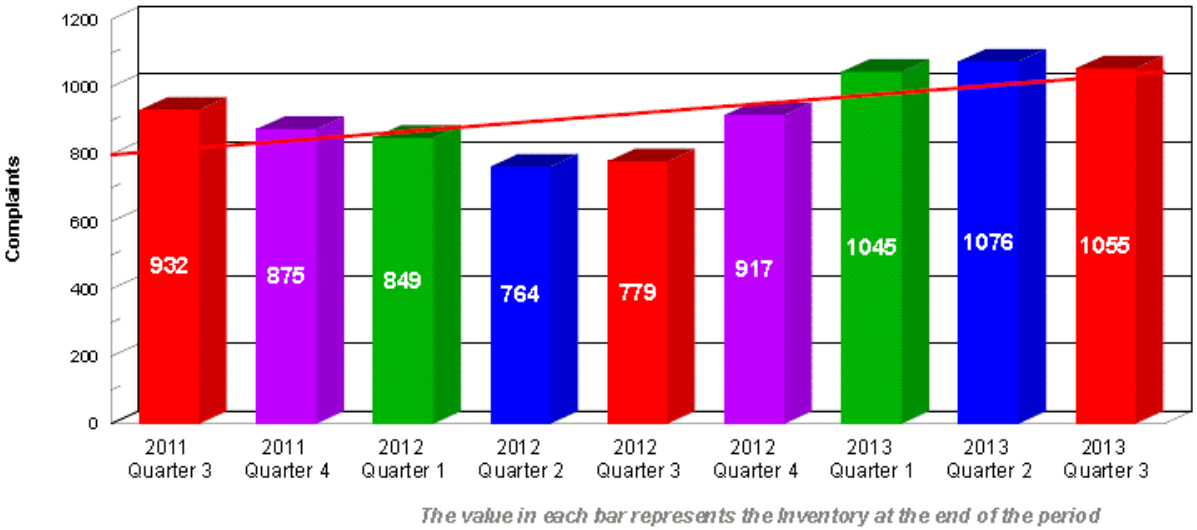
		Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Complaints against Lawyers	Closed	357	378	379	408	434
	Transferred	13	31	24	14	23
Lawyer Applicant Cases★	Closed	0	0	0	0	0
	Transferred	0	0	0	0	0
Complaints against Licensed Paralegals	Closed	27	43	39	28	42
	Transferred	0	3	3	2	7
Paralegal Applicant Cases★	Closed	0	0	0	0	0
	Transferred	0	0	0	0	0
Complaints against Non-Licensees/Non-Applicants*	Closed	0	0	0	0	0
	Transferred	0	0	0	0	1
TOTAL	Closed	384	421	418	436	476
	Transferred	13	34	27	16	31

★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP complaints see section 3.4.

3.2 – Complaints Resolution

Graph 3.2C: Complaints Resolution – Department Inventory



As the number of completed cases exceeded the number of cases received in the department, Complaints Resolution's inventory at the end of Q3 2013 decreased by 2% from inventory at the end of Q2 2013. However, it is approximately 13% higher than at the end of the same period in 2011 (932) and 36% higher than at the end of the same period in 2012 (779). The inventory continues to consist mostly of complaints against lawyers.

Detailed Analysis of Complaint Resolution's Inventory

	Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Complaints against Lawyers	709	830	957	959	928
Lawyer Applicant Cases★	0	0	0	0	0
Complaints against Licensed Paralegals	70	87	88	117	127
Paralegal Applicant Cases★	0	0	0	0	0
Complaints against Non-Licensees/Non-Applicants*	0	0	0	0	0
TOTAL	779	917	1045	1076	1055

★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP ccomplaints see section 3.4.

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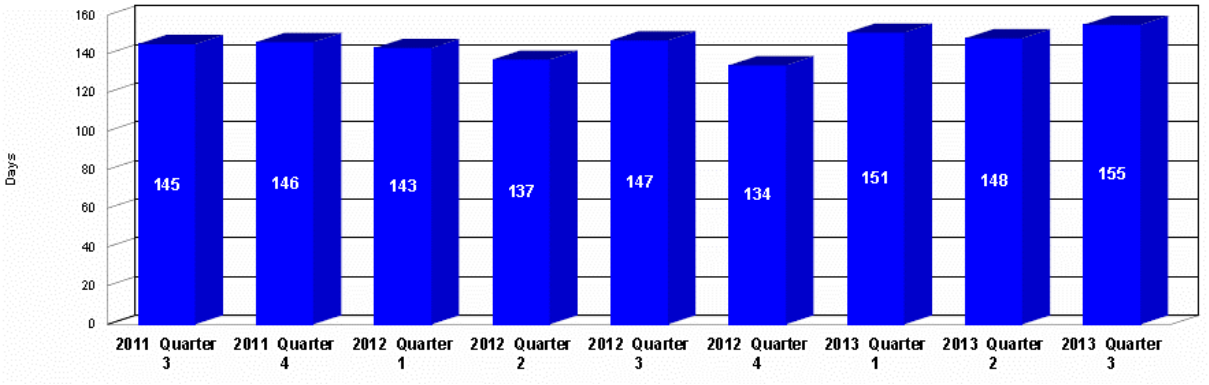
3.2 – Complaints Resolution

Graph 3.2D: Complaints Resolution - Median Age of Complaints



While the department's median age increased from the previous quarter, it is within the department's target range of 150-170 days.

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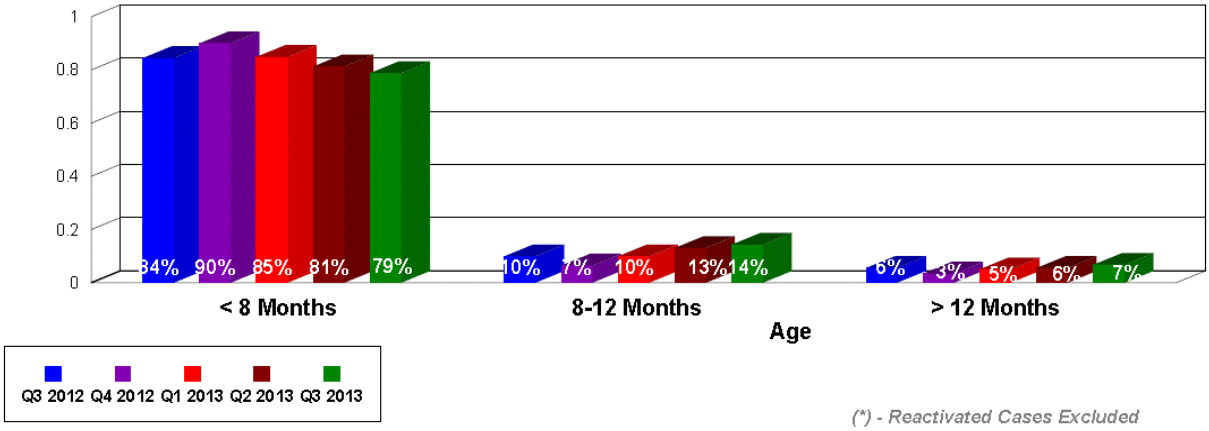
3.2 – Complaints Resolution

Graph 3.2E: Complaints Resolution – Aging of Complaints



(*) - Reactivated Cases Excluded

The above graph sets out the spectrum of aging in the department's inventory (excluding reactivated cases) at the end of each of the 5 quarters displayed. Excluding reactivated cases, Complaints Resolution's department inventory was 989 cases involving 867 subjects. The age distribution of those cases was:

Less than 8 months	780 cases involving 693 subjects
8 to 12 months	142 cases involving 127 subjects
More than 12 months	67 cases involving 47 subjects

The goal is to reduce the proportion of cases in the older time frames and increase the proportion of cases in the youngest time frame. However, it is recognized that there will always be cases that are older than 12 months in Complaints Resolution for the following reasons:

- Newer complaints against the lawyer/paralegal are received. In some cases existing cases await the completion of younger cases relating to the same licensee;
- Delays on the part of licensees in providing representations and in responding to the investigators' requests. In a number of instances, the Summary Hearing process is required;
- Delays on the part of complainants in responding to licensee's representations and to investigators' requests for additional information; and
- New issues raised by the complainant requiring additional investigation

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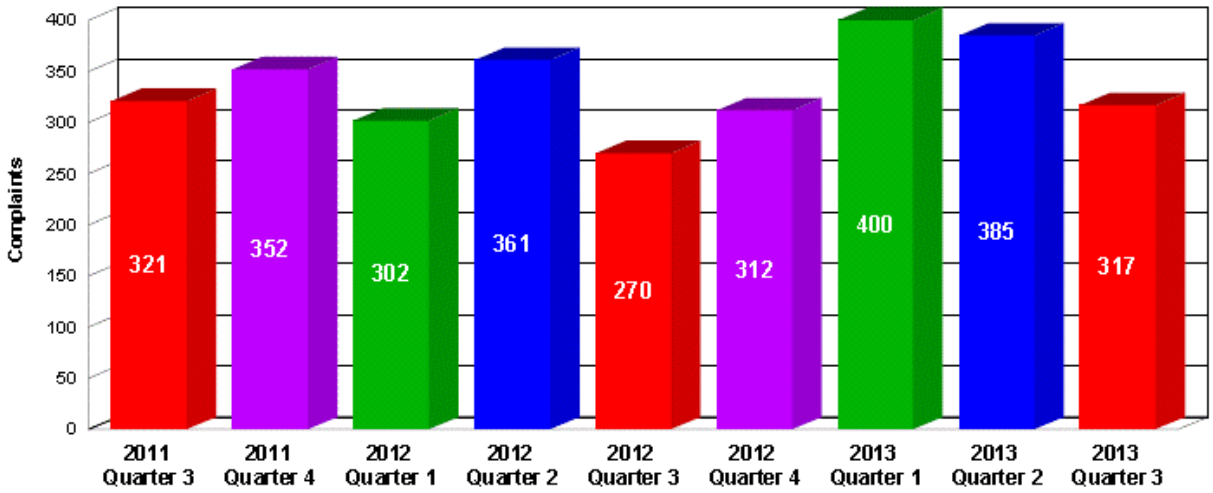
3.3 –Investigations

Graph 3.3A: Investigations - Input



The input of cases into the Investigations department in Q2 2013 decreased by approximately 18% from the input in the last quarter (Q2 2013).

Detailed Analysis of New and Re-opened Complaints Received in Investigations

	Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Complaints against Lawyers	192	200	254	208	197
Lawyer Applicant Cases★	19	4	18	18	11
Complaints against Licensed Paralegals	25	54	67	69	54
Paralegal Applicant Cases★	19	19	15	45	19
Complaints against Non-Licensees/Non-Applicants*	15	35	46	45	36
TOTAL	270	312	400	385	317

★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP complaints see section 3.4.

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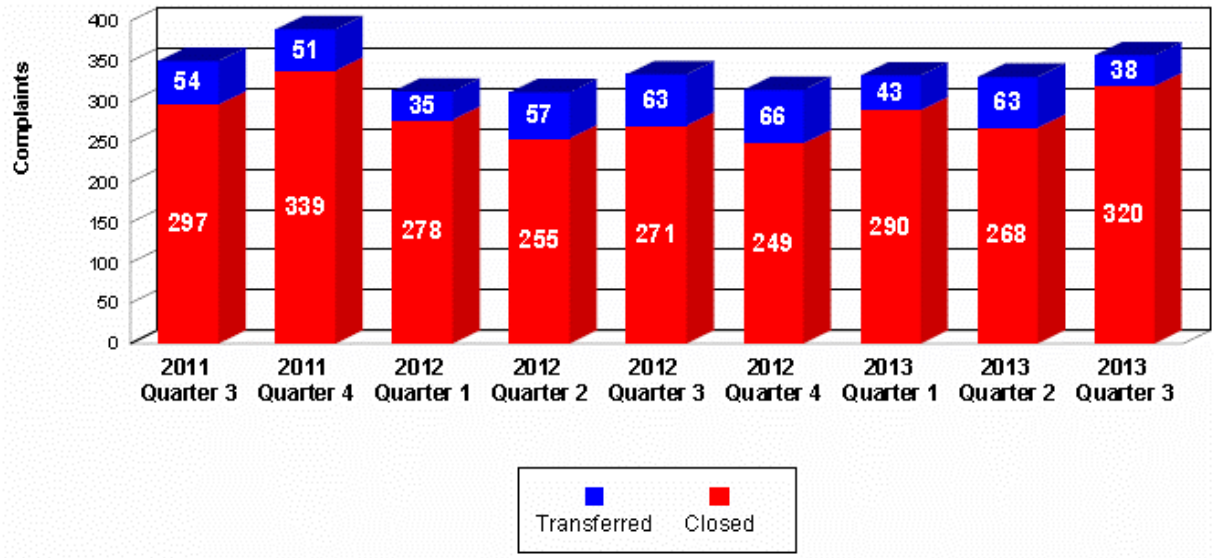
3.3 –Investigations

Graph 3.3B Investigations - Complaints Closed and Transferred Out



The number of cases closed/transferred out of the department in Q3 2013 (358 cases) was 8% higher than the number completed in Q2 2013 (331 cases) and 7% more than the number completed in the same period in 2012 (i.e. 334 cases in Q2 2012).

Detailed Analysis of Complaints Closed and Transferred Out of Investigations

		Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Complaints against Lawyers	Closed	146	160	181	171	194
	Transferred	47	60	23	45	32
Lawyer Applicant Cases★	Closed	5	8	11	17	14
	Transferred	0	0	1	0	0
Complaints against Licensed Paralegals	Closed	62	38	32	39	39
	Transferred	10	6	7	17	4
Paralegal Applicant Cases★	Closed	22	17	23	12	31
	Transferred	0	0	4	1	2
Complaints against Non-Licensees/Non-Applicants*	Closed	36	26	43	29	42
	Transferred	6	0	8	0	0
TOTAL	Closed	271	249	290	268	320
	Transferred	63	66	43	63	38

★ Applicant cases include good character cases and UAP complaints
* For a complete analysis of UAP complaints see section 3.4.

The Law Society of Upper Canada
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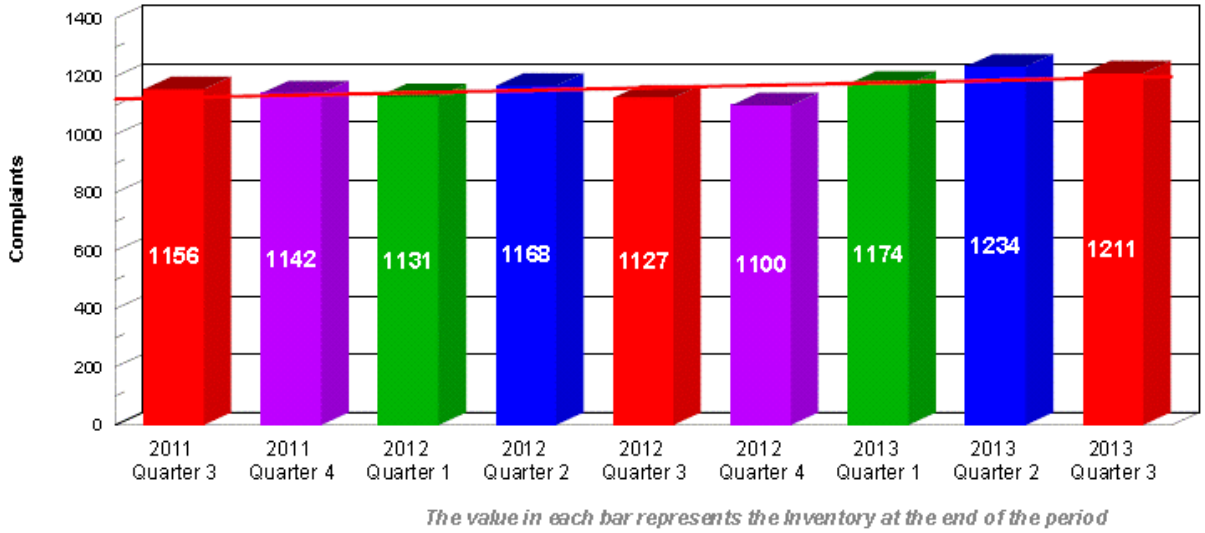
Quarterly Report (July 1 – September 30, 2013)

3.3 – Investigations

Graph 3.3C: Investigations – Department Inventory



As the number of cases completed in the department in Q3 2013 (358) exceeded the number of cases received (317), Investigations' inventory decreased by approximately 2% during the third quarter of 2013. The decrease in inventory is attributable to all groups except licensed paralegals. Inventory with respect to this group increased during the quarter.

Detailed Analysis of Investigations Inventory

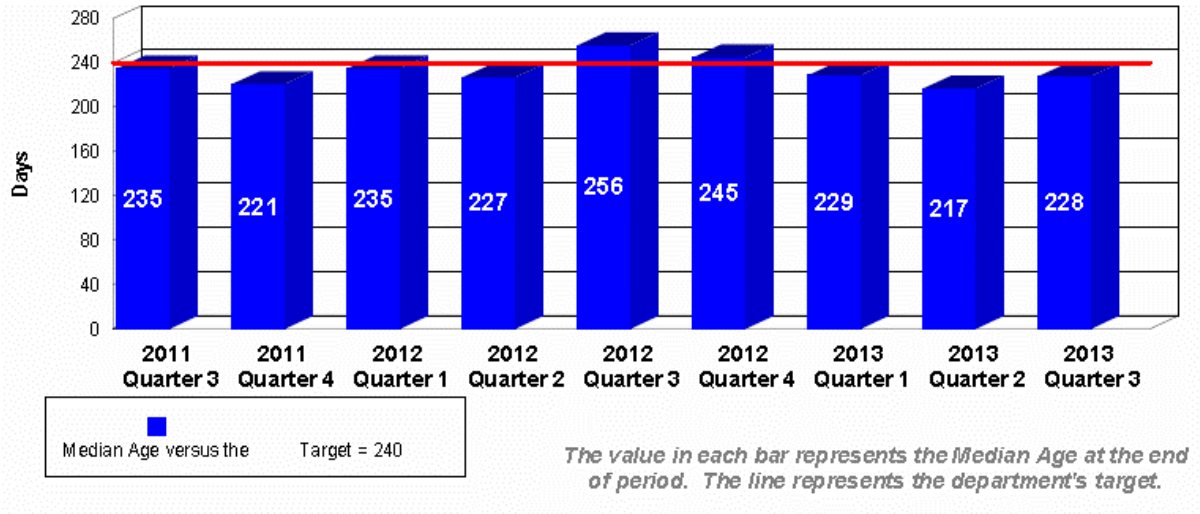
	Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Complaints against Lawyers	831	796	851	851	837
Lawyer Applicant Cases★	29	25	31	31	28
Complaints against Licensed Paralegals	142	145	174	186	200
Paralegal Applicant Cases★	43	43	32	64	52
Complaints against Non-Licensees/Non-Applicants*	82	91	86	102	94
TOTAL	1127	1100	1174	1234	1211

★ Applicant cases include good character cases and UAP complaints

* For a complete analysis of UAP complaints see section 3.4.

3.3 – Investigations

Graph 3.3D: Investigations – Median Age of All Complaints



While the department's median age increased in the past quarter to 228 days, it remains below the target of 240 days.

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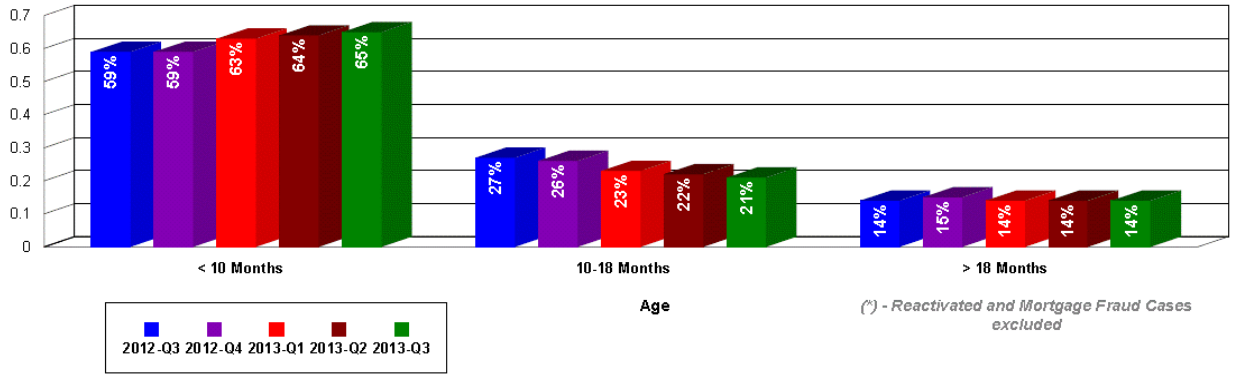
3.3 – Investigations

Graph 3.3E: Investigations – Aging of Complaints

(a) Core Cases



The above graph sets out the spectrum of aging in the department's inventory (excluding reactivated and mortgage fraud cases) at the end of each of the 5 quarters displayed. The inventory of Investigations at the end of Q3 2013, excluding reactivated and mortgage fraud cases, was 1026 cases involving 780 subjects. The distribution of those cases was:

Less than 10 months	662 cases involving 490 subjects
10 to 18 months	214 cases involving 179 subjects
More than 18 months	150 cases involving 111 subjects

While the department strives to reduce the proportion of cases in the older time frame and to increase the proportion of cases in the youngest time frame, it is recognized that there are cases that are older than 18 months in Investigations for the following reasons:

- The investigator has to wait for evidence from a third party (i.e. not the complainant or the licensee/subject), for example psychiatric evaluation, court transcripts, or a key witness;
- Newer complaints are received against the licensee/subject. In order to move forward together to the Proceedings Authorization Committee, the older cases await the completion of younger cases;
- A need to coordinate investigations between different licensees/subject where the issues arise out of the same set of circumstances (e.g. a complainant complains about 2 lawyers in relation to the same matter);
- Multiple cases involve one lawyer. These investigations are complex and time consuming;
- Where capacity issues are raised during a conduct investigation.

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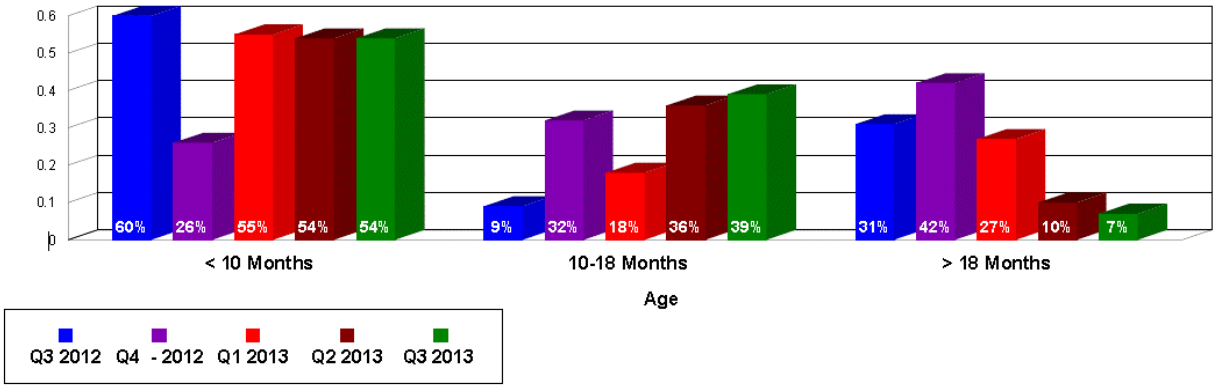
3.3 – Investigations

(b) Mortgage Fraud Cases



The above graph sets out the spectrum of aging in the department's mortgage fraud case inventory at the end of each of the 5 quarters displayed. The inventory of mortgage fraud cases at the end of Q3 2013 was 85 cases involving 73 subjects. The distribution of those cases was:

Less than 10 months	46 cases involving 37 subjects
10 to 18 months	33 cases involving 30 subjects
More than 18 months	6 cases involving 6 subjects

As noted above, the department strives to reduce the proportion of mortgage fraud cases in the older time frame and to increase the proportion of cases in the youngest time frame. However, it is recognized that there will always be mortgage fraud cases that are older than 18 months in Investigations for the reasons cited above, particularly:

- When newer complaints against the licensee/subject are received, existing investigations may have to await their completion in order that all the cases can be taken to Proceedings Authorization Committee together.
- There is a need to coordinate investigations between different licensees/subject where the issues arise out of the same set of circumstances (e.g. a complainant complains about 2 lawyers in relation to the same matter).
- There are multiple cases involve one lawyer resulting in greater complexity.

