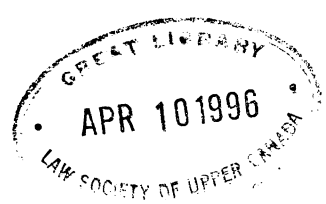
The Law Society of Upper Canada | Barreau du Haut-Canada

Professional Conduct Handbook

1996 Edition



as amended to 27 October 1996
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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, the lawyer's conduct should reflect credit on the legal profession, inspire the confidence, respect and trust of clients and the community, and avoid even the appearance of impropriety.

Amendments current to 27 October 1995. The Rules in their present format were adopted by Convocation of The Law Society of Upper Canada on 30 January 1987.

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 include more than one person, party, or thing of the same kind.

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

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Abbreviations, Citations and Bibliography

1. Footnotes conform to the *Canadian Guide to Uniform Legal Citation*, (Toronto: Carswell, 1986); 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 1, 1970. Divided into Canons, Ethical Considerations (ECs) and Disciplinary Rules (DRs).

ABA-MR *Model Rules of Professional Conduct* of the American Bar Association, adopted August 2, 1983.

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

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)).

CBA-COD *Code of Professional Conduct* of the Canadian Bar Association adopted in 1974.

IBA Sir Thomas Lund, *Professional Ethics*, being Book II of the International Bar Association published in 1970 by that Association (London: Sweet & Maxwell, 1970) Nos. A-1 to F-6. IBA 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 Mark M., *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright, 1957).

Que. *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r. 1.

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:

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

F.A.R. Bennion, *Professional Ethics: The Consultant Professions and Their Code* (London: Charles Knight, 1969). For further bibliographies see at 238-40.

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

F.T. Horne, ed., *Cordery on Solicitors*, 8th ed. (London: Butterworths, 1988).

H. Drinker, *Legal Ethics* (New York: Columbia University Press, 1965).

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

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

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

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

M.M. Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright, 1957). For further bibliographies see pages 295-96.

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

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

Integrity

Rule 1

The lawyer must discharge with integrity all duties owed to clients, the court, the public and other members of the profession.[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 the lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If personal integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed regardless of how competent the lawyer may be.[2]

2. Dishonourable or questionable conduct on the part of the lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of 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 the 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 into question the lawyer's professional integrity or competence.

Competence and Quality of Service

Rule 2

(a) The lawyer owes the client a duty to be competent to perform any legal services undertaken on the client's behalf.[1]

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

[Amended—Sept.1990]

COMMENTARY

Knowledge and Skill

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 qualifications 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 is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with legal matters to be undertaken on the client's behalf.[4]

3. It follows that the lawyer should not undertake a matter without honestly feeling competent to handle it, or able to become competent without undue delay, risk or expense to the client. This is an ethical consideration, and is to be distinguished from the standard of care 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 practice and procedures by which such principles can be effectively applied.

Maintaining Competence

5. The lawyer should keep abreast of developments in the branches of law wherein the lawyer's practice lies by engaging in continuing study and education.

Seeking Assistance

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

Promptness

7. The requirement of conscientious, diligent and efficient service means that the lawyer must make every effort to provide service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.[5]

Unsatisfactory Professional Practice

8. Numerous examples could be given of unsatisfactory professional practice 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:

[Amended—Sept. 1990]

(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 of proposals of settlement or of positions taken by the prosecuting attorney, or failure to explain them properly.

(k) Withholding information from the client or misleading the client about the position of a matter in order 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.

(m) Failure to maintain a limitation reminder or tickler system to ensure an effective follow-up procedure with respect to the lawyer's files.

(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.

(o) Self-induced disability, for example from the use of intoxicants or drugs, which interferes with or prejudices the lawyer's services to the client.[6]

Consequences of Incompetence

9. It will be noted that the Rule does not require 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 or unsatisfactory professional practice in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure regardless of tort liability. While damages may be awarded for negligence, incompetence or unsatisfactory professional practice can give rise to the additional sanction of disciplinary action.[7]

[Amended—Sept. 1990]

10. The lawyer who is incompetent does the client a disservice, brings discredit to the profession, and may bring the administration of justice into disrepute.[8] In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's associates or dependants.

Advising Clients

Rule 3

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

COMMENTARY

Scope of Advice

1. The lawyer's duty to the client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law, and the lawyer's own experience and expertise. The advice must be open and undisguised, and must clearly disclose what the lawyer honestly thinks about the merits and probable results.[2]

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

3. The lawyer should clearly indicate the facts, circumstances and assumptions upon which the opinion is based, for example in a case where the circumstances do not justify an exhaustive investigation with consequent expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.

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

Compromise or Settlement

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

Dishonesty or Fraud by Client

6. When advising the client the lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment. The lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or persons associated with such a 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, the lawyer may properly advise and represent a client who, in good faith and on reasonable grounds desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case.[7]

Threatening Criminal Proceedings

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 the client.[8]

Advice on Non-Legal Matters

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

Errors and Omissions

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 the lawyer is responsible. When so informing the client, the lawyer should be careful not to prejudice any rights of indemnity which either of them may have under any insurance, client's protection or indemnity plan, or otherwise. At the same time, the lawyer should recommend that the client obtain legal advice elsewhere as to any rights the client may have arising from such mistake. The lawyer should also give prompt notice of any potential claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced and, unless the client objects, assist and co-operate 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 the indemnity may not fully cover the claim, the lawyer should expeditiously deal with any claim which may be made and must not, under any circumstances, take unfair advantage that would defeat or impair the 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]

Confidentiality Of Information

Rule 4

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

COMMENTARY

Guiding Principles

1. The lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time the client must feel completely secure and entitled to proceed on the basis that without any express request or stipulation on the client's part matters disclosed to or discussed with the lawyer will be held 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 the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.[3]

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

4. The lawyer owes the duty of secrecy to every client without exception, and whether it be 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 lawyer and client forbids the lawyer from using any confidential information covered by the ethical rule for the benefit of the lawyer or a third person, or to the disadvantage of the client. Should the lawyer engage in literary works such as an autobiography, memoirs and the like, the lawyer 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 client, and should decline employment which might require such disclosure.[6]

7. The lawyer should avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Likewise, the lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened.[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 the client's affairs or business.

9. Confidential information may be divulged with the express authority of the client 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 directs otherwise) disclose the client's affairs to partners and associates in the firm and, to the extent necessary, to non-legal staff such as secretaries and filing clerks. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees and students the importance of non-disclosure (both during their employment and thereafter) and requires the lawyer to take reasonable care to prevent their disclosing or using any information which the lawyer is bound to keep in confidence.[8]

Justified Disclosure

10. 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.[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]

Where Lawyer's Conduct in Issue

12. Disclosure may also be justified in order to defend the lawyer or the lawyer's associates or employees against any allegation of malpractice or misconduct, or in legal proceedings to establish or collect the lawyer's fees, but only to the extent necessary for such purposes.[11]

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, should not act or continue to act in a matter when there is or there is likely to be a conflicting interest.

COMMENTARY

Guiding Principles

1. A conflicting interest is one which would be likely to affect adversely the lawyer's judgment on behalf of, or 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]

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

3. 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]

Disclosure and Consent

4. The Rule requires adequate disclosure to enable the client to make an informed decision about whether to have the lawyer act despite the presence or possibility of the conflicting interest. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf should not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead it may be only one of several factors which the client will weigh when deciding whether or not to give the consent referred to in the Rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the extra cost, delay and inconvenience involved in

engaging another lawyer and the latter's unfamiliarity with the client and the client's affairs. In the result, the client's interests may sometimes be better served by not engaging another lawyer, for example, when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

5. Before the lawyer accepts employment for more than one client in a matter or transaction, the lawyer must advise the clients concerned that the lawyer 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, the lawyer 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 the lawyer 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, the latter should obtain their written consent, or record their consent in a separate letter to each. The lawyer 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]

6. 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 the lawyer attempted to advise them on the contentious issue. In such circumstances the lawyer should ordinarily refer the clients to other lawyers. However, if the issue is one that 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, the clients may be permitted to settle the issue by direct negotiation in which the lawyer does not participate. Alternatively, the lawyer 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.

Where the Lawyer's Interest in Conflict

7. 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 the financial or other interest of the lawyer or the lawyer's associate. For example, the lawyer, or a family member, or a law partner 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]

Investment by Client where Lawyer has an Interest

8. 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 the lawyer must insist that the 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 7.

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

(b) 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 sent to the original lawyer and signed by the client) which must include at least the following:

(i) that the certifying lawyer has explained to the client the latter's 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 the certifying lawyer has explained the legal aspects of the transaction to the client, that the client appeared to understand the advice given, and further that the certifying lawyer has informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view.

(c) 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 upon the lawyer giving such independent advice and is an undertaking not to be lightly assumed or merely perfunctorily discharged.

10. In cases referred to in paragraphs 7 and 8 above, the lawyer who is asked to act must, before accepting the employment, disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later. If the lawyer does not choose to make such disclosure or cannot do so without breaching a confidence, the lawyer must decline the employment. If, following such disclosure, the client requests the lawyer to act, the latter should obtain the client's written consent or record such consent in a letter to the client. However, the lawyer should not uncritically accept the client's decision to have the lawyer act in such circumstances. It should be borne in mind that, if the lawyer accepts the employment, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the employment should be declined.

Lawyer as Arbitrator

11. 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 the lawyer.[7]

Trust Funds

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

Acting against Former Client

13. A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter, or when the lawyer 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 the lawyer has previously done for that person, and where such confidential information is irrelevant to that matter.

Duty to Unrepresented Person

14. The lawyer should not undertake to advise an unrepresented person, but should urge such a person 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 such person's interests will be protected by the lawyer. If the unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in this Rule.

Errors and Omissions Claims

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

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

As soon as a lawyer becomes aware that an error or omission may have occurred which may involve liability to the client for professional negligence, the lawyer should take the following steps:

1. The lawyer should immediately arrange an interview with the client and advise the client forthwith that an error or omission may have occurred which may form the basis of a claim by the client against the lawyer.
2. The lawyer should advise the client to obtain an opinion from another independent lawyer and that in the circumstances the first lawyer might no longer be able to act for the client.
3. Concurrently, the first lawyer should advise the Director of Insurance, Errors and Omissions Department of the Society, of the facts of the situation.
4. The lawyer must bear in mind that in order to fulfill all duties to the client, the insurer and the profession, the lawyer 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 lawyer 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.

Law Firms

16. For the sake of clarity, the foregoing paragraphs are expressed in terms of the individual lawyer and that lawyer's client. However, it should be understood that the term "client" includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work.

Burden of Proof

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

Preservation of Clients' Property

Rule 6

The lawyer owes a duty to the client to observe all relevant rules and law regarding the preservation and safekeeping of the client's property entrusted to the lawyer. Where there are no such rules or laws or the lawyer is in doubt, the lawyer should take care of such property as a careful and prudent owner would when dealing with property of like description.[1]

COMMENTARY

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

2. The lawyer should promptly notify the client of the receipt of any monies or other property of the client, unless satisfied that the client is aware that they have come into the lawyer's custody.[3]

3. The lawyer should clearly label and identify the client's property and place it in safekeeping distinguishable from the lawyer's own property.

4. In addition to maintaining the required records of clients' property in the lawyer's 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. The lawyer should ensure that it is delivered to the right person and, in case of dispute as to the person entitled, the lawyer 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 the 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 at the conclusion of the lawyer's mandate.

Privilege

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

Borrowing from Clients

Rule 7

1. The lawyer must not borrow money from a client save:

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

   (b) 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.

