THE LAW SOCIETY OF UPPER CANADA

Professional Conduct Handbook

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PROFESSIONAL CONDUCT HANDBOOK

Published under the authority of Convocation
for the guidance of members of
The Law Society of Upper Canada

LAW SOCIETY OF UPPER CANADA
OSGOODE HALL, TORONTO

FOREWORD

The lawyer should observe the Rules of Professional Conduct hereinafter set out in the spirit as well as in the letter.

Public confidence in the administration of justice and in the legal profession may be eroded by irresponsible conduct on the part of the individual lawyer. Accordingly, he should endeavour to conduct himself at all times so as to reflect credit on the legal profession, inspire the confidence, respect and trust of his clients and the community, and should strive to avoid even the appearance of impropriety.

PLEASE NOTE THAT THE RULINGS OF PROFESSIONAL CONDUCT AS PREVIOUSLY SET OUT IN THE PROFESSIONAL CONDUCT HANDBOOK, HAVE BEEN REPEALED AND REPLACED BY THE RULES HEREIN.

INTERPRETATION

For the purposes of these Rules, "Society" means The Law Society of Upper Canada and "lawyer" means a member, and where applicable, a student member of the Society.

Words importing the singular number or the masculine gender only include more persons, parties or things of the same kind than one, and females as well as males and the converse.

A word interpreted in the singular number has a corresponding meaning when used in the plural.

INTEGRITY

RULE 1

The lawyer must discharge his duties to his client, the court, members of the public and his fellow members of the profession, with integrity.[1]

Commentary

1. Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If the client is in any doubt as to his lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If the lawyer is lacking in personal integrity, his usefulness to his client and his reputation within the profession will be destroyed regardless of how competent a lawyer he may be.[2]

2. Dishonourable or questionable conduct on the part of the lawyer in either his private life or his professional activities will reflect adversely to a greater or lesser degree upon the integrity of the profession and the administration of law and justice as a whole.[3] If the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair a client's trust in the lawyer as a professional consultant, the Society may be justified in taking disciplinary action.[4]

3. Generally speaking however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer which do not bring his professional integrity or competence into question.

COMPETENCE AND QUALITY OF SERVICE

RULE 2

(a) The lawyer owes a duty to his client to be competent to perform the legal services which the lawyer undertakes on his behalf.[1]

(b) The lawyer should serve his client in a conscientious, diligent and efficient manner and he should provide a quality of service at least equal to that which lawyers generally would expect of a competent lawyer in a like situation.[2]

Commentary

1. Competence in the context of the first branch of this Rule goes beyond formal qualification of the lawyer to practise law. It has to do with the sufficiency of the lawyer's qualification to deal with the matter in question and includes knowledge and skill and the ability to use them effectively in the interests of the client.[3]

2. As a member of the legal profession, the lawyer holds himself out as knowledgeable, skilled and capable in the practice of law. Accordingly, his client is entitled to assume that he has the ability and capacity to deal adequately with the legal matters which he undertakes on the client's behalf.[4]

3. It follows that the lawyer should not undertake a matter unless he honestly believes that he is competent to handle it or that he can become competent without undue delay, risk or expense to his client. If the lawyer proceeds on any other basis he is not being honest with his client. This is an ethical consideration and is to be distinguished from the standard of care which a court would invoke for purposes of determining negligence.

4. Competence in a particular matter involves more than an understanding of the relevant legal principles: it involves an adequate knowledge of the practices and procedures by which such principles can be effectively applied. The lawyer should

keep abreast of developments in the branches of law wherein his practice lies.

5. The lawyer must be alert to recognize his lack of competence for a particular task and the disservice he would do his client if he undertook that task. If he is consulted in such circumstances, he should either decline to act or obtain his client's instructions to retain, consult or collaborate with a lawyer who is competent in that field. The lawyer should also recognize that competence for a particular task may require that he seek advice from, or collaborate with experts in scientific, accounting or other non-legal fields, and he should not hesitate to seek his client's instructions to consult experts in such a situation.

6. Numerous examples could be given of conduct which does not meet the quality of service required by the second branch of the Rule. The list which follows is illustrative but not by any means exhaustive:

(a) failure to keep the client reasonably informed;
(b) failure to answer reasonable requests from the client for information;
(c) unexplained failure to respond to the client's telephone calls;
(d) failure to keep appointments with clients without explanation or apology;
(e) informing the client that something will happen or that some step will be taken by a certain date, then letting the date pass without follow-up information or explanation;
(f) failure to answer within a reasonable time a communication that requires a reply;
(g) doing the work in hand but doing it so belatedly that its value to the client is diminished or lost;
(h) slipshod work, such as mistakes or omissions in statements or documents prepared on behalf of the client;
(i) failure to maintain office staff and facilities adequate to the lawyer's practice;
(j) failure to inform the client or to explain properly proposals of settlement;
(k) withholding information from the client or misleading the client as to the position of the matter to

cover up the fact of neglect or mistakes;

(l) failure to keep notes on the search of title in every real estate file or in another file which comprises part of a central repository in the lawyer's office, provided that the real estate file concerned and the file in the central repository are cross-referenced to each other;
(New – Nov. 1978)

(m) failure to maintain a limitation reminder or tickler system whereby a lawyer would ensure that he has an effective follow-up procedure with respect to his files;
(New – Nov. 1978)

(n) failure to make a prompt and complete report when the work is finished, or, where a final report cannot be made, failure to make an interim report where one might reasonably be expected;
(Formerly sub-para "l" – re-designated Nov. 1978)

(o) self-induced disability, for example from intoxicants or drugs, which interferes with or prejudices the lawyer's services to the client.[5]
(Formerly sub-para "m" – re-designated Nov. 1978)

7. The Rule calls for conscientious, diligent and efficient service on the lawyer's part and he is therefore obliged to do his best to provide prompt service to his client. If and when the lawyer can reasonably foresee that his advice or services will be unduly delayed he should inform his client.[6]

8. It will be noted that the Rule does not provide a standard of perfection. A mistake even though it might be actionable for damages in negligence would not necessarily constitute a failure to maintain the standard set by the Rule, but evidence of gross neglect in a particular matter or a pattern of neglect or mistake in different matters may be evidence of such a failure regardless of tort liability. In the result, where both negligence and incompetence are established, damages may be awarded for the former and the latter can give rise to the additional sanction of disciplinary action.[7]

9. The lawyer who is incompetent does his client a disservice, brings discredit on his profession and may bring the administration of justice into disrepute.[8] In addition, he damages his own reputation and practice and may injure those who are associated with or dependent upon him.

ADVISING CLIENTS

RULE 3

The lawyer must be both candid and honest when advising his client.[1]

Commentary

1. The lawyer's duty to the client who seeks legal advice from him 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 as to the merits and probable results.[2]

2. Whenever it becomes apparent that the client has misunderstood or misconceived his position or what is really involved, the lawyer should explain as well as advise, so that the client is apprised of his true position and fairly advised with respect to the real issues or questions involved.[3]

3. The lawyer should clearly indicate upon what facts, circumstances and assumptions his opinion or advice is based, e.g. in cases where the circumstances do not justify an exhaustive investigation with the consequent expense to the client. However, unless the client instructs him otherwise, the lawyer should investigate the matter in sufficient detail to enable him to express an opinion rather than mere comments with many qualifications.

4. The lawyer should be wary of bold and confident assurances to his client, especially when his employment may depend upon his advising in a particular way.[4]

5. The lawyer should advise and encourage his client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and he should discourage his client from commencing useless legal proceedings.[5]

6. When advising his client the lawyer must never knowingly

assist or encourage any dishonesty, fraud, crime or illegal conduct or instruct his client as to how to violate the law and avoid punishment. He should be on his guard against becoming the tool or dupe of an unscrupulous client or those who are associated with that client.[6]

7. A bona fide test case is not necessarily precluded by the preceding paragraph and so long as no injury to the person or violence is involved, it is not improper for the lawyer to 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.[7]

8. Apart altogether from the substantive law on the subject, it is improper for the lawyer to advise, threaten or bring a criminal or quasi-criminal prosecution in order to secure some civil advantage for his client.[8]

9. In addition to his opinion as to the legal questions, the lawyer may be asked for or may be expected to give his views as to non-legal matters such as the business, policy or social implications involved in the question or as to the course the client should choose. In many instances the lawyer's experience will be such that his views on non-legal matters will be of real benefit to his client. If the lawyer does express views on such matters, he should, where and to the extent necessary, point out that he lacks experience or other qualification in the particular field and he should clearly distinguish his legal advice from such other advice.[9]

10. The duty to give honest and candid advice requires the lawyer to inform the client promptly when the lawyer discovers that a mistake, which is or may be damaging to the client and which cannot readily be rectified, has been made in connection with a matter for which he is responsible. When so informing his client, the lawyer should be careful not to prejudice any rights of indemnity which he or his client may have under any insurance, client's protection or indemnity plan, or otherwise. At the same time the lawyer should recommend that his client obtain legal advice elsewhere as to any rights he may have arising from such mistake. The lawyer should also give prompt notice of any potential claim to his insurer or other indemnitor so that the client's protection from that source will not be prejudiced and, unless the client objects, assist and cooperate with the insurer or other indemnitor to the extent necessary to

enable any claim which is made to be dealt with promptly. If the lawyer is not so indemnified, or to the extent that his indemnity may not fully cover the claim, he should expeditiously deal with any claim which may be made against him and he must not, under any circumstances, take any unfair advantage that would defeat or impair his client's claim. In cases where liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, the lawyer is under a duty to arrange for payment of the balance.[10]

CONFIDENTIAL INFORMATION

RULE 4

The lawyer has a duty to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of his client, and he should not divulge any such information unless he is expressly or impliedly authorized by his client or required by law to do so.[1]

Commentary

1. The lawyer cannot render effective professional service unless there is full and unreserved communication between him and his client. At the same time the client must feel completely secure and he is entitled to proceed on the basis that without any express request or stipulation on his part matters disclosed to or discussed with his lawyer will be held secret and confidential.[2]

2. This ethical rule must be distinguished from the evidentiary rule of lawyer and client privilege with respect to oral or documentary communications passing between the client and his 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]

3. As a general rule, the lawyer should not disclose that a particular person has consulted or retained him about a particular matter unless the nature of the matter requires it.

4. The lawyer owes the duty of secrecy to every client without exception, regardless of whether he 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 may have arisen between them.[4]

5. The fiduciary relationship between the lawyer and his client forbids that the lawyer use any confidential information

covered by the ethical rule for the benefit of himself or a third person or to the disadvantage of his client. Should the lawyer engage in literary works such as his autobiography, memoirs and the like he should avoid disclosure of confidential information.[5]

6. The lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another and he should decline employment which might require him to do so.[6]

7. The lawyer should avoid indiscreet conversations, even with his spouse or family, about a client or his affairs and he should shun any gossip about such things even though the client is not named or otherwise identified. Likewise the lawyer should not repeat any gossip or information about his client's business or affairs that he overhears or that is recounted to him. 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, can result in prejudice to the client. Moreover the respect of the listener for the lawyers and the legal profession will probably be lessened.[7]

8. The rule may not apply to facts which are public knowledge but nevertheless the lawyer should guard against participating in or commenting upon speculation concerning his client's affairs or business.

9. Confidential information may be divulged with the express authority of the client or clients concerned, and, in some situations, the authority of the client to divulge may be implied. For example, some disclosure may be necessary in a pleading or other document delivered in litigation being conducted for the client. Again the lawyer may (unless the client otherwise directs) disclose the client's affairs to partners or associates in his firm and, to the extent necessary, to his non-legal staff such as secretaries and filing clerks. But this implied authority to disclose places the lawyer under a duty to impress upon his employees, students and associates the importance of non-disclosure (both during their employment and thereafter) and requires him to take reasonable care to prevent their disclosing or using any information which he himself is bound to keep in confidence.[8]

10. Disclosure by the lawyer may also be justified in order to defend himself or his associates or employees against any allegation of malpractice or misconduct, or in legal proceedings

to establish or collect his fee, but only to the extent necessary for such purposes.[9]

11. Disclosure of information necessary to prevent a crime will be justified if the lawyer has reasonable grounds for believing that a crime is likely to be committed.[10]

12. When disclosure is required by law or by order of a court of competent jurisdiction, the lawyer should always be careful not to divulge more information than is required of him.[11]

IMPARTIALITY AND CONFLICT OF INTEREST

RULE 5

The lawyer must not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the client or prospective client concerned, he should not act or continue to act in a matter when there is or there is likely to be a conflicting interest. A conflicting interest is one which would be likely to affect adversely the judgment of the lawyer on behalf of or his loyalty to a client or prospective client or which the lawyer might be prompted to prefer to the interests of a client or prospective client.[1]

Commentary

1. The reason for the rule is self-evident; the client or his affairs may be seriously prejudiced unless the lawyer's judgment and freedom of action on his client's behalf are as free as possible from compromising influences.[2]

2. Conflicting interests include but are not limited to the financial interest of the lawyer or an associate of the lawyer and the duties and loyalties of the lawyer to any other client, including the obligation to communicate information.[3]

3. The Rule requires adequate disclosure to the client so that he may make an informed decision as to whether he wishes the lawyer to act for him despite the presence or possibility of the conflicting interest. As important as it is to the client that his lawyer's judgment and freedom of action on his 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 which the client will weigh when deciding whether or not he will 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 his affairs. In the result, in the judgment of the client his interests may sometimes be better served by not engaging another lawyer. An example of this sort of situation is when the client and the other party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

4. Before the lawyer accepts employment for more than one client in a matter or transaction, the lawyer must advise the clients concerned that he has been asked to act for both or all of them, that 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 that if a conflict develops which cannot be resolved he cannot continue to act for both or all of them and may have to withdraw completely. If one of such clients is a person with whom the lawyer has a continuing relationship and for whom he acts regularly, this fact should be revealed to the other or others with a recommendation that they obtain independent representation. If, following such disclosure, all parties are content that the lawyer act, he should obtain their written consent, or record their consent in a separate letter to each. He should, however, guard against acting for both sides where, despite the fact that all parties concerned consent, it is reasonably obvious that an issue contentious between them may arise or their interests, rights or obligations will diverge as the matter progresses.[4, 5]

5. If, after the clients involved have consented an issue contentious between them or some of them arises, the lawyer, although not necessarily precluded from advising them on other non-contentious matters, would be in breach of the Rule if he attempted to advise them on the contentious issue. In such circumstances he should ordinarily refer the clients to other lawyers. However, if the issue is one which involves little or no legal advice, for example, a business rather than a legal question in a proposed business transaction, and the clients are sophisticated, he may let them settle it by direct negotiation in which he does not participate. Alternatively, he may refer one client to another lawyer and continue to advise the other if it was agreed at the outset that this course would be followed in the event of a conflict arising.

6. The same basic considerations apply where the conflicting interest arises not by reason of the lawyer's duties or obligations to another client but by reason of his own financial or other interest or that of an associate. For example, the lawyer or one

of his family or his partners might have a personal financial interest in the client 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.[6]

7. It is undesirable for a lawyer to represent anyone with respect to the investment by such person in a corporation or other entity in which the solicitor has an interest other than a corporation or other entity whose securities are publicly traded. At the very least he must insist that his client receive independent legal advice where the corporation is not publicly traded. If such investment be by way of borrowing from the client, the transaction may fall within the requirements of Rule 18.

8. (a) If the client elects to retain independent legal representation, the lawyer so retained shall act in all respects as though he were the client's own lawyer in connection with the transaction in question.