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3.4 – Unauthorized Practice (UAP)

Graph 3.4A: Unauthorized Practice Complaints in Intake

Quarter	New	Closed/Transferred			Active at end of Quarter
		Closed	Transfer to CR	Transfer to Inv	
Totals: 2008	337	122	50	168	
Totals: 2009	445	165	86	192	
Q1 2010	94	42	0	76	36
Q2 2010	89	32	0	69	32
Q3 2010	67	32	1	50	29
Q4 2010	80	45	0	54	18
Totals – 2010 (+ POL)	330* (398)	151	1	249	
Q1 2011 (+ POL)	61 (74)	24	0	41	20
Q2 2011 (+ POL)	61 (84)	20	1	54	12
Q3 2011 (+ POL)	70 (80)	27	0	49	28
Q4 2011 (+ POL)	63 (83)	16	1	62	15
Totals – 2011 (+POL)	255 (321)	87	2	206	
Q1 2012 (+ POL)	77(91)	16	0	61	17
Q2 2012 (+POL)	58 (80)	22	0	49	6
Q3 2012 (+POL)	41 (44)	16	0	27	11
Q4 2012 (+POL)	80 (84)	32	0	45	19
Totals – 2012 (+POL)	256 (299)	86	0	182	
Q1 2013 (+POL)	71(93)	29	0	59	11
Q2 2013 (+POL)	60(66)	26	0	51	5
Q3 2013 (+POL)	69 (81)	27	0	46	9

* In response to the number of UAP complaints being received in the division, a new allegation of "Practising Outside the Scope of Licence" ("POL") was added to the division's case management system in Q1 2010. This allows for improved identification of the nature of these complaints. In Q3 2013, complaints alleging practicing outside the scope of licensee were received in a total of 81 cases. Prior to Q1 2010, these would have been included in the UAP figures.

As noted in the chart above, in the first three quarters of 2012, the Division received 200 UAP complaints, approximately 14% more than it did during the same period in 2012 (176).

3.4 – Unauthorized Practice (UAP)

Graph 3.4B: Unauthorized Practice investigations (in Complaints Resolution and Investigations)

	New		Closed[6]		Inventory	
	CR	Inv	CR	Inv	CR	Inv
Totals: 2008	52	171	64	126	106	
Totals: 2009	77	187	48	138	168	
Q1 2010	0	76	12	73	17	79
Q2 2010	0	69	6	54	10	90
Q3 2010	1	50	2	31	8	108
Q4 2010	0	54	8	32	0	124
Totals: 2010	1	249	28	190	124	
Q1 2011	0	41	0	61	0	104
Q2 2011	1	54	0	56	1	102
Q3 2011	0	49	0	45	1	106
Q4 2011	1	62	0	26	1	139
Totals: 2011	2	206	0	188	140	
Q1 2012	0	61	1	45	0	156
Q2 2012	0	49	0	65	0	140
Q3 2012	0	27	0	41	0	120
Q4 2012	0	45	0	34	0	131
Totals: 2012	0	182	1	185	131	
Q1 2013	0	59	0	62	0	128
Q2 2013	0	51	0	36	0	143
Q3 2013	0	46	0	58	0	129

As noted in the chart above, in Q3 2013, a total of 58 UAP cases were completed. At the end of the quarter, the inventory of UAP cases in Investigations was 129 cases.

Graph 3.4C: UAP Enforcement Actions

In the third quarter of 2013, an order was obtained prohibiting the respondent from further contravening the provisions of s. 26.1 of the *Law Society Act* in 1 matter.

As at September 30, 2013, there are 2 open UAP matters. In 1 matter, the Law Society has commenced an action for a breach of a previous order prohibiting an individual from contravening the provisions of s.26.1 of the *Law Society Act*. In the second matter, an appeal of a permanent injunction has been filed.

[6] "Closed" refers to completed investigations and therefore consists of both those investigations that were closed by the Law Society and those that were referred for prosecution/injunctive relief.

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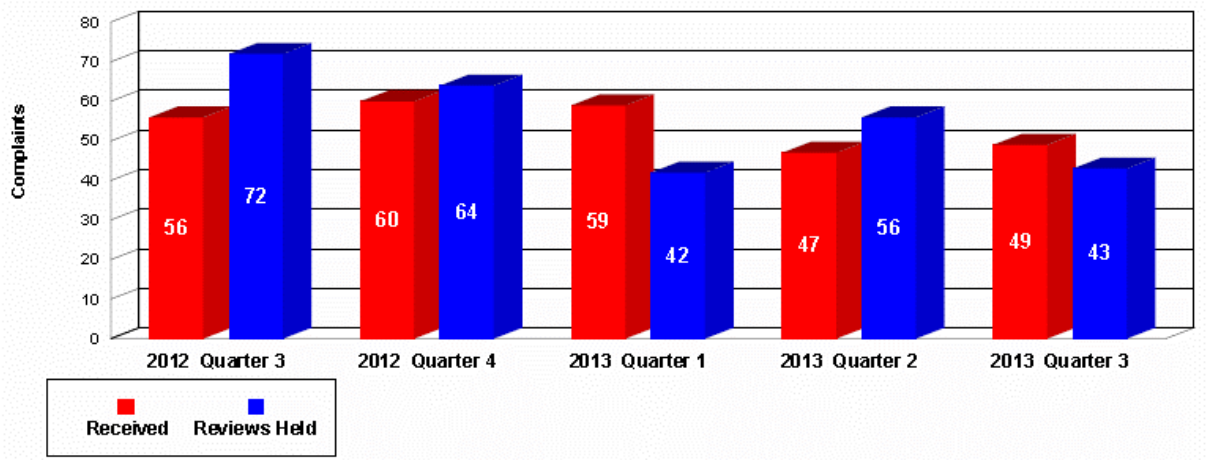
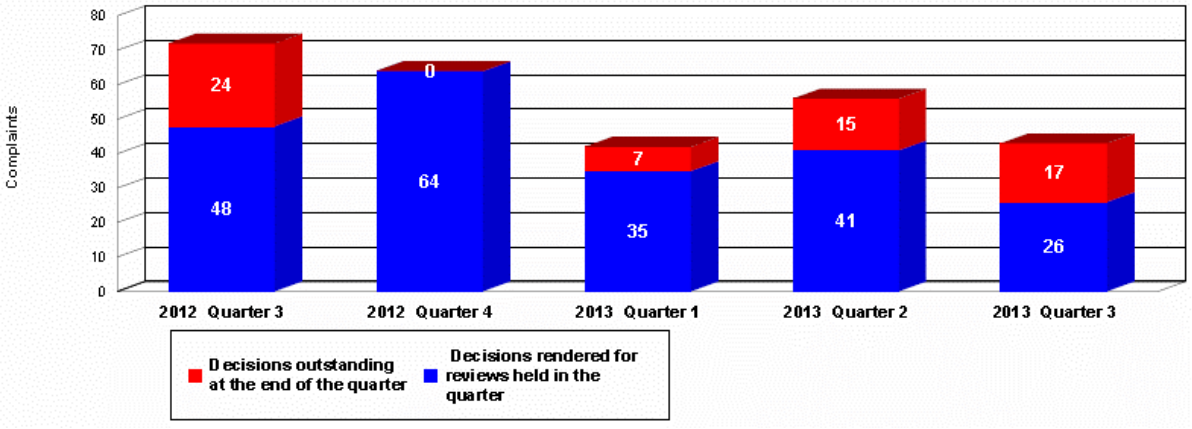
3.5 – Complaints Resolution Commissioner

Graph 3.5A: Reviews Requested and Files Reviewed (by Quarter)



In Q3 of 2013, the Complaints Resolution Commissioner received 49 requests for reviews of cases closed in either Complaints Resolution or Investigations and reviewed 43 cases. Eleven of the cases reviewed were conducted in writing.

Graph 3.5B: Status of Files Reviewed in each Quarter



While the files may be reviewed in one quarter, the final decision by the Commissioner may not be rendered in the same quarter. In Q3 of 2013, the Commissioner rendered decisions in 26 of the 43 cases reviewed in that quarter. As at September 30, 2013, decisions were outstanding in 17 of the 43 cases.

3.5 – Complaints Resolution Commissioner

Graph 3.5C: Decisions Rendered, by Quarter

Quarter	Decisions Rendered	Files to Remain Closed	Files Referred Back to PRD
Total 2009	194	174 (90%)	20 (10%)
Total 2010	193	160 (83%)	33 (17%)
Q1 2011	85	79 (93%)	6 (7%)
Q2 2011	60	58 (96%)	2 (4%)
Q3 2011	53	50 (94%)	3 (6%)
Q4 2011	62	61 (98%)	1 (2%)
Total 2011	260	248 (95%)	12 (5%)
Q1 2012	36	32 (89%)	4 (11%)
Q2 2012	50	48 (96%)	2 (4%)
Q3 2012	67	63 (94%)	4 (6%)
Q4 2012	89	81 (91%)	8(9%)
Total 2012	242	224 (93%)	18 (7%)
Q1 2013	35	33 (94 %)	2 (6 %)
Q2 2013	47	43 (91%)	4 (9%)
Q3 2013	40	36 (90%)	4(10%)

In Q2 2013 the Commissioner rendered 40 decisions. Of those 40 decisions, the Commissioner sent 4 files (10%) back to Professional Regulation. In 3 of those files, the Commissioner was not satisfied that the decision to close was reasonable and recommended further investigation. With respect to the fourth case, while he found the Law Society's decision to close the case to be reasonable, the Commissioner referred the case back for Professional Regulation to consider new information provided by the Complainant during the review..

With respect to the 3 cases referred back with a recommendation for further investigation, no decision has been rendered by the Director with respect to the Commissioner's recommendation.

Active Inventory

As at September 30, 2013, the Office of the Complaints Resolution Commissioner had an inventory of 137 files:

Request received; awaiting preparation of CRC materials	44 files
Ready for scheduling	10 files
Review Meeting Scheduled	66 files
Review Completed Awaiting decision	17 files
Cases in Abeyance	0 Files

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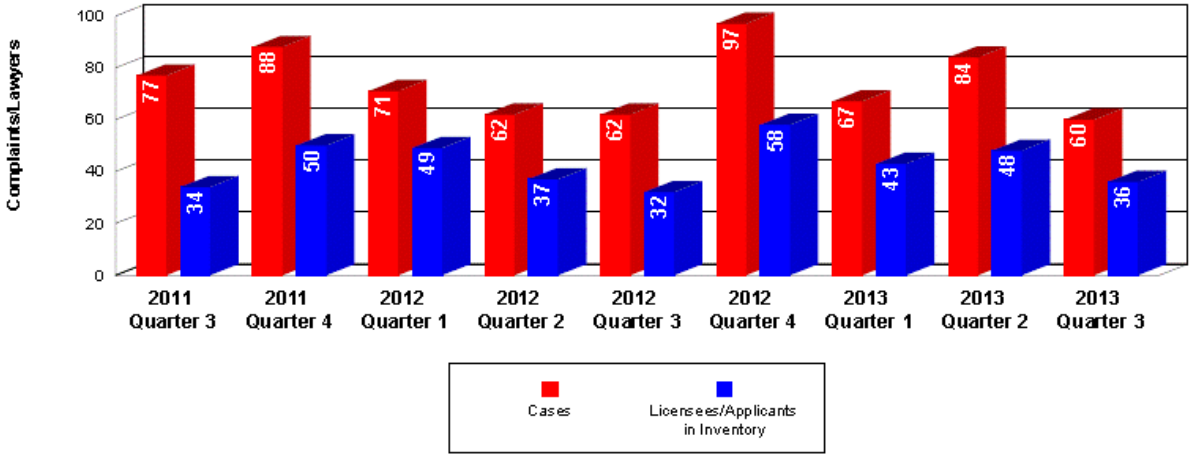
Quarterly Report (July 1 – September 30, 2013)

3.6 – Discipline

Graph 3.6A: Discipline - Input[7]



As noted in the chart below, in Q3 2013, the department received complaints from various departments involving 27 lawyers (relating to 50 cases), 8 licensed paralegals (relating to 8 cases), and 1 paralegal applicant (relating to 2 cases).

Detailed Analysis of New Cases Received in Discipline

		Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Lawyers	Cases	48	89	47	65	50
	Lawyers	27*	51*	29*	36*	27*
Lawyer Applicants	Cases	0	1	1	0	0
	Lawyer Applicants	0*	1*	1*	0	0
Licensed Paralegals	Cases	14	8	9	18	8
	Licensed Paralegals	5*	5*	7*	11*	8*
Paralegal Applicants	Cases	5	1	10	1	2
	Paralegal Applicants	1*	1*	6*	1*	1*
TOTAL	Cases	62	99	67	84	60
	Licensees & Applicants	32*	58*	43*	48*	36*

* The number of new Lawyers and Paralegals cited represents the number coming into the department each quarter. However, there may, in fact, already be cases involving the licensee/applicant in the department.

[7] "Input" refers to complaints that were transferred into Discipline from various other departments during the specific quarter. Includes new complaints/cases received in Discipline and the lawyers/applicants to which the new complaints relate.

The Law Society of Upper Canada
The Professional Regulation Division
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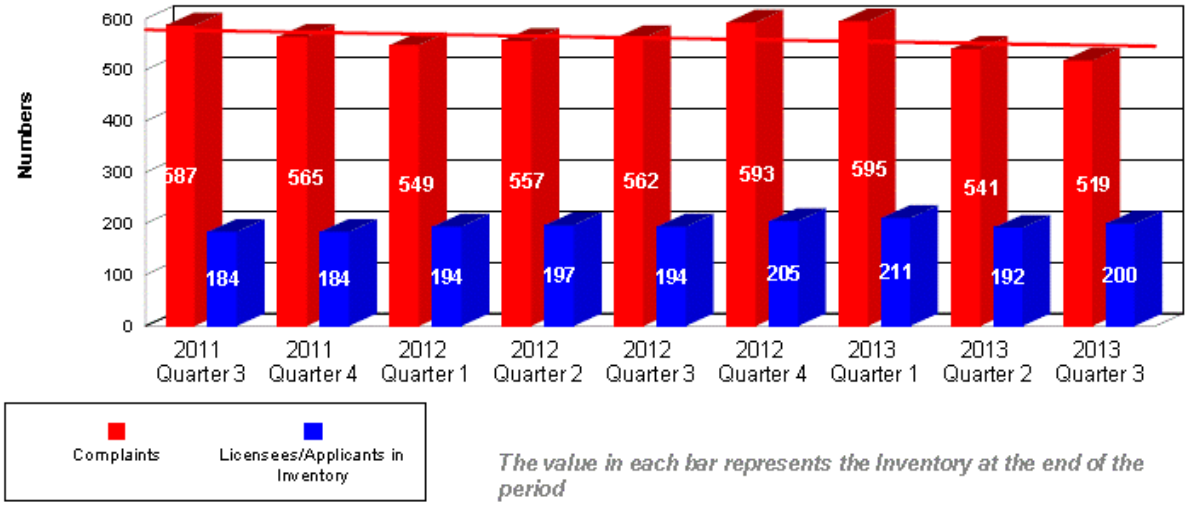
3.6 – Discipline

Graph 3.6B: Discipline – Department Inventory[8]



This graph shows the total number of licensees/applicants and related complaints that are in the Discipline process at the end of each of the last 9 quarters. At the end of Q3 2013, the department's inventory of licensee/applicants (200) was higher than at the end of Q3 2012 (194) and than at the end of Q3 2011 (184).

Detailed Analysis of Discipline's Inventory

		Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Lawyers	Cases	482	514	508	460	433
	Lawyers	162	171	176	160	164
Lawyer Applicants	Cases	4	4	5	3	1
	Lawyer Applicants	4	4	5	3	1
Licensed Paralegals	Cases	53	58	60	57	62
	Licensed Paralegals	18	21	20	20	26
Paralegal Applicants	Cases	23	17	22	21	23
	Paralegal Applicants	10	9	10	9	9
TOTAL	Cases	562	593	595	541	519
	Licensees & Applicants	194	205	211	192	200

[8] Consists primarily of complaints and lawyers/applicants that are in scheduling and are with the Hearing Panel or on appeal.

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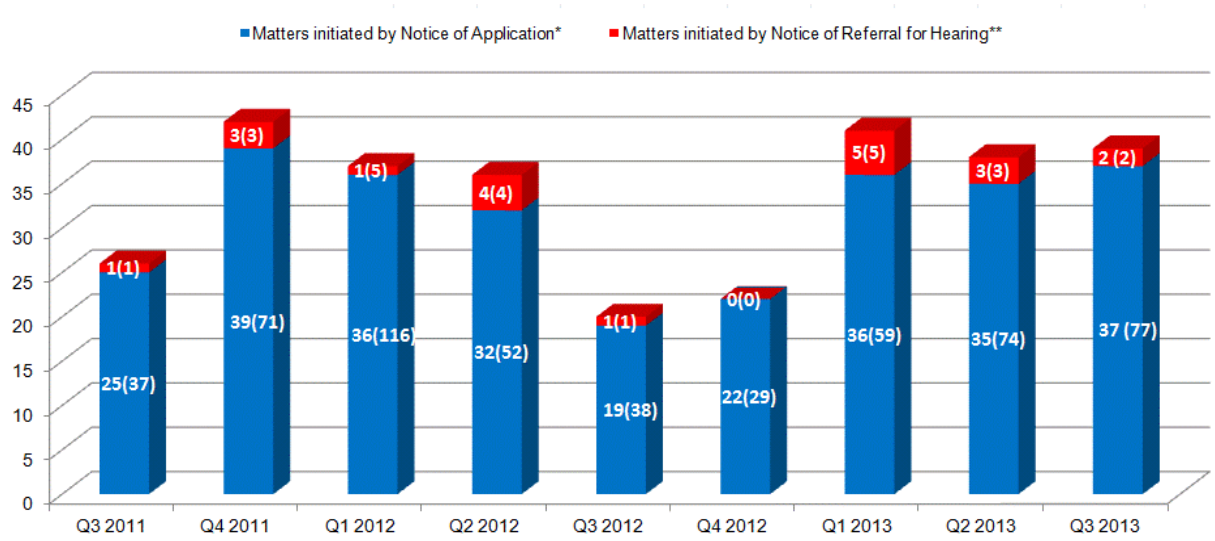
The Professional Regulation Division
Quarterly Report (July 1 – September 30, 2013)

3.6 – Discipline

Graph 3.6C: Discipline - Notices Issued



* Matters which are initiated by Notice of Application include conduct, capacity, non-compliance and competency matters. Also included in this category are interlocutory suspension/restriction motions.

** Matters which are initiated by Notice of Referral for Hearing (formerly Notice of Hearing) include licensing (including readmission matters), reinstatement and restoration matters.

The above graph shows the number of notices issued by the Discipline department in the past 9 quarters. The numbers in each bar indicate the number of notices issued and, in brackets, the number of cases relating to those notices. One notice may relate to more than one case. For example, in Q3 2013, 37 Notices of Application were issued (relating to 77 cases) and 2 Notices of Referral for Hearing were issued (relating to 2 cases).

With respect to the 37 Notices of Application[9]/Notices of Motion for Interim Suspension Order which were issued in Q2 2013:

28 were issued less than 1 month after PAC authorization;
6 were issued between 1 and 2 months after PAC authorization;
2 were issued between 2 and 3 months after PAC authorization; and
1 was issued more than 3 months after PAC authorization.

With respect to the 2 matters for which a Notice of Referral for Hearing were issued in Q2 2013, 1 was issued less than a month after PAC authorization. One matter did not require PAC authorization as it related to a reinstatement matter.

[9] Notices of Application are issued with respect to conduct, competency, capacity and non-compliance matters and require authorization by the Proceedings Authorization Committee (PAC).

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The Professional Regulation Division
Quarterly Report (July 1 – September 30, 2013)

3.6 – Discipline

Graph 3.6D: Discipline – Completed Matters

		Q1 2012	Q2 2012	Q3 2012	Q4 2012	Q1 2013	Q2 2013	Q3 2013
Conduct Hearings	Lawyers	17	16	18	31	20	33	17
	Paralegal Licensees	6	6	4	3	4	2	3
Interlocutory Suspension Hearings/Orders	Lawyers	2	1	1	-	-	1	-
	Paralegal Licensees	-	1	-	-	-	-	-
Capacity Hearings	Lawyers	-	-	1	4	1	-	-
	Paralegal Licensees	-	-	-	-	-	-	-
Competency Hearings	Lawyers	-	-	-	-	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-
Non-Compliance Hearings	Lawyers	-	-	-	1	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-
Reinstatement Hearings (incl. Term Disputes)	Lawyers	2	1	-	-	1	-	-
	Paralegal Licensees	-	-	-	-	-	1	1
Restoration	Lawyers	-	-	-	-	-	-	-
	Paralegal Licensees	-	-	-	-	-	-	-
Licensing Hearings (including Readmission)	Lawyer Applicants	-	1	2	1	-	2	2
	Paralegal Applicants	3	1	1	-	1	1	1
TOTAL NUMBER OF HEARINGS	Lawyers*	21	19	22	37	22	36	19
	Paralegals*	9	8	5	3	5	4	5
	TOTAL	**30**	**27**	**27**	**40**	**27**	**40**	**24**

3.6 – Discipline

Graph 3.6E: Discipline – Appeals

The following chart sets out the number of appeals filed with the Appeal Panel, the Divisional Court or the Court of Appeal in the calendar years 2008, 2009, 2010, 2011, 2012 and the first 3 quarters of 2013:

Quarter/Year	Appeal Panel	Divisional Court	Court of Appeal
2008	14	8 appeal	
2009	19	1 appeal	3 motions for leave; 2 appeals
2010	27	3 appeals; 2 judicial reviews	4 motions for leave
2011	18	6 appeals, 2 judicial reviews	2 motions for leave
2012	23	4 appeals; 5 judicial reviews	2 motions for leave
2013 1st Quarter 2nd Quarter 3rd Quarter	7 3 5	1 judicial review 3 appeals 1 judicial review	

As of September 30, 2013, there are 15 appeals pending before the Appeal Panel, 4 appeals in which the Appeal Panel has reserved on judgment, 1 appeal before the Appeal Panel that has been adjourned sine die, and 4 appeals in which the Appeal Panel has rendered decisions but is still seized on the issue of costs.

With respect to matters before the Divisional Court, there are 4 appeals and 2 judicial review matters pending. There are no matters pending in the Court of Appeal.

In the third quarter of 2013, decisions were rendered in 6 appeals before the Appeal Panel.

- 3 appeals were dismissed (1 was launched by a licensee; 2 were launched by applicants). The Appeal Panel remains seized of one of these appeals on the issue of costs;
- In 1 matter in which the Law Society and the licensee had filed appeals, the Appeal Panel dismissed the licensee's appeal against penalty (revocation), upheld certain findings and set aside other findings made by the Hearing Panel, ordering a new hearing on certain of the particulars. The Law Society has since advised that it will not proceed further with the balance of the Notice of Application. The Appeal Panel remains seized on the issue of costs;
- In the other 2 appeals, the Appeal Panel allowed the appeals in full or in part
  - In one appeal (by the Law Society), the Appeal Panel allowed the appeal in part, upholding the suspension order but setting aside the Hearing Panel's order as to costs and increasing the amount to be paid by the licensee. The Appeal Panel remains seized with respect to the issue of costs of the appeal:

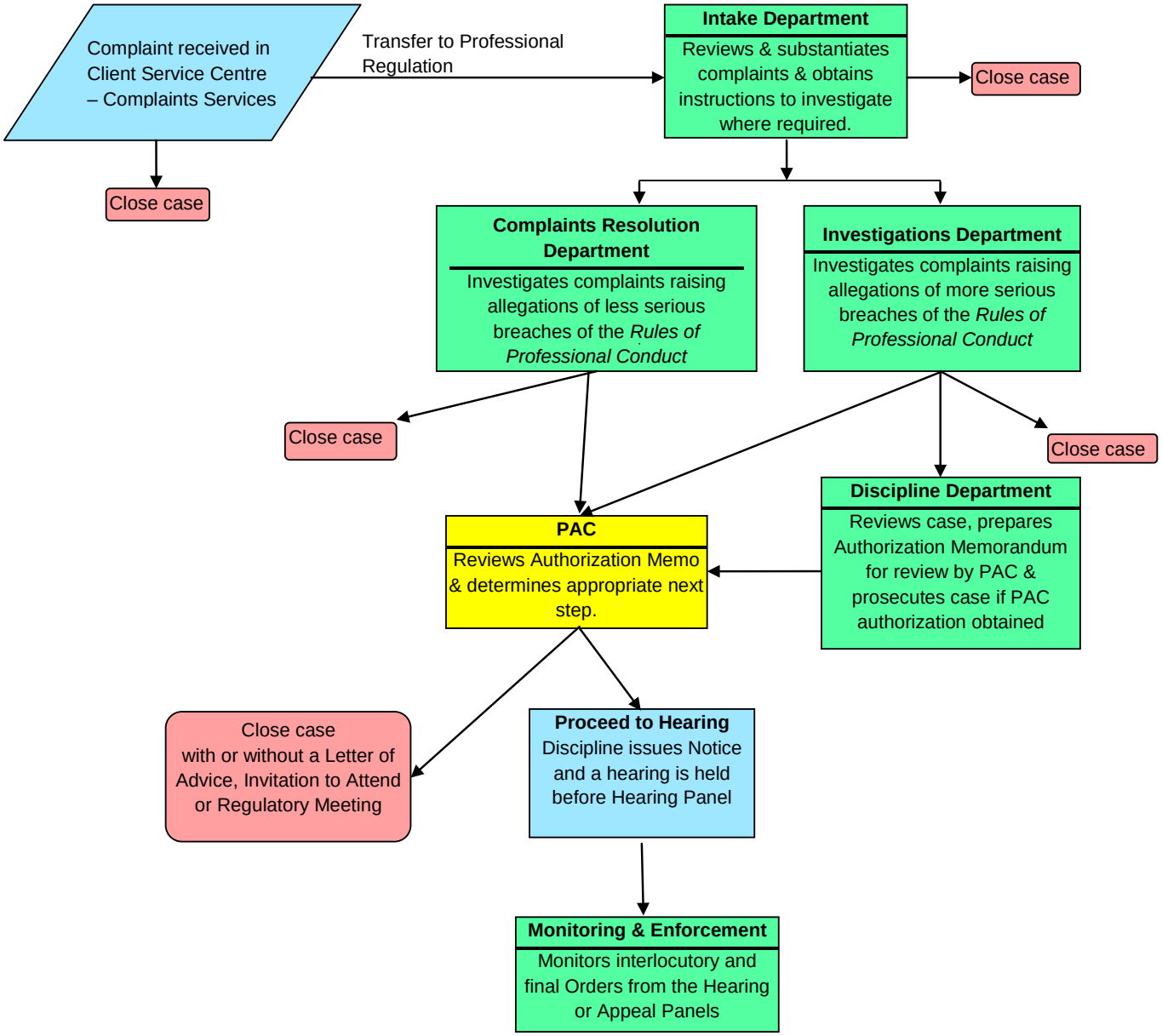
- In the other appeal (by a lawyer applicant), the Appeal Panel allowed the appeal, set aside the decision and order of the Hearing Panel and granted the appellant a Class L1 licence.