2. In any transaction other than one falling within the provisions of subparagraph 1(a), in which money is borrowed from a client by the lawyer's spouse or by a corporation, syndicate or partnership in which either the lawyer or the lawyer's spouse has, or both of them together have, directly or indirectly, a substantial interest, the lawyer must be 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.

3. Whether a person lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is to be considered a client within the above principle, is to be determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the loan or investment, then the lawyer will be considered bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

COMMENTARY

1. The relationship existing between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted to exist.

2. It is a matter of grave concern to Convocation that some instances of professional misconduct by lawyers relating to the misuse of trust funds or the improper obtaining of monies have involved the borrowing of money by the lawyers in question from their clients. Sometimes the monies have been borrowed from the client without 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 the lawyer's 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 the latter function the lawyer is in no way personally involved in the transaction and incurs no personal liability, providing that the lawyer 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.

3. With regard to independent legal representation attention is directed to paragraph 9(a) of the Commentary to Rule 5.

4. The above statements do not purport to be exhaustive. The attention of the profession is directed to the numerous reported authorities dealing with the duty of lawyers to their clients 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.

Withdrawal of Services

Rule 8

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

COMMENTARY

Guiding Principles

1. Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having accepted professional employment the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.[2]

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

Mandatory Withdrawal

3. In some circumstances the lawyer will be under a positive duty to withdraw. The obvious case is following discharge by the client. Other examples are (a) if the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the court and, following explanation, the client persists in such 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 lead to a breach of these Rules such as, for example, a breach of the Rule relating to conflict of interest (Rule 5); or (d) if the lawyer is not competent to handle the matter. In these situations there is a duty to inform the client that the lawyer must withdraw.[4]

Optional Withdrawal

4. Situations where a lawyer would be entitled to withdraw, although not under a positive duty to do so, will as a rule 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, the lawyer who is deceived by the client 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 the client on a difficult question.[5]

Non-Payment of Fees

5. Failure on the part of the client after reasonable notice to provide funds on account of disbursements or fees will justify withdrawal by the lawyer unless serious prejudice to the client would result.[6]

Criminal Proceedings

6. It is improper for a lawyer, having 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 agreed fee where the interval between the withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, provided that the lawyer:

(a) notifies the client, preferably in writing, that the lawyer is withdrawing because the fees have not been paid;

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

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

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

The requirement contained in subparagraph (d) has not previously been considered necessary. This may have been due, in part, to the fact that in all counties in Ontario, except the Judicial District of York, 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 from unwarranted criticism by the court, and to prevent the consequential loss of public confidence in the profession if Crown Counsel were not in a position to inform the court that the lawyer had given timely notification of the withdrawal.

The lawyer who has undertaken the defence of a criminal case may withdraw from the case for adequate cause, other than the 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 other lawyer to prepare adequately for trial. Such withdrawal shall be subject to the same requirements of notice to the client, accounting for monies received, notice to Crown Counsel and notice to the court as apply where the lawyer desires to withdraw because of non-payment of fees.

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

Where the lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees, and there is not a sufficient interval between the notice to the client of the lawyer's intention to withdraw and the date when the case is to be tried to enable the client to obtain another lawyer and to enable such lawyer to prepare adequately for trial, the first lawyer may withdraw from the case only with the permission of the court before which the case is to be tried.

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

Notice

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

Duty Following Withdrawal

8. Upon 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 which may be required 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 the employment;

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

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

The obligation in subparagraph (a) to deliver papers and property is subject to the lawyer's right of lien referred to in paragraph 11. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.[8]

9. A lawyer acting for several clients in a case or matter who ceases to act for one or more of them, should co-operate with the successor lawyer or lawyers to the extent required by the Rules, and should seek to avoid any unseemly rivalry, whether real or apparent.[9]

Lien for Unpaid Fees

10. Where upon the discharge or withdrawal of the lawyer the question of a right of lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce such a lien if the result would be to prejudice materially the client's position in any uncompleted matter.[10]

Duty of Successor Lawyer

11. Before accepting employment, the successor lawyer should be satisfied that the former lawyer approves, or has withdrawn or 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 former lawyer, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent, or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.[11]

On Dissolution of Law Firm

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]

Fees and Disbursements

Rule 9

The lawyer shall not:

(a) undertake to act for, charge or accept any amount which is not fully disclosed, fair and reasonable, and when asked by the client to quote a fee shall explain the nature and approximate amount of any anticipated disbursements to be incurred;

[Amended — Jan. 1989]

(b) divide a fee with another lawyer who is not a partner or associate unless (i) the client consents either expressly or impliedly to the employment of the other lawyer, and (ii) the fees are divided in proportion to the work done and responsibilities assumed;[1]

(c) charge any significant amount as a disbursement, such as the cost of a title search, which is not fully disclosed in a timely fashion, and is fair and reasonable;

[Amended — Mar. 1989]

(d) appropriate any funds of the client held in trust or otherwise under the lawyer's control for or on account of fees except as permitted by the Regulation made under the *Law Society Act*.[2]

COMMENTARY

Reasonableness of Fee

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 suggested fee schedule of a law association;

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

A fee will not be fair and reasonable if it cannot be justified in the light of all pertinent circumstances, including the factors mentioned.[3]

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.[4]

[2nd paragraph deleted — Jan. 1989]

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

Fees and Disbursements

4. When preparing and delivering accounts to clients, the lawyer should clearly and separately identify amounts charged as fees and amounts charged as disbursements, and should provide a detailed statement of disbursements.

[subparagraphs (b), (c), (d), (e) & (f) deleted — Jan. 1989]

Avoidance of Disputes about Fees and Disbursements

5. Breach of this Rule and misunderstandings about fees and financial matters bring the legal profession into disrepute and reflect adversely upon the general administration of justice. The lawyer should try to avoid controversy with the client about fees and should be ready to explain the basis for the charges (especially if the client is unsophisticated or uninformed as to the proper basis and measurements for fees). The lawyer should give the client a fair estimate of fees and disbursements pointing out any uncertainties involved, so that the client may be able to make an informed decision. This is particularly important concerning fee charges or disbursements which the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs which may substantially affect the amount of a fee or disbursement the lawyer should forestall misunderstandings or disputes by immediate explanation to the client.[5]

Interest

6. The lawyer may charge the client interest on an overdue account only as permitted by the *Solicitors Act* or as otherwise permitted by law.[6]

Division of Fees

7. 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 equally 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 or not.

It is also improper for the lawyer, in return for a fee, to permit the lawyer's name to be placed on such applications which have been prepared by the conveyancer.

A lawyer cannot give or accept a referral fee to or from a lawyer with respect to the referral of a client. This would also apply to an Ontario lawyer's dealings with a lawyer in another jurisdiction even where that jurisdiction may permit referral fees.

This does not prohibit an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold.

[Amended — March 1995]

Hidden Fees

8. The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance or other compensation 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 or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such other person or agency.[7]

Effect of Rule

9. Members are reminded that the fees, charges or disbursements of lawyers are subject to assessment pursuant to the provisions of the *Solicitors Act*. Compliance with this Rule and the Commentaries should not be taken as assurance that the fees, charges or disbursements will be regarded as fair and reasonable by the Assessment Officer.

Champerty and Contingent Fees

10. 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 the lawyer. It is improper for the lawyer to enter into an arrangement

with the client for a contingent fee except in accordance with the provisions of the *Solicitors Act* or in accordance with the *Class Proceedings Act, 1992*.[8]

[Amended — May 1995]

The Lawyer as Advocate

Rule 10

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

COMMENTARY

Scope of the Rule

1. The principle of this Rule applies generally to the lawyer as advocate, and therefore extends 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.[2]

Abuse of Process

2. The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect.[3]

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 the client and are brought solely for the purpose of injuring the other party;[4]

(b) knowingly assist or permit the client to do anything which the lawyer considers to be dishonest or dishonourable;[5]

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the 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;[6]

(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;[7]

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct;[8]

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;[9]

(g) knowingly assert something for which there is no reasonable basis in evidence, or the admissibility of which must first be established;[10]

(h) deliberately refrain from informing the tribunal of any pertinent authority which the lawyer considers to be directly on point and which has not been mentioned by an opponent;[11]

(i) dissuade a material witness from giving evidence, or advise such a witness to be absent;[12]

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

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

(l) needlessly inconvenience a witness.

3. (a) The lawyer who has unknowingly done or failed to do something which if done or omitted knowingly would have been in breach of this Rule and who discovers it, has a duty to the court, subject to Rule 4 on Confidentiality of Information, to disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.[13]

(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 that cannot be done the lawyer should, subject to Rule 8 on Withdrawal of Services, withdraw or seek leave to do so.[14]

4. In civil proceedings, the lawyer has a duty not to mislead the court as to the position of the client in the adversary process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial whereby a plaintiff is guaranteed recovery by one or more parties notwith-

standing the judgment of the court, shall forthwith reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

Unmeritorious Proceedings

5. The lawyer should never waive or abandon the client's legal rights, for example an available defence under a statute of limitations, without the client's informed consent. In civil matters it is desirable that the lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections or 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.[15]

Encouraging Settlements

6. Whenever the case can be fairly settled, the lawyer should advise and encourage the client to do so rather than commence or continue legal proceedings.[16]

Courteousness

7. 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 outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit discipline.[17]

Undertakings

8. 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 a personal promise and responsibility.[18]

Duty as Prosecutor

9. 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. The prosecutor 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, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant and known facts and witnesses, whether tending to show guilt or innocence.[20]

Duty as Defence Counsel

10. When defending an accused person, the lawyer's duty is to protect the client as far as possible from being convicted except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and not withstanding the lawyer's private opinion as to credibility or merits, the lawyer may properly rely upon any

evidence or defences including so-called technicalities not known to be false or fraudulent.[21]

11. Admissions made by the accused to the lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, or to the form of the indictment, or to the admissability or sufficiency of the evidence, but must not suggest that some other person committed the offence, or call any evidence which, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done, or in fact 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. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.[22]

Agreement on Guilty Plea

12. Where, following investigation:

(a) the defence lawyer bona fide concludes and advises the 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 the lawyer,

it is not improper for the lawyer to have discussions with the prosecutor regarding a possible disposition of the case. The public interest must not, however, be sacrificed in pursuit of an apparently expedient means of disposing of doubtful cases.[23]

Role in Adversary Proceedings

13. In adversary proceedings the lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (save as required by law or under subparagraph 2(h) and paragraph 9 above) to assist an adversary or advance matters derogatory to the 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 the client's case so as to ensure that the court is not misled.[24]

Interviewing Witnesses

14. The lawyer may properly seek information from any potential witness (whether under subpoena or not) but should disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.[25] An opposite party who is professionally represented should not be approached or dealt with save through or with the consent of that party's lawyer.[26]

Communication with Witness giving Evidence

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

(a) During examination-in-chief it is not improper for the examining lawyer to discuss with the witness any matter that has not been covered in the examination up to that point.

(b) During examination-in-chief by another lawyer of a witness who is unsympathetic to the lawyer's cause the lawyer not conducting the examination-in-chief may properly discuss the evidence with the 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 the witness is under cross-examination the lawyer ought not to have any conversation with the witness respecting the witness's evidence or relative to any issue in the proceeding.

(e) Between completion of cross-examination and commencement of re-examination the lawyer who is going to re-examine the witness ought not to have any discussion respecting evidence that will be dealt with on re-examination.

(f) During cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause the lawyer may properly discuss the witness's evidence with the witness.

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

(h) During re-examination of a 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. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.

If there is any question whether the lawyer's behaviour may be in violation of a rule of conduct or professional etiquette, it will often 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 as Witness

16. (a) The lawyer who appears as advocate should not submit the lawyer's own affidavit to the tribunal.