(b) If the client elects to waive independent legal representation but rely on independent advice only, the giving of independent advice by a lawyer to an investor in the above circumstances, once undertaken, imposes a high duty on the lawyer giving such independent advice and is an undertaking not to be lightly assumed or merely perfunctorily discharged.

(c) The lawyer giving such independent advice must, prior to any advance being made on the investment in question, provide the client with a signed certificate in writing (with a copy thereof signed by the client to the original lawyer) which must include at least the following:

(i) that the certifying lawyer has explained to the client his right to independent legal representation and that the client has expressly waived such right and elected to rely on the representation of the original lawyer;

(ii) that he has explained the transaction to the client, that the client understands the transaction and is satisfied to proceed on the basis outlined in sub-paragraph (i) supra; and

(iii) that the transaction appears to the certifying lawyer to be fair and reasonable from the point of view of the client.

9. In cases referred to in paragraphs 6 and 7 above when the lawyer is asked to act, he must, before accepting the employment, disclose and explain the nature of his conflicting interest

to the client, or in the case of a potential conflict, how and why it might develop later. If the lawyer does not choose to make such disclosure or cannot do so without breaching a confidence, he must decline the employment. If, following such disclosure the client requests him to act, he should obtain the client's written consent or record such consent in a letter to the client. However, the client's decision that he wants the lawyer to act in such circumstances should not be accepted uncritically by the lawyer. He should bear in mind that, if he accepts the employment, his first duty will be to his client, and if he has any misgivings about this ability to place his client's interests first, he should decline the employment.

10. The Rule will 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 sui juris and who wish to submit the dispute to him.[7]

11. The Rule does not purport to apply to situations in which the lawyer is holding funds or property of his client in trust. In all such cases the lawyer should abide by the applicable rules of law and of the Society.

12. A lawyer who has acted for a client in a matter should not thereafter act against him (or against persons who were involved in or associated with him in that matter) in the same or any related matter, or when he has obtained confidential information from the other party in the course of performing professional services. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work he has previously done for that person and where such confidential information is irrelevant to that matter.

13. The lawyer should not undertake to advise an unrepresented person but should urge him to obtain independent legal advice and if the unrepresented person does not do so, the lawyer must take care to see that such person is not proceeding under the impression that his interests will be protected by the lawyer. If the unrepresented person requests the lawyer to advise or act for him in the matter, the lawyer should be governed by the considerations outlined in this Rule.

14. For the sake of clarity, the foregoing paragraphs are expressed in terms of the individual lawyer and his client. However, it will be appreciated that the term "client" includes a client of the law firm of which the lawyer is a partner or

associate whether or not he handles the client's work.

15. Generally speaking, in disciplinary proceedings under this Rule, the burden of showing good faith and that adequate disclosure was made in the matter and the client's consent obtained, will rest upon the lawyer.

16. The introduction of compulsory insurance imposes additional obligations upon a lawyer. However, such obligations must not impair the relationship and duties of a lawyer to his client.

Section 12(b) of the policy of errors and omissions provides as follows:

'ASSUMPTION OF LIABILITY – The Insured shall not assume any liability, settle any claim or incur any expense, except at the Insured's own cost, or interfere in any negotiation for settlement or legal proceedings without the consent of the Insurer previously given in writing.'

The Insurer's rights must be preserved. There may well be occasions when a solicitor may believe that his actions or failure to take action have made him liable for damages to his client when in reality no such liability exists. Further, in every case a careful assessment will have to be made of the client's damages arising from the solicitor's negligence. Many factors will have to be taken into account in assessing the client's claim and damages.

As soon as a solicitor is aware that an error or omissions may have occurred which may make him liable to his client for professional negligence, he should take the following steps:

1. he should immediately arrange an interview with his client and advise the client forthwith that an error or omission may have occurred that may form the basis of a claim by the client against him;
2. the solicitor should advise the client to obtain an opinion from another independent solicitor and that in the circumstances he might no longer be able to act for him;
3. concurrently, the solicitor should advise Messrs. Maltman & Co., the adjusters for the Society of the facts of the situation;
4. the solicitor must bear in mind that in order to fulfill his duties to his client, the insurer and to his profession, he must co-operate to the fullest extent and

as expeditiously as possible with the Society's adjusters in the investigation and eventual settlement of the claim.

5. Upon settlement of the client's claim the solicitor must make arrangements to pay that portion of the client's claim that is not covered by the insurance, forthwith upon completion of the settlement.

OUTSIDE INTERESTS AND THE PRACTICE OF LAW

RULE 6

The lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize his professional integrity, independence or competence.[1]

Commentary

1. The term "outside interest" covers the widest possible range and includes activities which may overlap or be connected with the practice of law, such as for example, 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, careers in business, politics, broadcasting, and the performing arts. In each case the question of whether the lawyer may be permitted to engage in the outside interest, and, if so, to what extent will be subject to any applicable law or rule of the Society.[2]

2. The lawyer must not allow his involvement in an outside interest to impair the exercise of his independent professional judgment on behalf of his clients.[3]

3. Where the lawyer's outside interest is not related to the legal services that he performs for clients, ethical considerations will usually not arise unless his conduct might bring him or the profession into disrepute,[4] or his activities impair his competence as, for example, where the outside interest might so occupy his time that his client's interests would suffer from his inattention or unpreparedness.

PRESERVATION OF CLIENTS' PROPERTY

RULE 7

The lawyer owes a duty to his client to observe all relevant rules and laws regarding the preservation and safekeeping of the client's property entrusted to him. Where there are no such rules or laws or the lawyer is in any doubt, he should take the same care of such property as a careful and prudent man would take of his own property of like description.[1]

Commentary

1. The duties with respect to safekeeping, preserving and accounting for clients' moneys and other property are set out in the Regulations made pursuant to The Law Society Act.[2]

2. The lawyer should promptly notify his client of the receipt of any moneys or other property of the client unless he is satisfied that the client is aware that it has come into his custody.[3]

3. The lawyer should clearly label and identify his client's property and place it in safekeeping separate and apart from his own property.

4. In addition to maintaining the required records of clients' property in his custody, the lawyer should be prepared to account promptly for such property or to deliver it to or to the order of the client upon request. He should ensure that it is delivered to the right person, and in case of dispute as to the person entitled, he may have recourse to the courts.[4]

5. The duties here expressed are closely related to those regarding confidential information.[5] The lawyer should keep his clients' 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,[6] promptly return them to the client upon request or on the conclusion of his mandate.

6. The lawyer should be alert to claim on behalf of his clients any privilege in respect of their property seized or attempted to be seized by an external authority. In this regard he should be familiar with the nature of his client's privileges and with such relevant statutory provisions as are found in the Income Tax Act.[7]

THE LAWYER AS ADVOCATE

RULE 8

When acting as an advocate the lawyer must, while treating the tribunal with courtesy and respect, represent his client resolutely, honourably and within the limits of the law.[1]

Commentary

1. The lawyer has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case and to endeavour to obtain for his client the benefit of any and every remedy and defence which is authorized by law. He must discharge that duty by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect.[2]

The lawyer must not, for example:

(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 his client and are brought solely for the purpose of injuring the other party;[3]

(b) knowingly assist or permit his client to do anything which the lawyer considers to be dishonest or dishonourable;[4]

(c) appear before a judicial officer when he or his associates or his client have business or personal relationships with such officer which give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of such officer;[5]

(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;[6]

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, mis-stating 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;[7]

(f) knowingly mis-state the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority,[8]

(g) knowingly assert that for which there is no reasonable basis in evidence or the admissibility of which must first be established;[9]

(h) deliberately refrain from informing the tribunal of any pertinent authority which he considers to be directly in point and which has not been mentioned by his opponent;[10]

(i) dissuade a material witness from giving evidence or advise such a witness to absent himself;[11]

(j) knowingly assist a witness to misrepresent himself or impersonate another;

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

(l) needlessly inconvenience a witness.

2. (a) Where the lawyer discovers that he has unknowingly done or failed to do something which, if done or omitted knowingly, would have been in breach of this Rule, his duty to the court requires him, subject to Rule 4 on Confidential Information, to disclose the error or omission and do what he reasonably can in the circumstances to rectify it;[12]

(b) If the client desires that a course be taken which would involve a breach of this Rule, the lawyer must refuse and do everything reasonably possible to prevent it. If he cannot do so he should, subject to Rule 11 on Withdrawal, withdraw or seek leave to withdraw.[13]

3. (a) The lawyer should not submit his own affidavit to a tribunal in any proceeding in which he appears as advocate.

(b) The lawyer should not testify before a tribunal in any proceeding in which he appears as advocate, save as permitted by the Rules of Practice or as to purely formal or uncontroverted matters. Nor should the lawyer express his personal opinions or beliefs, or assert as fact anything that is properly subject to legal proof, cross-examination or challenge. He must

not make himself in effect an unsworn witness or put his own credibility in issue. If the lawyer is a necessary witness, he should testify and the conduct of the case should be entrusted to another lawyer. The lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings.[14] There are no restrictions upon the advocate's right to cross-examine a fellow lawyer, and the lawyer who does appear as a witness should not expect to receive special treatment by reason of his professional status.

(c) The requirements of this paragraph are at all times subject to any contrary provisions of the law or the discretion of the tribunal before whom the lawyer is appearing.

4. The lawyer may properly seek information from any potential witness (whether under subpoena or not) but he should disclose his interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.[15] An opposite party who is professionally represented should not be approached or dealt with save through or with the consent of his lawyer.[16]

5. The lawyer should never waive or abandon his client's legal rights, (for example an available defence under a statute of limitations) without his client's informed consent, but in civil matters it is desirable that the lawyer should avoid and discourage his client from resorting to frivolous or vexatious objections or attempts to gain advantage from slips or oversights not going to the real merits, or tactics which will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.[17]

6. Whenever his client's case can be fairly settled, the lawyer should advise and encourage his client to do so rather than commence or continue legal proceedings.[18]

7. 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 upon the merits.[19] The prosecutor exercises a public function involving much discretion and power, and must act fairly and dispassionately. He should not do anything which might prevent the accused from being represented by counsel or communicating with counsel and to the extent required by law and accepted practice, he should make timely disclosure to the accused or his counsel (or to the court if the accused is not represented) of all relevant facts and witnesses known to him, whether tending towards guilt or innocence.[20]

8. When defending an accused person, the lawyer's duty is to protect his 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 he is charged. Accordingly, and notwithstanding the lawyer's private opinions as to credibility or merits, the lawyer may properly rely upon any evidence or defences including "technicalities" not known to be false or fraudulent.[21]

9. Admissions made by the accused to his 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 his 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 he must not suggest that some other person committed the offence or call any evidence which, by reason of the admissions, he believes to be false. Nor may he 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 had not done, the act. Such admissions will also impose a limit upon the extent to which the lawyer may attack the evidence for the prosecution. He is entitled to test the evidence given by each individual witness for the prosecution and to argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but he should go no further than that.[22]

10. Where, following investigation,

(a) a defence lawyer bona fide concludes and advises his accused client that an acquittal of the offence charged is uncertain or unlikely,

(b) the client is prepared to admit the necessary factual and mental elements,

(c) the lawyer fully advises the client of the implications and possible consequences, and particularly of the detachment of the court, and

(d) the client so instructs him,

it is proper for the lawyer tentatively to agree with the prosecutor on the entry of a plea of guilty to the offence charged or to a lesser or included offence appropriate to the

admissions, and also on a disposition or sentence to be proposed to the court. The public interest must not be sacrificed in the pursuit of an apparently expedient means of disposing of doubtful cases.[23]

11. An undertaking given by the lawyer to the court or to another lawyer in the course of litigation must be strictly and scrupulously carried out. Unless clearly qualified, the lawyer's undertaking is his personal promise and responsibility.[24]

12. At all times the lawyer should be courteous and civil to the court and to those engaged on the other side. Legal contempt of court and the professional obligation 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.[25]

13. In adversary proceedings the lawyer's function as advocate is openly and necessarily partisan. Accordingly, he is not obliged (save as required by law or under paragraph 1(h) and paragraph 7 above) to assist his adversary or advance matters derogatory to his own client's case. When opposing interests are not represented, for example in ex parte or uncontested matters, or in other situations where the full proof and argument inherent in the adversary system cannot obtain, the lawyer must take particular care to be accurate, candid and comprehensive in presenting his client's case so as to ensure that the court is not misled.[26]

14. The principles of the present Rule apply generally to the lawyer in his capacity as advocate and therefore extend not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals and other bodies, regardless of their function or the informality of their procedures.[27]

15. The lawyer should observe the following guidelines respecting communication with witnesses giving evidence:

(a) During examination in chief by the lawyer of his own witness: it is not improper for such lawyer to discuss with the witness any matter that has not been covered in the examination before such discussion.

(b) During examination in chief by another lawyer of his witness who is not sympathetic to the lawyer's cause: it is not improper for the lawyer (not conducting the examination in chief) to discuss the evidence with

such a witness.

(c) Between completion of examination in chief and commencement of cross-examination of the lawyer's own witness: there ought to be no discussion of the evidence given in chief or relating to any matter introduced or touched upon during the examination in chief.

(d) During cross-examination by an opposing lawyer: while his witness is under cross-examination the lawyer ought not to have any coversation with him respecting his evidence or relative to any issue in the proceeding.

(e) Between completion of cross-examination and commencement of re-examination: the lawyer whose witness is to be re-examined by him ought not to have any discussion respecting evidence that will be dealt with on re-examination.

(f) During cross-examination by the lawyer of a witness not sympathetic to the cross-examiner's cause: it is not improper for such lawyer to discuss with such a witness the evidence of that witness.

(g) During cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause: in this case conversations ought to be restricted as in the case of communications during examination in chief of one's own witness.

(h) During re-examination of witness called by an opposing lawyer: if the witness is sympathetic to the lawyer's cause there ought to be no communication relating to the evidence to be given by that witness during re-examination. If the witness is adverse in interest, it does not seem improper for such lawyer to discuss the evidence of that witness with him.

If the lawyer questions whether his conduct may be in violation of a rule of conduct or professional etiquette, often it will be appropriate to obtain the consent of the opposing lawyer and leave of the court before engaging in conversations that may be considered improper or a breach of etiquette.

THE LAWYER IN PUBLIC OFFICE

RULE 9

The lawyer who holds public office should, in the discharge of his official duties, adhere to standards of conduct as high as those which these Rules require of a lawyer in the practice of law.[1]

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 or not he attained such office because of his professional qualifications.[2] He must bear in mind that he is in the public eye and therefore the legal profession can more readily be brought into disrepute by failure on his part to observe its ethical standards of conduct.