SECTION 4

APPENDICES

The Law Society of Upper Canada
The Professional Regulation Division
Quarterly Report (October 1 – December 31, 2012)

The Professional Regulation Complaint Process



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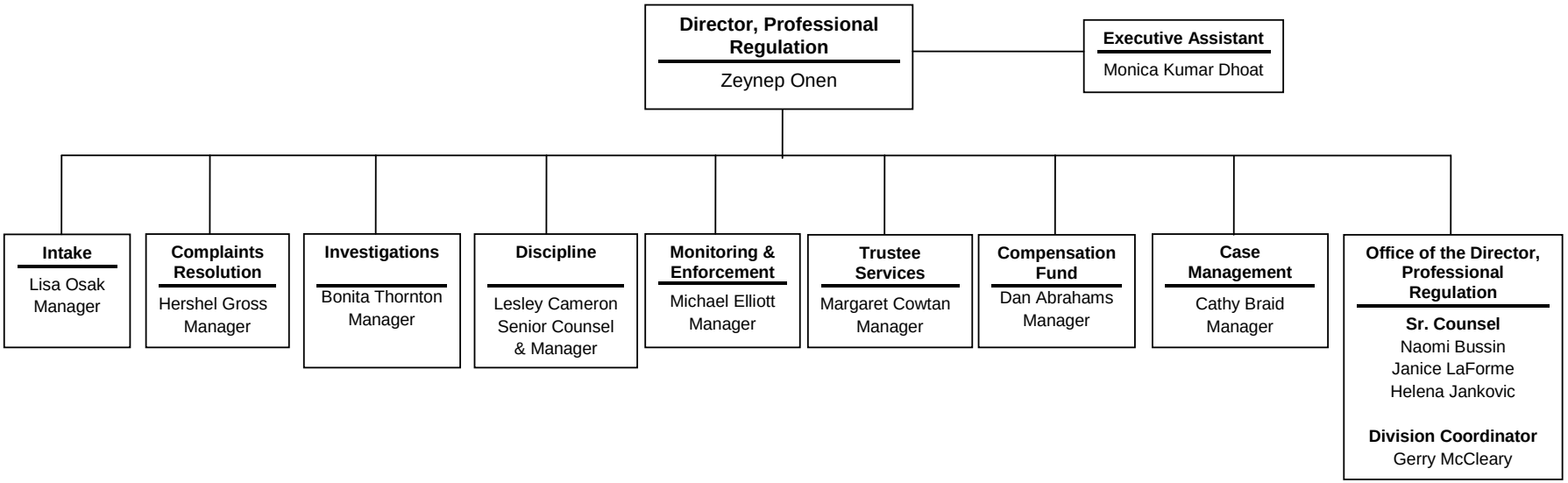
PROFESSIONAL REGULATION ORGANIZATIONAL CHART



The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 4

Report to Convocation
October 24, 2013

Inter-Jurisdictional Mobility Committee

Committee Members
Jacqueline Horvat (Chair)
William McDowell
Malcolm Mercer
Janet Minor
Joe Sullivan
Peter Wardle

Purpose of Report: Decision

Prepared by the Policy Secretariat
(Sophia Sperdakos 416-947-5209)

TABLE OF CONTENTS

For Decision

COMMITTEE PROCESS

1. The Committee met on October 8, 2013. Committee members Jacqueline Horvat (Chair), Malcolm Mercer, Janet Minor and Peter Wardle attended the meeting. Staff members Allison Cheron and Sophia Sperdakos also attended.

TAB 4.1

DECISION

BY-LAW 6 AMENDMENT - NATIONAL MOBILITY AGREEMENT 2013 INSURANCE PROVISIONS

MOTION

2. That Convocation approve the amendments to By-Law 6 to implement the insurance provisions of the National Mobility Agreement 2013 ("NMA 2103"), as set out in English at TAB 4.1.1: Proposed By-Law 6 Amendment, with the bilingual version under separate cover.

Background

3. The National Mobility Agreement, 2013 ("NMA 2013") that Convocation approved in February and June 2013 will be signed during the Federation of Law Societies conference in St. John's, Newfoundland, in October.

4. Implementation of the Agreement will involve a number of steps, including the development of the reading requirement respecting civil and common law and amendment of relevant by-laws, and in the case of the Barreau du Québec, the approval of the Office des Professions. The Barreau hopes this approval will occur by early in 2014.

5. The insurance requirements of the NMA 2013 respecting mobile lawyers who are members in Québec and one or more common law jurisdictions are different than they are for lawyers who are members in multiple common law jurisdictions:

   a. If a lawyer is a member of the Barreau and one other common law jurisdiction he or she will be required to maintain insurance coverage in both Québec and the other jurisdiction.

   b. Those who are members in both Québec and more than one other common law jurisdiction will be required to maintain insurance coverage with the Barreau and one of the other common law jurisdictions, namely the one in which he or she resides.

c. Those who are members in both Québec and more than one other common law jurisdiction, and who reside in Québec, will be required to maintain insurance coverage with the Barreau and one of the other common law jurisdictions, to be determined by a formula set out in the NMA 2013.

6. Accordingly, an Ontario member who is also a member of the Barreau du Québec will be required to maintain insurance coverage in both jurisdictions. An Ontario member who is also a member of the Barreau and one or more other common law jurisdictions will be required to maintain coverage with the Barreau and one common law jurisdiction, namely the one in which he or she resides. An Ontario member who is also a member of the Barreau and one or more other common law jurisdictions and who resides in Québec will be required to maintain insurance with the Barreau and one other common law jurisdiction, to be determined by the formula set out in the NMA 2013.

7. In September 2013 Convocation approved LAWPRO's ® insurance program for 2014. To ensure LAWPRO® was in a position to support the NMA 2013 insurance provisions upon implementation, the new provisions were included in the 2014 program. By-Law 6 must be amended to reflect these changes. The proposed By-Law 6 amendments are set out at **TAB 4.1.1: Proposed By-Law 6 Amendments.** The current version of Part I of By-Law 6 is set out at **TAB 4.1.2: Current Part I By-Law 6** for reference.

8. Proposed by-law amendments to implement the other provisions of the NMA 2013 will be provided to Convocation in early 2014.

TAB 4.1.1

THE LAW SOCIETY OF UPPER CANADA

BY-LAWS MADE UNDER
SUBSECTIONS 62 (0.1) AND (1) OF THE *LAW SOCIETY ACT*

BY-LAW 6
[PROFESSIONAL LIABILITY INSURANCE]

MOTION TO BE MOVED AT THE MEETING OF CONVOCATION ON OCTOBER 24, 2013

MOVED BY

SECONDED BY

THAT By-Law 6 [Professional Liability Insurance], made by Convocation on May 1, 2007 and amended by Convocation on June 28, 2007, February 21, 2008, September 24, 2009, November 24, 2011, September 27, 2012 and April 25, 2013, be amended as follows:

1. Subparagraph 9 (1) 3 i of the By-Law is revoked and the following substituted:

i. will be resident,

A. in a reciprocating jurisdiction, or

B. in Quebec and deemed resident in a reciprocating jurisdiction, and

2. Clause 9 (4) (a) of the By-Law is revoked and the following substituted:

Interpretation: "reciprocating jurisdiction"

(4) In subsection (1), "reciprocating jurisdiction" means a Canadian jurisdiction other than Ontario or Quebec,

(a) which is a signatory to,

(i) prior to January 1, 2014, the National Mobility Agreement originally entered into in December 2002 by the Society, the Law Society of British Columbia, The Law Society of Alberta, the Law Society of Saskatchewan, The Law Society of

Manitoba, The Barreau du Québec, the Nova Scotia Barristers' Society and the Law Society of Newfoundland,

(ii) beginning January 1, 2014, the National Mobility Agreement entered into in October 2013 by the Society, the Law Society of British Columbia, The Law Society of Alberta, the Law Society of Saskatchewan, The Law Society of Manitoba, The Barreau du Québec, the Chambre des Notaires du Québec, The Law Society of New Brunswick, the Nova Scotia Barristers' Society, the Law Society of Prince Edward Island and the Law Society of Newfoundland and Labrador, or

(iii) the Territorial Mobility Agreement originally entered into in November 2011 by the Society, the Law Society of Yukon, the Law Society of the Northwest Territories, the Law Society of Nunavut, the Law Society of British Columbia, The Law Society of Alberta, the Law Society of Saskatchewan, The Law Society of Manitoba, The Barreau du Québe, the Law Society of New Brunswick, the Nova Scotia Barristers' Society, the Law Society of Prince Edward Island and the Law Society of Newfoundland and Labrador;

3. Subsection 9 (7) of the By-Law is revoked and the following substituted:

Interpretation: "resident"

(7) In subsection (1), other than in the phrase "deemed resident", "resident" has the same meaning given it for the purposes of the *Income Tax Act* (Canada).

Interpretation: "deemed resident"

(7.1) In paragraph (1) 3, a licensee is deemed resident in a reciprocating jurisdiction if,

(a) where the Society and the governing bodies of the legal profession in all reciprocating jurisdictions have agreed on nationally consistent criteria for determining deemed residence, the licensee is deemed resident in a reciprocating jurisdiction under the criteria; or

(b) where the Society and the governing bodies of the legal profession in all reciprocating jurisdictions have not agreed on nationally consistent criteria for determining deemed residence, as between Ontario and one or more reciprocating jurisdictions, the licensee has been continuously authorized to practise law for the longest period of time in a reciprocating jurisdiction.

BY-LAW 6

May 1, 2007
Amended: June 28, 2007
February 21, 2008
September 24, 2009
November 24, 2011
September 27, 2012
April 25, 2013

PROFESSIONAL LIABILITY INSURANCE

PART I

LICENSEES HOLDING A CLASS L1 LICENCE

GENERAL

Interpretation

1. (1) In this Part,

"licensee" means a licensee who holds a Class L1 licence;

"Society's insurance plan" means the Society's professional liability insurance plan and includes any professional liability insurance policy which the Society may have arranged for licensees.

Interpretation: engaging in practice of law

(2) In this Part, a person engages in the practice of law if he or she gives legal advice respecting the laws of Ontario or Canada or provides any professional services of a barrister or solicitor for others.

INSURANCE PREMIUM LEVIES

Requirement to pay insurance premium levies

2. (1) Unless otherwise exempted, every licensee who is eligible for coverage under the Society's insurance plan and who engages in the practice of law during the course of any year shall pay insurance premium levies for that year in accordance with this Part.

Same

(2) A licensee who is required to pay any insurance premium levy shall pay the amount of the levy and any taxes that the Society is required to collect from the licensee in respect of the payment of the insurance premium levy.

Insurance premium levies

3. The insurance premium levies mentioned in section 2 shall consist of a base levy, an innocent party surcharge levy, a claims history surcharge levy and such other levies as may be set by Convocation or required by the insurer of the Society's insurance plan.

Time for payment of insurance premium levies

4. (1) The base levy, the innocent party surcharge levy and the claims history surcharge levy are due and payable on January 1 of the year in which the coverage applies.

Same

(2) Such other levies as may be set by Convocation or required by the insurer of the Society's insurance plan are due and payable on the dates specified by Convocation or the insurer of the Society's insurance plan.

Period of default

5. (1) For the purpose of subsection 46 (1) of the Act, the period of default for failure to pay an insurance premium levy is 120 days after the day on which payment of the levy is due.

Payment plan: deemed date of failure to pay

(2) Where the Society or the insurer of the Society's insurance plan arranges or permits a schedule for the payment of an insurance premium levy by instalments or otherwise and a required payment is not made by a scheduled date, failure to pay the levy will be deemed to have occurred on January 1 of the year in which the coverage applies.

Reinstatement of licence

(3) If a licensee's licence has been suspended under subsection 46 (1) of the Act for failure to pay an insurance premium levy in a given year, for the purpose of subsection 46 (2) of the Act, the licensee shall pay an amount equal to the amount of the insurance premium levy which the licensee is required to pay in respect of that year and a reinstatement fee.

Refund of unearned portion of insurance premium levy

6. Where a licensee, who has paid one or more of the base levy, innocent party surcharge

levy and claims history surcharge levy, subsequently, during the course of the year for which the levy or levies were payable, dies, retires, ceases to be eligible for coverage or is exempted by the Society from the requirement to pay one or more of the levies, the unearned portion of the levy or levies shall be refunded on a pro rata basis, subject to a two month minimum.

Society's insurance fund

7. (1) The insurance premium levies paid by licensees shall be used for the Society's insurance fund in respect of licensees, or to pay the required insurance premiums to the insurer of the Society's insurance plan, claims, group deductibles, adjusting costs, counsel and legal fees, administration costs and such other expenses reasonably incurred in connection with the Society's insurance plan.

Society's insurance fund not used up at year-end

(2) If at the end of any year the insurance fund is not entirely used up, the surplus remaining shall be carried forward into the next year.

Eligibility for coverage

8. (1) Every licensee is eligible for the standard coverage under the Society's insurance plan provided that his or her licence is not suspended.

Application for coverage

(2) A licensee who is eligible for coverage under the Society's insurance plan but who is not required under this Part to pay insurance premium levies may apply to the Society or to the insurer of the Society's insurance plan for coverage and, if granted coverage, shall pay the required levies in accordance with this Part.

Exemption from payment of insurance premium levies

9. (1) The following are eligible to apply for exemption from payment of insurance premium levies:

1. Any licensee who, during the course of the year for which a levy is payable, will not engage in the practice of law in Ontario.

2. Any licensee who, during the course of the year for which a levy is payable,

   i. will be resident in a Canadian jurisdiction other than Ontario,

   ii. will engage in the practice of law in Ontario on an occasional basis only, and

iii. demonstrates proof of coverage for the licensee's practice of law in Ontario under the mandatory professional liability insurance program of another Canadian jurisdiction, such coverage to be reasonably comparable in coverage and limits to professional liability insurance that is required under the Society's insurance plan.

3. Any licensee who, during the course of the year for which a levy is payable,

   i. will be resident in a reciprocating jurisdiction, and

   ii. demonstrates proof of coverage for the licensee's practice of law in Ontario under the mandatory professional liability insurance program of the reciprocating jurisdiction, such coverage to be reasonably comparable in coverage and limits to professional liability insurance that is required under the Society's insurance plan.

4. Any licensee who, during the course of the year for which a levy is payable,

   i. will be employed by a single employer,

   ii. will engage in the practice of law only for and on behalf of the employer as,

      A. counsel or solicitor to the Government of Canada or the Government of Ontario,

      B. a Crown Attorney,

      C. counsel to a corporation other than a law corporation, or

      D. a city solicitor, and

   iii. will not engage in the practice of law in Ontario other than for and on behalf of the employer.

5. Any licensee employed as a law teacher who, during the course of the year for which a levy is payable, will not engage in the practice of law in Ontario other than teaching.

6. Any licensee who, during the course of the year for which a levy is payable,

   i. will be employed or volunteer in a clinic within the meaning of the *Legal Aid Services Act, 1998*, a student legal aid services society or an Aboriginal legal services corporation, that is funded by Legal Aid Ontario, but will not be directly employed by Legal Aid Ontario,

ii. will engage in the practice of law only through the clinic, student legal aid services society or Aboriginal legal services corporation to individuals in communities served by the clinic, student legal aid services society or Aboriginal legal services corporation and will not otherwise engage in the practice of law in Ontario, and

iii. demonstrates proof of coverage for such practice of law under a professional liability insurance policy issued by a licensed insurer in Canada, such coverage to be at least equivalent to that required under the Society's insurance plan.

7. Any licensee who, during the course of the year for which a levy is payable, will act in the capacity of an estate trustee, a trustee for an *inter vivos* trust or an attorney for property in respect of an estate, a trust or a property of a person other than a related person of the licensee of which the licensee was named as estate trustee, trustee or attorney while the licensee was engaged in the practice of law in Ontario and,

i. will not otherwise engage in the practice of law in Ontario, or

ii. who otherwise qualifies for exemption from payment of insurance premium levies under paragraph 4, 5 or 6 and will not engage in the practice of law in Ontario other than as provided for under this paragraph or paragraph 4, 5 or 6.

Same

(2) A licensee who is exempt from payment of insurance premium levies under paragraph 1, 2, 3, 4, 5, 6 or 7 of subsection (1) continues to be exempt from payment of insurance premium levies even though he or she engages in the practice of law in Ontario in contravention of the paragraph under which he or she is exempt from payment of insurance premium levies if the following conditions are met:

1. The licensee's practice of law in Ontario in contravention of the paragraph under which he or she is exempt from payment of insurance premium levies is restricted to engaging in the practice of law only on a pro bono basis and only,

i. to or on behalf of non-profit organizations, or

ii. through a program that is and continues to be registered with Pro Bono Law Ontario and approved by the insurer of the Society's insurance plan while the licensee is engaging in the practice of law through the program.

2. Prior to engaging in the practice of law in Ontario in contravention of the

paragraph under which he or she is exempt from payment of insurance premium levies, the licensee applies to the insurer of the Society's insurance plan, in accordance with procedures established by the insurer, to continue to be exempt from payment of insurance premium levies and the insurer approves the licensee's application.

Interpretation: occasional practice of law

(3) For the purposes of paragraph 2 of subsection (1), in any year, a licensee engages in the practice of law on an occasional basis if, during that year, the licensee engages in the practice of law in respect of not more than ten matters.

Interpretation: "reciprocating jurisdiction"

(4) In subsection (1), "reciprocating jurisdiction" means a Canadian jurisdiction other than Ontario,

(a) which is a signatory to,

(i) the National Mobility Agreement originally entered into in December 2002 by the Society, the Law Society of British Columbia, The Law Society of Alberta, the Law Society of Saskatchewan, The Law Society of Manitoba, The Barreau du Québec, the Nova Scotia Barristers' Society and the Law Society of Newfoundland; or

(ii) the Territorial Mobility Agreement originally entered into in November 2006 by the Society, the Law Society of Yukon, the Law Society of Northwest Territories, the Law Society of Nunavut, the Law Society of British Columbia, The Law Society of Alberta, the Law Society of Saskatchewan, The Law Society of Manitoba, The Barreau du Québec, the Law Society of New Brunswick, the Nova Scotia Barristers' Society, the Law Society of Prince Edward Island and the Law Society of Newfoundland;

(b) in which a licensee is authorized to engage in the practice of law; and

(c) which would exempt the licensee from its mandatory professional liability insurance program if the licensee were resident in Ontario and demonstrated proof of coverage for the licensee's practice of law in the jurisdiction under the Society's insurance plan which was reasonably comparable in coverage and limits to the professional liability insurance that would otherwise be required of the licensee by the jurisdiction.

Interpretation: "employer"

(5) In paragraph 4 of subsection (1), "employer" includes a corporation, any affiliated, controlled and subsidiary company of the corporation and any other entity employing the licensee.

Interpretation: "affiliated", "controlled" and "subsidiary"

(6) In subsection (5), "affiliated", "controlled" and "subsidiary" have the same meanings given them in the *Securities Act*.

Interpretation: "resident"

(7) In subsection (1), "resident" has the same meaning given it for the purposes of the *Income Tax Act* (Canada).

Interpretation: "related person"

(8) In paragraph 7 of subsection (1), "related person" has the meaning given "related persons" in subsection 251 (2) of the *Income Tax Act* (Canada).

FILING INSURANCE DOCUMENTS

Interpretation: "insurance policy"

10. (1) In this section, "insurance policy" means a policy for indemnity for professional liability issued in respect of a licensee by the insurer of the Society's insurance plan.

Period of default

(2) For the purpose of clause 47 (1) (b) of the Act, the period of default for failure to complete or file with the Society, or with the insurer of the Society's insurance plan, any certificate, report or other document that a licensee is required to file under an insurance policy is 120 days after the day that the certificate, report or other document is required to be filed under the insurance policy.

DEDUCTIBLES

Interpretation: "insurance policy"

11. (1) In this section, "insurance policy" means a policy for indemnity for professional liability issued in respect of a licensee by the insurer of the Society's insurance plan.

Requirement to pay deductible

(2) A licensee shall pay to the insurer of the Society's insurance plan, or to such other person as the insurer may direct, any amount of a deductible under an insurance policy that the licensee is required by the insurer to pay.

Compliance with requirement

(3) For the purposes of subsection 47.1 (3) of the Act, a licensee complies with the requirement mentioned in subsection (2) when,

(a) the licensee pays to the insurer of the Society's insurance plan or, if the insurer has directed the licensee to pay to another person, to the person to whom the insurer has directed the licensee to pay, the amount of the deductible that the insurer has required the licensee to pay; or

(b) the licensee complies with an award made by the arbitrator as a result of an arbitration conducted under the insurance policy with respect to the requirement to pay the deductible.

The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 5

Report to Convocation
October 24, 2013

Professional Development & Competence Committee

COMMITTEE MEMBERS
Janet Minor (Chair)
Jacqueline Horvat (Vice-Chair)
Barbara Murchie (Vice-Chair)
Alan Silverstein (V-Chair)
Raj Anand
Jack Braithwaite
Robert Burd
Mary Louise Dickson
Adriana Doyle
Ross Earnshaw
Larry Eustace
Howard Goldblatt
Vern Krishna
Michael Lerner
Dow Marmur
Judith Potter
Nicholas Pustina
Jack Rabinovitch
Joseph Sullivan
Gerald Swaye
Robert Wadden
Bradley Wright

Purpose of Report: **Decision**
Information

Prepared by the Policy Secretariat
(Sophia Sperdakos 416-947-5209)

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For Decision

COMMITTEE PROCESS

1. The Committee met on October 10, 2013. Committee members Janet Minor (Chair), Jacqueline Horvat (Vice-Chair), Barbara Murchie (Vice-Chair), Alan Silverstein (Vice-Chair), Raj Anand, Jack Braithwaite, Robert Burd, Adriana Doyle, Ross Earnshaw, Larry Eustace, Howard Goldblatt, Michael Lerner, Dow Marmur, Judith Potter, Nicholas Pustina, Joe Sullivan, Gerry Swaye, Robert Wadden and Bradley Wright attended. Staff members Diana Miles and Sophia Sperdakos also attended.

TAB 5.1

DECISION

PATHWAYS REPORT IMPLEMENTATION: ARTICLING ENHANCEMENTS AND EXPERIENTIAL ASSESSMENT

MOTION

2. That Convocation approve the implementation of performance-based evaluations in the Articling Program that mirror the expected completion of skills and tasks competencies in the Law Practice Program ("LPP"), along the lines outlined in the Proposal at TAB 5.1.2: Skills Experiential Assessment in Articling, deferring consideration of the optimal focus and format of the Final Skills/Culminating Assessment until more information is available about learning outcomes in the articling program and the LPP.

Articling Enhancements

3. The Articling Task Force Pathways Report recommended a pilot project consisting of two components - a Law Practice Program ("LPP") and an articling requirement.

4. Pursuant to the Report's recommendations, during the pilot project, the 10-month articling requirement will continue with its current administrative structure, but with an additional focus on developing measures designed to enable a more useful evaluation of the articling program merits at the end of the pilot project. This will include enhanced documentation for articling principals and candidates to complete during the articling period.

5. To assist with implementation of Convocation's recommendation, the Law Society has retained the Law Society's Licensing Process psychometricians, The Performance Assessment Group (PAG), to undertake a number of activities related to the development of a reliable and valid assessment tool for the articling program.