(b) The lawyer who appears as advocate should not testify before the tribunal save as may be permitted by the Rules of Civil Procedure or as to purely formal or uncontroverted matters. Nor should the lawyer express personal opinions or beliefs, or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer must not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. The lawyer who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings.[27] There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

(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 which the lawyer is appearing.

The Lawyer and the Administration of Justice

Rule 11

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

COMMENTARY

Scope of the Rule

1. The obligation outlined in the Rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. The lawyer's responsibilities are greater than those of a private citizen. The lawyer must not subvert the law by counselling or assisting in activities which are in defiance of it. The lawyer 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 of being a lawyer will lend weight and credibility to public statements.[2] Yet for the same reason the lawyer should not hesitate to speak out against an injustice.

Improving the Administration of Justice

2. 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.[3]

3. The lawyer, by training, opportunity and experience is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. The lawyer should, therefore, lead in seeking

improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.[4]

4. The lawyer who seeks legislative or administrative changes should disclose whose interest is being advanced, whether the lawyer's interest, that of a client, or the public interest. The lawyer may advocate such changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes which the lawyer conscientiously believes to be in the public interest.[5]

Criticizing the Tribunal

5. 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 law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. Firstly, the lawyer should avoid criticism which is petty, intemperate or unsupported by a bona fide belief in its real merit, bearing in mind that in the eyes of the public professional knowledge lends weight to the lawyer's judgments or criticism. Secondly, if the lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Thirdly, where a tribunal is the object 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 therefore respect for the legal system.[6]

Security of Court Facilities

6. A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility shall inform the local police force and give particulars. Where possible the lawyer ought to suggest solutions to the anticipated problem such as:

(a) the necessity for further security;

(b) that judgment ought to be reserved;

(c) such other measures as may seem advisable.

[Amended — Nov. 1989]

Advertising and Making Legal Services Available

Rule 12

General

1. 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]

Advertising

2. Subject to paragraph 3 of this Rule individual lawyers or firms may advertise their services or fees in any medium including the use of brochures and similar documents provided the advertising:

(a) is not false or misleading and any factual information in the advertisement is verifiable;

(b) is in good taste and not such as to bring the profession or the administration of justice into disrepute;

(c) does not compare services or charges with other lawyers or firms.

3. Individual lawyers or firms may advertise fees charged for their services subject to the following conditions:

(a) advertisement of fees for consultation or for specific services shall contain an accurate statement of the services provided for the fee and the circumstances in which higher fees may be charged;

(b) if fees are advertised, the fact that disbursements are an additional cost must be made clear in the advertisement;

(c) advertisements shall not use words or expressions such as "from . . .", "minimum" or " . . . and up" or the like in referring to the fees to be

charged nor shall advertisements indicate that a price is a discount or reduction or special rate;

(d) services covered by advertised fees shall be provided at the advertised rate to all clients who retain the advertising lawyer or firm during the 30-day period following upon the last publication of the fee unless there are special circumstances which would not have been foreseen, the burden of proving which rests upon the lawyer.

Restrictions on Soliciting and Advertising

4. A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's so doing is to be retained in a particular matter, except as a public service. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful. All such letters or advertising circulars shall be clearly marked "advertisement" on each page thereof.

5. The lawyer shall not:

(a) permit the lawyer's 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 the lawyer's 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 legally represented in the transaction;

(d) offer or permit others to offer the lawyer's services to any prospective purchaser as being particularly fit to act for such purchaser because of special knowledge acquired as lawyer for the vendor;

(e) permit a vendor or real estate agent to hold out to a prospective purchaser that the lawyer, as lawyer for the vendor, will also act for the purchaser and that the lawyer's fees for so acting will be paid in whole or in part by the vendor;

(f) arrange for or encourage anyone (e.g., a real estate agent) to make a practice of recommending to any person 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.

6. 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.[2]

Firm Name, Letterhead and Related Matters

7. (a) A firm name may consist of or include the names of deceased or retired members of the firm.

(b) The name of a law firm shall not include a trade name, a commercial name, or a figure of speech. Save as provided in paragraph (c) below, it shall only include the names of persons who, if living, are qualified to practise in Ontario or in any other province or territory of Canada where the firm carries on its practice, or who, if dead, were qualified to practise in Ontario or in any other province or territory of Canada where the firm carries on its practice.

(c) The use of phrases such as "John Doe and Associates", or "John Doe and Company" and "John Doe and Partners" 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.

(d) When a lawyer retires from a firm to take up an appointment as a judge or master, or to fill any office incompatible with the practice of law, the lawyer's name shall be deleted from the firm name.

(e) A lawyer who purchases a practice may, for a reasonable length of time, use the words "Successor to _____" in small print under the lawyer's own name.

(f) It is improper to acquire and use a firm name unless such name was acquired along with the practice of a deceased or retiring member who conducted a practice under such name.

(g) Lawyers who practise in the industrial property field may show the names of patent and trademark agents registered in Canada who are identified as such but who are not lawyers.

(h) A lawyer's letterhead and the signs identifying the office shall 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 together with the addresses, telephone numbers and office hours and the languages in which the lawyer is competent and capable of conducting a practice. Logos may be used on letterheads provided they are in good taste.

[Amended — Oct. 1987]

(i) Lawyers may place after their names on their letterhead degrees from bona fide universities and post secondary institutions including honorary degrees; professional qualifications such as the designations of P.Eng., C.A., and M.D.; and recognized civil and military decorations and awards.

Restricted Practices

8. (a) The lawyer may indicate that the lawyer is a specialist in a particular area of the law only if the lawyer has been so certified by the Law Society. The lawyer may state that the lawyer's practice is restricted to a particular area or areas of the law or may indicate that the lawyer practises in a certain area or areas of the law if such is the case but may not indicate that the lawyer has a preferred area or areas of practice. The lawyer may indicate that the lawyer is in general practice if such is the case.

(b) A firm of lawyers may:

(i) indicate under its firm name that it is in general practice or that it practises in certain areas of the law or that it has a restricted practice;

(ii) indicate the area or areas of law in which particular members practise or to which they restrict their practice.

[Amended — Mar. 1989]

COMMENTARY

Finding a Lawyer

1. It is essential that a person requiring legal services be able to find, with a minimum of difficulty or delay, a lawyer 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 to have confidence. However, in larger centres these conditions will often not obtain, and as the practice of law becomes increasingly complex and the practice of many individual lawyers becomes 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 finding a lawyer with the special skill required for a particular task. Telephone directories, legal directories and referral services may help find a lawyer, but not necessarily the right one for the client's need.[3]

2. The lawyer who is consulted by a prospective client in such circumstances should be ready to assist in finding the right lawyer to deal with the problem. If unable to act, for example because of lack of qualification in the particular field, the lawyer should assist in finding a practitioner who is qualified and able to act. Such assistance should be given willingly and, except in very special circumstances, without charge.[4]

3. The lawyer may also assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services, by engaging in programmes of public information, education or advice concerning legal matters, and by being considerate of those who seek advice but 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 interests of the public or the profession.

Right to Decline Employment

5. The lawyer has a general right to decline a particular employment (except when assigned as counsel by a court), but it is a right to be exercised prudently if the probable result would be to make it very difficult for a person to obtain legal advice or representation. Generally speaking, the lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. As stated in paragraph 2, the lawyer declining employment should assist in obtaining the services of another lawyer qualified in the particular field and able to act.[5]

Responsibility to the Profession Generally

Rule 13

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

COMMENTARY

1. Unless the lawyer who tends to depart from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct 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 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 to do so. In all cases the report must be made bona fide without malice or ulterior motive.[2]

2. The lawyer shall attempt to persuade a client who has a claim against an apparently dishonest lawyer to report the facts to the Law Society before pursuing private remedies. If the client refuses to report the matter to the Law Society, the lawyer shall inform the client of the policy of the Law Society's Compensation Fund and should obtain instructions in writing to proceed with the client's claim without notice to the Law Society. The lawyer should inform the client of the provision of the *Criminal Code* of Canada dealing with the concealment of an indictable offence in return for an agreement to obtain valuable consideration (section 141). In the event the client wishes to pursue a private agreement with the apparently dishonest lawyer, the lawyer shall not continue to act if the agreement constitutes a breach of section 141.

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

4. The lawyer should not in the course of a professional practice write letters, whether to a 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]

Non-Discrimination

5. [*Commentary 5 was deleted by Convocation on 25 November 1994. It has been replaced by Rule 28, which was approved by Convocation on 23 September 1994.*].

[Deleted — Nov. 1994]

Duty to meet Financial Obligations

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

Lawyers have a professional duty generally 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.

Duty to observe Recruitment Guidelines for Articling Students and Summer Students

7. Lawyers have a duty to observe the guidelines of the Law Society pertaining to the recruitment of articling students and the engagement of summer students. Deliberate circumvention of the restrictions set out in the guidelines will be considered professional misconduct on the part of those who participate in or authorize the circumvention.

[New — Oct. 1987]

Responsibility to Lawyers Individually

Rule 14

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

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 personally abusive 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, the waiver of procedural formalities and similar matters which do not prejudice the rights of the client.[4]

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

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

6. The lawyer should give no undertaking that cannot be fulfilled and the lawyer should fulfill every undertaking given. Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If the lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as "on behalf of my client" or "on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility.[7]

7. The lawyer should not communicate upon or attempt to negotiate or compromise a matter directly with any person 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 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.

Retired Judges Returning to Practice

Rule 15

1. Without the express approval of Convocation, which approval may only be granted in exceptional circumstances and may be restricted as Convocation sees fit, no member who was formerly a judge of the Supreme Court of Canada, the Ontario Court of Appeal or the Federal Court of Canada, Appeal Division and who has retired, resigned or been removed from the Bench and has returned to practice, shall appear as counsel or advocate in any court, or in chambers, or before any administrative board or tribunal.

2. Without the express approval of Convocation, which approval may only be granted in exceptional circumstances and may be restricted as Convocation sees fit, no member who was formerly a judge of the Federal Court of Canada, Trial Division, the Tax Court of Canada, the Supreme Court of Ontario, Trial Division, a County or District Court or the Ontario Court of Justice (General Division) and who has retired, resigned or been removed from the Bench and has returned to practice, shall appear as counsel or advocate,

(a) before the court on which the judge served or any lesser court; and

(b) before any administrative board or tribunal over which the court on which the judge served excercised an appellate or judicial review jurisdiction;

for a period of two years from the date of such retirement, resignation or removal.

[Amended—Jan.1991]

Delegation to Non-Lawyers

Rule 16

1. Lawyers may in appropriate circumstances render services to their clients with the assistance of non-lawyers of whose competence they are satisfied. Though legal tasks may be delegated to such persons, the lawyer in question remains responsible for all services rendered and for all written materials prepared by non-lawyers. It is recognized that there exists a category of non-lawyers, generally referred to as law clerks, who have received specialized training or education and are therefore capable of doing independent work under the general supervision of a lawyer. Such persons are included within the scope of this Rule.

2. The lawyer may permit a non-lawyer to perform tasks delegated and supervised by a lawyer so long as the lawyer maintains a direct relationship with the client or, if the lawyer is in a community legal clinic funded by a Clinic Funding Committee, so long as the lawyer maintains a direct supervisory relationship with each client's case in accordance with the supervision requirements of the Clinic Funding Committee, and assumes full professional responsibility for the work. The lawyer shall not permit a non-lawyer to perform any of the duties that only lawyers may perform, or do things that lawyers themselves may not do. Generally speaking, and subject to the provisions of any statute, rule or court practice in that regard, the question of what the lawyer may delegate to a non-lawyer turns upon the distinction between any special knowledge of the non-lawyer and the professional and legal judgment of the lawyer which in the public interest must be exercised by the lawyer whenever it is required.