2. The lawyer who holds public office must not allow his personal or other interests to conflict with the proper discharge of his official duties. If he holds a part-time public office, he must not accept any private legal business in which his duty to his client will, or may conflict with his official duties, and if some unforeseen conflict arises, he should terminate the professional relationship, explaining to his client that his official duties must prevail. The lawyer who holds a full-time public office will not be faced with this sort of conflict, but he must nevertheless guard against allowing his independent judgment in the discharge of his official duties to be influenced by his own interest, that of some person closely related to or associated with him, that of his former or prospective clients, or that of his former or prospective partners or associates.[3]

3. Subject to any special rules applicable to the particular public office, the lawyer holding such office should, when he sees that there is a possibility of a conflict of interest, disqualify himself by declaring his interest at the earliest opportunity, and he should not take part in any consideration or discussion of or vote with respect to the matter in question.[4]

4. When the lawyer or any of his partners or associates is a member of an official body such as, for example, a school board or municipal council, he should not appear professionally before that body. However, subject to the rules of the official body it would not be improper for his partner or associate to appear professionally before a committee of such body if such partner or associate is not a member of that committee, provided that in respect to matters in which his partner or associate appears, the lawyer does not sit on the committee and takes no part in the discussion of such committee's recommendations nor votes upon them.[5]

5. The lawyer should not represent clients or advise them in contentious cases with respect to which he has been concerned in an official capacity if there may be a conflict of interest.[6]

6. After leaving public employment the lawyer should not act in connection with any particular matter in which he had substantial responsibility prior to his leaving. However, it would not be improper for the lawyer to act professionally in such a matter on behalf of the particular public body or authority which he served during his public employment.

7. By way of corollary to Rule 4, confidential information acquired by the lawyer by virtue of his holding public office should be kept confidential and should not be divulged nor used by him merely because he has ceased to hold such office.[7]

8. Generally speaking, the Society will not be concerned with the execution of the official responsibilities of a lawyer holding public office, but if his conduct in office reflects adversely upon his integrity or his professional competence, he may be subject to disciplinary action.[8]

FEES

RULE 10

The lawyer should not

(a) undertake to act for, charge or accept any fee which is not fully-disclosed, fair and reasonable;

(b) appropriate any funds of his client held in trust or otherwise under his control for or on account of his fees without the express authority of his client, except as permitted by the Regulation made under The Law Society Act[1]

Commentary

1. A fair and reasonable fee will depend upon and reflect such factors as

(a) the time and effort required and spent;

(b) the difficulty and importance of the matter;

(c) whether special skill or service has been required and provided;

(d) the amount involved or the value of the subject matter;

(e) the results obtained;

(f) fees authorized by statute or regulation, or a suggested fee schedule of a law association;

(g) such special circumstances as loss of other employment, uncertainty of reward, and urgency.

The lawyer should not offer to provide legal services at reduced rates for the purpose of attracting clients.

A fee will not be fair and reasonable if it is one which cannot be justified in the light of all pertinent circumstances, including the factors mentioned.[2]

2. It is in keeping with the best traditions of the legal profession to reduce or waive a fee in a situation where there is hardship or poverty or the client or prospective client would

otherwise effectively be deprived of legal advice or representation.[3]

3. Breach of this Rule and misunderstandings respecting fees and financial matters bring the legal profession into disrepute and reflect adversely upon the general administration of justice. The lawyer should try to avoid controversy with his client with respect to fees, and he should be ready to explain the basis for his charges (especially if the client is unsophisticated or uninformed as to the proper basis and measurements for fees). He 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 informed decisions. When something unusual or unforeseen occurs which may substantially affect the amount of the fee, the lawyer should forestall misunderstandings or disputes by explanations to his client.[4]

4. The lawyer should not charge his client interest on an overdue account unless permitted by law, and then only after adequate notice to the client.[5]

5. In matters where the lawyer is acting for two or more clients, it is his duty to divide his fees and disbursements equitably between them in the absence of agreement otherwise.

6. Any arrangement whereby lawyers directly or indirectly share, split or divide fees with conveyancers, notaries public, students, clerks or other persons who bring or refer business to the lawyer's office, is improper and constitutes professional misconduct. It is similarly improper for a lawyer to give any financial or other reward to such persons for referring business.

Thus an arrangement between a lawyer and a conveyancer to divide fees on applications for Probate or Administration is improper whether both participate in the work involved or not.

Similarly, any arrangement whereby in return for a flat fee or for part of the fee charged, a lawyer permits his name to be placed on such applications which have been prepared by the conveyancer is equally improper.

7. A fee will not be a fair one within the meaning of the Rule if it is divided with another lawyer who is not a partner or associate unless (a) the client consents, either expressly or impliedly to the employment of the other lawyer, and (b) the fees are divided in proportion to the work done and responsibilities assumed.[6]

8. The fiduciary relationship between the lawyer and his client requires full disclosure in all financial matters 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 whatsoever 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 and, where the lawyers' fees are being paid by someone other than the client such as a legal aid agency, a borrower, or a personal representative, the consent of such other. So far as disbursements are concerned, only bona fide and specified payments to others may be included, and if the lawyer is financially interested in the person to whom the disbursements are made, such as an investigating, brokerage or copying agency, he must expressly disclose this fact to his client.[7]

9. A lawyer should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject matter of litigation being conducted by him. It is improper for him to enter into an arrangement with his client for a contingent fee except in accordance with the provisions of the Solicitors Act.[8]

RULE 10.1

Any solicitor quoting a flat fee plus disbursements for a professional service is under a professional obligation to give such details of expected disbursements as to inform the client fully, so far as is reasonably possible, of the type and extent of such disbursements.

Commentary

1. It is not improper for a solicitor to charge as a disbursement any payment actually made, or for which a solicitor is liable, in the specific transaction to persons or offices not directly or indirectly employed or controlled by the solicitor's office and which are for services or materials necessary to enable the solicitor to properly carry out his obligations in the transaction.

Examples, in the context of a real estate transaction and

not intended to be exhaustive, include registry office payments for searches, searches under The Bank Act, searches for security registrations, bankruptcy searches, land transfer tax and municipal taxes.

2. It is improper for a solicitor to charge as a disbursement any direct or indirect cost incurred for a labour or service portion of a transaction by any person who is an employee of the solicitor, of the solicitor's office or of any company or other firm in which the solicitor has a direct or indirect financial interest. Where a labour or service portion of a transaction, e.g. a title search or closing of a real estate transaction, is to be delegated to any other person a client should be advised that there will be a disbursement for the fees of such other person. Services performed by such other person must be included in estimating such disbursement.

3. Items normally included as a part of office cost or overhead are not, in whole or in part, to be charged as disbursements. Any practice of charging to clients as a disbursement a proportion or percentage of a law office's long distance telephone accounts, photocopying expenses, transportation and other items of a similar general nature should be discontinued.

4. It is not improper to charge a client disbursements for long distance calls, photocopying, transportation, and other similar items payment of which has been actually made or expenses actually incurred in connection with the client's transaction and provided all such payments and expenses are reasonable.

5. Admittedly some charges such as photocopying may be difficult of precise cost calculation and in those areas reasonable actual costs may vary greatly and be dependent in part upon the size of a firm, type of photocopying equipment and volume of photocopying produced. The question of specific charges for photocopy reproduction should be resolved between a solicitor and his client, with the intervention of the Taxing Officer when appropriate and necessary.

6. Without limiting the foregoing solicitors as a general rule ought to inform a client in advance of any disbursement that the solicitor is aware may be incurred and which a client might not reasonably be expected to anticipate being made in addition to the fee quoted or estimated. *(New – June 1979)*

WITHDRAWAL OF SERVICES

RULE 11

The lawyer owes a duty to his client not to withdraw his services except for good cause and upon notice appropriate in the circumstances.[1]

Commentary

1. Although the client has the right to terminate the lawyer-client relationship at will, the lawyer has no such freedom of action. Having accepted professional employment he should complete the task to the best of his ability unless there is justifiable cause for his terminating the relationship.[2]

2. In all situations where the lawyer withdraws from employment he should act so as to minimize expense and avoid prejudice to his client, and do all that he reasonably can to facilitate the orderly transfer of the matter to the lawyer who succeeds him.[3]

3. In some circumstances the lawyer will be under a positive duty to withdraw. The obvious case is where he is discharged by the client. Other examples are (a) if he is instructed by his client to do something inconsistent with his duty to the court and if, following explanation, the client persists in his instructions; (b) if the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another; (c) if it becomes clear that the lawyer's continued employment will involve him in a breach of these Rules, such as for example, a breach of the Rule relating to Impartiality and Conflict of Interest (Rule 5); or (d) if the lawyer discovers that he is not competent to handle the matter. In these situations it will be the lawyer's duty to inform his client that he must withdraw.[4]

4. Situations where a lawyer would be entitled to withdraw, although not under a postive duty to do so, will usually only arise where there has been a serious loss of confidence between the lawyer and the client. Such a loss of confidence goes to the

very basis of the relationship. Thus, if the lawyer is deceived by his client he will have justifiable cause for withdrawal. Again, the refusal of the client to accept and act upon the lawyer's advice on a significant point might indicate such a loss of confidence. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by his client on a difficult question.[5]

5. Failure on the part of the client after reasonable notice to provide funds on account of disbursements or fees would also justify withdrawal by the lawyer if no serious prejudice to the client would result.[6]

6. No hard and fast rules can be laid down as to what will constitute reasonable notice prior to withdrawal. Where the point is covered by statutory provisions or rules of court, these will govern. In other situations the lawyer must be governed by the basic principle that he should protect his client's interests to the best of his ability and that he should not desert his client at a critical stage of a matter or at a time when his withdrawal would put the client in a position of disadvantage or peril.[7]

7. It is improper for a lawyer who has agreed to act to withdraw from a criminal case because of non-payment of fees where the date set for trial is not sufficiently far removed to enable the client to obtain another lawyer or to enable such other lawyer to prepare adequately for trial.

A lawyer who has agreed to act may withdraw from a criminal case because the client has not paid the fee agreed to be paid where the interval between the withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and sufficient to allow such other lawyer adequate time for preparation, provided that the lawyer:

(i) notifies the client in writing that he is withdrawing because his fees have not been paid;
(ii) accounts to the client for any monies received on account of fees;
(iii) notifies Crown Counsel in writing that he is no longer acting;
(iv) notifies the clerk or registrar of the appropriate court in writing that he is no longer acting where his name appears as lawyer for the accused on the records of the court.

The requirement contained in sub-paragraph (iv) has not previously been considered a requirement. This may be due, in

part, to the fact that in all counties in Ontario, except York County, the Crown Attorney is also the Clerk of the Peace who has by law the custody of certain documents relating to criminal cases. It is considered, however, that such a requirement is desirable as a courtesy to the court and, indeed, to protect the lawyer himself from unwarranted criticism by the court, and consequent loss of confidence by the public in the profession, if there has been a failure on the part of Crown Counsel to inform the court that he has received timely notification of the withdrawal by the lawyer. This might occur through inadvertence where a Crown Attorney, who is a member of a large staff, is asked to act in a particular court on very short notice and there is no document in the records of the court relating to withdrawal.

A lawyer who has undertaken the defence of a criminal case may withdraw from the case for adequate cause other than non-payment of fees, where the interval between the time of withdrawal and the trial of the case is sufficient to allow the client ample time to obtain another lawyer and to permit such lawyer to prepare adequately for trial, subject to the same requirements of notice to the client, accounting for monies received, notice to Crown Counsel and notice to the court which apply where he desires to withdraw because of non-payment of fees. Where a lawyer has withdrawn because of conflict with the client he should not under any circumstances indicate in a notice of withdrawal addressed to the court or Crown Counsel the cause of the conflict or make reference to any matter which would violate the privilege which exists between a lawyer and his client. The notice should merely state that he is no longer acting and has withdrawn.

Where a lawyer is justified in withdrawing from a criminal case, for a reason other than the non-payment of fees, and there is not a sufficient interval between the notification to the client of his intention to withdraw and the date upon 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, counsel may nevertheless withdraw from the case if, but only if, the court before which the case is to be tried grants him permission to withdraw.

Where circumstances arise which in the opinion of a lawyer require him to apply to the court for leave to withdraw, he should promptly inform Crown Counsel and the court of his intention to so apply in order to avoid or minimize

inconvenience to the court and witnesses.

8. Upon his discharge or withdrawal the lawyer should

(a) deliver to or to the order of the client all papers and property to which the client is entitled;

(b) give the client all information he may require in connection with the case or matter;

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

(d) promptly render his account for outstanding fees and disbursements;

(e) co-operate with the lawyer who succeeds him for the purposes outlined in paragraph 2.

The obligation in clause (a) to deliver papers and property is subject to the lawyer's right of lien referred to in paragraph 9. In the event of conflicting claims to such papers or property, the lawyer should use his best efforts to have the claimants settle the dispute.[8]

9. Where upon the discharge or withdrawal of the lawyer the question of his right of lien for unpaid fees and disbursements arises, he should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce his lien if the result would be to prejudice materially the client's position in any uncompleted matter.[9]

10. Before accepting employment, the successor lawyer should be satisfied that the other approves or has withdrawn or has been discharged by the client. 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 other 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 successor lawyer should not allow any outstanding account to interfere with his acting for the client.[10]

11. Where a lawyer acting for several clients in a case or matter ceases to act for one or more of them, he should co-operate with his successor lawyer or lawyers to the extent permitted by these Rules, and seek to avoid any unseemly rivalry or appearance of it.[11]

12. 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 prior to 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 paragraph 2.[12]

THE LAWYER AND THE ADMINISTRATION OF JUSTICE

RULE 12

The lawyer should encourage public respect for and try to improve the administration of justice.[1]

Commentary

1. The admission to and continuance in the practice of law implies on the part of the 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.[2]

2. The lawyer's training, opportunities and experience enable him to observe the workings and to discover the strengths and weaknesses of laws, legal institutions and authorities. He should therefore lead in seeking improvements in the legal system, but his criticisms and proposals should be bona fide and reasoned.[3]

3. The obligation outlined in the Rule is not restricted to the lawyer's professional activities but is a broad general responsibility resulting from his position in the community. His responsibilities are greater than those of a private citizen. He must not subvert the law by counselling or assisting in activities which are in defiance of it. He should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life must be particularly careful in this regard because the mere fact that he is a lawyer will lend weight and credibility to his statements.[4] But for the same reason he should not hesitate to speak out where he sees an injustice.

4. Although proceedings and decisions of tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, members of tribunals are often

prohibited by custom or by law from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, the lawyer should avoid criticism which is petty, intemperate or unsupported by his bona fide belief in its real merit, bearing in mind that in the eyes of the public his professional knowledge lends weight to his judgments or criticisms. Secondly, if he himself has been involved in the proceedings, there is the risk that his criticism may be, or may appear to be, partisan rather than objective. Thirdly, where the tribunal is the target of unjust criticism, the 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 the lawyer is thereby contributing to greater public understanding of and thus respect for the legal system.[5]

5. Whenever the lawyer seeks legislative or administrative changes, he should disclose whether he is pursuing his own interest, or that of a client or whether he is acting in the public interest. The lawyer may advocate such changes on behalf of a client even though he does not agree with them, but when he purports to act in the public interest, he should espouse only those changes which he conscientiously believes to be in the public interest.[6]

MAKING LEGAL SERVICES AVAILABLE

RULE 13

Lawyers should make legal services available to the public in an efficient and convenient manner which will command respect and confidence and by means which are compatible with the integrity, independence and effectiveness of the profession.[1]

Commentary

1. It is essential that a person requiring legal services be able to find, with a minimum of difficulty or delay, a lawyer who is qualified to provide such services. In a relatively small community, where lawyers are well known, the person will usually be able to make an informed choice and select a qualified lawyer in whom he has confidence. However in larger centres these conditions will not obtain and as the practice of law becomes increasingly complex and the practice of the individual lawyer tends to become restricted to particular fields of law, the reputations of lawyers and their competence or qualification in particular fields may not be sufficiently well known to enable a person to make an informed choice. Thus one who has had little or no contact with lawyers or who is a stranger in the community may have difficulty in finding a lawyer who has the special skill required for the particular task. Telephone directories, legal directories and referral services will help him find a lawyer, but not necessarily the right one for the work involved.[2]

2. The individual lawyer when consulted by a prospective client in such circumstances should be ready to assist in finding the right lawyer for the problem to be dealt with. If, for some reason, he cannot agree to act (e.g. he may not consider himself well qualified in the particular field), he should assist in finding a lawyer who is qualified and able to act. Such assistance should be willingly given and, except in very special circumstances, should be given without charge.[3]

3. The individual lawyer may also assist in making legal services available by participating in the Legal Aid Plan and referral services, by engaging in programmes of public information, education or advice concerning legal matters, and by being considerate of those who seek his advice but who are inexperienced in legal matters or cannot readily explain their problems.