6. The Report outlining the activities PAG has been retained to undertake on behalf of the Law Society is set out at **TAB 5.1.1: Enhanced Evaluation of Articling** for Convocation's information.

7. The focus of this aspect of articling enhancements will be on monitoring the exposure of articling candidates to the critical articling goals and objectives for entry level practice (taken from the official Articling Goals and Objectives Lawyering Skills Listing). The report addresses the need to enhance the reporting and tracking mechanisms in the program - upgrading them psychometrically by adding behavioural ratings systems for scoring purposes on the depth of exposure achieved.

8. Through this approach the Law Society will update and psychometrically modernize previous articling evaluation tools and make the tool accessible on-line, allowing for more effective tracking and use of the data.

9. At the same time, there will continue to be a requirement to complete a formal Training Plan. As well, the standardized Articling Goals and Objectives will continue to be used as one of the underpinnings of articling and the LPP and other experiential development, along with the National Admission Standard competencies.

Experiential Assessment

10. In addition to the development of the LPP and the enhancement and improved evaluation of the articling program the Pathways Report also provided for a final skills/culminating assessment ("the experiential assessment") that candidates in both streams would be required to complete as part of the licensing process. This is in addition to successful completion of the current Licensing Examinations (Barrister and Solicitor) that will continue to be a requirement for licensing.

11. The Pathways Report did not define the specific approach to the experiential assessment, but its recommendation anticipated that the experiential assessment would be developed and approved by Convocation prior to the implementation of the pilot project in 2014-

15. The PD&C Committee is tasked with the responsibility of proposing the experiential assessment for Convocation's consideration.

12. In the first instance, a working group of the PD&C Committee (Pathways Working Group #2) considered the issues related to the experiential assessment. This included meetings with two psychometric and assessment professionals with expertise in regulated environments that apply a performance-based assessment model of assurance. They provided options papers and made presentations to the working group to assist considerations of the assessment process. The working group and the Committee considered the goals of any assessment process, the cost implications, the time needed to develop an appropriate model and issues related to the optimal focus and format of the experiential assessment.

13. The experiential assessment is one part of a complex and multi-layered implementation process. The Committee is strongly of the view that the overall success of the pilot project requires a careful consideration of how best to proceed with each component. After careful analysis of the information it has received, the Committee is of the view that more time is required to implement the overall or culminating experiential assessment component of the Pathways Report.

14. To further the ability to determine the focus and format of the experiential assessment it is essential to implement performance-based evaluations in the articling program that mirror the expected completion of skills and tasks competencies in the LPP. This will level the field among candidates in advance of the introduction of the experiential assessment.

15. The performance appraisal system would focus on four critical core competencies whose demonstration and assessment is expected as part of every articling program and which will ideally bring the articling experience closer to approximating the LPP experience. During the course of the pilot project the PD&C department will work with principals to ensure that the skills within the core competencies can be addressed in a variety of

articling settings including barrister or solicitor-based practices, in-house settings, government settings, and others in additional non-private practice settings, etc.

16. The Committee's proposal is that the Law Society should spend the first three (3) years of the Pathways Pilot Project implementing the LPP and enhancing the Articling Program as discussed here, and should defer consideration of the optimal focus and format of the Final Skills/Culminating Assessment until more information is available about learning outcomes and an informed decision can be made.

17. The detailed reasons and discussion for this proposed approach are set out at **TAB 5.1.2: Skills Experiential Assessment in Articling**.

LET RIGHT PREVAIL

The Law Society of Upper Canada | Barreau du Haut-Canada

Pathways Pilot Project: Enhancement of the Evaluative Process in the Articling Program

Prepared by:
Diana C. Miles, Director
Professional Development and Competence

April 2013

Enhancement of the Evaluative Process in the Articling Program

The final report of the Articling Task Force states that during the pilot project the 10-month Articling Program will continue with its current administrative structure and with a focus on developing measures designed to enable a more useful evaluation of the program merits at the end of the pilot project, specifically including enhanced documentation for Principals and candidates to complete during the articling term.

This information report details the plans for development of an enhanced evaluative process in the Articling Program.

Following discussions between the Director, PD&C and the Law Society's Licensing Process psychometricians, The Performance Assessment Group (PAG), the Law Society retained these assessment specialists to undertake the following activities.

- Thorough review of the evaluation documents currently used in the articling program;
- Provision of recommendations on the development of a reliable and valid assessment tool for the articling program (see Appendix 1);
- Preparation of a Work Plan for the development of the recommended tool (see Appendix 2); and
- Provision of consultation and facilitation services during the development of the tool.

Retaining PAG for development of the tool provides the Law Society with the ability to leverage their extensive knowledge of the Licensing Process during the development of the new evaluative tool for the articling program. PAG was involved with the initial development and validation of the skills and task competencies that form a part of the Law Society's Competency Profile for licensing for lawyers. They also continue to work extensively with the Law Society on the ongoing development and validation of the competency profiles and substantive and skills requirements as they have evolved since the inception of the current Licensing Process. They are best placed to assist us quickly and cost efficiently to turn this knowledge into a valid and useful rating and evaluation system for the articling program.

PAG's first deliverable was a report on the *Enhancement of the Evaluative Process in the Articling Program* (see Appendix 1). The report discusses the considerations surrounding similar types of assessment tools; and more specifically, strategies are identified to enhance the face validity of the assessment tool that was discontinued in 2009 and recommendations are made for improving the rating process. Further to this report, PAG then submitted a Work

Plan to the Director outlining key steps to be undertaken for development of the tool. This plan can be found at Appendix 2.

In addition to this work on the substance of the evaluation activities of the articling program, the PD&C Department is also working in tandem with PAG and our internal business analysts to ensure that the final evaluative tool will be fully electronic. Principals and candidates will access the evaluation system online. The online nature of the new rating system will also allow the Law Society to effectively and efficiently use the results to provide aggregate statistical information and reporting when required internally or for use by the PD&C Committee or others in their deliberations.

The new assessment tool is expected to be complete by January 31, 2014 and will be implemented online by August 2014, in time for the 2014-15 Licensing Process articling candidates to begin their articling terms.

APPENDIX 1

Enhancement of the Evaluative Process in the Articling Program

Prepared for
The Law Society of Upper Canada

Prepared by
PERFORMANCE ASSESSMENT GROUP

April 2013

1. Introduction

The Articling Task Force, established in May 2011, proposed a pilot project (approved in November 2012) that will create a new Law Practice Program (LPP) as an alternative to articling in the preparation of candidates for licensure. Given that demand for articling placements has exceeded supply for several years, there is an identified need to create a program that offers candidates a comparable experience, thereby providing everyone with an opportunity to participate in this important component of the licensure process.

The new LPP process will involve a 3 to 5 year pilot project of transitional training that is scheduled to begin in the 2014-2015 licensing period. The LPP will be offered as an alternative to the articling program during this time and a final assessment will be developed to ensure each candidate, regardless of their chosen path, successfully completed the "required transition to practice competencies" prior to licensure. Finally, the Articling Task Force also recommended that the two paths to licensing be "monitored, assessed, and compared". The purpose of this paper is to propose an effective strategy to this end for the Articling Program. Parallel assessment of the LPP will be considered once the content of the LPP program has been developed.

2. Assessment and the Articling Program

The current articling program is designed to ensure that each student has successfully completed the required transition to practice competencies expressed in the Law Society's **Articling Goals and Objectives**.

Assessment of the effectiveness of the articling program in its current form will involve gathering information about the perceived experiences of the students and principals in the articling program. Given the unstructured nature of the articling process, it must be assumed that articling experiences vary widely across, and even within, placement settings. As a result, a formal assessment tool is required to measure these experiences from both perspectives, and to be able to track which placements are effective, which ones meet the Law Society's minimum standards, and which ones require improvement. In addition, such data will be of paramount importance for analyzing the overall value of the licensure prerequisite in light of the goals of transitional training and identifying opportunities to effect positive changes to the format or focus of articling that may allow the program to more closely align with those goals.

3. The Foundation

A requirement of a valid assessment is to clearly define the outcomes to be measured (Cascio & Aguinis, 2005). Therefore, in order to compare the experiences of all students, the fundamental issue is to define what is to be compared. A key starting point is the existing Articling Goals and Objectives.

The Articling Goals and Objectives were designed to reflect the entry level competencies of the Law Society licensure examinations (prior to 2011) which provide consistency throughout the licensure process. However, this list encompasses 66 unique goals and objectives which, when used to design the previous assessment form, resulted in 178 questions being asked of students and principals. Not surprisingly, this process was met with some resistance due to the onerous nature of the task. Effective assessment requires a balance between the amount of information collected and the demands that it places on the participants. When the form becomes too long and time consuming, proper attention to detail can suffer and a cursory effort may ensue (Cascio & Aguinis, 2005).

To overcome this limitation, the PERFORMANCE ASSESSMENT GROUP has proposed a review process whereby a working group of content experts who are knowledgeable in the articling process will rate entry level competencies contained in the Articling Goals and Objectives and the Federation of Law Societies National Admission Standards (NAS), Skills and Tasks Competencies (sections 2 and 3) in terms of their criticality and the frequency with which they are required in practice. Based on these ratings, a significantly shorter list of core goals and objectives will be developed. The working group will also consider the wording of each statement for clarity and accuracy and identify other goals and objectives that may have been overlooked in previous efforts. Once finalized by the group, the new list of goals and objectives for the articling process will serve as the foundation for subsequent tool development.

4. Creating an Effective Assessment Tool

One of the goals of the proposed articling program assessment tool is to overcome the limitations of past assessments. Given that the past articling assessment was discontinued in 2008 due, at least in part, to perceptions of the task being burdensome, an informed reduction in the number of goals and objectives to be assessed has been proposed. To further encourage acceptance from the individuals who will be completing the assessment tool, the PERFORMANCE ASSESSMENT GROUP proposes the creation of rating scales that incorporate **Behavioural Anchors** reflecting performance standards for the goals and objectives being assessed. Known as Behaviourally Anchored Rating Scales (BARS; Smith & Kendall. 1963), the scales for each objective or goal are normally presented vertically (this is optional) with scale points ranging anywhere from 1 – 5 to 1 – 9. It is an assessment method that combines the benefits of narrative descriptions of performance ("critical incidents"), and quantifiable ratings representing poor, acceptable, and good performance. The following rating scale based on the objective "Attended with a

lawyer at the initial interviews with new clients" is provided for illustrative purposes using a 5-point scale:

Attended With a Lawyer at the Initial Interviews With New Clients		
	⑤	Consistently attended initial interviews with new clients and was actively involved in all discussions
Attended initial interviews with new clients on a regular basis and participated in the discussions	④	
	③	Attended some initial interviews with new clients with minimal participation
Occasionally attended initial interviews with new clients but did not participate	②	
	①	Did not attend initial interviews with new clients

Research surrounding BARS suggests that they add face validity to the rating process when raters can readily identify with the statements provided as anchors to the rating scales which leads to perceptions of scale effectiveness (Kingstrom and Bass, 1981). As a result, the quality of the anchors is critical and it will therefore be extremely important to identify working group members who are familiar with not only the goals and objectives of the articling program, but how these goals and objectives translate into actual performance measures across typical articling experiences.

5. Developing BARS

In order to properly construct BARS, the following general steps are required (Smith & Kendall, 1963):

1. Data related to effective and ineffective behavior on the job are collected from people with knowledge of the job using the critical incident technique (Flanagan, 1954).
2. These data are then converted into performance dimensions by sorting them into homogeneous groups. Definitions for each group of behaviors are then created.
3. To ensure the homogeneity of the groups, subject matter experts (SMEs) are asked to re-translate the behavioral examples back into their respective performance dimensions. Behaviors where there is a low level of agreement are discarded. This re-translation process helps to ensure that behaviors are readily identifiable with their respective performance dimensions.

4. The retained behaviors are then scaled by having SMEs rate the effectiveness of each behavior. These ratings are usually made on a 5- to 9-point Likert-type scale.
5. Behaviors with a low variability in ratings are retained while behaviors with a higher variability are discarded. This step helps to ensure SME agreement about the rating of each behavior.
6. Finally, behaviors for each performance dimension, all satisfying the re-translation process, are used as scale anchors.

6. Using the Results of the Assessment Tool

As suggested above, the primary purpose of the proposed assessment tool will be to monitor the effectiveness of the articling program and ensure it is achieving the goals of transitional training. The results may also be used to compare and report on the experiences of the articling candidates and the LPP candidates with the goal of providing evidence that, from the perspective of the students (and principals), candidates in both programs are meeting the required competencies comparably. Analyses can also be conducted within each program. For example:

- Are articling students from large law firms having similar experiences with those in small firms?
- Are the experiences comparable in firms specializing in different areas of law?
- Do rural firms do a better job than urban firms?

The number of comparisons is only limited by sample size and the number of demographic variables collected on each firm. If a parallel tool is developed for the LPP, the rating scales would need to reflect the content of the program (education delivered, rather than articling experienced provided), however given both programs would be expected to share the same goals and objectives, there should be a reasonable degree of comparability between the two programs to allow for similar tools.

7. Conclusion

As the Law Society moves in a new direction with its articling program, it will be important to ensure that the assessment tool is not only aligned with critical entry level competencies and objectives, but that it acknowledges and allows for the variance that is inherent in the current articling framework. Through a rating process that involves a shorter, more critical list of goals and objectives, the PERFORMANCE ASSESSMENT GROUP believes it will be possible to improve rating participation, which will produce the data required for a more thorough assessment of the program and ultimately lead to enhanced experiential training for lawyer candidates.

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APPENDIX 2

Work Plan for Enhancement of the Evaluative Process in the Articling Program

Prepared for
The Law Society of Upper Canada

Prepared by
PERFORMANCE ASSESSMENT GROUP

April 2013

PHASE I: Summary Paper

A 2-3 page *Report on Enhancement of the Evaluative Process in the Articling Program* (see Appendix 1) will be prepared by the PERFORMANCE ASSESSMENT GROUP and will discuss the considerations surrounding similar types of assessment tools. Specifically, strategies will be identified to enhance the face validity of the assessment tool that was discontinued in 2009 and recommendations will be made for improving the rating process.

PHASE II: Finalization of Articling and the Law Practice Program Goals and Objectives

To promote a reliable and valid rating instrument, the goals and objectives of the program must be clearly stated and incorporated into the tool. The PERFORMANCE ASSESSMENT GROUP will work with select members of the Law Society to clearly define the goals and objectives of the articling program. As part of this process, this working committee will consider the measurability of each goal/objective and the criticality of each one. A second purpose of this process will be to determine if it is reasonable to reduce the number of goals/objectives in an attempt to streamline the rating process. A criticism of the previous tool was that it took too long to complete. In total, 178 questions were asked of raters which likely contributed to resistance to using the tool. The PERFORMANCE ASSESSMENT GROUP will attempt to address this limitation by ensuring the tool only assesses the goals/objectives that are most critical for ensuring a meaningful rating experience for the articling candidates as well as the participating principals.

To this end, is the PERFORMANCE ASSESSMENT GROUP proposes a 1-day meeting be held with subject matter experts chosen by the Law Society as being most familiar with the program and its goals and objectives. Starting with the existing goals and objectives, participants will be asked to rate the criticality of each one prior to the meeting. The PERFORMANCE ASSESSMENT GROUP will analyze the pre-meeting ratings and use them to guide the 1-day review process. We believe that by having the ratings completed prior to the meeting, we will complete this comprehensive review in 1 day.

PHASE III: Tool Development

Based on a literature review, the PERFORMANCE ASSESSMENT GROUP proposes that the assessment tool in question incorporate a form of Behaviourally Anchored Rating Scales, primarily due to the benefit of their face validity for raters. One of the limitations to the prior assessment tool

was resistance from those who had to complete it. Feedback on the tool suggested it was onerous by raters. The proposed tool will be streamlined as discussed above and incorporate "anchors" that describe examples of behaviours at various points on the scale. These anchors will allow raters to focus on the behaviour being assessed and provide a reference for where observed behaviours fall on each scale. This, coupled with fewer questions with clear instructions, should enhance buy in and cooperation.

To this end, it is proposed that two 2-day meetings be held to develop the anchors for the assessment tool. The first 2-day meeting will consist of committee members nominated by the Law Society as being familiar with the articling program and the range of articling positions currently available to candidates and what they will be required to do in each stream. Principals, past articling candidates, and Law Society representatives could all play a role in this stage of the process. During each meeting, participants will be divided into groups to develop five behavioural anchors for each goal/objective representing varying levels of performance. Once developed, the anchors will be reviewed by the entire group and finalized. The second 2-day meeting will consist of different participants, with similar qualifications, who will be asked to take the anchor statements in a scrambled form and assign them to the appropriate goal/objective. Called "reverse translation", this process helps ensure that the anchors created are unique to each goal/objective. Their second task will be to refine the anchors where necessary and finally, allocate them to the appropriate rating position on each scale.
At the conclusion of the second meeting, the PERFORMANCE ASSESSMENT GROUP will use these ratings and anchors to create a tool for pilot testing purposes, along with instructions.

PHASE IV: Pilot Testing

The PERFORMANCE ASSESSMENT GROUP will design the pilot test experience to acquire both qualitative and quantitative feedback on the initial tool. The focus of the pilot testing will be an assessment of the ease of use of the tool, and whether it measured appropriate behaviours. In addition, pilot test participants will be encouraged to recommend wording and/or content changes. The Law Society will administer the tool to appropriate individuals and the PERFORMANCE ASSESSMENT GROUP will conduct the subsequent analyses and summaries. If feasible, the PERFORMANCE ASSESSMENT GROUP recommends that the form be computerized to assist the pilot test participants in their task and to ensure legibility of their responses and ratings.

PHASE V: Assessment Tool Finalization

In the final phase of this project, a 2-day meeting will be held with a select group of past meeting participants (ideally based on their effectiveness in previous stages) to review the pilot test findings and make final changes to the assessment tool. At the conclusion of this meeting, the PERFORMANCE ASSESSMENT GROUP will make final editorial and formatting changes to the assessment tool and forward it to the Law Society for final approval.

LET RIGHT PREVAIL

The Law Society of Upper Canada | Barreau du Haut-Canada

PATHWAYS PILOT PROJECT

PROPOSAL FOR EXPERIENTIAL ASSESSMENT

PREPARED BY:

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September, 2013

Pathways Pilot Project

Proposal for Experiential Assessment

Executive Summary

The Pathways Pilot Project has a significant number of changes that have been approved for development. It is extremely challenging to make so many changes all at one time without risking deficiencies in some of those changes, regardless of the expertise and money applied to the development process. If there are real or perceived deficiencies in any one of the components, the entire licensing process will be in jeopardy. It is proposed that the Law Society should acknowledge that there is a need to engage in incremental development of some of the Pathways Pilot Project components in order to assure the greatest success of the whole.

Arguably, the priority component for implementation is the new Law Practice Program (LPP). Without its successful introduction, the Law Society is facing a serious barrier to entry issue. It is important that the Society support the implementation of the LPP by thoroughly monitoring and managing the relationship with and the work of the providers by engaging in proactive leadership and focusing on the implementation and evolution of the LPP.

The second most critical change in this new process is the need to properly define learning outcomes in the Articling Program, and ideally to also measure performance of candidates in that process in a manner that has some level of reliability.

The Final Skills/Culminating Assessment is the one component whose immediate implementation is in question as a result of the priorities of the new licensing model. This proposal will suggest that the Law Society should spend the first three (3) years of the Pathways Pilot Project implementing the Law Practice Program and enhancing the Articling Program, and should defer consideration of the optimal focus and format of the Final Skills/Culminating Assessment until more information is available about learning outcomes and an informed decision can be made.

Assumptions and Success Factors

- Articling Program is maintained as one of the transitional training paths toward licensing
- A Law Practice Program (LPP) is provided for those who are unable to find an articling placement or who prefer to complete a training program
- The experiential components of the licensing process should address consistent outcomes if the option to choose one or the other is to be considered defensible (to avoid the notion that the simulated environment is sub-standard, or that the articling experience provides inconsistent training and/or assessment of performance)
- The Law Society wishes to gain reasonable assurance that the experiential components of licensing achieve defined learning outcomes focused on the competencies that have been validated as the highest priority for entry-level assurance
- To gain that assurance, both experiential processes (LPP or Articling) should integrate a formal evaluation(s) of competencies that directly assess defined learning outcomes necessary for entry-level practice
- Proposals for the LPP have now been received and it is clear that the program(s) will integrate and assess the core competencies that have been determined to be foundational to entry-level practice, as confirmed by the validation of competencies undertaken nationally and included in the National Competency Profile approved by Convocation of the Law Society.

Input, Issues and Challenges

A. Form and Function

The Working Group of the PD&C Committee responsible for considering the recommendation for the implementation of a Final Skills/Culminating Assessment has received information on the critical need to ensure that any such assessment process is reliable, valid and fair in order to be defensible.

The reality of assessing skills competencies is that they are most validly assessed in a process of testing that includes the demonstration of those skills through task-based activities. The assessment processes with the highest level of validity and defensibility will therefore be those that involve in-person, active demonstration of a skill. The gold-standard example of such a testing system would be an objective structured clinical examination involving standardized clients and multiple (as many as 30 but potentially as low as 8- 10) stations where the opportunity to demonstrate skills through a highly structured series of task-based activities is provided.

The Working Group has also heard from expert psychometricians that the ability to assess licensing candidates in such a complex process will be significantly challenging for the legal profession in Ontario for a number of reasons, with the most significant being:

- The volume of candidates (2000+) that would have to be assessed
- The candidates' lack of prior exposure to the testing format

The working group found the apprenticeship and performance assessment approach of the accounting professions to be compelling. The culture of the accounting professions has evolved over many years and places an emphasis on strong alliances between the supervisor and the apprentice, focusing on the provision of supportive training environments that formally confirm acceptable achievement of competencies based on a competency profile provided by the Regulator. The profession is taking responsibility for 'raising' the next generation of accountants.

The Working Group acknowledges that this is not so for the law profession. The focus on the achievement of core skills in the articling phase is perceived to have diminished to the point where many have questioned the need for work placement requirements. Much of this concern stems from the Law Society's lack of control over articling and the inability to assure that critical entry-level skills and tasks are actually integrated into the learning, demonstrated and assessed.

Experts in the application of examination frameworks for professional licensure have indicated that the ability of a final testing process to be defensible, valid and acceptable to test takers and the profession is significantly dependent upon candidates having the benefit of exposure to the assessable tasks and testing modalities. Ideally, candidates will have the opportunity to demonstrate their ability to complete the entry-level tasks to the satisfaction of a supervisor in a safe and risk-free formative learning environment, prior to being independently tested by the Regulator.

The Working Group must also take into consideration the reality of the scheduling of the new licensing process components. This includes the LPP with a 17-week work placement (which may be offered more than once per year and may require staggered work placements in each offering to ensure availability of those placements) and the completion of the two licensing examinations. With so many components being undertaken by candidates at staggered times during each licensing year, scheduling will require that any final skills assessment process be offered at least twice per year, if not more, to provide candidates with the opportunity to complete their licensing process on a timely basis.

B. Costs

The Working Group is also being provided with a costing for a Final Skills/Culminating Assessment process. As discussed and approved by the group, the proposed process has been modeled after a modified unified final examination process that is used in the accounting profession. It includes additional video-enabled behavioural assessments in order to address the 'in-person' nature of legal competencies without necessarily embarking upon a full scale clinical assessment with standardized clients (actors) and testing stations.

To summarize that information: the cost of one offering per year of a modified unified skills examination process is estimated to be approximately $3 million (including HST, but not including any indirect allocations of operational expenses). There are virtually no economies of scale for such an examination process. All costs of ongoing content development, space rental and set up, examination process and administration must be replicated for every offering of the examination. This includes the development of brand new case-based test questions, video-enabled behavioural client simulations and all of the learning outcomes and scoring rubrics required to support the assessments. Hence, the cost of engaging in what has been determined by the Working Group as the most defensible, fair and acceptable final skills assessment scheme is likely to translate into a cost of approximately $6 million for two sessions per year.

Such a cost will result in a fee of $3000 per candidate just for the final test to be paid by candidates only, or perhaps partially through a subsidization from the profession. Added to this will be the costs for the licensing examinations and licensing supports of $2800 (today's fee and may be subject to change). Based on the proposals received, it appears that the LPP costs will be in the range of approximately $1500 to $2000 per candidate equalized across 2000 candidates (assuming the Law Society requires no significant change to the proposals as presented). This results in an overall fee for licensing in the range of $7500 per candidate and represents an increase of 168% over the current fee, or an increase of $4700 per candidate. If a contribution from the profession is approved, potentially in the range of $1 million as has been discussed previously, the fee per candidate will be reduced to approximately $7000 each, representing an increase of $4400 per candidate.