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

4. Every law office, including a branch office of a law firm, must at all times be effectively supervised by a lawyer.

COMMENTARY

Scope of Rule

1. This Rule has been formulated to provide guidelines for the delegation of duties to non-lawyers and the supervision of non-lawyers.

Permissible Delegation

2. The following examples, which do not purport to be exhaustive, illustrate the application to particular areas of practice of the general guidelines contained in paragraph 1 of the Commentary.

(a) Real Estate

The lawyer may permit a non-lawyer to attend to all matters of routine administration, and to assist in more complex transactions relating to the sale, purchase, option, lease or mortgaging of land, to draft statements of account and routine documents and correspondence, and to attend to registrations, provided that the lawyer should not delegate to a non-lawyer ultimate responsibility for review of a title search report, or of documents before signing, or the review and signing of a letter of requisition, a title opinion or reporting letter to the client.

(b) Corporate and Commercial

A lawyer may permit a non-lawyer to attend to all matters of routine administration, and to assist in more complex matters and to draft routine documents and correspondence relating to corporate, commercial and securities matters such as drafting corporate minutes and documents pursuant to corporation statutes, security instruments, security registration documents and contracts of all kinds, closing documents and statements of account, and to attend on filings.

(c) Wills, Trusts and Estates

A lawyer may permit a non-lawyer to attend to all matters of routine administration, and to assist in more complex matters, to collect information, draft routine documents and correspondence, prepare income tax returns, calculate such taxes, draft executors' accounts and statements of account, and attend to filings.

(d) Litigation

The lawyer may permit a non-lawyer to attend to all matters of routine administration, and to assist in more complex matters, to collect information, draft routine pleadings, correspondence and other routine documents, research legal questions, prepare memoranda, organize documents, prepare briefs, draft statements of account and attend to filings. Generally speaking, a non-lawyer shall not attend on examinations or in court except in support of a lawyer also in attendance. Permissible exceptions include law clerks employed by only one lawyer or law firm appearing on;

(i) routine adjournments in provincial courts;

(ii) appearances before tribunals where statutes or regulations permit non-lawyers to appear, e.g., Small Claims Court, Provincial Courts, Coroners' Inquests, as agent on summary conviction matters where so authorized by the *Criminal Code*, and administrative tribunals under the *Statutory Powers Procedure Act*;

(iii) attendance on routine examinations in uncontested matters such as for the purpose of obtaining routine admissions, attendance upon judgment debtor examinations and on watching briefs; however, in no circumstances shall a non-lawyer be permitted to conduct an examination for discovery in a contested matter or a cross-examination of a witness in aid of a motion;

(iv) attendance before a Master on simple *ex parte* matters or for a consent order;

(v) attendance on assessment of costs.

Non-Permissible Delegation

3. The lawyer may not permit a non-lawyer to,

(a) accept cases on behalf of the lawyer, except that such persons may receive instructions from established clients if the supervising lawyer is advised before any work commences;

(b) fix fees, except where such persons use a fee schedule; provided that the lawyer has set the fee schedule and is responsible for sending the account to the client;

(c) give legal opinions;

(d) give or accept undertakings, except with the express authorization of the supervising lawyer;

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

(f) be held out as a lawyer. (The lawyer should insure that the non-lawyer is identified as such when communicating orally or in writing with clients, lawyers, public officials or with the public generally whether within or outside the offices of the law firm of employment);

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

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

(i) be remunerated on a sliding scale related to the earnings of the lawyer, except where such person is an employee of the lawyer;

(j) conduct negotiations with third parties, other than routine negotiations where the client consents and the results thereof are approved by the supervising lawyer before action is taken;

(k) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose;

(l) sign correspondence containing a legal opinion, but the non-lawyer who has been specifically directed to do so by a supervising lawyer may sign correspondence of a routine administrative nature, provided that the fact such person is a non-lawyer is disclosed, and the capacity in which such person signs the correspondence is indicated;

(m) forward to a client any documents, other than routine documents, unless they have previously been reviewed by the lawyer.

4. For the purposes of this Rule and Commentary, a non-lawyer does not include a student-at-law.

Outside Interests and the Practice of Law

Rule 17

The lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence or competence.[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, a career in business, politics, broadcasting or the performing arts. In each case the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Society.[2]

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

3. Where the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute,[4] or impair the lawyer's competence as, for example, where the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

The Lawyer in Public Office

Rule 18

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

COMMENTARY

Scope of Rule

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 the lawyer attained such office because of professional qualifications.[2] Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by failure to observe its ethical standards.

2. Generally speaking, the Society will not be concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office which reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action.[3]

Conflict of Interest

3. The lawyer who holds public office must not allow professional or personal interests to conflict with the proper discharge of official duties. The lawyer holding part-time public office must not accept any private legal business where duty to the client will, or may, conflict with official duties. If some unforeseen conflict arises, the lawyer should terminate the professional relationship, explaining to the client that official duties must prevail. The lawyer who holds a full-time public office will not be faced with this sort of conflict, but must nevertheless guard against allowing independent judgment in the discharge of official duties to be influenced either by the lawyer's own interest, that of some person closely related to or associated with

the lawyer, that of former or prospective clients, or of former or prospective partners or associates.[4]

4. Subject to any special rules applicable to the particular public office, the lawyer holding such office who sees that there is a possibility of a conflict of interest should declare such interest at the earliest opportunity, and not take part in any consideration, discussion or vote with respect to the matter in question.[5]

5. If there may be a conflict of interest, the lawyer should not represent clients or advise them in contentious cases which the lawyer has been concerned with in an official capacity.[6]

Appearances before Official Bodies

6. When the lawyer or any of the lawyer's partners or associates is a member of an official body such as, for example, a school board or municipal council, the lawyer should not appear professionally before that body. However, subject to the rules of the official body, it would not be improper for a 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 of matters in which such partner or associate appears, the lawyer does not sit on the committee, take part in the discussions of such committee's recommendations or vote upon them.[7]

Conduct after Leaving Public Office

7. The lawyer who has left public office should not act for a client in connection with any matter for which the lawyer had substantial responsibility prior to leaving office. However, it would not be improper for the lawyer to act professionally in such a matter on behalf of the public body in question.[8]

8. By way of corollary to Rule 17, the lawyer who has acquired confidential information by virtue of holding public office should keep such information confidential and not divulge or use it notwithstanding that the lawyer has ceased to hold such office.[9]

Practice by Unauthorized Persons

Rule 19

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

COMMENTARY

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

2. Lawyers must assume complete professional responsibility for all business entrusted to them maintaining direct supervision over staff and assistants such as students and clerks to whom they delegate particular tasks and functions. The lawyer who practises alone or operates a branch or part-time office should ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work, and that legal advice is not given by unauthorized persons, whether in the lawyer's 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 the lawyer's letterhead, prepared under the lawyer's supervision and sent from the lawyer's office.

Disbarred Persons

Rule 20

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 suspended, or who has been involved in disciplinary action and been permitted to resign as a result thereof, and has not been reinstated or yet been readmitted.

Lawyers in their Public Appearances and Public Statements

Rule 21

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

2. The lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer. The lawyer owes a duty to the client to be qualified to represent the client effectively before the public and not to permit any personal interest or other cause to conflict with the client's interests.

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

4. The lawyer should, where possible, encourage public respect for and try to improve the administration of justice. In particular, the lawyer should treat fellow practitioners, the courts, and tribunals with respect, integrity, and courtesy. Lawyers are subject to a separate and higher standard of conduct than that which might incur the sanction of the court.

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

COMMENTARY

1. The media has recently shown greater interest in legal matters, which is reflected in more comprehensive coverage of the passage of legislation at the national and provincial levels and of those cases before the courts affecting the social, economic, and political life of society. This interest has been heightened by the enactment of the Charter of Rights and Freedoms. Media reporters have accordingly sought out the views, not only of lawyers directly involved in particular court proceedings, but also of lawyers who represent special interest groups or have recognized expertise in the field in order to obtain information and provide commentary.

Where the lawyer, by reason of professional involvement or otherwise, is able to assist the media in conveying accurate information to the public, it is proper that the lawyer do so, so long as there is no infringement of the lawyer's obligations to the client, the profession, the courts or the administration of justice.

2. The lawyer is often involved in a non-legal setting where contact is made with the media with respect to publicizing such things as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations, or in acting as a spokesman for organizations which, in turn, represent particular racial, religious or other special interest groups. This is a well-established and completely proper role for the lawyer to play, in view of the obvious contribution it makes to the community.

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

4. The lawyer is often involved as advocate for special interest groups whose objective it is to bring about changes in legislation, governmental policy, or even a heightened public awareness about certain issues. This is also an important role that the lawyer can be called upon to play.

5. Given the variety of cases that can arise in the legal system, particularly so far as civil, criminal, and administrative proceedings are concerned, it is simply impossible to set down guidelines which would anticipate every possible circumstance. There are going to be circumstances where the lawyer should have no contact with the media and other cases where the lawyer is under a specific duty to contact the media to serve properly the client — the latter situation arising more often in the context of administrative boards and tribunals where a given tribunal is an instrument of government policy and hence is susceptible to public opinion.

6. Lawyers should be conscious of the fact that when a public appearance is made or a statement is given the lawyer will ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used, or under what headline it may appear.

Interprovincial Law Firms

Rule 22

1. Lawyers may enter into agreements with lawyers in other Canadian jurisdictions to form an interprovincial law firm (an interprovincial law firm being one that carries on the practice of law in more than one province or territory of Canada), provided they comply with the requirements noted below.

2. The members of interprovincial law firms qualified to practise in Ontario must comply with all the requirements of the Law Society of Upper Canada.

3. The members of interprovincial law firms qualified to practise in Ontario must ensure that the books, records and accounts pertaining to their practice in Ontario be available in Ontario on demand by the Law Society's auditors or their designated agents.

4. The members of interprovincial law firms qualified to practise in Ontario must ensure that they do not permit their partners, associates, or employees who are not qualified to practise in Ontario, to be held out as or to represent themselves as qualified to practise in Ontario.

Lawyers in Mortgage Transactions

Rule 23

1. In this Rule:

(a) "syndicated mortgage" means a mortgage having more than one investor;

(b) "related persons" means related persons as defined in the *Income Tax Act* (Canada) and "related person" has a corresponding meaning.

Syndicated Mortgages, Lawyer Participation and Standard of Care

2. No lawyer engaged in the private practice of law in Ontario shall directly, or indirectly through a corporation, syndicate, partnership, trust or other entity in which the lawyer or a related person has a financial interest,

(a) hold a syndicated mortgage in trust for investor clients unless each investor client receives;

(i) a complete reporting letter on the transaction;

(ii) a trust declaration signed by the person in whose name the mortgage is registered; and

(iii) a copy of the duplicate registered mortgage;

(b) arrange or recommend the participation of a client as an investor in a syndicated mortgage where the solicitor is an investor unless the solicitor can demonstrate that the client had competent independent advice in making the investment or that the client is a knowledgeable investor; or

[Amended — March 1990]

(c) sell mortgages to, or arrange mortgages for, clients or other persons except in accordance with the skill, competence and integrity usually expected of a lawyer in dealing with clients.

Disclosure

3. Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer which would be of concern to a proposed investor.

No advertising

4. A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients, or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest.

5. Under this Rule, the ownership of less than five per cent (5%) of any class of securities of a corporation or other entity offering its securities to the public is not considered a "financial interest".