4. The means by which it is sought to make legal services more readily available to the public must be consistent with the public interest and must not be such as would primarily advance the economic interests of any individual lawyer or law firm, or detract from the integrity, independence or effectiveness of the legal profession. Promotional advertising is not in the interest of the public or the profession.[4] Such advertising has for good reason been prohibited by all professions. It would be likely to encourage self-aggrandizement at the expense of truth and could mislead the uninformed and arouse unattainable hopes and expectations resulting in the distrust of legal institutions and lawyers. Moreover, there are sound economic reasons for not allowing promotional advertising, quite apart from the traditional reasons for which the professions have rejected it. There is the risk that such advertising would tend to increase the cost of legal services and in the course of time would tend to bring about a concentration of legal services in large firms that could afford to advertise freely to the detriment of the medium size and small firm, thereby unduly limiting the choice of persons seeking independent legal representation.[5]

5. *(Deleted – Sept. 1979)*

6. Lawyers should not use on their letterhead or on signs identifying their office the names of persons who if living are not qualified to practise in Ontario, or if dead never were qualified to practise in Ontario.

Lawyers who practise in the industrial property field may show the names of patent and trade-mark agents registered in Canada who are identified as such but who are not lawyers.

A lawyer's letterhead and the signs identifying his office should be restricted to the name of the lawyer or firm, a list of the members of any firm including counsel practising with the firm and the words "barrister-at-law", "barrister and solicitor", "lawyer", "law office", or the plural where applicable, the words "notary" or "commissioner for oaths" or both, and their plural where applicable, may be added, and the words "patent

and trade mark agent" in proper cases and its plural where applicable. Such letterhead may also contain the information referred to in sub-paragraph (a) of paragraph 14 hereof other than with respect to the fee for an initial consultation.

(Amended —April 1979)

Such words as "money to loan", "insurance office", "proctors", "attorneys", "mortgages", "solicitor to the township", or any other client, and the like should not be used.

Lettering and signs should be of modest size and in good taste. As a general guide, no sign need have the letters larger than six inches in height.

The Professional Conduct Committee may in special circumstances authorize exceptions to this paragraph.

7. A lawyer's professional card shall contain no more than the information permitted by these rules on his, or his firm's letterhead. For a lawyer who is not in private practice, the card may include the name of his employer.

8. (a) The use of the phrase "and company" in a firm name by a lawyer, either practising alone or in association with others, is improper on the ground that such use has a commercial connotation not in keeping with the nature of the profession.

(b) The use of phrases such as "John Doe and Associates" or "John Doe and Partners" in a firm name is improper unless there are in fact, respectively, two or more other lawyers associated with John Doe in practice or two or more partners of John Doe in the firm.

9. Informational advertising (as opposed to promotional advertising) can be of assistance to persons seeking legal services, for example (a) advertising on behalf of the profession by the Society and by groups authorized by it; (b) publication of names on legal aid panels and referral services sponsored or approved by the Society; (c) the use of nameplates on law offices and the publication of professional cards, letterheads, telephone listings and announcements permitted by these Rules. The overriding considerations are that the content of such advertising should be true and should not be capable of misleading those to whom it is addressed.[6] *(Amended Dec. – 1978)*

10. When considering whether or not informational advertising in a particular area meets the public need, consideration must be given to the clientele to be served. For example, in a small

community with a stable population, a person who requires a lawyer for a particular purpose will not have the same difficulty in selecting one as someone in a newly-founded community or a large city.[7]

11. The lawyer should not, directly or indirectly, do or permit any act or thing to be done which can reasonably be regarded as professional touting[8] or as designed primarily to attract legal business. The lawyer should not offer generally to provide legal services at reduced rates for the sole purpose of attracting clients. However, he may properly assist in making legal services available by charging a reduced fee or no fee at all to a person who would have difficulty in paying the fee usually charged for such service, or by accepting a salary, flat fee or retainer from, or under a scheme established by Government or the Society or a community service group in order to provide legal services to a defined or identifiable section of the public. For this purpose, a community service group means a group established for purposes which are charitable or educational or which involve self-improvement of its members through mutual aid and assistance and includes a group formed for the express purpose of providing legal services to persons who cannot afford normal or fixed or any fees.

12. The lawyer should not solicit appearances on radio, television or other public forum in his professional capacity as a lawyer or attempt to use any such appearance as a means of professional advertisement. Nor should he engage in his capacity as a lawyer in any public appearance that might discredit the legal profession. It is quite proper for the lawyer to appear in his private or personal capacity as a speaker, actor or otherwise on a non-legal programme where his professional activity as a lawyer is not the reason for his appearance, and in such cases he may be described as a lawyer. If his professional capacity is the reason for his appearance, any introduction or description of him should be limited to his name, professional designation and a reasonable amount of biographical detail.[9]

13. The lawyer has a general right to decline particular employment (except when he has been assigned as counsel by a court), but it is a right he should be slow to exercise if the probable result would be to make it very difficult for a person to obtain legal advice or representation. Generally speaking, he should not exercise the right merely because a person seeking his 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 his private opinion as to the guilt of the accused. As stated in paragraph 2, the lawyer declining employment should assist in obtaining the services of another lawyer competent in the particular field and able to act.[10]

14. (a) A lawyer may publish a professional card in any publication provided that the publication will accept cards from all lawyers without restriction. The professional card may contain information that he is in General Practice, or that he will practise in up to three of the preferred areas of practice defined by Convocation, provided that he complies with the requirements respecting those areas approved from time to time by Convocation; it may also contain information concerning the languages in which he is proficient and capable of conducting his practice, his addresses, telephone numbers and office hours and his fee for an initial consultation. The card shall be no larger than 12 square inches or approximately 72 square centimeters in size. A lawyer may also publish as aforesaid and circulate among the profession or among his clients announcements containing information pertaining to his practice such as change of office hours, change of address or change of personnel. *(Amended – Sept. 1979)*

(b) A lawyer may insert a listing in the white pages of the telephone company directory for each place in which he maintains an office for the practice of law. In the yellow pages of the telephone company directory, in addition to a listing for each place in which he maintains an office for the practice of law, a lawyer may insert a listing in the yellow pages published for that area in which he can reasonably be considered to practise law. Such listings in a telephone company directory may contain the information referred to in sub-paragraph 14(a) and shall be no larger than is reasonably necessary to convey such information. Where the part of the yellow pages devoted to listings by lawyers provides separate sections for "General Practice" and for the preferred areas of practice

approved by Convocation from time to time a lawyer may either insert a listing under "General Practice", or may insert listings under not more than three such preferred areas of practice. A firm of lawyers may either:

(1) list the firm name only under "General Practice" and the names of each of the lawyers practising with the firm under up to three of such preferred areas of practice, followed by the firm name in brackets, or,

(2) list the firm name only under up to three such preferred areas of practice. *(Amended – Sept. 1979)*

(c) A lawyer should not authorize or permit any notice or announcement or card to be circulated or to be published in any newspaper, periodical, programme, directory, telephone company directory, law list or other publication except in accordance with the informational advertising provisions herein. *(New – Dec. 1978)*

(d) The provisions herein shall apply mutatis mutandis to firms of lawyers and associations of lawyers who practise under a firm name. *(New – Dec. 1978)*

15. A lawyer may write for a 'legal' publication, that is one intended to be read normally only by members of the legal profession, sign his name, and have his professional qualifications, firm name and biographical facts stated.

A lawyer may write for a 'non-legal' publication, that is, one with a general readership such as a newspaper, trade magazine, etc., and sign his name. He may be referred to as a barrister and solicitor, lawyer or Queen's Counsel, as the case may be and his firm name may be stated, but he should not be referred to as a specialist, nor should any other statement of his special or professional qualifications, experience or abilities be made by him or otherwise. The area or areas of law in which he practises may, however, be mentioned. *(Amended – Sept. 1979)*

16. Without express and unsolicited instructions from the client, it is improper for the lawyer to insert in the client's will, a clause directing the executor to retain the services of the lawyer in the administration of the estate.

17. A lawyer should not:

(a) permit his name to appear as solicitor, counsel or Queen's Counsel on any advertising material offering goods (other than securities or legal publications) or services to the public;

(b) while in private practice, permit his name to appear on the letterhead of a company as being its solicitor or counsel of a business, firm or corporation, other than the designation of honorary counsel or honorary lawyer on the letterhead of a non-profit or philanthropic organization which has been approved for such purpose by the Professional Conduct Committee;

(c) act for a vendor of property who, to the knowledge of the lawyer, as an inducement to a purchaser advertises or makes any representation through salesmen or otherwise, that a registered deed is included in the purchase price, or leads purchasers to believe that it is unnecessary for them to be represented in the transaction;

(d) hold himself out or permit himself to be held out to any prospective purchaser as being specially fit to act for such purchaser because of his special knowledge as solicitor for the vendor;

(e) permit a vendor or his agent to hold out to a prospective purchaser that he, as lawyer for the vendor, will act for such purchaser and that the vendor will pay in whole or part, his fees as lawyer for such purchaser;

(f) arrange for or encourage any other person (e.g. real estate agent) to make a practice of recommending to any party that the lawyer's services be retained;

(g) act for or accept a brief from, or on behalf of a member of a club or organization, as for example an automobile club which makes a practice of "steering" its members, provided that a lawyer may assist a community social agency by providing legal advice or service on a gratuitous basis for persons falling within the scope of the agency's activities.

RESPONSIBILITY TO THE PROFESSION GENERALLY

RULE 14

The lawyer should assist in maintaining the integrity of the profession and should participate in its activities.[1]

Commentary

1. Unless a lawyer who tends to depart from proper professional conduct is checked at an early stage, loss or damage to his 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 which would lead to serious breaches in the future. It is therefore proper (unless it be privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving or appearing to involve a breach of these Rules. Where, however, there is a reasonable likelihood that someone will suffer serious damage as a consequence of an apparent breach, for example where a shortage of trust funds is involved, the lawyer has an obligation to report the matter unless it is privileged or otherwise unlawful for him to do so. In all cases the report must be made bona fide without malice or ulterior motive.[2]

2. The lawyer has a duty to reply promptly to any communication from the Society.[3]

3. The lawyer should not write, in the course of his practice, letters, whether to his client, another lawyer or any other person, which are abusive, offensive or otherwise totally inconsistent with the proper tone of a professional communication from a lawyer.[4]

4. There shall be no discrimination by the lawyer on the grounds of race, creed, colour, national origin or sex in the employment of other lawyers or articled students or in other relations between him or her and other members of the profession.[5]

5. To maintain the honour of the Bar, members 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 obligations the lawyer concerned clearly indicates in writing that he is not prepared to meet the obligation personally.

Generally, members have a professional duty to meet financial obligations in relation to their practice, including prompt payment of the deductible under the Society's Errors and Omissions Insurance Plan when properly called upon to do so.

PRACTICE BY UNAUTHORIZED PERSONS

RULE 15

The lawyer should assist in preventing the unauthorized practice of law.[1]

Commentary

1. Statutory prohibitions against the practice of law by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal abilities, but they are immune from control, regulation and, in the case of misconduct, from discipline by the Society. Moreover, the client of a lawyer who is authorized to practice has the protection and benefit of the lawyer-client privilege, the lawyer's duty of secrecy, the professional standards of care which the law require of lawyers, the authority which the courts exercise over them, and of other safeguards such as professional liability insurance, rights with respect to the taxation of bills, rules respecting trust money, and requirements as to the maintenance of compensation funds.[2]

2. The lawyer must assume complete professional responsibility for all business entrusted to him. He must maintain direct supervision over his staff and over assistants such as students and clerks to whom he delegates particular tasks and functions. For example, if he practises alone or operates a branch or part-time office, he 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, whether in his name or otherwise. Furthermore, the amount of any fee to be charged to a client should be approved by the lawyer.[3]

3. No collection letter should be sent out over the signature of a lawyer unless the letter is on his letterhead, prepared under his supervision, signed by him and sent from his office.

RESPONSIBILITY TO LAWYERS INDIVIDUALLY

RULE 16

The lawyer's conduct towards other lawyers should be characterized by courtesy and good faith.[1]

Commentary

1. 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 conducts himself otherwise, does a disservice to his client, and neglect of the Rule will impair the ability of lawyers to perform their function properly.[2]

2. Any ill feeling which 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 references between them should be avoided, and haranguing or offensive tactics interfere with the orderly administration of justice and have no place in our legal system.[3]

3. The lawyer should accede to reasonable requests concerning trial dates, adjournments, waiver of procedural formalities and similar matters which do not prejudice the rights of his client.[4]

4. The lawyer should avoid sharp practice. He should 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 the client's rights. He should not use a tape-recorder or other device to record a conversation between the lawyer and a client, another lawyer, or anyone else, even if lawful, without first informing the other person of his intention to do so.[5]

5. The lawyer should answer with reasonable promptness all professional letters and communications from other lawyers which require an answer, and he should be punctual in fulfilling all commitments.[6]

6. The lawyer should give no undertaking he cannot fulfill and he should fulfill every undertaking he gives. Undertakings should be written or confirmed in writing and they should be absolutely unambiguous in their terms. If the lawyer giving an undertaking does not intend to accept personal responsibility, he should state this quite 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.[7]

7. The lawyer should not communicate upon or attempt to negotiate or compromise a matter directly with any party who is represented by a lawyer except through or with the consent of that lawyer.[8]

8. The lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but he should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.[9]

9. The same courtesy and good faith should characterize the lawyer's conduct toward lay persons lawfully representing others or themselves.

DISBARRED PERSONS

RULE 17

No lawyer shall, without the express approval of Convocation, retain, occupy office space with, use the services of, or employ in any capacity having to do with the practice of law, any person who in Ontario or elsewhere, has been disbarred and struck off the Rolls, or has been suspended, or has been involved in disciplinary action and has been permitted to resign as a result thereof, and who has not yet been readmitted.[1]

BORROWING FROM CLIENTS

RULE 18

1. A lawyer must not borrow money from his client save:

   (a) where the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business is that of lending money to members of the public; or

   (Amended – Nov. 1978)

   (b) where 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 representation; or

   (c) where in the case of a loan from a related person as defined by the *Income Tax Act* (Canada) 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.

   (Amended – Nov. 1978)

2. In any transaction, other than one falling within the provisions of sub-paragraph 18.1(a) supra, in which the funds of a client are borrowed by the lawyer, by the lawyer's spouse or by a corporation, syndicate or partnership in which the lawyer or his spouse has, or both of them together have, directly or indirectly a substantial interest, the fullest disclosure must be made to the client in writing and the lawyer must discharge the same onus as is set forth in sub-paragraphs 18,1(b) and (c), as the case may be.