C. Implementation

Expert psychometricians and others who have worked in the field of in-person licensure assessments have advised the Working Group that mounting such an effort for this group of legal learners will be a daunting task that will be subjected to significant ridicule if it is not completed at the level of a 'gold standard' fully defensible process. They have also provided their opinions that the development process for such a final culminating assessment, given the large scale of the project, is unlikely to be completed in the timeframes that have been set out

in the Articling Task Force Report unless it is significantly diminished in its scope which then brings into question the defensibility and value of undertaking such an assessment.

The Director of PD&C and the Pathways Operational Team have also had a further opportunity to review all of the information related to the proposed final assessment with psychometricians and licensure examination providers and technicians. The Team is of the opinion that it is very unlikely that the Law Society will be able to produce the required high quality assessment model in time to hold the first assessment in mid 2015.

The Director is also of the opinion, based on the proposals for the LPP, that the Final Skills/Culminating Assessment model that is being contemplated by the Working Group at this time appears to result in a significant level of duplication of assessment as between the LPP and this proposed examination. Further, the Director is of the opinion that the proposed Final Skills/Culminating Assessment scheme will be unable to match the level and value of the assessments that will have already been undertaken in the LPP. On the assumption that the Law Society will continue to maintain significant control over both the curricula and the assessments applied in the LPP, the need to test LPP candidates at the end of their licensing processes appears to be superfluous and an unnecessary cost and effort for these candidates. The proposed final assessment is unlikely to add further training value or provide any greater level of assurance of the competence of these candidates for entry-level practice.

Reconciling Task Force Recommendations with Implementation of the Pilot Project

There will now be two pathways for the training and achievement of skills and tasks competencies required for licensing.

In the proposed Law Practice Program (LPP), candidates will be expected to undergo assessments throughout the process. This has been confirmed by the proposals that have now been received by the potential providers. Periodic assessment ensures the reinforcement of the learning outcomes. Each component of the training would likely provide multiple opportunities to have the candidates prove their abilities and fulfil the competency requirements. LPP candidates will receive significant exposure to, demonstration and assessment of, all required entry-level competencies.

In the articling term, there have never been any formal assessments of tasks and skills with the exception of a Professional Responsibility test. Prior to 2009, there were performance evaluations required in mid-term and at end of term. These evaluations were to be based on the Training Plan filed by the Principal. The performance evaluations were removed in 2009 in an effort to increase placements by reducing the burdens upon the Principals. Under the recommendations of the Articling Task Force, as approved by Convocation, the Law Society has

reversed that decision and is now required to establish significantly enhanced evaluation systems for the Articling Program.

The first part of this articling enhancement involves establishing a psychometrically validated behavioural rating system to ascertain the skills and tasks competencies to which the candidates have received some exposure during the articling term. This rating process will prioritize the critical experiential competencies, as confirmed by subject matter experts from the profession through focus groups and psychometric validation processes. The rating tool will be an online evaluation that will be completed by the Principal and the candidate and will allow the Law Society to finally and formally confirm "what" is actually happening in the articling placements and to determine if the perceived concerns over potential lack of validity of the learning processes in some placements are borne out. Based on information that the Society receives every year from candidates, and that will likely be confirmed through the online rating tool to be introduced as part of the pilot project, it appears that there are some placements that are clearly inadequate training opportunities and do not meet the minimum expectations.

However, there is a component of the proposed articling enhancements related to "how" the candidate is performing in the articling placement that has yet to be addressed. This has always been a significant gap in the Law Society's ability to assess the competence of licensing candidates. Although almost all Principals sign off on the candidates' certificates of fitness to practice at the end of the articling term, there has been no means for the Society to confirm those opinions or, in fact, to gain assurance that entry-level competence in the expected tasks and skills were actually demonstrated.

The Articling Task Force addressed this deficiency by acknowledging the fact that it was, at this time, difficult to confirm articling placements as valid and defensible experiential training opportunities due to the inconsistency of the placements and the inability to control the training. A means of addressing this gap was proposed in the form of a final assessment which would see all candidates having to do a final test, regardless of the experiential training path chosen (LPP or Articling). Essentially, the solution at the time of the Task Force deliberations, **and without the benefit of the information that is now available for decision-making about implementation**, was to accept the perceived deficiencies of articling and force assessment through an independent testing requirement controlled by the Society. It is important to note that the Task Force Report also indicated that any such testing methodology that the Law Society applies to evaluate skills training experiences should address the fundamental "in-person" nature of the learning or it will risk being labelled inadequate for the purpose.

PROPOSAL: Skills Assessments in Articling

Objective: to address the need to enhance articling systems and Law Society oversight, to integrate appropriate performance measures into that experiential training activity, and to move the pilot project forward to develop an appropriate nexus between the LPP and Articling Program that will support a future final, culminating, valid and defensible skills assessment.

Solution: implement performance-based evaluations in the Articling Program that mirror the expected completion of skills and tasks competencies in the LPP in order to level the field in advance of the introduction of a culminating test, deferring the implementation of the Final Skills/Culminating Assessment. [1]

This interim step will begin the process of addressing many of the concerns and risks raised with respect to the articling process and its apparent lack of consistency and defensibility as an appropriate measure of candidate competency prior to licensing.

It is proposed that certain skills and tasks competencies will be formally integrated into the Articling Program and will require the Principal and the candidate to engage more fully in the activity of mentor/learner and formal performance management and assessment.

It is acknowledged that the addition of such obligations to the Articling Program may have the effect of reducing the number of articling placements because some Principals may not be inclined to support such an effort. But there is a significant opportunity at this early stage of developing a new licensing regime to move all components of the process to higher quality levels. Those articling placements / Principals who are not committed to being fully engaged in the ongoing competence development of the profession will pull out of the system. This is a positive result that will refine and improve the quality of the work placement platform. And with the implementation of the new LPP alternative, the potential of a declining number of articling placements no longer results in a potential barrier to entry. Candidates have a means of completing the process even if the number of articling placements decreases as a result of the Regulator asserting more control over learning activities within articling.

In support of this formalized performance management activity, articling Principals will be provided with performance feedback and mentoring training via a learning event (webcast or archived video presentation with supporting written documentation), expectations for learning outcomes and the assessment rubrics for each skill or task with explanations for scoring the performance of the candidate, and instructions on how to define a successful demonstration of

[1] The development of a Training Plan for the placement and the use of the Articling Goals and Objectives to support the evaluation of the scope of achievements during the placement will continue to be an integral part of the process.

each required competency. And, of course, the Law Society licensing team will always be ready to assist.

If the candidate does not demonstrate the skill or task at an appropriate level of competency then the Principal/law firm will be expected to ensure that the candidate is given additional opportunities to engage in the demonstration of the competency to the satisfaction of the Law Society's requirements as assessed by the supervisor.

The Law Society will provide performance rating checklists for Principals to complete that will be psychometrically established and validated to ensure that the Principals are consistently assessing performance. These will also include an opportunity to provide qualitative feedback in the form of performance commentary. All completed learning outcome rubrics and performance ratings will be required to be shared with the candidate and filed with the Law Society.

The Plan: Integrating Performance Assessment into the Articling Program

During the three (3) year pilot project, it is proposed that candidates be required to demonstrate certain core entry-level competencies during their articling term, as confirmed by their articling Principals. These core activities are derived from the competency profile of skills and tasks that has now been approved by Convocation as the national objectives upon which all training and assessment should be modeled going forward.

Specifically, the National Admission Standards competency profile provides the following list of Tasks that an entry-level lawyer candidate is expected to be able to perform at a minimally competent level at the licensing stage of their experiential development as a lawyer (either during articles, during an alternative to articles, or during a formal licensing assessment):

Section 3.1 **General Tasks**

s. 3.1.1 **Ethics, professionalism and practice management** – identify and resolve ethical issues, use conflict management systems, identify need for ILA, use time tracking/limitation reminder/bring forward/ trust and general accounting/client records and files/practice checklists/billing and collection systems

s. 3.1.2 **Establishing a Client Relationship** – interview potential client, confirm who is being represented, confirm client's identity, confirm who will be providing instructions, draft retainer/engagement letter, document client consent/instructions, discuss and set fees and retainers

s.3.1.3 **Conducting a Matter** – gather facts through interviews, searches and other methods, seek additional expertise when necessary, develop case strategy, identify mode of dispute resolution, conduct due diligence, draft opinion letter/demand letter/affidavit/statutory declaration/written submission/simple contract or agreement/legal accounting/release, impose/accept/refuse trust condition or undertaking, negotiate resolution of dispute or legal problem

s. 3.1.4 **Concluding Retainer** – address outstanding client concerns, draft exit/reporting letter

Section 3.2 **Adjudication/Alternative Dispute Resolution**

s. 3.2.1 Draft pleadings, draft court orders, prepare or respond to a motion or application, interview and brief a witness, conduct simple hearing or trial

In performing these tasks, the following skills are also expected to be exhibited by the entry-level candidate at a minimally competent level at the licensing stage of their experiential development as a lawyer (either during articles, during an alternative to articles, or during a formal licensing assessment):

Section 2.1 **Ethics and Professionalism Skills** – identifying ethical issues and problems, engaging in critical thinking about ethical issues, making informed and reasoned decisions about ethical issues

Section 2.2 **Oral and Written Communication Skills** – eliciting information from clients and others, explaining the law, obtaining instructions

Section 2.3 **Analytical Skills** – identifying client's goals and objectives, identifying due diligence required, identifying and evaluating the appropriateness of alternatives for resolution of the issue or dispute

Section 2.4 **Research Skills** – conducting factual research, conducting legal research including identifying legal issues, selecting relevant sources, using techniques of legal reasoning and argument, identifying/interpreting/applying results of research, effectively communicating results of research

Section 2.5 **Client Relationship Management** – managing client relationships, developing legal strategy in light of client's circumstances, advising client, maintaining client communications, documenting advice given to and instructions received from client

Section 2.6 **Practice Management Skills** – managing time, delegating tasks and providing appropriate supervision, managing files, managing finances, managing professional responsibilities

The following tasks and skills would become part of the performance requirements in the Articling Program. These tasks and skills have been chosen because they represent the top priority tasks and skills in the national competency profile and are also considered to be achievable in **any** articling placement that is capable of validly supporting the Law Society's experiential training requirements and assessments. If an articling placement / Principal is unable to provide the candidate with appropriate exposure to these core skills and tasks, then the Law Society is in a position to reconsider the acceptability of the placement.

It is proposed that the performance reviews and assessments in articling will be limited to the four (4) activities set out below. Following the pilot, further activities for formal assessments could be added if the integration is successful and it was deemed appropriate or necessary to do so[2].

Task Competency	**Skill Competency**	**Competencies to be Assessed**
Establishing Client[3] Relationship	**Interviewing a client**	✓ Interviewing to understand client's needs ✓ Eliciting information from client ✓ Advising client in light of client's circumstances ✓ Documenting advice given to client and instructions received from client ✓ Managing client expectations

[2] The Law Society currently has in place an exemption for articling for those candidates with a minimum of 10 months practice experience in a common law jurisdiction. It is proposed that the exemption requirements will be revised slightly to require the applicant to prove the completion of the above-noted tasks and skills through confirmation of their referees. They are already required to provide references and backup information, but that backup may now require additional proof of completion.

[3] In this context, client may have a number of different meanings. The term is used generally to refer to the authorizing individual in the situation/file/interaction. For instance, a private client, in-house counsel in an organization, Ministry employees in a government setting, or others in non-private practice environment, etc.

Conducting Matter: Matter Management	**Draft an opinion document**	✓ Identifying client's goals and objectives ✓ Gather facts and identify applicable areas of law ✓ Conduct legal research and analysis ✓ Assessing possible course of action and range of likely outcomes ✓ Developing legal strategy in light of client's circumstances ✓ Identifying and evaluating appropriateness of alternatives for resolution of issue or dispute
Conducting Matter: Advocacy	**Representation of client in an appearance or through an alternative dispute resolution mechanism**	✓ Effectively formulating and presenting well-reasoned and accurate legal argument, analysis, advice or submissions ✓ Advocating in a manner appropriate to the legal and factual context ✓ Conducting a motion, application or simple hearing before an adjudicative body ✓ OR ✓ Negotiating the resolution of a dispute or legal problem in a formal ADR process, or other representation in a solicitor-type practice
Ethics, Professionalism and Practice Management	**Successful completion of Professional Responsibility Assessment and exposure to/use of law firm/legal practice management systems**	✓ Identifying ethical issues and problems ✓ Engaging in critical thinking about ethical issues ✓ Making informed and reasoned decisions about ethical issues Exposure to and/or use of systems supporting: ✓ conflict management ✓ tracking, limitation reminder and bring forward ✓ trust and general accounting ✓ client records and files ✓ billing and collection

All articling placements will require that a formal training plan be prepared and filed with the Law Society, which will include a more extensive review of anticipated activities within the placement related to the Articling Goals and Objectives and National Admission Standards Competency Profile. In addition, all candidates will continue to be required to complete the Law Society's online Professional Responsibility and Practice Course during the articling term. That online course places an emphasis on practice management matters and will assist to support training and exposure to practice issues.

THIS SECTION CONTAINS

IN CAMERA MATERIAL

The Law Society of Upper Canada | Barreau du Haut-Canada

Tab 6

Report to Convocation

October 24, 2013

Access to Justice Committee

Committee Members
Marion Boyd (Co-Chair)
Cathy Corsetti (Co-Chair)
Adriana Doyle (Vice-Chair)
Michael Lerner (Vice-Chair)
Mary Louise Dickson
Robert Evans
Avvy Go
Susan Hare
George Hunter
Virginia MacLean
Susan McGrath
Janet Minor
Barbara Murchie
Jack Rabinovitch
Susan Richer
Baljit Sikand

Purposes of Report: Decision

Prepared by the Equity Initiatives Department
(Marisha Roman – 416-947-3989)

COMMITTEE PROCESS

1. The Access to Justice Committee met on October 9, 2013. Committee members Marion Boyd, Co-Chair, Cathy Corsetti, Co-Chair, Adriana Doyle, Vice-Chair, Michael Lerner, Vice-Chair, Robert Evans, Avvy Go, Virginia MacLean, Susan McGrath, Janet Minor, Barbara Murchie, and Susan Richer participated. Staff members Sally Ashton, Julia Bass and Marisha Roman also attended.

TAB 6.1

FOR DECISION

FUNDING OF EXTERNAL ORGANIZATIONS

REQUEST TO CONVOCATION

2. **Convocation is requested to approve an amended policy on requests for funding from external organizations as set out in this report following paragraph 10.**

BACKGROUND

3. In June 2012, Convocation approved a policy for requests to the Law Society from external organizations for support and funding of initiatives that will assist the Law Society to fulfill its mandate. After the first year of implementing the policy, some amendments are recommended.

4. The current policy notes that the Law Society is not a funding agency and the amendments seek to emphasize this. In short, the recommended change is that the Law Society would invite applications to meet identified needs rather than accepting a variety of grant applications as part of the annual budget process.

5. Prior to the current policy being implemented, requests for funding from external organizations were being made to the Law Society on an ad-hoc basis and were being processed in an inconsistent manner. A working group, consisting of members of the Access to Justice, Equity and Aboriginal Issues and Audit & Finance Committees, developed the current policy with Convocation's approval to guide the Law Society in considering requests for funding. The goal of the current and draft revised policy is to enable the Law Society to make decisions on support and funding requests on a principled basis and include consideration of the Law Society's budget, its statutory mandate, Convocation's priorities for the bencher term, and requirements for maintenance of the Law Society's own access to justice programs in a structured, consistent and transparent way.

6. The current policy emphasizes that the Law Society is not a funding agency, and only in exceptional circumstances will the Law Society consider requests for financial support for programs or projects that advance its mandate and align with Convocation's priorities for the bencher term. However, publication of the policy resulted in the submission of twelve grant applications for the 2014 budget year, requesting a total of $1.4 million in funding. Consideration of these current applications is being conducted through the budget planning process.

PROPOSED CHANGES

7. To be more efficient and realistic in the future, the new policy maintains the existing objectives, a similar application form and criteria but envisages the Law Society inviting funding applications from specific service providers if a specific need has been identified and specific funds have been allocated. This will ensure a more productive use of bencher, staff and applicant time as well as management of the expectations of applicants.

8. Under the new policy, proposed invitees, required services and amount of funding would be approved by Convocation as part of the new program approval process initiated by a Committee. Certain "legacy" funding arrangements would be approved either as part of the budget process or in advance of the budget process.

9. The Audit & Finance, Access to Justice and Equity and Aboriginal Issues committees discussed the proposed amendments and approved them unanimously at their meetings on October 9 and 10.

10. A copy of the draft new policy is attached.

POLICY GOVERNING
LAW SOCIETY OF UPPER CANADA DECISIONS
ON SUPPORT AND FUNDING FOR EXTERNAL ORGANIZATIONS

Function, Mandate and Priorities of Law Society

The primary function of the Law Society of Upper Canada (the "Law Society") as prescribed by the Law Society Act is to regulate the legal professions in the public interest. As it carries out this function, the Law Society Act further directs the Law Society to apply specific principles, as follows: the Law Society has a duty to maintain and advance the cause of justice and the rule of law, to act so as to facilitate access to justice for the people of Ontario, to protect the public interest and to act in a timely, open and efficient manner.

The Law Society is not a funding agency and is mindful of its statutory duties, its obligations to responsibly manage its members' fees and its budget planning process. Therefore, the Law Society will, at its discretion and only in exceptional circumstances, invite applications for financial support by external organizations for programs or projects that have been specifically identified by the Law Society as advancing the Law Society's mandate. The program or project must also align with the Law Society's current priorities for the bencher term.

As part of the application process, the organization applying for financial support must identify how the program or project will meet the identified need, advance the Law Society's mandate, and align with the priorities for the bencher term.

Applications

Organizations invited to apply will be asked to complete the application form and submit it to the office of the Law Society's Chief Financial Officer along with supporting documentation.

Application of Policy

The policy governs all instances for funding in excess of $10,000 by external organizations, including requests for renewal of funding, subject to conditions imposed by agreement or statute. Any request for funding for an amount that is less than $10,000 should be submitted to the Law Society's Chief Executive Officer or appropriate Senior Manager for consideration.

The Law Society retains the discretion to consider a portion of a funding application as well as the option of offering non-financial support in addition to or in lieu of financial support. Further, the Law Society retains the discretion to invite the participation of other organizations to consider potential funding partnerships for a project proposal.

Qualifying Organizations

The Law Society will provide financial and/or non-financial support only to not-for-profit or charitable status organizations whose mandate aligns with the Law Society's mandate and priorities for the bencher term.

Term of Support

Funding will typically be awarded for a maximum term of 3 years. Invited organizations may request a funding renewal by filing a new application along with a full report accounting for its use of the most recent Law Society funding.

Conditions for Funding

The Law Society reserves the right to impose conditions on funding as it sees fit. Conditions include, but are not limited to, recognition of Law Society support in organizational communications, representation on an organization's board of directors, a third party audit, and/or a requirement that the funding must be applied or disbursed within an identified period of time.

Decisions on financial and non-financial support of external organizations are made at the discretion of the Law Society and will be guided by these principles as well as the criteria outlined below. Above all, these decisions will be subject to Law Society budget implications and the recognition that the Law Society is not a funding agency.

Evaluation Criteria:

a) Decisions on Law Society support and funding are discretionary and are governed primarily by consideration of budget implications.
b) Funding decisions will be made on how the application meets the identified need, the basis of an organization's financial need, its record of financial responsibility and accountability to other funders, and the merits of the intended project or program.
c) Annual progress reports must be completed including a full accounting of the Law Society funding. The onus is on the organization to ensure that the application form and supporting documents provide sufficient information and clarity.
d) The applicant organization may be contacted by the Law Society to provide further information following submission of the funding proposal.

The Law Society of Upper Canada | Barreau du Haut-Canada

Tab 7

Report to Convocation

October 24, 2013

Equity and Aboriginal Issues Committee/ Comité sur l'équité et les affaires autochtones

Committee Members
Howard Goldblatt, Chair
Julian Falconer, Vice-Chair
Susan Hare, Vice Chair
Raj Anand
Constance Backhouse
Mary Louise Dickson
Avvy Go
Michelle Haigh
Janet Minor
Judith Potter
Susan Richer
Paul Schabas
Baljit Sikand
Beth Symes

Purposes of Report: Decision and Information

Prepared by the Equity Initiatives Department
(Josée Bouchard – 416-947-3984)

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For Decision

For Information

COMMITTEE PROCESS

1. The Equity and Aboriginal Issues Committee/Comité sur l'équité et les affaires autochtones (Equity Committee) met on October 10, 2013. Committee members Howard Goldblatt, Chair, Susan Hare, Vice-Chair, Constance Backhouse, Mary Louise Dickson, Avvy Go, Janet Minor and Susan Richer participated. Julie Lassonde, representative of the Association des juristes d'expression française de l'Ontario (AJEFO), and Sandra Yuko Nishikawa, Chair of the Equity Advisory Group/Groupe consultatif en matière d'équité (EAG), also participated. Staff members Josée Bouchard, Ekua Quansah and Marisha Roman also attended.

TAB 7.1

FOR DECISION

CREATION OF A LAW SOCIETY HUMAN RIGHTS AWARD

MOTION

2. **That Convocation approve the creation of a Law Society Human Rights Award and the Terms of Reference presented at TAB 7.1.1.**

BACKGROUND

3. In April 2006, Convocation adopted a motion to "appoint a group of benchers, to be responsible for monitoring human rights violations that target members of the legal profession and judiciary, here and abroad, as a result of the discharge of their legitimate professional duties".

4. The mandate of the Monitoring Group approved by Convocation is to,
   a. review information that comes to its attention about human rights violations that target members of the profession and the judiciary, here and abroad, as a result of the discharge of their legitimate professional duties;
   b. determine if the matter is one that requires a response from the Law Society; and
   c. prepare a response for review and approval by Convocation.

5. The mandate was further expanded to state that where Convocation's meeting schedule makes such a review and approval impractical, the Treasurer may review such responses in Convocation's place and take such steps as he or she deems appropriate. In such instances, the Monitoring Group shall report on the matters at the next meeting of Convocation.

6. On September 20, 2007, Convocation approved the following recommendations, which expanded the Monitoring Group's mandate:

a. That the Monitoring Group explore the possibility of developing a network of organizations, and work collaboratively with them, to address human rights violations against judges and lawyers;
b. That the Monitoring Group be authorized to collaborate with the Law Society of Zimbabwe to assist it in strengthening its self-regulation capabilities and the independence of the profession.

7. Since its inception in 2006, the Monitoring Group has recommended interventions to Convocation in support of lawyers and judges generally through letters of intervention to foreign authorities and public statements.

8. To date, the Monitoring Group has recommended, and Convocation has approved, Law Society interventions in more than sixty matters originating from countries such as Algeria, Bahrain, Brazil, Belarus, China, Colombia, the Democratic Republic of Congo, Equatorial Guinea, Egypt, Georgia, Honduras, India, Iran, Kenya, Malaysia, Myanmar (Burma), Nepal, Pakistan, Peru, the Philippines, Rwanda, Russia, Saudi Arabia, Spain, Sri Lanka, Sudan, Syria, Tunisia, Turkey, the United Arab Emirates, Venezuela, Vietnam and Zimbabwe.

9. The Monitoring Group has received positive responses from its interventions. The legal profession reacted very positively to the Law Society's actions in support of lawyers in Pakistan, and numerous lawyers from foreign countries have noted that public interventions from organizations such as the Law Society are helpful in informing the community that human rights violations of lawyers and judges do not go unnoticed. Justice Afiuni of Venezuela, while in house arrest, thanked the Law Society for its intervention. Burmese lawyers who were reinstated to the practice of law thanked the international community and the Law Society for their effort to assist them. Doctor Shirin Ebadi indicated to then Treasurer Pawlitza the importance of the Law Society intervening in support of lawyers in Iran. More recently, the Law Society interventions in support of Madam Justice Bandaranayake in Sri Lanka received considerable media attention and were positively received.

10. The interventions relate to cases of human rights violations against both judges and lawyers as a result of the discharge of their professional duties. Reports of the incidents indicate that the lawyers and judges have been subjected to various forms of persecutions, including,
    a. harassment and intimidation;
    b. unlawful detentions and incommunicado detentions;
    c. unlawful house arrests;
    d. violence, abuse and torture; and
    e. assassinations.

11. Over the years, the Human Rights Monitoring Group has provided support to lawyers and judges who have shown outstanding contributions to the promotion of the rule of law. They have often risked their lives as a result of the discharge of their legitimate professional duties. The Monitoring Group wishes to recognize outstanding individuals who have dedicated their careers to the advancement of human rights and/or the promotion of the rule of law. As a result, it proposes the creation of an award, to be given to an individual who demonstrates outstanding achievement in promoting human rights.

12. The Monitoring Group discussed the costs of creating such an award. In light of the mandate and work of the Monitoring Group, which considers and recommends interventions across the world, recipients may be from Canada or abroad. As a result, the cost of granting the award may vary significantly because of expenses such as travel, accommodation and interpretation when required. It is estimated that granting the award could have nominal costs, or could cost up to $20,000, excluding the costs for a reception.