Guarantees by a Lawyer

6. (a) A lawyer shall not guarantee personally any mortgage, or other document securing indebtedness, in which a client is involved as a borrower or lender.

(b) Notwithstanding subparagraph (a) preceding, a lawyer may give a personal guarantee in the following or similar circumstances:

(i) to a financial institution, whose business includes that of lending money to the public and which is providing funds directly or indirectly to the lawyer, the lawyer's spouse, parent or child; or

(ii) for the benefit of a non-profit or charitable institution where the lawyer as a member or supporter of such institution is asked, either individually or together with other members or supporters of the institution, to provide a guarantee.

Acceptable Mortgage Transactions

7. A lawyer may engage in the following mortgage transactions in connection with the practice of law:

(a) a lawyer may act on behalf of a borrower and a lender but only if the lawyer complies with paragraph 4 of the Commentary to Rule 5;

(b) a lawyer may introduce a borrower (whether or not a client) to a lender (whether or not a client) and may subsequently act on behalf of either or both parties, but where the lawyer is acting on behalf of both parties

the lawyer shall comply with paragraph 4 of the Commentary to Rule 5;

(c) a lawyer may invest in mortgages personally or on behalf of a related person or a combination thereof;

(d) a lawyer may deal in mortgages in the capacity of an executor, administrator, committee, trustee of a testamentary or *inter vivos* trust established for purposes other than mortgage investment or pursuant to a power of attorney given for purposes other than exclusively for mortgage investment; and

(e) a lawyer may collect, on behalf of clients, mortgage payments that are made payable in the name of the lawyer pursuant to a written direction to that effect given by the client to the mortgagor provided that such payments are deposited into the lawyer's trust account.

The Duty of the Lawyer as an Articling Principal and the Duty of the Articling Student

Rule 24

1. The lawyer in the capacity of a principal to an articling student owes an important duty and responsibility to that student. These encompass meaningful training and exposure to and involvement in work which will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession.

2. The articling student owes a duty to the principal and the principal's firm to act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

Lawyers as Mediators

Rule 25

The lawyer who functions as a mediator must ensure that the parties to the mediation process understand fully that the function being discharged is not part of the traditional practice of law and that the lawyer is not acting as a lawyer for either party. The lawyer as mediator acts to assist the parties to resolve the matters in issue.

COMMENTARY

1. The lawyer-mediator should suggest and encourage the parties to seek the advice of separate counsel before and during the mediation process if they have not already done so.

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

3. The lawyer-mediator must at the outset inform the parties to the mediation that although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by the solicitor-client privilege.

4. In acting in the capacity of a mediator the lawyer as a general rule should not give legal advice as opposed to legal information to the parties during the mediation process.

5. As a general rule, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of Rule 5 and its Commentaries and the common law authorities.

Medical-Legal Reports

Rule 26

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

2. A lawyer who receives a medical-legal report from a physician containing opinions or findings which if disclosed might cause harm or injury to the client, should attempt to dissuade the client from seeing the report but, if the client insists, the lawyer is duty bound to produce it.

COMMENTARY

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

2. In the event that the client insists on seeing a medical-legal report about which the lawyer has reservations for the reasons noted in paragraph 2 of this Rule, the lawyer should suggest that the client attend at the office of the physician to see the report in order that the client will have the benefit of the expertise of the physician in understanding the significance of the conclusion contained in the medical-legal report.

Sexual Harassment

Rule 27

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

COMMENTARY

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

(i) when such conduct might reasonably be expected to cause insecurity, discomfort, offence or humiliation to another person or group; or

(ii) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services; or

(iii) when submission to such conduct is made implicitly or explicitly a condition of employment; or

(iv) when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, matters of promotion, raise in salary, job security and benefits affecting the employee); or

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

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

- sexist jokes causing embarrassment or offence, told or carried out after the joker has been advised that they are embarrassing or offensive, or that are by their nature clearly embarrassing or offensive
- leering
- the display of sexually offensive material

- sexually degrading words used to describe a person
- derogatory or degrading remarks directed towards members of one sex or one sexual orientation
- sexually suggestive or obscene comments or gestures
- unwelcome inquiries or comments about a person's sex life
- unwelcome sexual flirtations, advances, propositions
- persistent unwanted contact or attention after the end of a consensual relationship
- requests for sexual favours
- unwanted touching
- verbal abuse or threats
- sexual assault.

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

[New — July 1992]

Discrimination

Rule 28

The lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and specifically to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the *Ontario Human Rights Code*), marital status, family status or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other members of the profession or any other person.

COMMENTARY

The Law Society of Upper Canada acknowledges the diversity of the community of Ontario in which its members serve and expects members to respect the dignity and worth of all persons and to treat all persons equally without discrimination. Members must ensure that no one is denied services or receives inferior service on the basis of the grounds noted in the Rule. Members must ensure that their employment practices do not offend the Rule. Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the *Ontario Human Rights Code* and related equity legislation.

Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The *Ontario Human Rights Code* requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the *Code*.

The Rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

[New — September 1994]

Conflicts Arising as a Result of Transfer Between Law Firms

Rule 29

Definitions

(1) In this Rule:

"client" includes anyone to whom a member owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them;

"confidential information" means information obtained from a client which is not generally known to the public;

"law firm" includes one or more members practising,

(a) in a sole proprietorship,

(b) in a partnership,

(c) in association for the purpose of sharing certain common expenses but who are otherwise independent practitioners,

(d) as a professional law corporation,

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

(f) in a corporation or other body;

"matter" means a case or client file, but does not include general "know-how" and, in the case of a government lawyer, does not include policy advice unless the advice relates to a particular case;

"member" means a member of this Society, and includes an articled law student registered in this Society's pre-call training program.

Application of Rule

(2) This Rule applies where a member transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring member or the new law firm is aware at the time of the transfer or later discovers that,

(a) the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client ("former client");

(b) the interests of those clients in that matter conflict; and

(c) the transferring member actually possesses relevant information respecting that matter.

(3) Subrules (4) to (7) do not apply to a member employed by the federal, a provincial or a territorial Attorney General or Department of Justice who, after transferring from one department, ministry or agency to another, continues to be employed by that Attorney General or Department of Justice.

Firm Disqualification

(4) Where the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter unless,

(a) the former client consents to the new law firm's continued representation of its client; or

(b) the new law firm establishes, in accordance with subrule (8), that,

(i) it is in the interests of justice that its representation of its client in the matter continue, having regard to all relevant circumstances, including,

(A) the adequacy of the measures taken under (ii),

(B) the extent of prejudice to any party,

(C) the good faith of the parties,

(D) the availability of alternative suitable counsel, and

(E) issues affecting the national or public interest, and

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

Transferring lawyer disqualification

(5) Where the transferring member actually possesses relevant information respecting the former client but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client,

(a) the member should execute an affidavit or solemn declaration to that effect, and

(b) the new law firm shall,

(i) notify its client and the former client, or if the former client is represented in that matter by a member, notify that member, of the relevant circumstances and its intended action under this Rule, and

(ii) deliver to the persons referred to in (i) a copy of any affidavit or solemn declaration executed under (a).

(6) A transferring member described in the opening clause of subrule (4) or (5) shall not, unless the former client consents,

(a) participate in any manner in the new law firm's representation of its client in that matter; or

(b) disclose any confidential information respecting the former client.

(7) No member of the new law firm shall, unless the former client consents, discuss with a transferring member described in the opening clause of subrule (4) or (5) the new law firm's representation of its client or the former law firm's representation of the former client in that matter.

Determination of compliance

(8) Anyone who has an interest in, or who represents a party in, a matter referred to in this Rule may apply to the Society or to a court of competent jurisdiction for a determination of any aspect of this Rule.

Due diligence

(9) A member shall exercise due diligence in ensuring that each member and employee of the member's law firm, and each other person whose services the member has retained,

(a) complies with this Rule; and

(b) does not disclose,

(i) confidences of clients of the firm, and

(ii) confidences of clients of another law firm in which the person has worked.

COMMENTARY

1. Application of this Rule

The purpose of the Rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.

a. Lawyers and support staff

This Rule is intended to regulate members of the Society and articled law students who transfer between law firms. It also imposes a general duty on members to exercise due diligence in the supervision of non-lawyer staff, to ensure that they comply with the Rule and with the duty not to disclose,

- confidences of clients of the member's firm; and
- confidences of clients of other law firms in which the person has worked.

[*b. Government employees and in-house counsel*

The definition of "law firm" includes one or more members of the Society practising in a government, a Crown corporation, any other public body and a corporation. Thus, the Rule applies to members transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.]

[NOT YET IN EFFECT]

c. Law firms with multiple offices

The Rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm and a legal aid program with many community law offices. The more autonomous that each unit or office is, the easier it should be, in the event of a conflict, for the new firm to obtain the former client's consent or to establish that it is in the public interest that it continue to represent its client in the matter.

d. Practising in association

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

2. Matters to consider when interviewing a potential transferee

When a law firm considers hiring a lawyer or articled law student ("transferring member") from another law firm, the transferring member and the new law firm need to determine, *before transfer*, whether any conflicts of interest will be created.

Conflicts can arise with respect to clients of the firm which the transferring member is leaving, and with respect to clients of a firm in which the transferring member worked at some earlier time.

During the interview process, the transferring member and the new law firm need to identify, firstly, all cases in which,

i. the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client;

ii. the interests of these clients in that matter conflict; and

iii. the transferring member actually possesses relevant information respecting that matter.

When these three elements exist, the transferring member is personally disqualified from representing the new client, unless the former client consents.

Second, they must determine whether, with respect to each such case, the transferring member actually possesses relevant information respecting the former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client.

If this element exists, then the transferring member is disqualified unless the former client consents, and the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the public interest.

In this Rule, "confidential" information refers to information obtained from a client which is not generally known to the public. It should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

In determining whether the transferring member possesses confidential information, both the transferring member and the new law firm need to be very careful to ensure that they do not, during the interview process itself, disclose client confidences.

3. Matters to consider before hiring a potential transferee

After completing the interview process and before hiring the transferring member, the new law firm should determine whether a conflict exists.

a. Where a conflict does exist

If the new law firm concludes that the transferring member does actually possess relevant information respecting a former client which is confidential and which, if disclosed to a member of the new law firm, may prejudice the former client, then the new law firm will be prohibited, if the transferring member is hired, from continuing to represent its client in the matter unless,

i. the new law firm obtains the former client's consent to its continued representation of its client in that matter; or

ii. the new law firm complies with subrule (4)(b), and in determining whether continued representation is in the interests of justice, both clients' interests are the paramount consideration.

If the new law firm seeks the former client's consent to the new law firm continuing to act it will, in all likelihood, be required to satisfy the former client that it has taken reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur. The former client's consent must be obtained before the transferring member is hired.

Alternatively, if the new law firm applies under subrule (8) for a determination that it may continue to act, it bears the onus of establishing the matters referred to in subrule (4)(b). Again, this process must be completed before the transferring person is hired.

An application under subrule (8) may be made to the Society or to a court of competent jurisdiction. The Society has developed a procedure for adjudicating disputes under this Rule, which is intended to provide an informal and economical procedure for the speedy disposition of disputes.

The circumstances enumerated in subrule (4)(b)(i) are drafted in broad terms to ensure that all relevant facts will be taken into account. While clauses (B) to (D) are self-explanatory, clause (E) addresses governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.

b. Where no conflict exists

If the new law firm concludes that the transferring member actually possesses relevant information respecting a former client, but that information is not confidential information which, if disclosed to a member of the new law firm, may prejudice the former client, then,

- the transferring member should execute an affidavit or solemn declaration to that effect; and
- the new law firm must notify its client and the former client/former law firm "of the relevant circumstances and its intended action under the Rule", and deliver to them a copy of any affidavit or solemn declaration executed by the transferring member.