3. Whether a person lending money to a lawyer on his own account or investing funds in a security in which the lawyer has an interest is to be considered a client within the above principle, is to be determined having regard to all the circumstances. If the circumstances are such that the lender or investor might reasonably suppose that he was entitled to look to the lawyer for guidance and advice in respect of the loan or investment, then the lawyer should consider himself bound by

the same fiduciary obligation that attaches to a lawyer in dealings with a client.

Commentary

1. It is a matter of grave concern to Convocation that in a number of instances of professional misconduct on the part of lawyers, in relation to the misuse of trust funds or the improper obtaining of monies, the borrowing of money by the lawyers in question from clients has been a factor leading to the professional misconduct involved. In some instances the monies have been borrowed from the client without any security, other than the promissory note of the lawyer. Usually the money was borrowed from the client for the purpose of being reinvested by the lawyer for his own profit. This practice, of course, must be carefully distinguished from the normal and traditional function of the lawyer in placing funds left with the lawyer on trust to be invested on behalf of the client. In performing such function the lawyer is in no way personally involved in the transaction, and providing that he acts without negligence in investing the funds of the client, obtains the security bargained for by the client, and makes a full and accurate report to the client, he incurs no personal liability.

The relationship existing between a lawyer and his client is a fiduciary one and no conflict between his own interest and his duty to his client can be permitted to exist.

2. With regard to independent legal representation attention is directed to paragraph 8(a) of the Commentary to Rule 5.

3. The above statements do not purport to be exhaustive. The attention of the profession is called to the numerous reported authorities as to the duty of the lawyer to his client and the various transactions and dealings that the courts have held to be improper or reprehensible conduct in violation of these principles, and which, in addition to their consequences at law, constitute professional misconduct.

RETIRED JUDGES RETURNING TO PRACTICE

RULE 19

Without the express approval of Convocation, no member who was formerly a Judge of the Supreme Court of Canada, the Federal Court of Canada, the Supreme Court of Ontario or of a County or District Court and who has retired, resigned or been removed from the Bench and returned to practice, shall appear as counsel or advocate in any court, or in chambers, or before any administrative board or tribunal.

Commentary

1. Litigants are bound to think that a former judge will be in a preferred position before the courts whether or not such is the fact. If in a given case the former judge should be in a preferred position by reason of having held judicial office, the administration of justice would suffer; if in a given case the reverse were true, his client might suffer. There may, however, be cases where the Society would consider that no impropriety or appearance of impropriety would result, e.g. in the case of resignation for good reason after only a very short time on the Bench.

ABBREVIATIONS, CITATIONS AND BIBLIOGRAPHY

1. In the footnotes standard "Canadian form" citations and references are used; for brevity alternate citations are not offered. Short-form references to existing Canons, Codes, Rulings and particular writings are as follows:

Alta. *Rulings* of the Benchers of the Law Society of Alberta, contained in the *Professional Conduct Handbook* published by that Society at Calgary in 1968, as amended (Nos. 1 to 43).

ABA *Code of Professional Responsibility* of the American Bar Association (Chicago), adopted with effect from January 1st, 1970. Divided into Canons, Ethical Considerations (ECs) and Disciplinary Rules (DRs).

Bennion *"Professional Ethics: The Consultant Professions and Their Code"*, by F. A. R. Bennion (1969, Charles Knight, London, 267 pp.).

B.C. *Rulings* of the Benchers of the Law Society of British Columbia contained in the *Professional Conduct Handbook* published by that Society at Vancouver in 1970, as amended (Nos. A-1 to G-7).

CBA *Canons of Legal Ethics* of The Canadian Bar Association adopted in 1920 (Nos. 1(1) to 5(6).

IBA *"Professional Ethics"*, by Sir Thomas Lund, being Book II of the International Bar Association published in 1970 by that Association (Sweet & Maxwell, London, Nos. A-1 to F-6, 51 pp.) Includes as an Appendix the *"International Code of Ethics"* of the International Bar Association adopted in 1956, as amended.

N.B. *Rules* of the Barristers' Society of New Brunswick contained in the *Professional Conduct Handbook* published by that Society at Fredericton in 1971 (Nos. A-1 to F-3).

Orkin — *"Legal Ethics: A Study of Professional Conduct"*, by Mark M. Orkin (1957, Cartwright, Toronto, 330 pp.).

P.C.C. — Professional Conduct Committee.

Que. — *Code of Professional Ethics* of The Bar of the Province of Quebec, being arts. 29 to 100 of By-law No. 1 of that Bar, adopted in 1968, as amended.

Sask. — *Canons of Legal Ethics and Etiquette* of The Law Society of Saskatchewan, published by the Benchers of that Society at Regina in 1962, as amended.

2. The following is a selected bibliography of texts and other sources helpful to those concerned with matters within the general ambit of this Code:

Arthurs, H. W., and Bucknall, B. D.: Bibliographies on the Legal Profession & Legal Education in Canada (1968, York University, Toronto)

Bennion, F. A. R., *supra No. 1.* For further bibliographies see at pp. 238-40.

Boulton, W. W.: Conduct and Etiquette at the Bar (1971 (5th), Butterworths, London).

Cordery on Solicitors (1968 (6th and suppls.), Butterworths, London).

Drinker, H.: Legal Ethics (1965, Columbia U. P., New York).

Johnston, Q., and Hopson, D.: Lawyers and Their Work (1967, Bobbs-Merrill, Indianapolis).

Lund, Sir T.: A Guide to the Professional Conduct and Etiquette of Solicitors (1960, Law Society, London).

Maru, O., and Clough, R. L.: Digest of Bar Association Ethics Opinions (1970, American Bar Foundation, Chicago).

Mathews, R. E.: Problems Illustrative of the Responsibilities of Members of the Legal Profession (1968 (2nd), Council on Legal Education for Professional Responsibility, New York). For further bibliographies see at pp. xii-xiv.

Orkin, M. M., *supra* No. 1. For further bibliographies see at pp. 295-96.

Pirsig, M.: Professional Responsibility (1970, West, St. Paul, Minn.)

Trumbull, W. M.: Materials on the Lawyer's Professional Responsibility (1957, Little Brown, Boston).

NOTES

RULE 1

1. *O.E.D.:* "Integrity, . . . soundness of moral principle . . . esp. in relation to truth and fair dealing; uprightness, honesty, sincerity."

   Cf. IBA, "Introductory": "The rules of professional conduct enforced in various countries . . . uniformly place the main emphasis upon the essential need for integrity and, thereafter, upon the duties owed by a lawyer to his client, to the Court, to other members of the legal profession and to the public at large."

2. "Integrity, probity or uprightness is a prized quality in almost every sphere of life . . . The best assurance the client can have . . . is the basic integrity of the professional consultant . . . Sir Thomas Lund says that . . . his reputation is the greatest asset a solicitor can have . . . A reputation for integrity is an indivisible whole; it can therefore be lost by actions having little or nothing to do with the profession . . . Integrity has many aspects and may be displayed (or not) in a wide variety of situations . . . the preservation of confidences, the display of impartiality, the taking of full responsibility are all aspects of integrity. So is the question of competence. . . *Integrity is the fundamental quality, whose absence vitiates all others." Bennion, passim,* pp. 108-12 (Emphasis added).

3. Illustrations of conduct which may infringe the Rule (and, often, other provisions of this Code) include:

   (a) committing any personally disgraceful or morally reprehensible offence which reflects upon his integrity (whereof a conviction by a competent court would be prima facie evidence):

   (b) committing, whether professionally or in his personal capacity, any act of fraud or dishonesty, e.g. by knowingly making a false tax return or falsifying a document even without fraudulent intent, whether or not prosecuted therefor;

   (c) making untrue representations or concealing material facts from a client with dishonest or improper motives;

   (d) taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of a client;

   (e) misappropriating or dealing dishonestly with his client's monies:

   (f) failing without the client's consent to pay over for that purpose any money received from or on behalf of a client expressly for a specific purpose;

   (g) knowingly assisting, enabling or permitting any person to act fraudulently, dishonestly or illegally towards his client:

   (h) failing to be absolutely frank and candid in all his dealings with the courts, his fellow lawyers and other parties to proceedings, subject always to not betraying his client's cause, abandoning his legal rights or disclosing his confidences;

   (i) failing, when dealing with a person not legally represented, to disclose material facts, e.g. the existence of a mortgage on a property being sold, or by supplying false information, whether he is professionally representing a client or is concerned personally;

(j) failing to honour his word when pledged, even though under technical rules the absence of a writing might afford a legal defence.

(k) some other examples are specifically dealt with in subsequent chapters.

(The foregoing are drawn largely from IBA A-1 to A-24 and from other disciplinary records. For illustrative cases in the same area see, e.g. 36 *Halsbury* (3d) pp. 222-26 and *Orkin*, pp. 204-14. In *Re Weare* (1893) 2 Q.B. 439 (C.A.) the striking-off of a solicitor who had knowingly rented his premises for use as a brothel was sustained by the Court.)

As to the distinction, in disciplinary proceedings, between "professional misconduct" and "unprofessional conduct", see note 3 to the *Preface, supra.*

4. Cf. IBA, Chapter 2.
"The public looks for a hallmark bestowed by a trusted professional body, and evidenced by entry on a register or members' list." (p. 36) "Membership of a . . . professional body is generally treated as an indication of good character in itself . . ." (p. 111) *Bennion.*

RULE 2

1. Cf. IBA B-1; ABA Canon 6, ECs 6-1 to 6-5, DR 6-101 (A).
"The public looks for a hallmark bestowed by a trusted professional body, and evidenced by entry on a register or members' list. (p. 36) . . . Having bestowed a hallmark of competence, a professional institute has some responsibility for ensuring that it remains valid." (p. 48) *Bennion.*
See also Bastedo, *A Note on Lawyers' Malpractice,* (1970) 7 Osg. Hall L.J. 311.

2. As a matter of law the English and Canadian courts have consistently held that actions by clients against their lawyers for breach of duty stem from the contracts of employment made or implicit on retainer, or from the fiduciary relationship that exists between lawyer and client, and not on any general "tort" basis. A contractual or fiduciary relationship must be established. See, e.g. *Groom v. Crocker et al.* (1938) 2 All E.R. 394 (C.A.), *Rowswell* v. *Pettit et al.* (1968) 68 D.L.R. (2d) 202 (Ont. H.C.) at pp. 209-12 (affd. with variations as to damages by S.C.C. sub nom. *Wilson et al.* v. *Rowswell* (1970) S.C.R. 865.)

3. "Incompetence goes wider than lack of professional skill, and covers delay, neglect and even sheer disobedience to the client's instructions." *Bennion,* p. 53.

4. "This solicitor's very presence as a lawyer . . . is an assurance to the public that he has the training, the talent and the diligence to advise them about their legal rights and competently to aid in their enforcement. Having regard to the faith which a citizen ought to be able to place in a member of the Law Society . . ." per Porter J.A. in *Cook* v. *Szott et al.* (1968) 68 D.L.R. (2d) 723 at 726 (Alta. App. Div.).

5. Cf. *Orkin,* pp. 123-25, and para. 9, *post.*
"A client has a right to honest explanations for delay on the part of his solicitor, and it is clear that the Benchers . . . concluded that the solicitor had not given an honest explanation for the delay, but on the contrary had deceived his client as to the reason for such delay . . . " per Farris C.J.S.C. in *Re Legal Professions Act; Sandberg* v. *"F"* (1945) 4 D.L.R. 446 at 447 (B.C. Visitorial Tribunal). Cf. IBA D-1. In some jurisdictions (e.g. Ontario, "Law Society Act" R.S.O. 1970 c. 238 s. 35) provision is made for inquiry and suspension of members incapacitated by reason of age, physical or mental illness including addiction to alcohol or drugs, or other cause.

6. For a denunciation of dilatory practices of solicitors with observations re, see *Allen* v. *McAlpine et al.* (1968) 2 W.L.R. 366 (C.A.)

7. "I take the law as to the standard of care of a solicitor to be accurately stated in Charlesworth on Negligence . . . . . it must be shown that the error or ignorance was such that an ordinarily competent solicitor would not have made or shown it." per LeBel J. in *Aaroe & Aaroe* v. *Seymour* (1957) 6 D.L.R. (2d) 100 at 101 (Ont. H.C.).
". . . as a future guide to Benchers (this Visitorial Tribunal) expresses the opinion that the words "good cause" in the *Legal Professions Act* are broad enough . . . to justify the Benchers in suspending a member . . . who has been guilty of a series of acts of gross negligence, which, taken together, would amount to a course of conduct sufficient to bring the legal profession into disrepute." per Farris C.J.S.C. in *Re Legal Professions Act; Baron* v. *"F"* (1945) 4 D.L.R. 525 at 528. (B.C. Visitorial Tribunal).

8. For an instance of "inordinate and inexcusable delay" see *Tiesmaki* v. *Wilson* (1972) 23 D.L.R. (3d) 179 per Johnson J.A. at 182 (Alta. App. Div.).

RULE 3

1. Cf. CBA 3(1); Que. 47(1)(3); IBA A-10; *Orkin* at pp. 78-79.

2. The lawyer should not remain silent when it is plain that his client is rushing into an "unwise, not to say disastrous adventure." See per Lord Danckwerts in *Neushal* v. *Mellish & Harkavy* (1967) 111 Sol. Jo. 399 (C.A.).

3. For cases illustrating the extent to which a lawyer should investigate and verify facts and premises before advising see, e.g., those collected in 43 E. & E.D. (Repl.) at pp. 97-115.

4. Cf. CBA 3(1) and Eaton, *Practicing Ethics* (1966) 9 Can. B.J. 349.

5. Cf. CBA 3(3) and *Orkin* at pp. 95-97. N.B. C-3: "The lawyer has a duty to discourage a client from commencing useless litigation; but the lawyer is not the judge of his client's case and if there is a reasonable prospect of success the lawyer is justified in proceeding to trial. To avoid needless expense it is the lawyer's duty to investigate and evaluate the proofs or evidence upon which the client relies *before* the institution of proceedings. Similarly, when possible the lawyer must encourage the client to compromise or settle the dispute." "(the litigation process) operates to bring about a voluntary settlement of a large proportion of disputes . . . This fact of voluntary settlement is an essential feature of the judicial system." Jackett (C.J.F.C.C.), *The Federal Court of Canada,* A Manual of Practice (1971) at pp. 41-42.

6. Cf. CBA 3(5) ". . . the great trust of the lawyer is to be performed within and not without the bounds of the law." See also ABA DR 7-102(A).
   Any complicity such as "abetting", "counselling" or being an "accessory" to a crime or fraud is obviously precluded.
   Cf. ABA ECs 7-3 and 7-5: "Where the bounds of law are uncertain . . . the two roles (of advocate and adviser) are essentially different. In asserting a position on behalf of his client, an *advocate* for the most part *deals with past conduct* and must take the facts as he finds them. By contrast a lawyer serving as *adviser* primarily *assists* his client *in determining* the course of *future conduct* and relationships . . . A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment . . ." (Emphasis added).
   "The arms which (the lawyer) wields are to be the arms of the warrior and not of the assassin. It is his duty to accomplish the interests of his clients *per fas,* but not *per nefas."* per Cockburn L.C.J. in a speech in 1864 quoted as being derived from Quintilian in Rogers, *The Ethics of Advocacy* (1899) 15 L.Q.R. 259 at 270-71. Applied to a solicitor in a "very clear case where the solicitor has been guilty of misconduct" and is "floundering in a quagmire of ignorance and moral obliquity" (he having pending trial of an action, in anticipation of an adverse outcome, advised his client to dispose of its property and, after verdict, taken an assignment of part of that property). *Centre Star* v. *Rossland Miners Union (1904-05) 11 B.C.R. 194 at 202-03 (B.C. Full Ct.).*

7. For example, to challenge the jurisdiction for or the applicability of a shop-closing by-law or a licencing measure, or to determine the rights of a class or group having some common interest.