EQUITY COMMITTEE CONSIDERATION

13. The Equity Committee considered the recommendation to create a Human Rights Award at its meeting in February 2013. Members were in favour of the creation of the award but raised the following two concerns:

a. The timing of the award should coincide with other awards such as the Law Society Medal. This would allow the option of giving the award either at a separate ceremony or with the other award ceremony. In addition, this would provide an opportunity for the recipients to speak at a call to the bar in June.

b. The selection committee should be expanded to include the Chair of the Equity Committee, a lay bencher and a paralegal bencher.

MONITORING GROUP CONSIDERATION

14. On March 11, 2013, the Monitoring Group considered the concerns raised by the Equity Committee and decided as follows:

a. The timing of the award should remain as proposed in the Terms of Reference. The Monitoring Group wishes to ensure that the Human Rights Award will be presented on its own due to the unique nature of this award. It is anticipated that the recipient will make a presentation in the context of a rule of law event that will be opened to members of the public and the profession.

b. The composition of the Selection Committee could be expanded by allowing the selection committee to invite a lay person to represent the interests of the public.

CONVOCATION CONSIDERATION

15. Convocation considered the request to create the award in May 2013 but made no decision. The Monitoring Group decided, based on the discussion at Convocation, to review the Terms of Reference and present a revised version of the terms to Convocation in the fall.

MONITORING GROUP AND EQUITY COMMITTEE CONSIDERATION

16. The Monitoring Group and Equity Committee considered and approved the revised Terms of Reference that reflect the debate at Convocation.

TAB 7.1.1

HUMAN RIGHTS AWARD – TERMS OF REFERENCE

The Award

The purpose of this award is to recognize outstanding contributions to the advancement of human rights and/or the promotion of the rule of law provincially, nationally or internationally. The award will be granted for devotion to the advancement of human rights and the rule of law over a long term or for a single outstanding act of service. Unless there are reasons to proceed otherwise, the award will be granted to one individual every two years.

Award Criteria to be met by recipient

The criteria for the award are as follows:

a) Must demonstrate an outstanding contribution to human rights and/or the promotion of the rule of law where the service is in accordance with the highest ideals of the legal profession; and
b) Must not have received the award previously.

The award, in consultation with the proposed recipient's family/next of kin, may be granted posthumously.

Nominations

A call for nominations will be published in March, every two years, with a deadline for nominations in May of that year.

Selection Committee

The award recipient will be selected by the Law Society LL.D. Advisory Committee. The Chair of the Human Rights Monitoring Group shall be a standing member of that committee.

Selection Process

The Human Rights Monitoring Group will receive all nomination materials related to the Human Rights Award. The Human Rights Monitoring Group will provide a list of up to five nominees, ranked in order of preference with a rationale for the ranking. The list shall be provided to the Law Society LL.D. Advisory Committee for final selection. The LL.D. Advisory Committee will present the final candidate to Convocation for decision.

Recognition of Recipient

The award will be presented at a Law Society of Upper Canada rule of law event.

TAB 7.2

FOR DECISION

HUMAN RIGHTS MONITORING GROUP REQUEST FOR INTERVENTION

NASRIN SOTOUDEH - IRAN

MOTION

17. **That Convocation approve the letters of intervention and public statement respecting human rights lawyer Nasrin Sotoudeh in Iran, presented at TAB 7.2.1.**

SOURCES OF INFORMATION

18. The background information for this report is taken from the following sources: Amnesty International; Associated Press;[1] British Broadcast Corporation (BBC) News; CNN; International Campaign for Human Rights in Iran;[2] PEN Canada;[3] Reuters; The Guardian; The Toronto Star; International Campaign for Human Rights in Iran;[4] and Observatory for the Protection of Human Rights Defenders.[5]

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[1] The Associated Press (AP) is a global news network, delivering news from every corner of the world to all media platforms and formats. On any given day, more than half the world's population sees news from the AP. Founded in 1846, the AP is one of the largest and most trusted sources of independent newsgathering. The AP is headquartered in New York and about 3,700 employees – two-thirds of them news gatherers – work in more than 300 locations worldwide.

[2] The International Campaign for Human Rights in Iran is a non-governmental organization that focuses on the challenges faced by Iranians in civil society and the human rights community. Founded in 2007, the mission of the International Campaign for Human Rights in Iran is to gather support for Iranian human rights activists and defenders who are advocating for their civil, political, social, and economic rights within the framework of international treaties and standards that define Iran's obligations.

[3] PEN Canada is a nonpartisan organization of writers that works with others to defend freedom of expression as a basic human right, at home and abroad. PEN Canada promotes literature, fights censorship, helps free persecuted writers from prison, and assists writers living in exile in Canada.

[4] The International Campaign for Human Rights in Iran is a non-governmental organization that focuses on the challenges faced by Iranians in civil society and the human rights community. Founded in 2007, the mission of the International Campaign for Human Rights in Iran is to gather support for Iranian human rights activists and defenders who are advocating for their civil, political, social, and economic rights within the framework of international treaties and standards that define Iran's obligations.

[5] The Observatory for the Protection of Human Rights Defenders is a joint program of the International Federation for Human Rights (FIDH) and the World Organization Against Torture (OMCT). It is an action program based on the absolute necessity to establish a systematic response from NGOs and the international community to the repression against defenders.

BACKGROUND

19. The systemic harassment, arrest and imprisonment of human rights lawyers in Iran remain an ongoing concern for the Human Rights Monitoring Group ("Monitoring Group"). To date, the Law Society has written approximately 10 letters of intervention in support of Iranian lawyers, including Shirin Ebadi, Saleh Kamrani, Nasser Zarafshan, Houtan Kian, Abdolfattah Soltani and Nasrin Sotoudeh.

LAWYER: NASRIN SOTOUDEH

20. On September 4, 2010, it was reported that Ms. Nasrin Sotoudeh was arrested. Ms. Sotoudeh, a prominent human rights lawyer, is known for defending juveniles facing the death penalty, prisoners of conscience and children victims of abuse. Ms. Sotoudeh has also represented several political activists and protesters who were arrested in the aftermath of the disputed presidential election in Iran in 2009. She was also a member of the Iranian Women's Rights Movement 'One Million Signature Campaign' aimed at collecting signatures from Iranians opposed to the country's discriminatory laws against women.

21. It was reported that Ms. Sotoudeh went to Evin prison court, where she had been summoned by the Revolutionary Prosecutor's Office on charges of "propaganda against the State" and "collusion and gathering with the aim of acting against national security". After her questioning by a magistrate, Ms. Sotoudeh was arrested. Her lawyer was not permitted to be present during the questioning.

22. A few days prior to her arrest, she had reported to the International Campaign for Human Rights in Iran that the Iranian authorities were using tax harassment against human rights lawyers in order to limit their working conditions. She gave the example of Ms. Shirin Ebadi who was subjected to the payment of taxes of hundreds of thousands of dollars on the money she had been granted for her Nobel Peace Prize.

23. Prior to her arrest, Ms. Sotoudeh was threatened by Iranian intelligence officials that she would be arrested if she continued to represent Ms. Ebadi. On August, 28, 2010, Ms. Sotoudeh's office and home were searched by members of the services of intelligence and her assets frozen.

24. It was reported that the arrest of Ms. Sotoudeh was related to the systemic approach by Iranian officials to arrest hundreds of activists and opposition members. More than 90 have been sentenced to prison terms ranging from 6 months to 15 years or death.

25. In January 2011, Ms. Sotoudeh was sentenced to 11 years in prison, a 20 year ban on her legal practice and a 20 year ban on foreign travel on charges of "acting against national security, collusion and propaganda against the regime, and membership in the Centre for Human Rights Defenders." An appeals court later reduced her sentence to 6 years.

UPDATE

26. Ms. Sotoudeh was released on September 18, 2013, along with several other political prisoners. The grounds and conditions of her release remain unclear.

THE MONITORING GROUP'S CONSIDERATION

27. The Monitoring Group considered the following issues when making a decision about this case.

Sources

28. The sources used for this report are reliable.

Mandate

29. The arrests of lawyers who take on sensitive cases, such as Ms. Sotoudeh, fall within the mandate of the Monitoring Group.

Law Society of Upper Canada's Interventions

30. The Law Society of Upper Canada has sent approximately 10 intervention letters between 2006 and 2013. A number of these interventions referenced Ms. Sotoudeh's case specifically.

TAB 7.2.1

PROPOSED LETTERS OF INTERVENTION AND PUBLIC STATEMENT

[Date]

His Eminence, Ayatollah Sayed Ali Khamenei
The Office of the Supreme Leader
Islamic Republic Street – End of Shahid
Keshvar Doust Street,
Tehran, Islamic Republic of Iran

Your Eminence:

Re: Human Rights Lawyer Nasrin Sotoudeh and other lawyers in Iran

I write on behalf of The Law Society of Upper Canada* further to our numerous letters addressed to you and the former President of Iran, His Excellency Mahmoud Ahmadinejad, sent over the last 7 years. These letters have expressed our deep concern about ongoing human rights violations against lawyers in Iran, including the imprisonment of human rights lawyer Nasrin Sotoudeh.

It is our understanding Nasrin Sotoudeh was released on September 18, 2013, along with several other political prisoners. The grounds and conditions of her release remain unclear.

Ms. Sotoudeh, a prominent human rights lawyer, is known for defending juveniles facing the death penalty, prisoners of conscience and young victims of abuse. In September 2010, Ms. Sotoudeh was arrested and in January 2011, she was sentenced to 11 years in prison, a 20 year ban on her legal practice and a 20 year ban on foreign travel on charges of "acting against national security, collusion and propaganda against the regime, and membership in the Centre for Human Rights Defenders." An appeals court later reduced her sentence to 6 years.

The Law Society of Upper Canada has followed Ms. Sotoudeh's case closely, along with cases of other lawyers in Iran. The Law Society of Upper Canada has repeatedly condemned the harassment of lawyers in Iran, including the treatment of Shirin Ebadi, Saleh Kamrani, Houtan Kian, Nasser Zarafshan, and Abdolfattah Soltani,

We are pleased to learn that Nasrin Sotoudeh has been released; however we remain deeply concerned about the situation of lawyers who remain in prison due to the exercise of their legitimate professional duties. International human rights instruments, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, state that respect for human rights is essential to advancing the rule of law.

The Law Society of Upper Canada views the release of Ms. Sotoudeh as a step in the right direction. The Law Society urges the government of Iran to:

a. put an end to all acts of harassment against Ms. Sotoudeh and other human rights defenders in Iran;

b. release and guarantee in all circumstances the physical, psychological and professional integrity of lawyers whose detentions are arbitrary and aimed at impeding their human rights activities;

c. take steps to ensure that lawyers and judges are not subjected to politically motivated sanctions as a result of their work;

d. publicly recognize the importance, legitimacy and independence of the work of lawyers and judges; and

e. continue to take steps to ensure that human rights and fundamental freedoms, in accordance with national human rights standards and international instruments, are respected in all circumstances.

Yours very truly,

Thomas G. Conway
Treasurer

**The Law Society of Upper Canada is the governing body for some 46,000 lawyers and 5,600 paralegals in the Province of Ontario, Canada and the Treasurer is the head of the Law Society. The mandate of the Law Society is to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law.*

[Date]

His Excellency Dr. Hassan Rouhani
President-Elect
Islamic Republic of Iran

Your Excellency:

Re: Human Rights Lawyer Nasrin Sotoudeh and other lawyers in Iran

I write on behalf of The Law Society of Upper Canada* further to our numerous letters addressed to the former President of Iran, His Excellency Mahmoud Ahmadinejad, and the Supreme Leader of Iran, His Eminence Ayatollah Sayed Ali Khamenei sent over the last 7 years. These letters have expressed our deep concern about ongoing human rights violations against lawyers in Iran, including the imprisonment of human rights lawyer Nasrin Sotoudeh.

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[Date]

Nationwide Union of Iranian Bar Associations
No.3 Zagros Street
Argentine Square
Tehran 15149
Islamic Republic of Iran

Dear Chairperson,

Re: Lawyer Nasrin Sotoudeh

The Law Society of Upper Canada is the governing body for more than 46,000 lawyers and 5,600 paralegals in the province of Ontario, Canada. The Law Society is committed to preserving the rule of law and to the maintenance of an independent Bar. Due to this commitment, the Law Society established a Human Rights Monitoring Group with a mandate to review information of human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required of the Law Society.

I write to inform you that the Law Society of Upper Canada sent the attached letter to the Iranian authorities expressing our support for the release of lawyer Nasrin Sotoudeh and urging the authorities to address ongoing human rights violations against lawyers in Iran.

In view of the fact that your organization represents the interests of lawyers in Iran, we would value the opportunity to communicate with you in regard to what problems, if any, lawyers may be experiencing in your country.

If you are willing and able to do so, we would be very interested in hearing from you concerning the case noted in the attached letter. In particular, if we have any of the facts in the case wrong, it would assist us in our work to know that.

Please forward any further correspondence to the attention of Josée Bouchard, Equity Advisor, Law Society of Upper Canada, 130 Queen St. West, Toronto, Ontario, Canada, M5H 2N6 or to jbouchar@lsuc.on.ca.

I thank you for your time and consideration.

Sincerely,

Paul Schabas
Chair, Human Rights Monitoring Group

Encl.

[Date]

Attn: Chair Dr. G Eftekhar Jahromi

Iranian Central Bar Association
No.3 Zagros Street
Argentine Square
Tehran 15149

Dear Dr. Jahromi,

Re: Lawyer Nasrin Sotoudeh

The Law Society of Upper Canada is the governing body for more than 46,000 lawyers and 5,600 paralegals in the province of Ontario, Canada. The Law Society is committed to preserving the rule of law and to the maintenance of an independent Bar. Due to this commitment, the Law Society established a Human Rights Monitoring Group with a mandate to review information of human rights violations targeting, as a result of the discharge of their legitimate professional duties, members of the legal profession and the judiciary, in Canada and abroad. The Human Rights Monitoring Group reviews such information and determines if a response is required of the Law Society.

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I thank you for your time and consideration.

Sincerely,

Paul Schabas
Chair, Human Rights Monitoring Group

Encl.

Proposed Public Statement

The Law Society of Upper Canada Pleased to Hear of Release of Iranian Human Rights Lawyer Nasrin Sotoudeh

The Law Society of Upper Canada* is pleased to hear of the recent release of human rights lawyers, Nasrin Sotoudeh of Iran.

According to reports, Nasrin Sotoudeh was released on September 18, 2013, along with several other political prisoners. The grounds and conditions of her release remain unclear.

Ms. Sotoudeh, a prominent human rights lawyer, is known for defending juveniles facing the death penalty, prisoners of conscience and young victims of abuse. In September 2010, Ms. Sotoudeh was arrested and sentenced to 11 years in prison, a 20 year ban on her legal practice and a 20 year ban on foreign travel on charges of "acting against national security, collusion and propaganda against the regime, and membership in the Centre for Human Rights Defenders." An appeals court later reduced her sentence to 6 years.

The Law Society of Upper Canada has followed Ms. Sotoudeh's case closely, along with cases of other lawyers in Iran. The Law Society of Upper Canada has repeatedly condemned the harassment of lawyers in Iran, including the treatment of Shirin Ebadi, Saleh Kamrani, Houtan Kian, Nasser Zarafshan, and Abdolfattah Soltani,

The Law Society of Upper Canada is pleased to learn that Nasrin Sotoudeh has been released; however we remain deeply concerned about the situation of lawyers who remain in prison due to the exercise of their legitimate professional duties. International human rights instruments, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*, state that respect for human rights is essential to advancing the rule of law.

The Law Society of Upper Canada views the release of Ms. Sotoudeh as a step in the right direction. The Law Society urges the government of Iran to:

a. put an end to all acts of harassment against Ms. Sotoudeh and other human rights defenders in Iran;

b. release and guarantee in all circumstances the physical, psychological and professional integrity of lawyers whose detentions are arbitrary and aimed at impeding their human rights activities;

c. take steps to ensure that lawyers and judges are not subjected to politically motivated sanctions as a result of their work;

d. publicly recognize the importance, legitimacy and independence of the work of lawyers and judges; and

e. continue to take steps to ensure that human rights and fundamental freedoms, in accordance with national human rights standards and international instruments, are respected in all circumstances.

**The Law Society of Upper Canada is the governing body for some 46,000 lawyers and 5,600 paralegals in the Province of Ontario, Canada, and the Treasurer is the head of the Law Society. The mandate of the Law Society is to govern the legal profession in the public interest by upholding the independence, integrity and honour of the legal profession for the purpose of advancing the cause of justice and the rule of law.*

The Law Society urges the legal community to intervene in support of members of the legal profession in their effort to advance the respect of human rights and to promote the rule of law.

TAB 7.3

FOR INFORMATION

SEXUAL ORIENTATION AND GENDER IDENTITY: CREATING AN INCLUSIVE WORK ENVIRONMENT – A GUIDE FOR LAW FIRMS AND OTHER ORGANIZATIONS

BACKGROUND

31. In 2004, the Law Society released its *Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment* guide for law firms and other organizations. The Guide presented at TAB 7.3.1 is an update of the 2004 guide.

32. The Equity Advisory Group and the Equity and Aboriginal Issues Committee approved the revised guide.

The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 7.3.1

THE LAW SOCIETY OF UPPER CANADA

SEXUAL ORIENTATION AND GENDER IDENTITY: CREATING AN INCLUSIVE WORK ENVIRONMENT

A GUIDE FOR LAW FIRMS AND OTHER ORGANIZATIONS

September 2013

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INTRODUCTION

The *Ontario Human Rights Code* (the *Code*)[1], the *Rules of Professional Conduct* (the *Rules*)[2] and the *Paralegal Rules of Conduct* (the *Paralegal Rules*)[3] prohibit discrimination and harassment in the legal workplace, in the delivery of services and in all professional dealings. One aspect of this is the creation of an inclusive workplace for all individuals, regardless of their sexual orientation, gender identity or gender expression.

With this in mind, the Law Society of Upper Canada created this Guide to assist law firms[4] in fostering a work environment in which employment benefits are conferred in a non-discriminatory manner and in which participation in the social culture of the firm is a viable option for all individuals working there. The Law Society of Upper Canada envisions that adoption and implementation of the model policy included in this Guide will contribute to law firms becoming a place in which individuals' choice to keep confidential or to disclose information about their sexual orientation or gender identity neither results in discrimination or harassment nor detracts from either the individual's dignity and self-worth or value to the firm.

The Guide is one of a series of guides adopted by the Law Society to assist law firms and legal organizations in developing their own resources.[5] This Guide is only up-to-date as at the date of writing.

The document is divided into the following parts:

Part I : Background
Part II: Effective Implementation and Review of the Policy
Part III: The Model Policy
Part IV: Employers' Obligations under the Law
Part V: Glossary of Terms

[1] *Human Rights Code*, R.S.O. 1990, c. H.19.
[2] *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000).
[3] *Paralegal Rules of Conduct* (Toronto: Law Society of Upper Canada, May 29, 2007).
[4] References to 'law firms' in this document encompasses paralegal firms, legal clinics, non-profit organizations and other professional legal environments.
[5] Law Society guides are available online at: http://www.lsuc.on.ca/with.aspx?id=2147487014.

PART I- BACKGROUND

WHY LAW FIRMS SHOULD HAVE WRITTEN POLICIES

Under the *Rules,* the *Paralegal Rules* and the *Code,* individual lawyers, paralegals and law firms have a positive obligation to develop a work environment that promotes respect for the personal characteristics of all individuals affiliated with the legal profession. It is also well established that the adoption of effective human rights policies and procedures and the design and delivery of education programs assist in creating a respectful work environment and in reducing the risk of liability for employers.[6]

The advantages of written policies include the following:

1. They encourage respect for the dignity of all individuals working at the law firm.
2. They demonstrate management's commitment to its legal and professional obligations.
3. They communicate a law firm's commitment to equity principles to people outside of the law firm, such as prospective recruits and clients.
4. They minimize the risk of workplace harassment or discrimination and of harm to individuals working at the firm.
5. They provide procedures for handling complaints and enhance transparency.
6. They outline preventative, remedial and disciplinary actions that may be taken.
7. They minimize the risk of harm to staff, paralegals and lawyers, as well as the risk that a firm will be held liable.

MODEL POLICIES DEVELOPED BY THE LAW SOCIETY

In the last decade, the Law Society has adopted a number of model policies and guidelines to promote equality within the legal profession. These include:

Guide to Developing a Policy Regarding Workplace Equity in Law Firms[7]

To assist law firms in meeting their obligation to avoid discrimination in employment practices, this guide outlines a model policy for the promotion of workplace equity. The guide includes reference to employment practice topics in the areas of recruitment, interviewing job candidates, hiring and promotion, the right to equal opportunities at work, professional development, accommodation, evaluation, mentors and compensation.

Available at http://www.lsuc.on.ca/with.aspx?id=2147487014

Available in French at: http://rc.lsuc.on.ca/pdf/equity/workplaceEquity_fr.pdf

[6] For example, see *Ferguson v. Meunch Works Ltd.* (1997), 33 C.H.R.R. D/87 (B. C. H. R. T.).
[7] *Guide to Developing a Policy Regarding Workplace Equity in Law Firms* (Toronto: Law Society of Upper Canada, updated March 2003).

Guide to Developing a Law Firm Policy Regarding Accommodation Requirements[8]

The *Code* prohibits discrimination in services and employment on enumerated grounds and mandates that employers accommodate needs based on the enumerated *Code* grounds to the point of undue hardship. Based in part on the Ontario Human Rights Commission's *Policy on Creed and the Accommodation of Religious Observances*[9] and *Policy and Guidelines on Disability and the Duty to Accommodate*,[10] this document sets out the legal duty to accommodate employees' creed and religious beliefs, disability, as well as gender and family status. Particularly practical is the section on model procedures for requesting and granting accommodations.

Available at http://www.lsuc.on.ca/with.aspx?id=2147487014

Available in French at:

http://rc.lsuc.on.ca/pdf/equity/accommodationRequirements_fr.pdf

Guide to Developing a Policy Regarding Flexible Work Arrangements[11]

One means of fulfilling an employer's legal duty to accommodate employees with family responsibilities or disabilities is through the adoption of flexible work arrangements. This guide outlines various alternate work arrangements for both associates and partners of law firms in addition to outlining responses to the challenges presented by each option.

Available at http://www.lsuc.on.ca/with.aspx?id=2147487014

Available in French at: http://rc.lsuc.on.ca/pdf/equity/flexibleWork_fr.pdf

Preventing Harassment, Discrimination and Violence in the Legal Workplace: Guide to Developing Policies for Law Firms or Legal Organizations [12]

The Law Society published this document to guide law firms in taking a proactive approach and having an effective complaints mechanism in place so that they, as employers, can limit their vicarious liability for discrimination and harassment in the workplace. The guide includes an overview of legal requirements, a discussion of policy and implementation issues, a sample model policy for law firms, and step by step complaints procedures for both medium/large and small law firms. Model forms are provided for convenience.

Available at http://www.lsuc.on.ca/with.aspx?id=2147487014

Available in French at http://www.lsuc.on.ca/with.aspx?id=2147487014&langtype=1036

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[8] *Guide to Developing a Law Firm Policy Regarding Accommodation Requirements* (Toronto: Law Society of Upper Canada, updated May 2005).
[9] *Policy on Creed and the Accommodation of Religious Observances* (Toronto: Ontario Human Rights Commission, October 20, 1996, revised December 2009).
[10] *Policy and Guidelines on Disability and the Duty to Accommodate* (Toronto: Ontario Human Rights Commission, March 22, 2001, revised December 2009).
[11] *Guide to Developing a Policy Regarding Flexible Work Arrangements* (Toronto: Law Society of Upper Canada, updated March 2003).
[12] *Preventing Harassment, Discrimination and Violence in the Legal Workplace: Guide to Developing Policies for Law Firms or Legal Organizations* (Toronto: Law Society of Upper Canada, updated January 2012).

Guide to Developing a Customer Accessibility Policy[13]

Effective January 2012, all providers of goods and services are required to comply with the *Accessibility Standards for Customer Service* Regulation (*the Customer Service Standards)*[14] adopted under the *Accessibility for Ontarians with Disabilities Act*, 2005 (the *AODA)*[15]. The *Customer Service Standards* are aimed at improving accessibility for persons with disabilities accessing services across Ontario. The Law Society published this guide to assist law firms in developing the resources to comply with the *Customer Service Standards.*

Available at http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147487130

Summary of Fair Hiring Practice Guidelines[16]

This document was published by the Law Society to assist firms in reviewing their interview and hiring practices and to ensure that they comply with the *Code, the Rules,* and the *Paralegal Rules,* which prohibit harassment and discrimination. The document outlines best hiring practices and provides examples of inappropriate comments and questions that an employer may ask during the recruitment process.