Although the Rule does not require that the notice be in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute as to the fact of notification, its timeliness and content.

The new law firm might, for example, seek the former client's consent to the transferring member acting for the new law firm's client in the matter because, absent such consent, the transferring member may not act.

If the former client does not consent to the transferring member acting, it would be prudent for the new law firm to take reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur. If such measures are taken, it will strengthen the new law firm's position if it is later determined that the transferring member did in fact possess confidential information which, if disclosed, may prejudice the former client.

A transferring member who possesses no such confidential information, by executing an affidavit or solemn declaration and delivering it to the former client, puts the former client on notice. A former client who disputes the allegation of no such confidential information may apply under subrule (8) for a determination of that issue.

c. Where the new law firm is not sure whether a conflict exists

There may be some cases where the new law firm is not sure whether the transferring member actually possesses confidential information respecting a former client which, if disclosed to a member of the new law firm, may prejudice the former client.

In such circumstances, it would be prudent for the new law firm to seek guidance from the Society before hiring the transferring member.

4. Reasonable measures to ensure non-disclosure of confidential information

As noted above, there are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur:

a. where the transferring member actually possesses confidential information respecting a former client which, if disclosed to a member of the new law firm, may prejudice the former client; and

b. where the new law firm is not sure whether the transferring member actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring member did in fact possess such confidential information.

It is not possible to offer a set of "reasonable measures" which will be appropriate or adequate in every case. Rather, the new law firm which seeks to implement reasonable measures must exercise professional judgment in determining what steps must be taken "to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur."

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures". For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm or a legal aid program may be able to argue that, because of its institutional structure, reporting relationships, function, nature of work and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences.

The guidelines at the end of this Commentary, adapted from the Canadian Bar Association's Task Force report entitled: *Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* (February 1993), are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

In cases where a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client which, if disclosed to a member of the new "law firm", may prejudice the former client, the interests of the new client (i.e., Her Majesty or the corporation) must continue to be represented. Normally, this will be effected either by instituting satisfactory screening measures or, when necessary, by referring conduct of the matter to outside counsel. As each factual situation will be unique, flexibility will be required in the application of subrule (4)(b), particularly clause (E).

GUIDELINES

1. The screened member should have no involvement in the new law firm's representation of its client.

2. The screened member should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.

3. No member of the new law firm should discuss the current matter or the prior representation with the screened member.

4. The current client matter should be discussed only within the limited group which is working on the matter.

5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

6. No member of the new law firm should show the screened member any documents relating to the current representation.

7. The measures taken by the new law firm to screen the transferring member should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

8. Affidavits should be provided by the appropriate firm members, setting out that they have adhered to and will continue to adhere to all elements of the screen.

9. The former client, or if the former client is represented in that matter by a member, that member, should be advised,

(a) that the screened member is now with the new law firm, which represents the current client, and

(b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

10. The screened member's office or work station and that of the member's secretary should be located away from the offices or work stations of lawyers and support staff working on the matter.

11. The screened member should use associates and support staff different from those working on the current client matter.

[New — October 1995]

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*, at 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 the lawyer's integrity (whereof a conviction by a competent court would be prima facie evidence);

(b) committing, whether professionally or in the lawyer's 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 the lawyer's 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 fraudently, dishonestly or illegally towards the lawyer's client;

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

(j) failing to honour the lawyer's 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 is 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), at 222-26 and *Orkin*, at 204-14. *Re Weare* (1893), [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).

Abstract of disciplinary provisions illustrating the distinction, in disciplinary proceedings, between "professional misconduct" and "unprofessional conduct":

Alberta:	*Legal Profession Act*, R.S.A. 1980, c. L-9 as am. S.A. 1981, c. 53, s. 20
s. 47(2)	"[conduct] incompatible with the best interests of the public or the members of the Society"
	"tends to harm the standing of the legal profession"
s. 47(3)	"incompetently carrying on the practice of law"
	"incompetently carrying out duties or obligations undertaken by a member or a student-at-law in his capacity as a member or student-at-law"
British Columbia:	*Legal Profession Act*, R.S.B.C. 1987, c. 25
s. 45	"professionally misconducted himself"
	"conducted himself in a manner unbecoming a member"
	"has contravened this Act or a rule made under it"

	"has incompetently carried out duties undertaken by him in his capacity as a member of the society"
s. 51	"convicted of an offence that was proceeded with by way of indictment"
Manitoba:	*Law Society Act*, R.S.M. 1987, c. L-100
s. 49(9)	"conviction of a person of any crime or offence under the Criminal Code (Canada)"
s. 52(1)	"professional misconduct" "conduct unbecoming a barrister, solicitor, or student"
s. 52(2)	"incompetent"
s. 53(3)(a)	"addiction to or excessive use or consumption of alcohol or drugs"
s. 53(3)(b)	"mental incapacity"
New Brunswick:	*Law Society Act*, S.N.B. 1973, c. 80 as am. S.N.B. 1986, c. 96
s. 16(1)	"professional misconduct" default re clients' monies breach of Act or regulation
Newfoundland:	*Law Society Act*, S.N. 1977, c. 77
s. 52(1)(a)	"violation of any principle contained in a code of ethics established or adopted by the Benchers"
s. 52(1)(b)	"professional misconduct" "conduct unbecoming a member or student"
s. 56	"convicted of an indictable offence"
Northwest Territories:	*Legal Profession Ordinance*, S.N.W.T. 1976 (2nd), c. 4
s. 23	"[conduct] inimical to the best interests of the public or the members of the Society" "tends to harm the standing of the legal profession"
Nova Scotia:	*Barristers and Solicitors Act*, R.S.N.S. 1967, c. 18 as am. S.N.S. 1988, c. 21
s. 29(1)	"conduct which may constitute professional misconduct" "conduct unbecoming a barrister or an articled clerk"
(3A)(a)	"professional misconduct, conduct unbecoming a barrister or incompetence"
(3B)	"convicted of an offence under the provisions of the Criminal Code (Canada)"
s. 30(1)	"too ill, physically, mentally or emotionally" "insolvent or absconding"
Ontario:	*Law Society Act*, R.S.O. 1980, c. 233
s. 34	"professional misconduct" "conduct unbecoming a barrister and solicitor"
s. 38	"conduct unbecoming a student member"

Prince Edward Island:	*Law Society and Legal Profession Act*, R.S.P.E.I. 1974, c. L-9
s. 27	"professional misconduct" "conduct unbecoming a member"
Quebec:	*Bar Act*, R.S.Q. 1977, c. B-1
s. 107	"derogatory to the honour or dignity of the Bar or prejudicial to the discipline of its members" "position or office . . . incompatible with the practice of the profession of advocate" "occupation, industry or trade carried on or the position held is incompatible with the honour or dignity of the Bar"
s. 111	"conviction of an indictable offence"
Saskatchewan:	*Legal Profession Act*, R.S.S. 1978, c. L-10
s. 59	"conduct unbecoming a barrister and solicitor"
s. 70	"convicted of an indictable offence"
Yukon Territories:	*Legal Profession Act*, R.S.Y.T. 1986, c. 100
s. 24(2)	"contrary to the public interest" "harms the standing of the legal profession" "contrary to the code of professional conduct and ethics"
s. 24(3)	"incompetently carrying out duties or obligations undertaken by a member or student-at-law in his capacity as a member or student-at-law"
England:	*Cordery on Solicitors* at 315 ". . . because he has been guilty of an act or omission for which the Act or some other statute prescribes that penalty, or because he has committed an act of misconduct which renders him unfit to be permitted to continue in practice." (at 317): "Misconduct which makes a solicitor unfit to continue in practice may be divided into three kinds: criminal conduct, professional misconduct and unprofessional conduct." (at 318): "The jurisdiction is not limited to cases where the misconduct charged amounts to an indictable offence, or is professional in character, but extends to all cases where the solicitor's conduct is 'unprofessional', i.e., such as renders him unfit to be an officer of the court." "Is it a personally disgraceful offence or is it not? Ought any respectable solicitor to be called upon to enter into that intimate discourse with [the offender] which is necessary between two solicitors even though they are acting for opposite parties?": *Re Weare* (1893), [1893] 2 Q.B. 439 at 446 (C.A.), Lord Esher M.R. "Counsel . . . takes the position that the expressions (unprofessional conduct and professional misconduct) are synonymous . . . I agree . . . that the phrases are often used interchangeably but

cannot agree that this is always so. . . . Accepting as I do that the terms are not synonymous. . .": *Re Novak and Law Society* (1973), 31 D.L.R. (3d) 89 at 102 (B.C.S.C.), McKay J.

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" (at 36). "Membership of a . . . professional body is generally treated as an indication of good character in itself. . ." (at 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" (at 36). ". . . Having bestowed a hallmark of competence, a professional institute has some responsibility for ensuring that it remains valid" (at 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* (1938), [1938] 2 All E.R. 394 (C.A.), *Rowswell v. Pettit* (1968), 68 D.L.R. (2d) 202 (Ont. H.C.) at 209-12 (aff'd with variations as to damages by S.C.C. *sub nom. Wilson v. Rowswell* (1970), [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* at 53.

4. "This solicitor's very presence as a lawyer . . . is an insurance 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 . . ." *Cook v. Szott* (1968), 68 D.L.R. (2d) 723 at 726 (Alta. S.C. A.D.), Porter J.A.

5. Cf. *Orkin* at 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 . . ." *Re Legal Professions Act*; *Sandberg v. "F"* (1945), 4 D.L.R. 446 at 447 (B.C. Visitorial Tribunal), Farris C.J.S.C. Cf. IBA D-1. In some jurisdictions (e.g. Ontario, Law Society Act, R.S.O. 1980, c. 238 s. 35 as am. S.O. 1986, c. 64, s. 25(6)) 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, see *Allen v. McAlpine* (1968), [1968] 2 Q.B. 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": *Aaroe & Aaroe v. Seymour* (1957), 6 D.L.R. (2d) 100 at 101 (Ont. H.C.), LeBel J.

"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": *Re Legal Professions Act*; *Baron v. "F"* (1945), 4 D.L.R. 525 at 528 (B.C. Visitorial Tribunal), Farris C.J.S.C.

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

Rule 3

1. Cf. CBA 3(1); Que. 3.01.01; IBA A-10; *Orkin* at 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 *Neushal v. Mellish & Harkavy* (1967), 111 Sol. Jo. 399 (C.A.), Lord Danckwerts.

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 97-115~~. 44 The Digest (Green-Band ed.) Solicitors § 1306-1614 (1984).

4. Cf. CBA 3(1) and Eaton, "Practising Ethics" (1966), 9 Can. Bar J. 349.

5. Cf. CBA 3(3) and *Orkin* at 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 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 DR7-102(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 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 licensing measure or to determine the rights of a class or group having some common interest.

8. See article, "Criminal Law May Not Bé 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. Summarized from Johnstone & Hopson (a U.K.-U.S. comparison), at 78-81: The lawyer's advice is usually largely based on the lawyer's 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. The lawyer may indicate his or her preference and argue persuasively, or pose available alternatives in neutral terms. The lawyer makes the law and legal processes meaningful to clients; the lawyer explains legal doctrine and practices and their implications; he or she interprets both doctrine and impact. Often legal and non-legal

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 the client's 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 the client's attention.