8. See article, *Criminal Law May Not Be Used to Collect Civil Debts* (1968) vol. II No. 4 Law Soc. U.C. Gaz. 36. And cf. B.C. E-5; Alta 41; ABA DR 7-105(A).

9. Epitome from Johnstone & Hopson, *Lawyers and Their Work* (1967), Bobbs-Merill, Indianapolis (a U.K.-U.S. comparison), pp. 78-81: The lawyer's advice is usually largely based on his conception of relevant legal doctrine and its bearing on the particular factual situation at hand. Anticipated reactions of courts, probative value of evidence, desires and resources of clients, and alternative courses of action are likely to have been considered and referred to. He may indicate his preference and argue persuasively, or pose available alternatives in neutral terms. He makes the law and legal processes meaningful to clients; he explains legal doctrine and practices and their implications; he interprets both doctrine and impact. Often legal and nonlegal issues are intertwined. Much turns on whether the client wants a servant, a critic, a sounding board, a neutral evaluator of ideas, reassurance, authority to strengthen his hand . . . The real problem may be one, not of role conflict, but of role definition. The lawyer may spot problems of which the client is unaware and call them to his attention.

10. See Bastedo, *A Note on Lawyers' Malpractice* (1970) 7 Osg. Hall L.J. 311.

RULE 4

1. Cf. CBA 3 (7); Que. 47(2), 131(1)(2); B.C. B-6; Alta. 15; N.B. C-5; IBA B-8; ABA Canon 4, DRs, 4-101(A)(B)(C).

2. ". . . it is absolutely necessary that a man, in order to prosecute his rights or to defend himself . . . should have recourse to . . . lawyers, and . . . equally necessary . . . that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent) . . ." per Jessell M.R. in *Anderson* v. *Bank of British Columbia* (1876) L.R. 2 Ch.D. 644 at 649 (C.A.).

3. Cf. *Orkin* pp. 83-86, and Tollefson, *Privileged Communications in Canada* (1967) Proceedings of 4th Int. Comp. Law Symp. (Univ. of Ottawa Press) 32 at 36-41.

4. ". . . a fundamental rule, namely the duty of a solicitor to refrain from disclosing confidential information unless his client waives the privilege . . . Because the solicitor owes to his former client a duty to claim the privilege when applicable, it is improper for him not to claim it without showing that is has been properly waived." per Spence J. in *Bell et al.* v. *Smith et al.* (1968) S.C.R. 664 at 671.
   To waive, the client must know of his rights and show a clear intention to forego them: *Kulchar* v. *March & Benkert* (1950) 1 W.W.R. 272 (Sask. K.B.).

5. Misuse by a lawyer for his own benefit of his client's confidential information may render the lawyer liable to account: *McMaster* v. *Byrne* (1952) 3 D.L.R. 337 (P.C.); *Bailey* v. *Ornheim* (1962) 40 W.W.R. (N.S.) 129 (B.C.S.C.).

6. *"Joint Retainer.* When two parties employ the *same solicitor,* the rule is that communications passing between either of them and the solicitor, in his *joint capacity,* must be disclosed in favour of the other – *e.g.* a proposition made by one, to be communicated to the other; or instructions given to the solicitor in the presence of the other; though it is otherwise as to communications made to the solicitor in his *exclusive* capacity." (quotation from *Phipson on Evidence* cited and approved by Aikins J. in *Chersinoff* v. *Allstate Insurance* (1968) 69 D.L.R. (2d) 653 at 661 (B.C.S.C.).
   As to the duties of lawyers instructed by insurers in the defence of assureds in motor-accident cases, see *Groom* v. *Crocker at al.* (1938) 2 All E.R. 394 (C.A.).

7. See Eaton, *Practicing Ethics,* (1967) 10 Can. B.J. 528.

8. "When a solicitor files an affidavit on behalf of his client . . . it should be assumed, until the contrary is proved, or at least until the solicitor's authority to do so is disputed by the client, that the solicitor has the client's authority to make the disclosure." per LeBel J. in *Kennedy* v. *Diversified* (1949) 1 D.L.R. 59 at 61 (Ont. H.C.).

9. There is no duty or privilege where a client conspires with or deceives his lawyer: *The Queen* v. *Cox* (1885) L.R. 14 Q.B.D. 153 (C.C.R.).
   Cf. *Orkin* at p. 86 re the exceptions of "crime", "fraud", and "national emergency".

10. To oust privilege the communication must have been made to execute or further

a crime or fraud – it must be "prospective" as distinguished from "retrospective": *R.* v. *Bennett* (1964) 41 C.R. 227 (B.C.S.C.) and cases there cited.

11. Cf. Freedman, *Solicitor-Client Privilege Under The Income Tax Act*, (1969) 12 Can. B.J. 93.

RULE 5

1. Cf. CBA 3(2), 3(7); Que. 47(7)(8), 55; B.C. B-1, B-2, B-9(b); N.B. C-9; IBA B-7; ABA DR 5-101(A), 5-105; *Orkin* at pp.98-101.

2. Cf. ABA EC 5-1.

3. "A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as it is relevant . . . What he cannot do is to act for the client and at the same time withhold from him any relevant knowledge that he has . . ." per Megarry J. in *Spector* v. *Ageda* (1971) 3 All E.R. 417 at 430 (Ch. D).
"Applying this (*dictum* of Cozens-Hardy M.R. in *Moody* v. *Cox et al.* (1917) 2 Ch. 71) to a simple circumstance which arises in every conveyancing transaction, does a solicitor acting for both parties disclose the previous purchase price to the purchaser . . .? If he does there may be a breach of duty . . . This example alone faces a solicitor with an unanswerable dilemma, which may only be resolved by his refusing to act for one . . . or . . . possibly stepping back from a situation in which both clients really need positive advice." Article in 1970 Law Soc. Gaz. 332. And see thirteen "Examples of Difficulties" there listed. In *Cornell* v. *Jaeger* (1968) 63 W.W.R. 747 (Man.) the non-disclosure by a solicitor of his personal interest in a property to the clear detriment of his client was held to amount to fraud.

4. "Notwithstanding that (the solicitor) had acted for the plaintiff and had been introduced to the defendants by the plaintiff and acted for both the plaintiff and (R) while they were negotiating the purchase . . . he divorced himself from his responsibilities . . . and acted for the defendants while they acquired the property . . . and, after the writ was issued . . . acted for both defendants . . . I refer to Bowstead on Agency: 'It is the duty of a solicitor – . . . (8) not to act for the opponent of his client, or of a former client, in any case in which his knowledge of the affairs of such client or former client will give him an undue advantage . . .' *This is a principle of ethical standards which admits of no fine distinctions but should be applied in its broadest sense,* and it makes no difference whether the solicitor was first acting for two parties jointly who subsequently disagreed and became involved over the subject-matter of his joint retainer, or acted for one party with respect to a matter and took up a case for another party against his former client about the same matter." per McRuer C.J.H.C. in *Sinclair* v. *Ridout & Moran* (1955) 1 O.R. 167 at 182-83 (Ont. H.C.) (Emphasis added).
And see article, Knepper, *Conflicts of Interest in Defending Insurance Cases* (1970) 19 Defense L.J. 515 and "Guiding Principles" at pp. 540-44.

5. See for examples *Orkin* at p. 100.
(leave to appeal granted) ". . . by reason of the same solicitor appearing for (R) and (D), and it being apparent that there was a conflict of interest between (R) and (D), each one blaming the other for the injuries of the children, he should not have acted for (D) after having acted for (R)." *Regina* v. *DePatie* (1971) 1 O.R. 698 at 699 (Ont. C.A.).

6. Cf. Alta. 34 and B.C. B-13: ". . . in a number of instances of professional misconduct . . . the borrowing of money by (the lawyers) in question has been a factor leading to the . . . misconduct . . . (A lawyer) should not borrow money from his clients save in exceptional circumstances, and in that case the onus of proving that the client's interests were fully protected by the nature of the case or by independent advice will rest on (the lawyer) . . . (Attention is called to)

the various transactions and dealings that the courts have held to be improper or reprehensible conduct in violation of these principles, and which, in addition to their consequences at law, constitute professional misconduct."

7. Cf. Que. 55; ABA EC 5-20.

RULE 6

1. Cf. B.C. B-8; N.B. F-3; IBA D-1. This Rule is closely connected with the Rule relating to Impartiality and Conflict of Interest.

2. In Quebec, pursuant to s. 13(3)(b) of the "Bar Act" the General Council of the Bar has, by s. 26 of By-law No. 1, defined many "professions, callings, industries, trades, offices (and) functions incompatible" with the practice of law.
   Sask. 7 and Que. 51 prohibit lawyers from being interested in collection agencies. Cf. *Orkin* at pp. 188-90.

3. B.C. B-8 identifies the dangers: ". . . that make it difficult for a client to distinguish in which capacity he is acting in a particular instance or which could give rise to a conflict of interest or duty to a client."
   For a discussion of "independent judgment" as it may be impaired by outside interests, see Weddington, *A Fresh Approach to Independent Judgment* (1969) 11 Ariz. L.R. 31.

4. In *Re Weare* (1893) 2 Q.B. 439 (C.A.) the striking-off of a solicitor who had knowingly rented his premises for use as a brothel was sustained by the court.

RULE 7

1. Cf. CBA 3(8); Que. 47(6), 48(10); ABA DR 9-102(B). Although the basic duty declared may parallel the legal duty under the law of bailment, it is here reiterated as being a matter of professional responsibility quite apart from the position in law.

2. Ontario, Regs. 17 to 19, captioned "Books, Records and Accounts", of Reg. 556, R.R.O. 1970.

3. Cf. ABA DR 9-102(B) (1).

4. By seeking leave to interplead.

5. Cf. Rule relating to Confidential Information.

6. Cf. Paragraph 9 of the Rule relating to Withdrawal. As to the proper disposition of papers, which is frequently a perplexing problem, see *Cordery on Solicitors* (1968, 6th) at pp. 118-20 for a discussion of law and principles and a table of categories with supporting authorities.

   The lawyer's arrangements and procedures for the storage and eventual destruction of completed files should reflect the foregoing considerations and particularly the continuing obligations as to confidentiality. Further, the operation of limitations laws pertinent to the client's position may preclude the destruction of files or particular papers.
   In several provinces statutes provide for the appointment of a custodian or trustee or the intervention of the syndic to conserve clients' property where a lawyer has died, absconded or become incapable. See, e.g. "Legal Professions Act" R.S.B.C. 1960 c. 214 as am. by S.B.C. 1969 c.15, ss.71A to 71D; "Bar Act" S.Q. 1966-67 c. 77 s. 23(3); "Law Society Act" R.S.O. 1970 c. 238 s. 43.

7. See article, Freedman, *Solicitor-Client Privilege Under The Income Tax Act* (1969) 12 Can. B. J. 93.

RULE 8

1. Cf. CBA 2(1), 3(5); ABA Canon 7.
"The concept that counsel is the mouth-piece of his client and that his speech is the speech of the client is as unfortunate as it is inaccurate. He is not the agent or delegate of his client. Within proper bounds, however, counsel must be fearless and independent in the defence of his client's rights . . . He must be completely selfless in standing up courageously for his client's rights, and he should never expose himself to the reproach that he has sacrificed his client's interests on the altar of expediency . . ." per Schroeder J.A., *Some Ethical Problems in Criminal Law* (1963) Law Soc. U.C. Special Lectures 87 at 102.

2. Cf. CBA 3(5); ". . . he must be a man of character. The Court must be able to rely on the advocate's word; his word must indeed be his bond; . . . The advocate has a duty to his client, a duty to the Court, and a duty to the State; but he has above all a duty to himself that he shall be, as far as lies in his power, a man of integrity. No profession calls for higher standards of honour and uprightness, and no profession, perhaps, offers greater temptations to forsake them . . ." from Hyde, *Lord Birkett* (1964, Hamish Hamilton, London) at p. 551. Courtesy and respect, as used herein, includes the dutues to be prompt and punctual.

3. Cf. IBA A-19; ABA DR 7-102(A)(1).

4. Cf. IBA A-15.

5. Cf. ABA Canon 9, DR 9-101; IBA E-3.

6. Cf. CBA 2(4), 5(5); Que. 31, 43(3); N.B. B-6; AB9 EC7-34 and 7-35, DR 7-110; IBA A-16.
In *Toronto Transit* v. *Aqua Taxi* (1955) O.W.N. 857 (Ont. H.C.), where a sealed letter improperly attempting to influence a decision had been delivered to a judge of the Court, while exonerating the lawyers concerned, made it clear that any involvement in such conduct would be most improper.

7. Where a lawyer joined in a scheme to mislead a court by arranging proceedings to result in an apparent acquittal which could then be used to answer prior pending proceedings for the same offence (both a Justice, a constable and another lawyer being misled in the process), Held: "These facts . . . establish a stupid, but nevertheless unworthy, attempt to pervert the course of justice, and most certainly constitute conduct unbecoming a barrister and solicitor in the pursuit of his profession." *Banks* v. *Hall* (1941) 2 W.W.R. 534 (Sask. C.A.).
A lawyer counselling false evidence would be guilty of perjury if it were given (Criminal Code, ss. 22, 120), and of counselling if it were not (*ibid.* s. 422).
It is an offence to fabricate anything with intent that it be used as evidence by any means other than perjury or incitement to perjury (*ibid.* s. 125).
Similarly, it is an offence wilfully to attempt in any manner to obstruct, pervert or defeat the course of justice (*ibid.* s. 127).
"The swearing of an untrue affidavit . . . is perhaps the most obvious example of conduct which a solicitor cannot knowingly permit . . . He cannot properly, still less can he consistently with his duty to the Court, prepare and place a perjured affidavit upon file . . . A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act . . ." per Viscount Maugham in *Myers* v. *Elman* (1940) A.C. 282 at 293-94 (H.L.).

"(Counsel) had full knowledge of the impropriety of the paragraphs in the affidavit . . . (and) is bound to accept responsibility for (them) . . . If he knows that his client is making false statements under oath and does nothing to correct it his silence indicates, at the very least, a gross neglect of duty." per McLennan J.A. in Re *Ontario Crime Commission* (1962) 37 D.L.R. (2d) 382 at 391 (Ont. C.A.).

8. Cf. Que. 32(3); N.B. B-1; IBA A-14; ABA DR 7-102(A)(5).

9. Cf. N.B. B-7; ABA EC 7-25, DR 7-106(C)(1).

10. Cf. CBA 1(1); Que. 32(3); N.B. B-3; IBA A-14; ABA EC7-23, DR7-106(B)(1). See *Glebe Sugar* v. *Greenock Trustees* (1921) W.N. 85 (H.L.) for a strong statement by Lord Birkenhead L.C. of the duty of counsel to disclose authority bearing one way or the other to the court. "The extreme impropriety of such a course (withholding known pertinent authority) could not be made too plain." See also *Plant* v. *Urquhart* (1922) 1 W.W.R. 632 (B.C.C.A.) per McPhillips J.A. at 638-39.