Available at http://www.lsuc.on.ca/with.aspx?id=2147487014

Available in French:
http://rc.lsuc.on.ca/pdf/equity/summaryFairHiringPracticeGuidelines_fr.pdf

[13] *Accessibility for Ontarians with Disabilities Act, 2005- Guide to Developing a Customer Service Accessibility Policy* (Toronto, Law Society of Upper Canada, November 2011).
[14] *Accessibility Standards for Customer Service* Regulation, O.Reg. 429/07.
[15] *Accessibility for Ontarians with Disabilities Act*, S.O. 2005, c.11.
[16] *Summary of Fair Hiring Practice Guidelines* (Toronto, Law Society of Upper Canada, April 2011).

SEXUAL ORIENTATION, GENDER IDENTITY AND THE LEGAL PROFESSION

Although the legal profession is becoming increasingly diverse, there is evidence that persons who identify as lesbian, gay, bisexual, transsexual, transgender, intersex, queer/questioning, two-spirited, and allies (LGBTTIQQ2SA) still experience barriers to equality in the legal profession. Studies indicate the following:

- The Discrimination and Harassment Counsel (DHC) Program was established by Convocation in 1999 to provide services to individuals who allege harassment or discrimination by a lawyer, and since 2008, by a paralegal. In her report to Convocation for the period of January 1, 2003 to December 31, 2011, the DHC reported that sexual orientation was raised as a ground of discrimination in 5% of cases.[17] The report also cited several incidences of discrimination based on sex, experienced by transsexual women and a trans-man.[18] Complaints raised included a refusal of counsel to use correct pronouns in referring to the trans[19] person, as well as a complaint about gender based employee dress code expectations in the workplace.[20]
- In 2004, the Law Society of Alberta released the results of a study on bias and equity in Alberta's legal profession.[21] Eighty-eight percent of the gay, lesbian or bisexual lawyers and sixty-eight percent of the heterosexual lawyers who responded believed that there is discrimination on the basis of sexual orientation in the profession. In the five-year period preceding the survey, 40% of the gay, lesbian and bisexual respondents had experienced discrimination while seeking or during employment. In addition to experiencing bias in the courtroom, gay, lesbian and bisexual lawyers reported being subjected to discrimination in pay, quality of work assignments, rainmaking opportunities, performance evaluations and exclusion from social events. The authors also cited a number of American studies that support the finding of discrimination on the basis of sexual orientation in the profession.[22]

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[17] C. Peterson, *Report of the Activities of the Discrimination and Harassment Counsel for the Law Society of Upper Canada for the Period of January , 2003 to December 31, 2011*(Toronto: Law Society of Upper Canada, 2011) at 16.

[18] *Ibid* at 18-19. "Trans-man" is a term for the transition from female to male.

[19] See Glossary of Terms, Part V for definition.

[20] *Supra* note 17 at 23, 30.

[21] M. Cooper, J. Brockman & I. Hoffart, *Final Report on Equity and Diversity in Alberta's Legal Profession* (Calgary: Law Society of Alberta, 2004).

[22]For example, see Judicial Council of California, *Sexual Orientation Fairness in the California Courts. Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Subcommittee* (Orange County, CA: Judicial Council of California, 2001); Lesbian and Gay Law Association of Greater New York, *LeGaL Report on Sexual Orientation Fairness in Second Circuit Courts* (New York: LeGaL, 1997) available at http://www.le-gal.org; King County Bar Association, *In Pursuit of Equality. The Final Report of the KCBA Task Force on Lesbian and Gay Issues in the Legal Profession* (Washington, DC: King County Bar Association, 1995), cited in Washington State Bar. "Trends and Issues Affecting Lesbians and Gays in the Legal Profession" (1999) 12 Washington State Bar News Online, available at http://www.wsba.org/media/publications/barnews/archives/1999/dec-99-diversity.htm ; Los Angeles County Bar Association, Committee on Sexual Orientation, *Report of the Committee on Sexual Orientation Bias* (Los Angeles, CA: County Bar Association, 1994).

- The Law Society has undertaken various initiatives to promote equality for persons identifying as to lesbian, gay, bisexual, transsexual, transgender, intersex, queer/questioning, two-spirited, and allies ("LGBTTIQQ2SA") within the legal profession, in accordance with its mandate.[23]

[23] Law Society initiatives that promote equality for lesbian, gay, bisexual, Two-Spirited, transgender and queer identified individuals in the legal profession include:
Discrimination and Harassment Counsel: a service provided by the Law Society to confidentially assist anyone who may have experienced discrimination or harassment by a lawyer or paralegal (mentioned above)
Equity and Diversity Mentorship Program: This program encourages students from equity-seeking communities to consider law as a career and to assist in the transition into the profession. In cooperation with school boards, legal organizations and law schools, the Law Society matches students (law school students, Licensing Process students and newly called lawyers) with volunteer members of the profession who give insight into the practice of law**Equity Advisory Group (EAG):** a group of lawyers, paralegal and legal organizations with expertise in the area of equality and diversity. It is mandated to assist the Equity Committee in the development of policy options for the promotion of equity and diversity in the legal profession; and
Equity Public Education Series: includes lectures, seminars, workshops and consultations to address issues of equity and diversity in the legal profession. It also aims to build bridges between the legal profession and members of the public (particularly from Aboriginal, Francophone and equity-seeking communities) who are concerned about equality rights and want to contribute to enhancing equity and diversity in the legal profession.

PART II- EFFECTIVE IMPLEMENTATION AND REVIEW OF THE POLICY

ESTABLISHING A DRAFTING COMMITTEE

The starting point to develop a policy is to establish a committee to draft the policy. To the extent possible, the committee should diverse and composed of partners and employees of varying gender identities and of differing age, ethnic origin, marital and partnership status, gender identity and sexual orientation. If there are lawyers or individuals in the law firm with expertise in the relevant employment and discrimination law, one or more should be included.

It is most important that the committee include respected individuals of the law firm who appreciate the importance of the issues to be addressed and who will be able to communicate these matters to others within the law firm. The composition of the committee is critical to the credibility of the process and the policies that are produced.

DEVELOPING A POLICY

Committee members should educate themselves about the applicable law and become familiar with existing firm practices and policies that may be relevant.

It is suggested that committee members consult with individuals at the firm, such as the diversity committee or the executive committee. The committee may wish to circulate a draft of the policy for comments. This purpose of that step is to generate support and allow for useful insight. It is important to explain the rationale for introducing such a policy, as well as the effect of the proposed policy on existing arrangements.

It is important for the committee to be respectful of persons identifying as lesbian, gay, bisexual, transsexual, transgender, intersex, queer/questioning, two-spirited, and allies ("LGBTTIQQ2SA") who wish to keep their gender identity or sexual orientation confidential or to openly express them.

COMMUNICATING THE POLICY

Once adopted, firms should communicate the policy to all staff, paralegals and lawyers at the firm and develop an education or awareness strategy. The initial presentation of the policy combined with a clear statement of senior and managing partners' support are important to its success.

The law firm may wish to distribute copies of the policy directly to each individual working at the firm, and/or post copies of the policy in a common area and online. Firms may also wish to publicize the existence of the policy in their recruitment materials.

IMPLEMENTING THE POLICY

It is advisable that individuals charged with implementing and applying the policy

be fully versed in the specifics of the policy, the law, interviewing techniques and information gathering. It is important that individuals working at the law firm understand the negative impact that harassment and discrimination has on the dignity of those who identify as LGBTTIQQ2SA within the workplace, as well as on workplace productivity.

Factors that may cause opposition within the workplace should be identified, and discussed frankly. One example may be the misconception that such policies outlaw personal relationships between members of the law firm, and create a "chilling" anti-social atmosphere. These concerns should be recognized and addressed at the outset through discussion of the purposes and goals of workplace policies.

REVIEWING, EVALUATING AND REVISING THE POLICY

It is important to review and revise the policy on a periodic basis, and evaluate the fairness of its implementation, and its effectiveness in reducing barriers for those working at the firm who identify as LGBTTIQQ2SA. The first review should take place after there has been sufficient time to evaluate its operation.

Confidential channels of communication may be created to encourage staff comments on the policy, either on an ongoing basis, or during the course of the review.

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The pages that follow are a precedent for a policy that firms may adapt for their own use. In some cases, a firm may wish to add details or examples from the footnotes to the actual text of its own policy.

The precedent addresses the most common situation: a firm composed of partners, associates, and other staff who are not subject to a collective agreement. Where a workplace is governed by a collective agreement, modifications may need to be made to the policy, and possibly to the collective agreement.

The Sexual Orientation and Gender Identity model policy is a precedent intended to provide guidance, rather than to represent the ultimate or ideal policy. A firm will need to design its own policy, tailoring the recommended model to its particular circumstances.

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PART III- MODEL POLICY

SEXUAL ORIENTATION AND GENDER IDENTITY: CREATING AN INCLUSIVE WORK ENVIRONMENT

MODEL POLICY FOR "THE FIRM"[24]

STATEMENT OF PRINCIPLES

1. The Firm recognizes that discrimination in employment on the basis of gender identity, gender expression, sex, sexual orientation, marital status and/or family status, is illegal and the Ontario *Human Rights Code* (the *Code*), the *Rules of Professional Conduct* (the *Rules*) and the *Paralegal Rules of Conduct, (*the *Paralegal Rules)* of the Law Society of Upper Canada prohibit harassment and discrimination on those grounds.

2. The Firm recognizes that the choice of a partner and the manner in which one chooses to live with that individual, as well as the expression of one's intrinsic gender identity are fundamental human rights worthy of respect and non-discriminatory treatment.

3. The Firm is committed to providing a work environment that promotes equality and ensures that all individuals are treated with respect and dignity.

4. Harassment and discrimination are not tolerated by the Firm. Regardless of position or seniority, individuals found to have engaged in behavior constituting harassment or discrimination may be severely disciplined.

APPLICATION

5. The policy applies to everyone working for the Firm or who is a partner, director, member or employee of the Firm, whether part-time, full-time or casual, regardless of their position in the Firm, including [professional and administrative staff, articling students, summer students, paralegals, salaried lawyers, contract lawyers, associates and partners].[25] The policy also applies to others in the work context, such as [volunteers, co-op students, dependent and independent contractors].[26] The term "all individuals working at the Firm" encompasses all those named in this paragraph.

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[24] References to "the Firm" in this document encompasses paralegal firms, legal clinics, non-profit organizations and other professional legal environments. Individual workplaces may replace "The Firm" with their own applicable term.

[25] The terminology used in this paragraph may have to be adapted based on terminology used by the firm or organization. For example, some law firms do not have "directors".

[26] *Ibid.*

6. The policy applies to employment relationships and professional dealings within the context of the legal work environment and includes dealings by and between partners, along with dealings related to the partnership.
7. The policy applies to every aspect of the legal work environment, including recruitment, selection, promotion, transfer, training, compensation and performance reviews.
8. The policy covers any legal work-related environment and professional dealings including,

    a. any place where the business of the firm is conducted or where social and/or other functions related to the business of the firm occur;

    b. activities that are incidental or connected to the business of the firm, including activities that are incidental or connected to the business of partners or the partnership; or

    c. incidents that occur after the official business of a meeting but are incidental or connected to the meeting.

9. The policy is not intended to constrain acceptable social interactions between people in the Firm.

DEFINITIONS

The following definitions apply for the purposes of the policy:

10. **"Discrimination"** means differential treatment, whether intentional or not, that imposes a disadvantage or a burden on a person or group of persons, or that results in the denial of a benefit to a person or group of persons, based on one or more of the prohibited grounds of discrimination set out in the *Code*.

11. **"Harassment"** means engaging in a course of vexatious comment or conduct against an individual in the workplace that is known or ought reasonably to be known to be unwelcome.

12. **"Spouse"** means a person cohabiting in a conjugal relationship with another person of the same or different sex, whether or not the two persons are legally married to each other.[27]

13. ***Transgender*** refers to someone whose life experience includes existing in more than one gender. This may include people who identify as transsexual and people who describe themselves as being on a "gender spectrum" or as living

[27] The firm may wish to include a minimum period of conjugal cohabitation in this definition. The length of required periods of conjugal cohabitation vary according to various statutes, such as the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the *ESA, 2000*) or the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Suppl.) (the *ITA*), as well as the Firm's employment benefit providers. If a time period is included, the firm should verify its compliance with the requirements of relevant statutes.

outside the categories of "man" or "woman".[28] For the purposes of this policy, this includes persons who identify as **"transsexual",** whether or not they have undergone sex reassignment surgery.[29]

14. ***Gender identity*** refers to a person's subjective sense of self, in particular, their inner sense of being male or female. A person's gender identity is different from their sexual orientation. People's gender identity may be different from their birth-assigned sex and/or their physical sex characteristics and may include female , male, transgender, transsexual, intersex, crossdresser, or trans[30]

DUTY OF CONFIDENTIALITY

15. The Firm respects each individual's choice to disclose or to keep confidential information about their sexual orientation, their gender identity and/or experience as a transgender person.

16. The Firm understands that care and diligence in the administration of employment benefits and pension plans is necessary so as not to expressly or inadvertently reveal the sexual orientation or gender identity of an individual who may wish to keep this information private.[31]

17. To enable an individual to register for, or to collect employment or pension benefits, the Firm may be required to record information that directly or indirectly identifies an individual's sexual orientation or gender identity. Subject to reasonable limits, the Firm will ensure the confidentiality of the information collected for these purposes. The Firm will also request that, as much as may be practical and subject to any requirements imposed by law, the benefits and pension plan providers will keep the information confidential.

18. Pension plan and employment records, including, but not limited to, requests for bereavement and parental leave, medical/dental insurance claims, next-of-kin declarations, beneficiary designations, inquiries about the extension of benefits/pensions to a spouse, as well as resumés, academic transcripts, and letters of reference, shall be kept confidential, subject to reasonable limits and except where disclosure is required by law.

19. Personal information disclosed to the Firm shall be stored in a manner so as to limit access to this information to those who require access to handle a matter.

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[28] For definition, please refer to the Glossary of Terms at Part V. A firm may wish to include the Glossary of Terms, or some of the definition, in its policy.
[29] *Ibid.*
[30] *Ibid.*
[31] The Firm is aware that information which identifies the gender of an individual's spouse or claims for benefits for certain prescription drugs/ medical treatments can indirectly reveal an individual's sexual orientation or gender identity.

20. Where practical, the Firm will arrange for individuals who work at the Firm to register and submit claims directly to the provider with whom the Firm has contracted for employment benefits and pension plans. Where that provider is unwilling/unable to consent to the request that individuals who work at the Firm submit claims directly to that provider, [insert title of position appointed under this policy] will be responsible for assisting in the registration and collection of benefits. Individuals entrusted with this responsibility will be trained with regard to the Firm's expectation that any information acquired while carrying out related duties is to be kept in strict confidence.

PROCEDURES

21. The Firm ensures that its employment benefits and pension plans comply with the statement of principles and duty of confidentiality outlined in this policy.

22. The Firm will appoint [insert title of position(s) responsible, hereinafter "the Appointed Person"][32] to ensure that all policies adopted by the Firm are consistent with this policy.[33]

23. The Appointed Person will also be available to answer, in confidence, any questions an individual working at the firm may have with respect to this policy or the Firm's employment benefits and pension plan

APPLICATION

Employment and Pension Benefits and Employment Practices

24. Employment and pension benefits are conferred on all individuals who work at the Firm, regardless of that individual's sexual orientation or gender identity. Examples of such benefits include:

    a. **Bereavement Leave**- a leave granted to an individual, either with or without pay, on the death of a relative or a relative of a spouse.

    b. **Dental Benefits**- see Medical Benefits.

    c. **Emergency Leave**- a leave granted to an individual,[34] either with or without pay, to attend to a matter, emergency or otherwise, of a family member.[35]

[32] Depending on the size and structure of the organization, the firm may wish to appoint the Director of Human Resources, a Senior Partner, or a committee of individuals to fulfill this role.

[33] The Appointed Person should be provided with a private workspace or office area so as to be able to answer questions about employment benefits in confidence. When completing administrative work related to the registration and collection of benefits, the Appointed Person must ensure that the general public or others who are in the vicinity cannot see the enrollment and claim forms or computer submissions.

d. **Group Life Insurance**- term insurance covering a group of people such as employees of a company. A spouse may be designated the beneficiary of group life insurance. The plan provider may require disclosure of the plan members' beneficiary designations.

e. **Maternity Leave-** a leave, either with or without pay, granted to a birth mother to provide time off for pregnancy and childbirth and to provide time to bond with the newly born child.

f. **Medical Benefits**- packages offered by employers covering various health and dental expenses. The Firm should communicate its medical and dental benefits plan to all employees.

g. **Parental Leave**- a leave granted, either with or without pay, to an individual following the birth of a child or the coming of a child into the individual's custody, care and control for the first time. Parental leave cannot be denied to qualifying employees on the basis of sexual orientation.[36]

h. **Pension Plan Survivor Benefits**- survivor benefits are benefits paid to the eligible survivors or to the estate of a deceased contributor who has made enough contributions to the Canada Pension Plan. The benefits are available to qualifying spouses or common law partners, regardless of sex. Spouses or common law partners who at "relevant times" live

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[34] The Firm may choose to extend Emergency Leave to all individuals who work at the Firm regardless of its size and regardless if they fall within the ambit of the *ESA, 2000, supra* note 27.

[35] The *ESA, 2000* defines "spouse" as either of two persons who,

(a) are married to each other, or

(b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right. ("conjoint")

Section 50(1) of the *ESA, 2000*, sets out an entitlement to a leave of absence without pay for employees of employers who regularly employ 50 or more employees because of:

2. The death, illness, injury or medical emergency of an individual described in subsection (2) [or] 3. An urgent matter that concerns an individual described in subsection (2).

Section 50(2) states that:

Paragraphs 2 and 3 of subsection (1) apply with respect to the following individuals:

1. The employee's spouse
2. A parent, step-parent or foster parent of the employee, the employee's spouse
3. A child, step-child or foster child of the employee, the employee's spouse
4. A grandparent, step-grandparent, grandchild or step-grandchild of the employee or of the employee's spouse
5. The spouse of a child of the employee.
6. The employee's brother or sister.
7. A relative of the employee who is dependent on the employee for care or assistance.

[36] Section. 48(1) of the *ESA, 2000* states that

48. (1) An employee who has been employed by his or her employer for at least 13 weeks and who is the parent of a child is entitled to a leave of absence without pay following the birth of the child or the coming of the child into the employee's custody, care and control for the first time.

separate and apart from the pension plan member lose entitlement to benefits.[37]

i. **Relocation Allowances**- expenses arising from the relocation of an individual who works at the Firm and their spouse that are reimbursed by the Firm shall be reimbursed by the Firm regardless of an individual's sexual orientation.

25. **Next of Kin Declarations**- Human Resources or the Appointed Person shall keep this confidential information on file for use in the event of a medical emergency.

26. The Firm shall not administer its benefit plans in a discriminatory manner based on sexual orientation, gender identity or gender expression.

Social Events

27. The Firm is committed to creating a work environment in which those who work at the Firm and identify as LGBTTIQQ2SA are treated with respect and are included in all aspects of the Firm's social culture. Milestones in the personal lives of individuals who work at the Firm that are celebrated by the Firm shall include all individuals, regardless of their sexual orientation or gender identity.

28. The following events in the personal life of an individual who works at the Firm may be either officially or informally observed:

    a. **Events to Celebrate the Birth of a Child/ Adoption/ Weddings/ Commitment Ceremonies/ Anniversaries**- The Firm encourages the celebration of significant events in the lives of all individuals covered by this policy.

    b. **Funerals**- The Firm extends expressions of sympathy on the death of a spouse or family member of any individuals working at the Firm. .

    c. **Holiday or Firm Parties**- The Firm encourages those covered by this policy and their spouses/guests, if they wish, to attend holiday or firm parties.

Inclusion of Transgender Individuals working at the Firm

29. The Firm recognizes that transgender individuals may face distinct barriers to inclusion in the workplace. The following employment practices are adopted to ensure that transgender persons are treated equally and with dignity:

[37] *Canada Pension Plan* (R.S.C., 1985, c. C-8).

a. **Washroom and other Gender-Specific Facilities-** The Firm respects the needs of those who identify as transgender regarding the use of washrooms and gender-specific facilities. It is that person's right to use a washroom that is in accordance with their gender identity and presentation.

b. **Dress Code Policy-** The Firm's Dress Code policy respects the rights of those who identify as transgender, and permits any person to dress consistently with their gender identity. This provision is subject to reasonable limits and/or *bona fide* occupational requirements.

c. **Name and sex-designation change**- The Firm recognizes that a person at the Firm who is transitioning may choose to change their legal name and pronoun to reflect their reassigned gender. When the person who is transitioning is ready, the Firm will use the new name and pronoun in all daily written and oral communication. Once the person's name has been legally changed, the Firm will update all internal and benefits related systems to reflect the new name.

d. **Use of the appropriate pronoun**- The Firm and its employees will use the pronoun chosen by the person who identifies as transgender in any and all communications. If unsure of which pronoun to use, it is appropriate to respectfully ask the person which pronoun they prefer.

e. **Medical and leave benefits**- Effective June 2008, some may be eligible for coverage of sex reassignment surgery as an insured service under the Ontario Health Insurance Plan (OHIP).[38] Any additional medical or leave benefits related to sex reassignment surgery will be communicated by the Firm to all employees.

f. **Privacy and Confidentiality-** The Firm recognizes that a person's transgender identity is confidential and may only be disclosed with the consent of the person. The Firm will take any steps necessary to ensure that a person's privacy needs are met when dealing with day to day workplace policies, such as payroll and identification documents.

RECOURSE

30. Should a person believe that benefits are being conferred or administered in a discriminatory manner, the Firm encourages that person to report it to [insert the title of the position responsible for handling complaints], who shall do what is

[38] *O. Reg. 6/04* amending the *Health Insurance Act,* R.S.O. 1990, c. H.6. Coverage for sex-reassignment surgical procedures is only available to patients who have completed the Gender Identity Clinic program operated by the Center for Addiction and Mental Health and for whom the clinic has recommended that surgery take place. See *Relisting of Sex-Reassignment Surgery under OHIP,* Bulletin 4480, Ministry of Health and Long Term Care (June 2008).

necessary to address the situation. All complaints or inquiries made under this section will be confidential.

31. Further recourse may be available under other policies adopted by the Firm, including [the Firm should list other applicable policies, such as a policy on preventing or addressing discrimination and harassment; an accommodation policy, etc…].

32. Nothing in this policy precludes a person from seeking assistance or filing complaints under external avenues of recourse including,

    - the Discrimination and Harassment Counsel;
    - the right to file an application with the Ontario Human Rights Tribunal under the *Code*;
    - the right to file a complaint with the Law Society of Upper Canada under the *Rules* and *Paralegal Rules*.

EDUCATION AND TRAINING

33. As an extension of its commitment to a discrimination and harassment-free workplace, all current and future individuals who work at the Firm will be informed of the policy. The Firm will make the policy available to all who work at the Firm.[39]

34. Training on the duty of confidentiality under this policy will be provided for all individuals at the Firm who have access to confidential information collected for the purposes of registration and administration of the employment benefits and pension plans.

[39] The firm may wish to state in its recruiting materials that where it extends benefits to spouses, it is committed to providing those benefits in a non-discriminatory manner. Also, the firm may assert in its recruiting materials that it is commitment to encouraging full participation in the firm's employment and social benefits, regardless of sexual orientation and gender identity.

PART IV- EMPLOYER OBLIGATIONS UNDER THE LAW

SAME-SEX BENEFITS

Sexual Orientation as Prohibited Ground of Discrimination

Ontario Human Rights Code[40]

Sexual orientation is a prohibited ground of discrimination under the *Code*. It has been repeatedly and actively recognized by the courts and the Human Rights Tribunal of Ontario that same-sex relationships are fundamentally worthy of the same respect, dignity and equal treatment as the intimate relationships of heterosexual individuals.