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

Rule 4

1. Cf. CBA 3(7); Que. 3.05.01; B.C.B-6; Alta.15; N.B.C-5; IBA B-8; ABA Canon 4, DRs, 4-101 (A)(B)(C).

2. ". . . [I]t 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) . . ." *Anderson v. Bank of British Columbia* (1876), 2 Ch.D. 644 at 649 (C.A.), Jessel M.R.

3. Cf. *Orkin* at 83-86, and Tollesfson, "Privileged Communications in Canada" in Proceedings of 4th Int. Comp. Law Symp. (Univ. of Ottawa Press, 1967) 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 to claim it without showing that it has been properly waived." *Bell v. Smith* (1968), [1968] S.C.R. 664 at 671, Spence J.

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* (1938), [1938] 2 All E.R. 394 (C.A.).

7. See Eaton, "Practising Ethics" (1967) 10 Can. Bar 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." *Kennedy v. Diversified* (1949), 1 D.L.R. 59 at 61 (Ont. H.C.), LeBel J.

9. Cf. Freedman, "Solicitor-Client Privilege Under the Income Tax Act" (1969) 12 Can. Bar J. 93.

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. There is no duty or privilege where a client conspires with or deceives his lawyer: *R. v. Cox* (1885), 14 Q.B.D. 153 (C.C.R.).

Cf. *Orkin* at 86 re the exceptions of "crime", "fraud", and "national emergency".

Rule 5

1. Cf. CBA-COD 5; CBA 3(2), 3(7); Que. 3.05.04; B.C. B-1, B-2 B-9(b); N.B. C-9; IBA B-7; ABA-MR 1.7, 1.8, 1.9; ABA DRs 5-101(A), 5-105; *Orkin* at 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 . . ." *Spector v. Ageda* (1971), [1971] 3 All E.R. 417 at 430 (Ch.D.), Megarry J.

"Applying this [*dictum* of Cozens-Hardy M.R. in *Moody v. Cox* (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. C.A.) a solicitor's failure to disclose his personal interest in a property was held to amount to fraud where that interest was clearly to the detriment of his client.

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." *Sinclair v. Ridout & Moran* (1955), O.R. 167 at 182-83 (H.C.), McRuer C.J.H.C. [*Emphasis added*]

And see article, Knepper, "Conflicts of Interest in Defending Insurance Cases" (1970) 19 Defense L.J. 515 and "Guiding Principles", ibid., at 540-44.

5. Common "multiple client" situations where there is real danger of divergence of interest arising between clients include the defending of co-accused, the representation of co-plaintiffs in tort cases or of insureds and their insurers, the representation of classes or groups such as beneficiaries under a will or trust and construction lien and bankruptcy claimants.

See for examples *Orkin* at 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." *R. v. DePatie* (1971), 1 O.R. 698 at 699 (H.C.).

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. ABA EC 5-20.

8. "The appellant had for many years been the respondent's solicitor, and a quarrel . . . brought about a rupture . . . . It was then . . . that the appellant by his letters to the wife incited her and improperly encouraged her to prosecute an action

. . . thus stirring up a litigation against the respondent." *Sheppard v. Frind* (1941), [1941] S.C.R. 531 at 535, Tashereau J.

"The solicitor acting for the defendant . . . drew the mortgage and advised the said defendant on the effect thereof. Later the same solicitor acting for the mortgagee bank brought action against his former client based on a claim arising out of and related to that mortgage. Solicitors should not so conduct themselves even with the knowledge and consent of all parties . . ." *La Banque Provinciale v. Adjutor Levesque Roofing* (1968), 68 D.L.R. (2d) 340 at 345 (N.B.C.A.).

9. Cf. *Orkin* at 127-28.

"In every case where there is the least doubt . . . as to whether the other party is capable of protecting himself, it is the duty of [the] solicitor . . . to see, if possible, that the other party is adequately represented; and, in the absence of such independent representation, it is the duty of the Court to scrutinize . . . to see whether . . . there has been any overreaching or unconscionable dealing." *Chait & Leon v. Harding* (1920-21), 19 O.W.N. 20 at 21 (H.C.), Orde J.

"It was [the solicitor's] duty to see that the infirm person was adequately protected or had independent advice. If [he] regarded himself as the adviser of the aged plaintiff, he should have insisted that proper arrangements protecting [him] were entered into . . ." *Finney v. Tripp* (1922), 22 O.W.N. 429 at 430 (H.C.), Middleton J.

Rule 6

1. Cf. CBA-COD 7; CBA 3(8); Que. 3.02.06; ABA-MR 1.15; 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. For example, in Ontario, ss. 13 to 18 captioned "Books, Records and Accounts" of O. Reg. 573 enacted pursuant to the *Law Society Act*, R.S.O. 1980, c. 233. Similar provisions exist in the other provinces and territories.

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* at 89-90 for a discussion of law and principles.

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. 1987, c. 25, s. 60; *Bar Act*, R.S.Q. 1977, c. B-1, s. 76(2); *Law Society Act*, R.S.O. 1980, c. 233, s. 43.

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

Rule 8

1. Cf. CBA-COD 11; Que. 3.03.04, .05; B.C. G-5; IBA B-4; ABA MR 1.16; 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 Halsbury (3d) under "Solicitors", paras. 101-02 and supplements. See also *Orkin* at 90-95.

2. In appeals to the Supreme Court of Canada, see Rule 14(1) of that Court, whereunder the lawyer of record in the Court below may be deemed to represent the client for purposes of the Appeal.

3. Cf. ABA DR 2-110(A).

Provincial Rules of Court provide for the giving of notice of change of solicitors and for the making of applications for leave to withdraw:

Alta. *Rules of Court*, Alta. Reg. 390/68, Part 42, rules 554, 555 as am. Alta. Reg. 313/81, and Part 63, rule 956.

B.C. *Rules of Court*, Rule 16.

Man. *The Queen's Bench Rules*, Man. Reg. 26/45, Rules 345 and 704(2),(3).

N.B. *Rules of Court of New Brunswick*, Rules 17.03,.04.

Nfld. *Rules of the Supreme Court*, Rules 23.01,.06.

N.S. *Civil Procedure Rules*, Rules 44.01,.06 & 63.22(3).

Ont. *Rules of Civil Procedure*, O. Reg. 560/84, Rules 15.03,.04.

Que. Arts. 248-53 *C.C.P.*

Sask. *Rules of the Court of Queen's Bench*, Part I Rule 12 and Part 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 O. Reg. 59/86 s. 62(1)(a).

On an application for an order that the lawyer has ceased to act under the Ontario Rules the lawyer's supporting materials must show particularly facts warranting his or her so ceasing: *Ely v. Rosen* (1963), 1 O.R. 47 (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." *R. v. Spatarao* (1971), 3 O.R. 419 at 422 (C.A.), Jessup J.A.

4. Cf. CBA 3(2) and 5(5); 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." *Myers v. Elman* (1939), [1940] A.C. 282 at 322 (H.L.), Lord Wright.

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 Law Society of Upper Canada *Special Lectures* (1969) at 295-99.

5. Cf. 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." *Re Solicitors Act*; *Collision v. Hurst* (1946), O.W.N. 668 at 671 (H.C.), Urquhart, J.

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 (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, *supra*, note 4 at 295-96); and Cf. Alta. 8: "If a member accepts a retainer to represent an accused at a preliminary hearing and not at the trial . . . [the member] 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. ". . . [C]ounsel 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 296).

As to the proper disposition of papers, which is frequently a perplexing problem, see *Cordery on Solicitors* at 89-90 for a discussion of law and principles.

9. Cf. CBA 4(1).

10. "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 not be entitled to embarrass other parties interested . . ." *Re Gladstone* (1972), 2 O.R. 127 at 128 (C.A.), McGillivray J.A.

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

12. "Subject to any question of lien, the client's papers in possession of the firm belong to the client and cannot be 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* at 276.

Rule 9

1. 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.

2. Cf. CBA-COD 10; CBA 3(8),(9); Que. 3.08.01, .02; B.C. B-5; Alta. 32; N.B. E-1; IBA A-8; ABA DR 2-106.

3. The proper "factors or 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 at 436-37 (H.C.), McBride M.: ". . . 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 (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"]." *Knuller Ltd. v. D.P.P.* (1972), [1972] 2 All E.R. 898 at 929-30 (H.L.), Lord Simon L.C.

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

5. 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 . . . [M]uch 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." *Re Solicitor* (1972), 1 O.R. 694 at 697 (H.C.), Wright J.

"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." *Millar v. R.* (1922), 67 D.L.R. 119 at 120 (Ont. C.A.), Riddell J.

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. 1987 c. L-100, s. 58; Alberta *Supreme Court Rule* 616(2)(f).

6. Cf. *Solicitors Act*, R.S.O. 1980, c. 478, s. 35, re-enacted by 1983, c. 21, s. 1, amended 1984, c. 11, s. 214(5), permitting interest at the rate established for pre-judgment interest from the expiration of one month after delivery of the bill. The rate of interest "shall be shown on the bill delivered", ibid. s. 35(4).

7. See particularly the Rule and Commentary respecting Impartiality and Conflict of Interest for the reasons underlying these proscriptions, and *Orkin* at 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 ed. (1971) at 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 for the introduction to the lawyer of business from which professional work resulted to the lawyer in which he or she acted for or his or her 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 . . ." *Re Solicitor* (1920), 47 O.L.R. 522 at 525 (H.C.), Middleton J.

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. Callandine* (1965), 47 D.L.R. (2d) 322 (B.C.C.A.); *Hogan v. Hello* (1969), 1 N.B.R. (2d) 306. All provinces and territories with the exception of Ontario now (1989) permit regulated "contingent fees".

Alta.
a) *Alberta Rules of Court*, Alta. Reg. 390/68, Rule 613.(f)-621.
b) Ruling 1 from Rulings of the Law Society of Alberta adopting the CBA Code of Professional Conduct. Rule X, commentary 8 permits the use of contingent fee agreements.

B.C. *Law Society Rules*, Rule 1050.

Man. *Law Society Act*, R.S.M. 1987, c. L-100, s. 58, adopting the CBA Code of Professional Conduct, 1974.

N.B.
a) *Judicature Act*, S.N.B. 1973, c. J-2, s. 72.1 as am. S.N.B. 1978, c. 32, s. 32.
b) Section 61 of the regulations enacted pursuant to the *Barristers' Society Act*, S.N.B. 1973, c.80, s. 41, adopting the CBA Code of Professional Conduct, 1974.
c) Rule E-2 of the Rules of the Barristers' Society of New Brunswick contained in the Professional Conduct Handbook adopted by that Society in 1971.

Nfld. *Rules of the Supreme Court*, 1986, Rules 55.16 to 55.19.

N.W.T. *Rules of Court*, Rules 551(f), 553 to 558(1), & 559.

N.S. *Civil Procedure Rules*, Rules 63.16 to 63.22.

Ont. The *Solicitors Act*, R.S.O. 1980, c. 478, s. 30 prohibits the use of contingent fee agreements.

P.E.I. *Rules of Civil Procedure*, Rules 7317 and 6322.

Que.
a) *Bar Act*, R.S.Q. 1977, c. B-1, s. 126(3).
b) Tariff of certain extrajudicial fees of advocates, R.R.Q. 1981, c. B-1, r. 14.

Sask. *Speers v. Hagemeister* (1974), 52 D.L.R. (3d) 109 (Sask. C.A.).

Y.T.
a) *Legal Profession Act*, R.S.Y.T. 1986, c. 100, s. 68.
b) Section 7(8) of the Act adopts the CBA Code, 1974.
c) Section 224.(a) & (b) of the Rules enacted pursuant to the *Legal Profession Act*, adopt both the CBA Code, 1974 and the Code of Professional Conduct — Pt. I, Rule 12.