11. Cf. IBA A-18; ABA DR 7-109(B).

12. Cf. N.B. B-8; ABA DR 7-102(B) and DR 4-101 (C) (2).

13. Cf. ABA DR 1-110(B) (2). N.B. B-8: "Upon learning of fraudulent testimony participated in by his client counsel has a duty to withdraw from the case and to advise the court and the adverse party of the fraud." And see *Orkin* at p. 127 re.

14. Cf. CBA 2(3); N.B. C-11; ABA EC 7-24, DR 7-106(C)(3)(4).
"It is to be borne in mind that the function of counsel in any Court is that of an advocate; he is there to plead his client's cause upon the record before the Court and he does not in any sense occupy the dual position of advocate and witness." per McGillivray J.A. in *Cairns* v. *Cairns* (1931) 3 W.W.R. 335 at 345 (Alta. App. Div.).
"It is improper, in my opinion, for counsel for the Crown to express his opinion as to the guilt or innocence of the accused. In the article to which I have referred it is said that it is because the character or eminence of a counsel is to be wholly disregarded in determining the justice or otherwise of his client's cause that it is an inflexible rule of forensic pleading that an advocate shall not, as such, express his personal opinion of or his belief in his client's cause." per Locke J. in *Boucher* v. *The Queen* (1955) S.C.R. 16 at 26.
As to the impropriety of a lawyer witness later appearing as counsel, see *Imperial Oil* v. *Grabarchuk* (1974) 3 O.R. (3d) 783 (Ont. C.A.); *Phoenix* v. *Metcalfe* (1974) 5 W.W.R. 661 (B.C.C.A.).

15. Cf. B.C. D-1(b); N.B. B-8; IBA A-18; ABA DR 7-109(A)(B)(C).
"I do not know of any rule that a defence counsel cannot interview a witness that may be called for the Crown . . . The Crown, by issuing a lot of subpoenas, cannot throw a cloud over a lot of witnesses, excluding the defence from the preparation of their case." per Roach J.A. in *Rex* v. *Gibbons* (1946) 86 C.C.C. 20 at 28-29 (Ont. C.A.).

16. Cf. Que. 52; B.C. D-1(b); N.B. D-8; IBA D-7; ABA EC 7-18, DR 7-104(A)(1).
B.C. D-1(b) deals with situations where it is difficult to tell whether one is dealing with a witness (which is proper), or communicating with an opposite party who is legally-represented (which is improper). The problem may arise where the opposite party is a corporation or government agency. The test

suggested is, "Is he likely to be involved in the 'decision-making' process of the party, or does he merely carry out the directions of others?"
"The principle was laid down long ago . . . that once it appears a person has an attorney there can be no effective dealing except through him." ". . . a lawyer 'should never in any way . . . attempt to negotiate or compromise the matter directly with any party represented by a lawyer, except *through* such lawyer.'... To notify the lawyer that the matter *is* settled is not to negotiate *through* him." per Tritschler J.A. in *Nelson* v. *Murphy* (1957) 22 W.W.R. 137 at 142 (Man. C.A.).

17. Cf. CBA 4(4); Que. 43(2); N.B. D-4; ABA EC 7-38, 7-39, DR 7-106(C)(5). See *Orkin* at pp. 60-63 for instances of dilatory tactics held to be improper.

18. Cf. CBA 3(3), *Orkin* at pp. 95-97. And see paragraph 5 of the Rule relating to Advising Clients.

19. But see Para 10 *post.*

20. Cf. CBA 1(2); Que. 44: N.B. C-12; ABA ECs 7-13,7-14,DR 7-103, *Orkin* at pp. 116-20.
"It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings." per Rand J. in *Boucher* v. *The Queen* (1955) S.C.R. 16 at 23-24.
See also *Richard* v. *The Queen* (1960) 126 CCC 255 per Bridges J.A. at p. 280, *Regina* v. *Lalonde* (1972) 5 CCC second series p. 168 and Martin, "Preparation for Trial", Law Soc. U.C. Special Lectures 1969, p. 221 at p. 235 et seq.

21. Cf. CBA 2(6); Que. 45; N.B. C-6; IBA B-5; ABA EC 7-24, DR 7-106(C)(4).

22. See *Orkin,* p. 115, and Boulton, *Conduct and Etiquette at the Bar* (5th ed.), pp. 71-73, reproducing substance of 1912 Annual Statement of the General Council of the Bar; also quoted and commented upon by Schroeder J.A. (Note 1, *supra,* at pp. 94-97).
See also Martin, *The Role and Responsibility of the Defence Advocate* (1969-70) 12 Crim. L.Q. 376 at 386-87.

23. See guidelines laid down in *R.* v. *Turner* (1970) 2 All E.R. 281 at 285 (C.A.); panel discussion in (1969) Law Soc. U.C. Special Lectures at pp. 299-311; Ratushny, *Plea Bargaining and the Public* (1972) 20 Chitty's L.J. 238.

24. Cf. CBA 4(3); Que. 43(1); IBA A-21, A-23; ABA EC 7-38, DR 7-106(C)(5).
N.B. D-5: "Undertakings should be written and the terms should be unambiguous. Counsel when giving an undertaking accepts personal responsibility unless expressly excepted."
"It has more than once been determined by this Court that if attorneys choose to practice upon loose understandings . . . they cannot expect aid from the Court, if difficulties arise in carrying them out . . ." per Barry J. in *Ferguson* v. *Swedish-Canadian* (1912) 41 N.B.R. 217 at 220 (N.B.C.A.).
"on behalf of our client . . . we undertake": Held, in the circumstances, that

the solicitors were personally responsible. See *Re Solicitor* (1971) 1 W.W.R. 529 (B.C.C.A.)
". . . one's word should be one's bond . . ." *Lund,* 1950 Lecture to the Law Society (reprinted by Law Society of Upper Canada in 1956; see at pp. 33-34).

25. Cf. CBA 2(1); Que. 32(1), 34; N.B. B-3, D-4; IBA C-1; ABA EC 7-36, DR 7-106(C)(6).

26. Cf. Que. 53; N.B. C-8; IBA A-20; ABA EC 7-19.

27. Cf. ABA EC 7-15.

RULE 9

1. Cf. IBA E-3; ABA EC 8-8, DR 8-101 (A).

2. Common examples include Senators, Members of Parliament, members of provincial Legislatures, cabinet ministers, municipal councillors, school trustees, members and officials of boards, commissions, tribunals and departments, commissioners of inquiry, arbitrators and mediators, Crown prosecutors, and many others. For a general discussion, see Woodman, *The Lawyer in Public Life* (1971) Pitblado Lectures (Manitoba) p. 129.

3. Cf. generally the Rule relating to Impartiality and Conflict of Interest. "When a lawyer is elected to . . . (a) public office of any kind, or holds any public employment . . . his duty as the holder of such office requires him to represent the public with undivided fidelity. His obligation as a lawyer . . . continues; . . . it is improper for him to act professionally for any person . . . (who) is actively or specially interested in the promotion or defeat of legislative or other matters proposed or pending before the public body of which he is a member or by which he is employed, or before him as the holder of a public office or employment" from Brand, *Bar Associations, Attorneys and Judges (*(Chicago, 1956) p. 179.

4. For example, in Ontario Premier Davis in September, 1972 issued "Conflict of Interest Guidelines" to provincial Ministers requiring them "while holding office . . . (to) abstain from day to day participation in any . . . professional activity. Specific "conflict of interest" laws are under active consideration in several Canadian jurisdictions.

5. Cf. B.C. B-9(a).

6. Cf. ABA DR 9-101 (A)(B): ". . . not accept private employment in (matters in which the lawyer has acted in a judicial capacity or had substantial responsibility while he was a public employee).

7. Statutory oaths of office commonly impose obligations of "official secrecy."

8. In *Barreau du Montreal* v. *Claude Wagner* (1968) Q.B. 235 (Que. Q.B.) it was held that the respondent, then provincial Minister of Justice, was not subject to the disciplinary jurisdiction of the Bar in respect of a public speech in which he had criticized the conduct of a judge, because he was then exercising his official or "Crown" functions. In *Gagnon* v. *Bar of Montreal* (1959) S.C. 92 (Que. S.C.) it was held that on the application for readmission to practice by a former judge his conduct while in office might properly be considered by the admissions authorities.

RULE 10

1. Cf. CBA 3(8)(9); Que. 81; B.C. B-5; Alta. 32; N.B. E-1; IBA A-8; ABA DR 2-106.

2. The proper "factors of fairness" have been many times declared by the courts. For a recent compilation and discussion see, e.g., *Re Solicitors* (1972) 3 O.R. 433 per McBride M. at 436-37 (Ont. H.C.): ". . . I have not set down these factors in any sense in order of importance. In my view most of these eight factors should be considered in every case . . . . . time expended is not in most cases, the overriding factor, nor even the most important. On the other hand, there are comparatively few cases where the time factor can be completely ignored."
As to the utility of consensual local "minimum fees tariffs", see *Re Solicitors* (1970) 1 O.R. 407 (Ont. H.C.).
"Certainty is a desirable feature of any system of law. But there are certain types of conduct . . . which cannot be satisfactorily regulated by specific statutory enactment, but are better left to the practice of juries and other tribunals of fact. They depend finally . . . on proof of the attainment of some degree (followed by a page of illustrations, most related to "reasonableness") per Lord Simon L. C. in *Knuller Ltd.* v. *D.P.P.* (1972) 2 All E.R. 898 at 929-30(H.L.)

3. See *Twa* v. *The King* (1948) 4 D.L.R. 833 at 837 (Ont. H.C.) and cf. CBA 3(9).

4. Cf. CBA 3(10). "The question of compensation for solicitors has long been the anxious concern of the Court, both in the interests of clients and their solicitors. ...much legislative and judicial activity was directed to the reform and settlement of procedures for fair and reasonable fees . . . (In Ontario) there is a procedure for determining in every case where it is invoked, that a solicitor's charges are fair and reasonable." per Wright J. in *Re Solicitor* (1972) 1 O.R. 694 at 697 (Ont. H.C.).
"The object of a bill of costs is to 'secure a mode by which the items of which the total sum is made up, should be clearly and distinctly shown, so as to give the client an opportunity of exercising his judgment as to whether the bill was reasonable or not.' " per Riddell J. in *Millar* v. *The King* (1922) 67 D.L.R. 119 at 120 (Ont. App. Div.).
In certain provinces local law requires that clients be expressly advised of their right to have any agreement specially agreeing fees in advance judicially reviewed. See N.B. E-2; *The Law Society Act* R.S.M. 1970 c. L-100 s. 49; Alberta *Supreme Court Rule* 616(1)(f).

5. Cf. *Solicitors Act* R.S.O. 1970 c. 441 s. 35, permitting 5% interest from the expiration of one month from demand. In 1976 the Ontario P. C. C. held that it is not to be considered improper for a member to indicate on his bill to his client that interest will be charged on his disbursements and costs in accordance with Section 35 of the Solicitors' Act.

6. Cf. B.C. B-5(b) and Alta. 35 (proscribing "agency fees" in consideration of the "mere introduction" of business). Cf. also ABA DR 2-107(a). The intention is not to interfere with routine agency arrangements for such services as searches or document registration in county towns or provincial capitals, etc.

7. See particularly the Rule and Commentary respecting Impartiality and Conflict of Interest for the reasons underlying these proscriptions, and *Orkin* at pp. 154-55.

The lawyer may not profit by interest on client's trust monies in his hands. In some provinces payment of such interest to Law Foundations and legal aid plans is now authorized.

The general principles and fiduciary duties of the law of agency apply to the lawyer-client relationship, particularly with respect to fidelity, the obligation to account, and against "secret profits." See Fridman, *The Law of Agency* (3rd, 1971) at pp. 30-31, 132-39, and other standard authorities on agency. It would, for example, be improper for a lawyer without express disclosure and consent to take any commission, procuration or other fee or reward from a lender, a stock broker, a real estate or insurance agent, a trust company, a bailiff or a collection agent in consideration of the introduction by the lawyer of business from which professional work resulted to him in which he acted for or his fees were paid by the person whose business was so introduced.

As to disbursements: "in any case where there is liability upon the part of the solicitor and there is no dishonesty, the mere fact that the amount has not been paid ought not to prevent recovery. If there should be shown any dishonesty the case would be very different . . . " per Middleton J. in *Re Solicitor* (1920) 47 O.L.R. 522 at 525 (Ont. H.C.).

8. See Williston, *The Contingent Fee in Canada* (1968) 6 Alta. L.R. 184; Arlidge, *Contingent Fees,* (1974) Ottawa L.R. 374; *Thomson* v. *Wishart* (1910) 19 Man. R. 340 (Man. C.A.), and *Monteith* v. *Calladine* (1965) 47 D.L.R. (2d)322 (B.C.C.A.); *Hogan* v. *Hello* (1969) 1 N.B.R. (2d) 306. Alberta, British Columbia, Manitoba, New Brunswick, the Northwest Territories, Nova Scotia and Quebec now (1974) permit regulated "contingent fees"; the remaining Canadian jurisdictions do not.

RULE 11

1. Cf. Que. 60; B.C. G-5 IBA B-4; ABA EC 2-32, DR 2-110(A)(C). For cases, see 4 Can. Abr. (2d) under "Barristers & Solicitors; Termination of Relationship", paras, 430-34 and supplements, and 36 Halsby. (3d) under "Solicitors", paras. 101-02 and supplements. See also *Orkin,* pp. 90-95.

2. In appeals to the Supreme Court of Canada, see Rules 21 to 23 of that Court, whereunder the lawyer of record in the Court below may be deemed to represent for purposes of the Appeal.

3. Cf. ABA DR 2-110(A).
Provincial Rules of Court provide for the giving of notices of change of solicitors and for the making of applications for leave to withdraw:
Alberta: Rules 646 and 704
British Columbia; m.r. 44 to 44i
Manitoba: Order 7 Rule 2
New Brunswick: Order 7 Rule 2
Newfoundland: Order XV Rule 24
Nova Scotia: Rule 44
Ontario: Rules 390-94
Quebec: C. C. P. arts. 249-53
Saskatchewan: Order I Rule 16 and Order XLVII Rule 576
For cases, see 4 Can. Abr. (2d) under "Barristers & Solicitors; Change of Solicitors", paras. 342-58 and supplements.
In legal aid cases provincial regulations may also require notice to plan administrators, e.g. Ontario R.R.O. 1970 Reg. 557 s. 59.
On an application for an order that he has ceased to act under the Ontario Rules the lawyer's supporting materials must show particularly facts warranting his so ceasing: *Ely* v. *Rosen* (1963) 1 O.R. 47 (Ont. H.C.).
"I have no doubt that the learned trial Judge seriously erred in law when he purported to direct counsel for the accused that he could not withdraw from the case, notwithstanding the fact that the accused, his client, apparently wished to discharge him." per Jessup J. A. in *Regina* v. *Spatarao* (1971) 3 O.R. 419 at 422 (Ont. C.A.).

4. Cf. CBA 3(2) and 5(5); Que. 47, 61, 62 and 65; IBA B-7 ABA DR 2-110(B).
". . . this case where (N.R.) is held to have sworn affidavits of discovery which were false and where the solicitor . . . should not have allowed them to be sworn if he had done the duty which he owed to the Court . . . The solicitor cannot simply allow the client to make whatever affidavits of documents he thinks fit nor can he escape the responsibility of careful investigation or supervision. If the client will not give him the information he is entitled to require or if he insists on swearing an affidavit which the solicitor knows to be imperfect or which he has every reason to think is imperfect, then the solicitor's proper course is to withdraw from the case." per Lord Wright in *Myers* v. *Elman* (1940) A.C. 282 at 322 (H.L.)
For a panel discussion chaired by Gale C.J.O. on the rights and obligations of lawyers with respect to withdrawal in criminal cases, see 1969 Law Society of Upper Canada *Special Lectures* at pp. 295-99.