Legal Recognition of Same-Sex Marriage

The *Civil Marriage Act*[41]*,* grants same sex marriage rights to all Canadians, by providing a gender neutral definition of marriage.[42] In its enactment, the *Civil Marriage Act* also amended several other pieces of Federal legislation to conform with the changes.[43]

Tax benefits

Income Tax Act[44]

With the legalization of same sex marriage, the *Income Tax Act (ITA)* was amended to confer benefits equally to both heterosexual and same sex spouses and common law conjugal partners. [45]

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[40] *Supra* note 1.
[41] S.C. 2005, c.33
[42] Section 2 of the *Civil Marriage Act* states that*:*
2**.** Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
[43] Consequential Amendments from the *Civil Marriage Act* include *Canada Business Corporations Act* (R.S.C. , 1985, c. C-44)*; Canada Cooperatives Act* (SC 1998, c.1)*; Canada Pension Plan* (R.S.C., 1985, c. C-8); *Civilian War-Related Benefits Act* (R.S.C. , 1985, c. C-31)*; Divorce Act* (R.S.C.,1985, c.3 (2nd Supp.))*; Federal Law - Civil Law Harmonization Act, No.1* (S.C. 2001, c.4)*; Income Tax Act* (R.S.C., 1985, c.1 (5th Supp.))*; Marriage (Prohibited Degrees) Act* (S.C. 1990, c.46) and *Modernization of Benefits and Obligations Act* (S.C. 2000, c.12).
[44] *Income Tax Act (ITA)* (R.S.C., 1985, c.1 (5th Supp.))
[45] The definition of spouse as exclusive to the domain of heterosexual couples was challenged in *Rosenberg v. Canada (Attorney General)* (1998) 158 D.L.R. (4th) 664. Rosenberg was employed by C.U.P.E., which required mandatory enrollment in a private pension plan. Under the plan, surviving opposite-sex spouses of deceased members were entitled to two-thirds of the member's benefits. The C.U.P.E. plan was registered with Revenue Canada (now the Canada Customs and Revenue Agency) in order to take advantage of the tax deferral benefits offered under the *ITA*. However, s. 252(4) of the *ITA* limited private pension plans registration to plans which restricted survivor benefits to opposite-sex spouses. Under the *ITA*, the term 'spouse' was expansive, encompassing opposite-sex couples who were both legally married and those who had been living in common law conjugal relationships for a period of 12 months. The Ontario Court of Appeal held that the definition was discriminatory on the basis of sexual orientation and that the appropriate remedy would be to include same-sex partners into the *ITA* definition. With the enactment of the *Civil Marriage Act*, the *ITA* was further amended to simply refer to "spouse" and "common-law partner" inclusive of all individuals regardless of sex.

GENDER IDENTITY

Prior to June 2012, discrimination on the basis of gender identity or gender expression was not explicitly prohibited under the *Code.* Discrimination against those who identify as transgender was considered to be discrimination on the basis of sex, disability (Gender Identity Disorder found to be a disability) or both.[46]

In June 2012 however, the Ontario Legislature passed Bill 33, also known as *Toby's Act,* enshrining the "Right to be free from discrimination and harassment because of gender identity or gender expression" into the *Code.*[47] Pursuant to *Toby's Act*, the *Code* was amended to explicitly protect the rights of those who identify as transgender, and serves as an important step towards ensuring that those who identify as transgender in Ontario enjoy both equal treatment as well as equal access to all goods and services.[48]

In the employment context in Ontario, the *Code* provides that every person has the right to equal treatment without discrimination because of sex, gender identity or gender expression. *The Code* aims to protect individuals who may be targeted for discriminatory behaviour because of stereotypes, rather than being judged on their individual merits. An employer is prohibited from limiting employment opportunities for transgender individuals and from discriminating against individuals based on their gender identity or gender expression.

PROFESSIONAL RESPONSIBILITY

Rule 5.04 (Discrimination) of the *Rules*[49] and Rule 2.03 (Harassment and Discrimination) of the *Paralegal Rules* [50] impose an obligation on all lawyers and paralegals to refrain from discrimination on enumerated grounds. Under the same rules, lawyers and paralegals are charged with the responsibility of respecting human rights laws in force in Ontario.

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46 See *Hogan v. Ontario (Health and Long-Term Care*) 2006 HRTO 32, *MacDonald v. Downtown Health Club for Women*, 2009 HRTO 1043; *Kavanagh v. Canada (Attorney General)*, [2001] C.H.R.D. No. 21, at para. 135.

47 Bill 33, *Toby's Act* (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression) S.O. 2012 C.7.

48 In the lead up to the enactment of *Toby's Act*, the Human Rights Tribunal of Ontario (HRTO) further affirmed that gender identity should be determined based on lived experience rather than a surgical procedure. In *XY v. Ministry of Government and Consumer Services (XY)* the HRTO held that the *Vital Statistics Act* (*VSA)* discriminated against transgendered people by requiring them to undergo sex reassignment surgery in order to change the sex designation of their birth certificate. The *VSA* was subsequently amended to remove the surgery requirement, thus enabling all trans people to have identification documents which reflects their experienced gender. See *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726. The decision in *XY* is further supported by the Ontario Human Rights Commission's *Policy on Discrimination and Harassment based on Gender Identity (2000)* intended to help the public understand how the *Code* protects against discrimination and harassment based on gender identity (understood at this time as "sex"). The Policy is currently in the process of being revised and updated. See *Policy on Discrimination and Harassment based on Gender Identity* (OHRC: March 2000, revised December 2009).

49 *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, November 1, 2000).

50 *Paralegal Rules of Conduct* (Toronto: Law Society of Upper Canada, May 1, 2007).

A prohibition on sexual harassment is found in Rule 5.03 (Sexual Harassment) of the *Rules* and Rule 2.03 of the *Paralegal Rules* (Harassment and Discrimination). The commentary to Rule 5.03 suggests that behaviours such as making unwanted inquiries or comments about another's sexual orientation or sex life, making degrading comments about a particular sex, as well as making derogatory comments of a sexual nature toward an individual are unacceptable actions. The Rule imposes a duty on all members of the profession to refrain from such offensive behaviour.

PENSION BENEFITS AND REGISTRATION OF PENSION PLANS

With the legalization of same sex marriage in Canada, pension benefits are extended equally to both heterosexual and same sex spouses and common law partners of plan members. Spouses can receive a pre-retirement benefit where the plan member dies before retirement or a survivor benefit if the plan member dies after retirement.[51]

Married spouses, living separate and apart, continue to be eligible for survivor pension benefits as long as the marriage has not ended in divorce or the contributor has not resided in a conjugal relationship with another person for at least one year. However, upon the separation of common law spouses, their right to survivor pension benefits is relinquished. Thus, the common law spouses must be living together at the time of the contributor's death in order to collect survivor pension benefits.[52]

Pension plans that entitle same sex partners of the plan members to survivor benefits may be registered under the *ITA*. [53]

EMPLOYMENT BENEFITS- GENERALLY

Benefits granted in addition to those set out in the *Employment Standards Act, 2000* (*ESA, 2000*)[54] and its companion, *O.Reg.286/01*, are conferred at the discretion of the employer. Employers have a legal obligation to extend benefits to opposite-sex and same-sex spouses and partners alike.

EMPLOYMENT BENEFITS- GROUP INSURANCE PLANS

Section 44 of the *ESA, 2000* expressly prohibits discrimination on the basis of marital status, which includes same-sex partnerships, in the provision of employee benefits.[55]

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[51] *Canada Pension Plan*, *supra* note 37.
[52] See *Hodge v. Canada (Minister of Human Resources Development),* [2004] S.C.R. 357.
[53] See *Rosenberg*, *supra* note 45.
[54] *ESA, 2000*, *supra* note 27.
[55] *ESA, 2000*, s.44 (1) provides:

> Except as prescribed, no employer or person acting directly on behalf of an employer shall provide, offer or arrange for a benefit plan that treats any of the following persons differently because of the age, sex or marital status of employees:
>
> 1. employees.
> 2. beneficiaries.

Regulation 286/01 sets out exceptions where distinctions are permitted on the basis of sex, age, disability and marital status. In essence, it is not permissible to differentiate on the grounds of marital status between people with opposite-sex partners and those with same-sex partners. It is permissible, however, to distinguish between employees with partners (either of the opposite or same sex) and those without partners. The legislation mandates that permitted differential treatment must be made on an actuarial basis.

PREGNANCYAND PARENTAL LEAVE

Minimum pregnancy and parental leaves are mandated by the *ESA, 2000* and are available to employees who qualify. In the case of maternity leave, it is available to all qualifying and birth mothers, including surrogate mothers.

Parental leave is available under the *ESA, 2000* to a qualifying adult who is a parent following the birth of a child or the coming of the child into the individual's custody, care and control for the first time.[56] "Parent" as defined in s. 45 of the *ESA,2000*, "includes a person with whom a child is placed for adoption and a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own …" Because the leaves are a statutory right, employers have no discretion to grant or withhold maternity and parental leave to qualifying individuals.

Under the *Employment Insurance Act, 1996 (EIA)*[57] maternity benefits are available to qualifying individuals who can prove their pregnancy.

The *EIA* makes parental benefits available to qualifying individuals for the care of one or more new-born children of the claimant or one or more children placed with the claimant for the purposes of adoption under the laws governing adoption in the province in which the claimant resides.

Payable as of January 2011, the *EIA* also provides special benefits to self employed persons, including maternity, parental, adoption, sickness and compassionate care benefits.[58] The *EI Special Benefits* were previously only available to wage earners and salaried workers.

An employer may supplement benefits ("top up") received under the *EIA* provided the conditions set out in s. 38 the *Employment Insurance Act Regulations* are met.[59] The conditions are that the combined weekly benefits received under the *EIA* and from the employer do not exceed the employee's weekly earnings and that the amount paid by

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3. survivors.
4. dependants.

[56] *ESA,2000*, *supra* note 15 at s. 48(1).
[57] S.C. 1996 c.23.
[58] For details of the new EI benefits plan and how to apply, see Human Resources and Skills Development Canada, online: http://www.hrsdc.gc.ca and Services Canada, online: http://www.servicecanada.gc.ca/eng/sc/ei/sew/index.shtml.
[59] SOR/96-332 as amended SOR/2002-274, s. 2; SOR/202-274, s.3.

the employer does not reduce the individual's accumulated sick or vacation leave, severance pay or other accumulated credits from employment.

Effective March 2009, the Law Society of Upper Canada launched the "Parental Leave Assistance Program" (PLAP) to support lawyers in small firms or sole practitioners to maintain their practices after the birth or adoption of a child. The program provides financial benefits to practising lawyers who are partners in firms of five lawyers or fewer who do not have access to other maternity, parental, or adoption financial benefits under public or private plans and who meet the eligibility criteria.[60]

EMERGENCY LEAVE

The *ESA, 2000* provides for unpaid leaves for employees whose employer regularly employs 50 or more employees in the event of death, injury or medical emergency of a spouse, partner or other family members.[61]

PUBLIC COMMITMENT CEREMONIES

Though same sex marriage is now legal in Canada, some couples (whether heterosexual or same sex) may choose to undergo public commitment ceremonies instead of legal marriage. In *Boutilier v. Canada (Natural Resources)*[62], the Canadian Human Rights Tribunal held that the Treasury Board's practice of denying leave to employees for the purpose of participating in public same-sex commitment ceremonies was discriminatory. In addition to ordering the employer to cease the discriminatory practice, the Tribunal ordered the Treasury Board to grant leaves for marriage and public commitment ceremonies on the same terms. The employer was further ordered to credit the complainants' annual leave used when marriage leave was denied and to pay $5,000 for the pain and suffering of each complainant.

[60] For more details about the program and eligibility criteria see The Law Society of Upper Canada, online: http://www.lsuc.on.ca/with.aspx?id=2147487024.
[61] Section 50(2) of the *ESA, 2000* provides an exhaustive listing of the particular individuals and their relationship to the employee.
[62] [2003] C.H.R.D. No. 14 (C.H.R.T.).

PART V- GLOSSARY OF TERMS

GLOSSARY OF TERMS

The definitions in this glossary are adapted and/or taken from:

- The Ontario Human Rights Commission *Gender identity and gender expression* brochure[63];
- The Ontario Human Rights Commission's *Policy on discrimination and harassment because of gender identity;*[64]
- Project Open Door's *Trans Inclusion Policy and Procedure Toolkit* [65];
- The 519 Church Street Community Centre's *Equity Glossary of* Terms[66]; =
- The University of British Columbia's *Sexual Orientation and Gender Identity Glossary;*
- The University of California Davis' *LGBTQIA Glossary; and*
- The definition of "Two-Spirited person" was developed by the *McGill Project: Two Spirited People.*[67]

The Law Society recognizes that language is fluid and culturally specific. The terms and definitions listed below may change over time and may have different meanings in different contexts. Furthermore, in all instances, self-identification is paramount.

This is not an authoritative and/or exhaustive list.

Ally: A person who understands that lesbian, gay, bisexual, transgender, Two-Spirited and queer people suffer from discrimination, and who uses their privilege to support or advocate for these communities. Being an ally can mean using inclusive language, being sensitive, and showing respect and support to individuals and community members.[68]

Asexual: A person who has no sexual attraction to others.[69]

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[63] *Gender identity and gender expression* brochure, Ontario Human Rights Commission, (Queen' Printer for Ontario: 2013).
[64] *Policy on Discrimination and Harassment Because of Gender Identity* (Ontario Human Rights Commission: March 2000, revised December 2009).
[65] *Trans Inclusion Policy and Procedure Toolkit* (Toronto: Project Open Door, the 519 Church Street Community Centre, 2011).
[66] *The 519's Equity Glossary of Terms*, The 519 Church Street Community Centre. Available online: http://www.cfcollaborative.ca/wp-content/uploads/2011/12/The-519s-Equity-Glossary-of-Terms-Oct-21-11.pdf.
[67] For the full definition and citation see Brotman, Shari and Ryan, Bill. *Critical Issues in Practice with Gay, Lesbian, Bisexual and Two-Spirit People, McGill School of Social Work* (2001) at 9. Available online: http://www.sexualhealthcentresaskatoon.ca/pdfs/p_critical.pdf
[68] *Trans Inclusion Policy*, *supra* note 65 at 50.
[69] *519's Equity Glossary of Terms*, *supra* note 66 at 4.

Bisexual: A person who may be sexually or romantically attracted to people of any gender or sex.[70]

Crossdresser: A person who, for emotional and psychological well-being, dresses in clothing usually associated with the "opposite" sex.[71]

Gay: A man who is romantically/sexually attracted to or involved with other men. This term has also has been used as an umbrella term for everyone who has same-sex romantic/sexual attractions or relations, particularly in mainstream media But this usage is falling-out of favour because it is not as inclusive as some of the other umbrella terms, such as "queer" or the acronym "LGBTTIQQ2SA." Some lesbians prefer to call themselves "gay".[72]

Gender expression: The external attributes, behaviour, appearance, dress, etc. by which people express themselves and through which others perceive that person's gender.[73]

Gender identity: A person's subjective sense of self, in particular, their inner sense of being male or female. A person's gender identity is different from their sexual orientation. A person's gender identity may be different from their birth-assigned sex and/or their physical sex characteristics and may include female, male, transgender, transsexual, intersex, crossdresser, or trans[74]

Heterosexism/Heteronormativity: The presumption that heterosexuality is universal, normative and/or superior to homosexuality, lesbianism and bisexuality. Prejudice, bias or discrimination may be based on such presumptions.[75]

Homophobia: A learned discomfort with, or fear, dislike or hatred of homosexuality and/or lesbianism or gay people. This could include, but is not limited to, a discomfort with or dislike of lesbian or gay people, bisexual people (biphobia) and transgender people (transphobia).[76]

Intersexed: Being born with both XX and XY chromosomes, the full or partial sex organs of both male and female genders, or with underdeveloped or ambiguous sex organs, in addition to a hormone balance reflective of both genders. Those who are born intersexed may also embody secondary sex characteristics of either gender. This word replaces the inappropriate term 'hermaphrodite'.[77]

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[70] *Ibid.*
[71] *Gender identity and gender expression* brochure, *supra* 63
[72] The University of British Columbia's *Sexual Orientation and Gender Identity Glossary,* available at http://www.students.ubc.ca/access/orientation-gender/glossary/.
[73] *Gender identity and gender expression* brochure, *supra* note 63.
[74] *Ibid.*
[75] *519's Equity Glossary, supra* note 66 at 2.
[76] *Ibid* at 3.
[77] *Gender identity and gender expression* brochure, *supra* note 63.

***Lesbian*:** A female identified person who is romantically/sexually attracted to or involved with other women .[78]

***LGBTTIQQ2SA*:** An acronym used to refer to lesbian, gay, bisexual, transsexual, transgender, intersex, queer/questioning, two-spirited, and allies.

Out: A person who lives as openly gay, lesbian, bisexual or trans.[79]

Queer: An umbrella term used by some people who self identify as members of the LGBTTIQQ2SA communities and cultures. This term has not been reclaimed by everyone and may be hurtful for some.[80]

Sexual orientation: An enduring emotional, romantic, sexual, and/or affectional attraction. Terms include homosexual, heterosexual, bisexual, pansexual, non-monosexual, queer, and asexual, and may apply to varying degrees.[81]

Sex-reassignment surgery: Medical procedures by which an individual's genitals and/or secondary sex characteristics are surgically altered to create the physical appearance of a different biological sex.[82]

Two-Spirited: A term derived from interpretations of Aboriginal languages used to describe a person who has received the gift of having the privilege to house both male and female spirits in their bodies. The concept of Two-Spirited person relates to today's designation of being a gay, lesbian, bisexual and transgender person of Aboriginal origins. Being given the gift of two-spirits means that the individual has the ability to see the world from multiple perspectives at the same time. The term also has significant cultural and spiritual layers.[83]

Trans*:* An umbrella term that encompasses any person whose gender identity does not match society's expectations of someone with their physical sex characteristics. This may include transgender or transsexual individuals.[84]

Transgender: Someone whose life experience includes existing in more than one gender. This may include people who identify as transsexual and people who describe themselves as being on a "gender spectrum" or as living outside the categories of "man" or "woman".[85]

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[78] *519's Equity Glossary*, *supra* note 66 at 4.
[79] *Ibid* at 5.
[80] *Trans Inclusion Policy*, *supra* note 65 at 51.
[81] The University of California Davis' *LGBTQIA Glossary*, available at http://lgbtcenter.ucdavis.edu/lgbt-education/lgbtqia-glossary.
[82] *Ibid.*
[83] *McGill Project*, *supra* note 67 at 9.
[84] *Ibid.*
[85] *Gender identity and gender expression* brochure, *supra* note 63.

Transgenderists: Self-identifying and presenting as a different gender than that which is socially expected based on their physical sex characteristics, but have decided not to undergo sex reassignment surgery.[86]

Transition: The process of changing one's sex, which may or may not include hormones, cross living, and sex-reassignment surgery.[87]

Transphobia: A learned discomfort with, or fear, dislike or hatred of trans persons . Like all prejudices, it is based on negative stereotypes and misconceptions that are then used to justify and support discrimination, harassment, and violence toward people who are transgender.[88]

Transsexual: People whose gender identity is different from the sex assigned to them at birth. They may seek or undergo one or more medical treatments to align their bodies with their internally felt identity, such as hormone therapy, sex-reassignment surgery or other procedures.[89]

[86] *Policy on discrimination and harassment because of gender identity*, *supra* note 64 at 15.
[87] *Ibid.*
[88] *Trans Inclusion Policy*, *supra* note 65 at 52.
[89] *Gender identity and gender expression* brochure, *supra* note 63.

TAB 7.4

FOR INFORMATION

FUNDING OF EXTERNAL ORGANIZATIONS

BACKGROUND

33. In June 2012, Convocation approved a policy for requests to the Law Society from external organizations for support and funding of initiatives that will assist the Law Society to fulfill its mandate. The policy has been amended so that the Law Society would invite applications to meet identified needs rather than accepting a variety of grant applications as part of the annual budget process. The new policy maintains the existing objectives, a similar application form and criteria but envisages the Law Society inviting funding applications from specific service providers if a specific need has been identified and specific funds have been allocated. The Equity and Aboriginal Issues Committee approved the amended policy. The amended policy is available in the Access to Justice Committee report to Convocation.

TAB 7.5

PUBLIC EDUCATION EQUALITY AND RULE OF LAW SERIES CALENDAR 2013 - 2014

For a list of upcoming events, please consult http://www.lawsocietygazette.ca/events/

LOUIS RIEL EVENT – TEN YEARS AFTER R. V. POWLEY – LOOKING FORWARD AND LOOKING BACK

Date: November 15, 2013

Time: 2:00 p.m. to 5:00 p.m. followed by reception

Location: Hilton Toronto, 145 Richmond St. West

Speakers: Jean Teillet, Partner, Pape Salter Teillet

Gary Lipinsky, President of the Métis Nation of Ontario

Jason T. Madden, Partner, Pape Salter Teillet

THE DOMESTIC APPLICATION OF INTERNATIONAL LAW : WHAT LAWYERS NEED TO KNOW
Rule of Law Event

In partnership with the Canadian Centre for International Justice and the Kirsch Institute

Date: November 21, 2013

Time and location: Donald Lamont Learning Centre (4:00 p.m. – 7:00 p.m.)
Convocation Hall (7:00 p.m. – 8:00 p.m.)

Speakers: Justice Philippe Kirsch, former Judge and first President of the International Criminal Court

The Honourable Ian Binnie, former Supreme Court of Canada Judge

Raj Anand, partner at WeirFoulds and Law Society of Upper Canada Bencher

Tina Lie, partner, Paliare Roland Barristers

Cost: Panel and reception: $150
Reception: $20

BLACK HISTORY MONTH
Date : February 6, 2014
Time and location : Donald Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 7:00 p.m.)

INTERNATIONAL WOMEN'S DAY
Date : March 6, 2014
Time and location: Donald Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 7:00 p.m.)

LA JOURNÉE DE LA FRANCOPHONIE
Date : March 25, 2014
Upper Barristers' Lounge (6:00 p.m. – 8:00 p.m.)

HOLOCAUST REMEMBRANCE DAY
Date : April 28, 2014
Donald Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

ASIAN AND SOUTH ASIAN HERITAGE MONTH
Date : May 22, 2014
Donald Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

ACCESS AWARENESS FORUM
Date: June 4, 2014
Donald Lamont Learning Centre (4:00 p.m. – 8:00 p.m.)

NATIONAL ABORIGINAL HISTORY MONTH - June 19, 2014
Donald Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

PRIDE WEEK - June 24, 2013
Donald Lamont Learning Centre (4:00 p.m. – 6:00 p.m.)
Convocation Hall (6:00 p.m. – 8:00 p.m.)

The Law Society of Upper Canada | Barreau du Haut-Canada

TAB 8

Report to Convocation
October 24, 2013

Tribunals Committee

Committee Members
Raj Anand (Chair)
Adriana Doyle (Vice-Chair)
Larry Banack
Jack Braithwaite
Christopher Bredt
Paul Dray
Lee Ferrier
Alan Gold
Howard Goldblatt
Jennifer Halajian
Linda Rothstein
Virginia MacLean
Dow Marmur
Mark Sandler
James Scarfone
Robert Wadden

Purposes of Report: Information

Prepared by the Policy Secretariat
(Sophia Sperdakos 416-947-5209)

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FOR INFORMATION

COMMITTEE PROCESS

1. The Committee met on October 10, 2013. Committee members Raj Anand (Chair), Adriana Doyle (Vice-Chair), Jack Braithwaite, Christopher Bredt, Paul Dray, Lee Ferrier, Alan Gold, Howard Goldblatt, Jennifer Halajian, Virginia MacLean, Dow Marmur, Linda Rothstein, James Scarfone and Robert Wadden attended. Staff members Grace Knakowski, Lisa Mallia, Sophia Sperdakos and Jim Varro and Tribunals Chair David Wright also attended.

TAB 8.1

INFORMATION

a) TERMS OF REFERENCE - LAW SOCIETY TRIBUNAL CHAIR'S PRACTICE ROUNDTABLE

2. The Tribunal Chair is establishing a body to be known as the Tribunal Chair's Practice Roundtable. The mandate of the Law Society Tribunal ("Tribunal") Chair's Practice Roundtable is to function as a forum for the Tribunal to consult with and obtain feedback from those who practise before the Tribunal regarding its policies, processes, practices, Rules of Practice and Procedure, and practice directions

3. The Terms of Reference are set out at **TAB 8.1.1: Chair's Practice Roundtable Terms of Reference** for Convocation's information.

TAB 8.1.1

TERMS OF REFERENCE
LAW SOCIETY TRIBUNAL CHAIR'S PRACTICE ROUNDTABLE

1. The mandate of the Law Society Tribunal ("Tribunal") Chair's Practice Roundtable is to function as a forum for the Tribunal to consult with and obtain feedback from those who practice before the Tribunal regarding its policies, processes, practices, Rules of Practice and Procedure, and practice directions.

2. The Roundtable's focus is on the effectiveness of the Tribunal in conducting its proceedings. The Roundtable is not a forum for the discussion of the merits of individual cases, substantive issues of law, the content of the Rules of Professional Conduct, Law Society processes outside the Tribunal, or proposed or possible by-law changes or legislative amendments.

3. The Roundtable shall be composed of the following members:

    a. The Tribunal Chair and the Senior Counsel and Manager, Tribunals Office;

    b. Three individuals who regularly represent licensees and/or licensee applicants before the Tribunal. These individuals will be selected by the Tribunal Chair following a call for applications;

    c. Three individuals who regularly represent the Law Society before the Tribunal. These members will be designated by the Director of Professional Regulation; and

    d. Two individuals who regularly appear as duty counsel before the Tribunal. These members will be designated by the Advocates Society Duty Counsel Program.

4. The Roundtable will meet at least three times per year.

5. The agenda for each meeting will be set by the Tribunal Chair, after soliciting proposed agenda items from Roundtable members.

6. In order that the Roundtable may function in an atmosphere that encourages candour, members will maintain reasonable discretion and confidentiality with respect to Roundtable discussions.

7. No minutes or votes will be taken at Roundtable meetings.

8. No members will receive compensation for their participation in the Roundtable.

THIS SECTION CONTAINS

IN CAMERA MATERIAL