5. Cf. Que. 62; ABA DR 2-119(C).
"No solicitor . . . need put up with abuse and accusations such as were alleged to have been made here and would be fully entitled, after them, to withdraw from the case. An accusation of fraud, in fact, would make it improper for the

solicitor to continue to act for the client, since it showed that the client had lost confidence in him." per Urquhart J. in *Re Solicitors Act; Collison* v. *Hurst* (1946) O.W.N. 668 at 671 (Ont. H.C.).

6. "An Attorney is ordinarily justified in withdrawing if the client fails or refuses to pay or secure the proper fees or expenses of the attorney after being reasonably requested to do so." (Proposition in *Corpus Juris Secundum* approved and applied in *Johnson* v. *Toronto* (1963) 1 O.R. 626 (Ont. H.C.)).

7. "If the case is scheduled to be tried on a date which will afford the accused ample time to retain another counsel, a lawyer who has not been paid the fee agreed upon may withdraw . . . But if he waits until the eve of the trial so that there is no time for another counsel to prepare adequately . . . it becomes too late for him to withdraw. He must continue on . . ." (from panel discussion, note 4 *supra* at pp. 295-96). and Cf. Alta. 43: "If a member accepts a retainer to represent an accused at a preliminary hearing and not at the trial . . . (he) should have a clear and unambiguous understanding with his client to that effect and . . . should advise the Court at the beginning of the inquiry . . ."

8. ". . . counsel should be generous in accounting for any moneys which have been received but not yet earned, bearing in mind that a great deal of the time he has spent . . . may be of little value to the other counsel who is required to take over." (*ibid.* at p. 296).
As to the proper disposition of papers, which is frequently a perplexing problem, see *Cordery on Solicitors* (6th) at pp. 118-20 for a discussion of law and principles and a table of categories with supporting authorities.

9. "It is quite apparent . . . that the applicant dismissed the . . . solicitor without just cause . . . The common law right of a solicitor to exercise a lien upon documents in his possession where he has been discharged without cause by his client is well recognized subject, however, to certain exceptions. . . . where third parties are involved the Court may interfere . . . always upon the basis that whereas a solicitor may assert a lien . . . he should nto be entitled to embarrass other parties interested . . ." per McGillivray J. A. in *Re Gladstone* (1972) 2 O.R. 127 at 128 (Ont. C.A.).

10. See Morden, *A Succeeding Solicitor's Duty to Protect the Account of the Former Solicitor* (1971) 5 Law Soc. U.C. Gaz. 257.

11. Cf. CBA 4(1).

12. "Subject to any question of lien, the client's paper in possession of the firm belong to the client and cannot be the subject of agreement as against him, but as *between themselves* solicitors can agree that on dissolution the clients of the old firm and their papers shall either be divided between the dissolving partners, or belong to those continuing the business of the firm . . ." (Emphasis added) *Cordery on Solicitors* (6th) at pp. 463-64.

RULE 12

1. *IBA* "Duty to the Court": "In view of the vital part played by lawyers in the administration of justice they are under an obligation to strive to maintain respect for that administration . . ."

2. Cf. the traditional barristers' oath: ". . . to protect and defend the rights and interest of such of your fellow-citizens as may employ you . . . You shall not pervert the law to favour or prejudice any man . . ."
ABA ECs 8-1, 8-2 and 8-9: "Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This sytem should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances . . . Rules of law are deficient if they are not just, understandable and responsive to the needs of society . . . The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes . . ."

3. ABA ECs 8-1 and 8-2: "By reason of education and experience, lawyers are especially qualified to recognize deficiences in the legal system and to initiate corrective measures therein . . . (The lawyer) should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed."

4. Cf. CBA Preamble: "The lawyer is more than a mere citizien . . ." ". . . lawyers, because of *what* they are as opposed to *who* they are . . . are required to assume responsibilities of citizenship well beyond (the basic requirements of good citizenship) . . . This . . . is necessary because we are the profession to which society has entrusted the administration of law and the dispensing of justice." from MacKimmie, *Presidential Address* (1963) 6 Can. B. J. 347 at 348. For lucid and divergent views as to the limits to which lawyers may properly go in "defying the law" see editorial *"Civil Disobedience and the Lawyer"* (1967) 1(3) Law Soc. U.C. Gaz. 5 and response thereto (1968) 2 Law Soc. U.C. Gaz. 44.

5. Cf. CBA 2(2) and ABA EC 8-6. Tribunals generally possess summary "contempt" powers, but these are circumscribed and are not lightly resorted to. Means exist through Attorneys-General and Judicial Councils for the investigation and r emedying of specific complaints of official misbehaviour and neglect; in particular cases these should be resorted to in preference to public fora and media.

6. Cf. ABA EC 8-4.

RULE 13

1. Cf. ABA Canon 2, EC 2-1; IBA at p. 30.

2. Cf. ABA ECs 2-6, 2-7.

3. Cf. ABA EC 2-8.

4. "There are rules of conduct which all professional men must observe. Refraining from advertising would, I think, clearly be one." per Goddard L.C.J. in *Hughes* v. *Architects' Council* (1957) 2 Q.B. 550 at 559-60. (Q.B.D.).
And see, generally, *Bennion:* Chap. 10, "Attraction of Business"; Chap. 11, "Touting and Canvassing"; Chap. 12, "Advertising."

5. Cf. ABA EC 2-9, *Bennion* at pp. 153-55.
And see, generally, Gipson, *Advertising, Solicitation and the Profession's Duty to Make Legal Counsel Available* (1972) 81 Yale L.J. 1181.

6. Cf. ABA EC 2-10, IBA D-4.

7. At present the Governing Bodies and Professional Conduct Committees, through rulings, by-laws, rules and opinions regulate the details of permissible and impermissible advertising within their jurisdictions. Such matters as signs, name-plates, professional cards, announcements, letterheads, listings, firm-names and "specialist" representations are dealt with. The regulations vary considerably from place to place and change from time to time; no attempt is here made to collect or epitomize them. For summaries of rulings and of illustrative decisions in these areas, see *Orkin* at pp. 177-78, *Cordery on Solicitors* (6th) at pp. 486-87.

8. Cf. CBA 5(3); Que. 70-73; Alta. 7; N.B. D-6, F-1; IBA D-2, etc.
"By *Touting* we mean a direct approach seeking business from persons individually, as by a letter addressed to them by name.
Canvassing is regarded as the circularising of prospective clients generally.
Advertising means the seeking of business without direct contact with the prospective client, as by the use of mass media such as newspapers and television." *Bennion,* p. 142 (emphasis added).

9. Cf. Alta. 13; B.C. B-9. And see *Merchant* v. *Benchers* (1973) 2 W.W.R. 109 (Sask. C.A.).

10. Cf. Que. 54; N.B. C-4; ABA EC 2-26 to 2-29; *Orkin* at pp. 87-88.

RULE 14

1. Cf. CBA 5(1); Que. 29(1); ABA Canon 1.
"The legal profession . . . has emerged over the centuries in order to fill a pressing public need for protection . . . under the law of the rights and liberties of the individual, however humble, if necessary against the state itself." (IBA, Introductory).
"Public confidence in the profession would be shaken if such conduct were tolerated . . . no solicitor could escape (striking-off) simply by showing that there had been no dishonesty and no concealment, and that no client had suffered . . ." per Parker L.C.J. in *In re a Solicitor* (1959) 193 Sol. Jour. 875 (Q.B.D.).

2. Cf. CBA 5(1); Que. 36(2); B.C. F-3; ABA DR 1-103, EC 1-4. Alta. 22: "It is conduct unbecoming . . . not to (report instances) when they clearly involve a shortage of trust funds or a breach of an undertaking."

3. Cf. Que. 41, 42; Alta. 18; N.B. D-1; Sask. 12. "The reprehensible thing about the solicitor's conduct is his indefensible ignoring of the communications of the Law Society . . ." per Walsh J. in *In re X., a Solicitor* (1920) 16 Alta. L.R. 542 at 543.

4. Cf. IBA D-6.

5. Reflecting the public policy declared by the *Canadian Bill of Rights* and the similar legislation of the various provinces. See Ont. 36, enacted in 1974.

RULE 15

1. Cf. CBA 5(1)(2); IBA E-5 and E-6; ABA Canon 3, DRs 3-101 (A)(B) and 3-103(a).

2. Cases and statutes provide that certain acts amount to the "practice of law". See, for example:
B.C. Legal Professions Act, R.S.B.C. 1960 c. 214 s.111 as amended by S.B.C. 1969 c.15
Man. Law Society Act, R.S.M. 1970 c. L-100 s. 48(1)(2)
N.B. Barristers Society Act, S.N.B. 1931 c. 50 s. 14A as amended by S.N.B. 1937 c.30.
Nfld. Law Society Act, R.S.N. 1952 c. 115 s. 76(2)
N.S. Barristers and Solicitors Act, R.S.N.S. 1967 c. 18 s. 4(2)
P.E.I. Legal Profession Act, R.S.P.E.I. 1951 c. 84 ss. 1(c), 41 as amended by the S.P.E.I. 1969 c. 24
Quebec Bar Act, S.Q. 1966-67 c. 77 s. 128 as amended by S.Q. 1969 c. 48
The statutes of all provinces prohibit the practice of law by unauthorized persons:
Alta. Legal Profession Act, R.S.A. 1970 c. 203 ss. 92 et seq.
B.C. supra s. 72
Man. supra s. 48(1)(6)
N.B. supra s. 14(3)
Nfld. supra s. 76(1)
N.S. supra s. 4(1), 5
Ontario Law Society Act, R.S.O. 1970 c. 238 s. 50(1)(2)
P.E.I. supra s. 41 as amended
Quebec supra ss. 132 et seq.
Sask. Legal Profession Act, R.S.S. 1965 c. 301 s. 69
"To protect the public against persons who . . . set themselves up as competent to perform services that imperatively require the training and learning of a solicitor, although such persons are without either learning or experience to qualify them, is an urgent public service." per Robertson C.J.O. in *Rex ex rel. Smith* v. *Ott* (1950) O.R. 493 at 496. (Ont. C.A.).
"When a man says in effect, I am not a lawyer but I will do the work of a lawyer for you he is offering his services as a lawyer. In offering his services as a lawyer he is holding himself out as a lawyer even though he makes it clear he is not a properly qualified lawyer." per Miller C.C.J. in *Regina* v. *Woods* (1962) O.W.N. 27 at 30.
And see, generally, *Orkin* at pp. 350-53, *Bennion* at p. 54.

3. Cf. B.C. G-2; Alta. 40; IBA E-4 and E-6; ABA EC 3-5 and 3-6.
And see comment, *Delegation of Authority by Solicitors* (1968)(3) Law Soc. U.C. Gaz. 23.

RULE 16

1. Cf. CBA 4(1)(2)(4); Que. 29(1), 43(1)(2); ABA EC 7-37 and 7-38, DR 7-101 (A) (1).

2. ". . . besides the duty which an attorney owes to the court and his client, he is bound, as regards the opposite party and his professional brethren, to conduct his business with fairness and propriety." *Dobie* v. *McFarlane* (1832) 2 U.C.Q.B. (O.S.) 285 at 323. And see N.B. D-4.

3. Cf. CBA 4(2), *Orkin* at pp. 131-32. N.B. D-4: ". . . it is the duty of counsel to 'try the merits of the cause and not to try each other.' "

4. Cf. CBA 4(2); Que. 43(2); ABA EC 7-38 and 7-39. ". . . the attorney, I think, is not bound to lay before his client every opportunity he may have of shutting out the other party from a hearing, nor bound to take or follow the direction of his client as to the degree of liberality which he shall observe in his practice." per Robinson C.J. in *Shaw et al* v. *Nickerson* (1850) 7 U.C.Q.B. 541 at 544.

5. Cf. CBA 4(4). "Truth and not trickery, simplicity and not duplicity, candour and not craftiness in the conduct of legal affairs . . ." per Chancellor Boyd in *Address on Legal Ethics* (1905) 4 Can. L. Rev. 85. ABA EC 7-38: "He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so." If he intends to insist on "Peremptory Rules" he should make it clear.
". . . to build up a client's case on the slips of an opponent is not the duty of a professional man . . . Solicitors do not do their duty to their clients by insisting upon the strict letter of their rights. That is the sort of thing which, if permitted, brings the administration of justice into odium." per Middleton J. in *Re Arthur and Town of Meaford* (1915) 34 O.L.R. 231 at 233-34 (Ont. H.C.).
". . . we do not think that (the defendant's attorney's) conduct was marked with candour in not drawing the plaintiffs' attorneys' notice to such objections to the procedure as he had or intended to insist upon until the day before the opening of the court at which the trial was to be had . . ." Gwynne J. in *Cushman et al* v. *Reid* (1869) 20 U.C.C.P. 147 at 153-54.
As to tape-recordings, see (1972) 6 Law Soc. U.C. Gaz. 15.

6. Alta. 20: "Failure to reply to letters or other communications from another member is at the very least discourteous . . . this practice frequently places the other member in an awkward and embarrassing position . . . and tends to lower the reputation of the whole profession."

7. Cf. paragraph 11 of the Rule relating to the Lawyer as Advocate. Alta. 17: ". . . the use of such words as 'on behalf of my client' or 'on behalf of the vendor' do not relieve the solicitor giving the undertaking of personal responsibility." B.C. D-2: ". . . difficulties may arise if (members) give undertakings on behalf of clients since clients may change instructions or solicitors. An undertaking given by one solicitor to another can be released or altered only by the latter and not by his client. The giving of an uncertified cheque is an undertaking, except in the most unusual and unforseen circumstances the justification for which rests upon the member, that such cheque will be paid . . ."

8. Cf. CBA 4(3); Que. 52; B.C. D-1(a); Alta. 16; N.B. D-3; ABA EC 7-18; *Nelson* v. *Murphy et al.* (1957) 9 D.L.R. (2d) 195 (Man. C.A.) per Tritschler J.A. at p. 213: "The principle was laid down long ago . . . that once it appears a person

has an attorney there can be no effective dealing except through him . . . a lawyer 'should never in any way . . . attempt to negotiate or compromise the matter directly with any party represented by a lawyer, except *through* such lawyer.' "

". . . not hold any communication of the kind that passed here, except with the Solicitor of the opposite party, and even had the defendant come to the office of plaintiff's Solicitor, as the latter alleges, of his own accord, he should have refused to negotiate with him personally." per Van Koughnet C. in *Bank of Montreal* v. *Wilson* (1867) 2 Chy. Chs. 117 and 119 (U.C. Chy.).

9. Cf. CBA 5(1); IBA C-4; ABA EC 2-28; *Orkin* at pp. 97-98. And see paragraph 9 of the Rule relating to Making Legal Services Available.

RULE 17

1. Cf. B.C. F-4. In cases of hardship or illness and for other good cause Governing Bodies may well permit regulated and limited employments (as, for example, towards rehabilitating an offender or one recovering from a disability). Their concern is to protect the public, not to unnecessarily inhibit individuals.

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