Rule 10

1. Cf. CBA-COD 8; CBA 2(1), 3(5); ABA-MR 3; ABA Canon 7.

"The concept that counsel is the mouthpiece 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 alter of expediency . . ." Schroeder J. A., "Some Ethical Problems in Criminal Law" (1963) Law Soc. U.C. Special Lectures 87 at 102.

2. Cf. ABA EC 7-15.

3. 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* (London: Hamish Hamilton, 1964) at 551. Courtesy and respect, as used herein, includes the duties to be prompt and punctual.

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

5. Cf. IBA A-15.

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

7. Cf. CBA 2(4), 5(5); Que. 2.03, 3.05; N.B. B-6; AB 9 ECs 7-34 and 7-35, DR 7-110; IBA A-16.

In *Toronto Transit v. Aqua Taxi* (1955), [1955] O.W.N. 857 (H.C.), where a sealed letter improperly attempting to influence a decision had been delivered to a judge, the Court, while exonerating the lawyers concerned, made it clear that any involvement in such conduct would be most improper.

8. 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), the Court said: "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), [1941] 2 W.W.R. 534 at 537 (Sask. C.A.), Turgeon C.J.S.

A lawyer counselling false evidence would be guilty of perjury if it were given (*Criminal Code*, ss. 22, 131), and of counselling if it were not (ibid. s. 464).

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. 137).

Similarly, it is an offence wilfully to attempt in any manner to obstruct, pervert or defeat the course of justice (ibid. s. 139).

"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 . . ." *Myers v. Elman* (1939), [1940] A.C. 282 at 293-94 (H.L.), Viscount Maugham.

"[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." *Re Ontario Crime Commission* (1962), 37 D.L.R. (2d) 382 at 391 (Ont. C.A.), McLennan J.A.

9. Cf. N.B. B-1; IBA A-14; ABA DR 7-102(A)(5).

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

11. Cf. CBA 1(1); N.B. B-3; IBA A-14; ABA EC 7-23, DR 7-106(B)(1). See *Glebe Sugar v. Greenock Trustees* (1921), 2 A.C. 66 (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), [1922] 1 W.W.R. 632 at 638-39 (B.C.C.A.), McPhillips J.A.

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

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

14. 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 127.

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

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

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

18. Cf. CBA 4(3); 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 practise upon loose understandings . . . they cannot expect aid from the Court, if difficulties arise in carrying them out . . ." *Ferguson v. Swedish-Canadian* (1912), 41 N.B.R. 217 at 220 (N.B.C.A.), Barry J.

Where solicitors wrote: ". . . on behalf of our client . . . we undertake . . ." it was held that, in the circumstances, the solicitors were personally responsible: *Re Solicitors* (1916), [1917] 1 W.W.R. 529 (B.C.C.A.).

". . . [O]ne's word should be one's bond . . ." Lund, 1950 Lecture to the Law Society (Law Society of Upper Canada, 1956) at 33-34.

19. But see Para 10 *post*.

20. Cf. CBA 1(2); N.B. C-12; ABA ECs 7-13, 7-14, DR 7-10, *Orkin* at 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." *Boucher v. R.* (1955), [1955] S.C.R. 16 at 23-24, Rand J.

See also *Richard v. R.* (1960), 126 C.C.C. 255 at 280, Bridges J.A.; *Regina v. Lalonde* (1972), 5 C.C.C. (2nd) 168; and Martin, "Preparation for Trial", Law Soc. U.C. Special Lectures (1969), 221 at 235 ff.

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

22. See *Orkin* at 115, and Boulton, "Conduct and Etiquette at the Bar" (5th ed.), at 71-73, reproducing substance of 1912 Annual Statement of the General Council of the Bar; also quoted and commented upon by Schroeder J.A., *supra*, note 1, at 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), [1970] 2 All E.R. 281 at 285 (C.A.); panel discussion in (1969) Law Soc. U.C. Special Lectures at 299-311; Ratushny, "Plea Bargaining and the Public" (1972) 20 Chitty's L.J. 238.

24. Cf. N.B. C-8; IBA A-20; ABA EC 7-19.

25. 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." *R. v. Gibbons* (1946), 86 C.C.C. 20 at 28-29 (Ont. C.A.), Roach J.A.

26. Cf. B.C. D-1(b); N.B. D-7, D-8; IBA D-7; ABA EC 7-19, 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." *Nelson v. Murphy* (1957), 9 D.L.R. 195 at 213 (Man. C.A.), Tritschler J.A.

27. 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." *Cairns v. Cairns* (1931), [1931] 3 W.W.R. 335 at 345 (Alta. S.C. A.D.), McGillivray J.A.

"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 of 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." *Boucher v. R.* (1954), [1955] S.C.R. 16 at 26, Locke J.

As to the impropriety of a lawyer witness later appearing as counsel, see *Imperial Oil v. Grabarchuk* (1974), 3 O.R. (3d) 783 (C.A.); *Phoenix v. Metcalfe* (1974), [1974] 5 W.W.R. 661 (B.C.C.A.).

Rule 11

1. Cf. CBA-COD 12. 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. CBA Preamble: "The lawyer is more than a mere citizen. . . . [L]awyers, 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. Bar 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.

3. Cf. the traditional barristers' oath: " . . . to protect and defend the rights and interests 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 system 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 . . ."

4. ABA ECs 8-1 and 8-2: "By reason of education and experience, lawyers are especially qualified to recognize deficiencies 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."

5. Cf. ABA EC 8-4.

6. 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 remedying of specific complaints of official misbehaviour and neglect; in particular cases these should be resorted to in preference to public fora and media.

Rule 12

1. Cf. CBA-COD 13; ABA-MR 7; ABA Canon 2, EC 2-1; IBA at 30.

2. Cf. Alta. 28. Such a direction does not bind the executor: *Re Croft* (1960), O.W.N. 171 (H.C.).

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

4. Cf. ABA EC 2-8.

5. Cf. N.B. C-4; ABA ECs 2-26 to 2-29; *Orkin* at 87-88.

Rule 13

1. Cf. CBA-COD 14; CBA 5(1); ABA-MR 8; 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 . . ." *Re a Solicitor* (1959), [1960] 2 Q.B. 212, Parker L.C.J.

2. Cf. CBA 5(1); 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. 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 . . ." *Re X., a Solicitor* (1920), 16 Alta. L.R. 542 at 543, Walsh J.

4. Cf. IBA D-6.

Rule 14

1. Cf. CBA-COD 167; CBA 4(1)(2)(4); ABA ECs 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 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); ABA ECs 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." *Shaw v. Nickerson* (1850), 7 U.C.Q.B. 541 at 544, Robinson C.J.

5. Cf. CBA 4(4). Chancellor Boyd, "Address on Legal Ethics" (1905) 4 Can. L. Rev. 85: "Truth and not trickery, simplicity and not duplicity, candour and not craftiness in the conduct of legal affairs. . . . " 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." The lawyer who intends to insist on "Peremptory Rules" should make this clear.

". . . [T]o 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." *Re Arthur and Town of Meaford* (1915), 34 O.L.R. 231 at 233-34 (H.C.), Middleton J.

". . . [W]e do not think that [the defendant's attorney's] conduct was marked with candor in not drawing the plaintiff's attorney's 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 . . ." *Cushman v. Reid* (1869), 20 U.C.C.P. 147 at 153-54, Gwynne J.

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 8 of the Rule relating to the Lawyer as Advocate. Alta. 17: ". . . [T]he use of such words as 'on behalf of my client' or 'on behalf of the vendor' does not relieve the solicitor giving the undertaking of personal responsibility." B.C. D-2: ". . . [D]ifficulties 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 unforeseen circumstances the justification for which rests upon the member, that such cheque will be paid . . ."

8. Cf. CBA 4(3); B.C. D-1(a); Alta. 16; N.B. D-3; ABA EC 7-18; *Nelson v. Murphy* (1957), 9 D.L.R. (2d) 195 at 213 (Man. C.A.), Tritschler J.A. "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 a lawyer.' "

". . . [The lawyer should] 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." *Bank of Montreal v. Wilson* (1867), 2 Chy. Chs. 117 and 119 (U.C. Chy.), Van Koughnet C.

9. Cf. CBA 5(1); IBA C-4; ABA EC 2-28; *Orkin* at 97-98.

Rule 15

1. Cf. CBA-COD 17, Commentary 4: "A judge who returns to practice after retiring or resigning from the bench should not (without the approval of the governing body) appear as a lawyer before the court of which the former judge was a member or before courts of inferior jurisdiction thereto in the province where the judge exercised judicial functions."

The following provinces and territories prohibit retired judges from returning to practice (where that would entail appearing in chambers or as counsel before specified courts) without express permission of the law society's governing body:

Alta. Alta. Reg. 265/71, s. 82.(2) Also, Alberta has adopted the CBA Code, 1974.

Nfld. *Law Society Act*, S.N. 1977, c. 77, s. 59. Benchers prohibit superior court judges from appearing before the court of which they were a member or before any lower court.

N.W.T. Rules of the Law Society, s. 62(3).

Y.T. Rules of the Law Society, s. 151A enacted pursuant to *Legal Profession Act*, R.S.Y.T. 1986, c. 100. Section 6.(8) of the Act adopts the CBA Code, 1974.

The following provinces reposit a discretion in the governing body to specify the terms upon which retired judges may be reinstated:

B.C. Rules of the Law Society, Rule 400(5) — (applies to superior court judges and to judges appointed pursuant to federal statutes).

N.S. Regulations of the Nova Scotia Barrister's Society, ss. 22A, 46.(16) enacted pursuant to *Barristers and Solicitors Act*, R.S.N.S. 1967, c. 18.

The following provinces permit retired judges to appear in chambers or as counsel before any court subject to a specified "cooling off" period:

B.C. Rule 400, *supra*, ss. (4)(b) — 3 years (applies only to provincial court judges appearing as counsel in provincial court).

Man. Rules of the Law Society, Rule 70.4 — 3 years (superior court judge or full-time provincial court judge) and 1 year (part-time provincial court judge).

N.B. *Barristers Society Act*, R.S.N.B. 1985, c. 80, s. 59 — 5 years.

Nfld. *Law Society Act*, S.N. 1977, c. 77, s. 59. Benchers require that a retired provincial court judge not appear before that court for 3 years.

Que. *Bar Act*, R.S.Q. 1977, c. B-1, s. 74 — 12 months.

Sask. Rules of the Law Society of Saskatchewan, Rule 84A — 3 years where a superior court judge has sat on the Bench for more than 3 years; 2 years where a superior court judge has sat on the Bench for less than 3 years; 6 months for a provincial court judge.

The following province permits a retired judge to appear before any court without a "cooling off" period:

P.E.I. Regulations of the Law Society of Prince Edward Island, Gaz. Pt. II, vol. III — No. 13, s. 20.(5)(a).

2. ". . . [I]f a man should step down [from the Bench] and . . . perhaps challenge the decisions which he pronounced, or even fail to support them in argument, he will shake the authority of the judicial limb of government, and mar the prestige and dignity of the Courts of Justice . . . ." *Re Solicitors Act and O'Connor* (1930), I.R. 623 at 631 (H.C.), Kennedy C.J.

Rule 17

1. Cf. CBA-COD 6; 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, s. 122(1)(b) of the *Bar Act*, R.S.Q. 1977, c. B-1 provides that a person shall become disqualified from practising as an advocate when "he holds a position or an office incompatible with the practice or dignity of the profession of advocate."

Sask. 7 and Que. 4.01.01(c) prohibit lawyers from being interested in collection agencies. Cf. *Orkin* at 188-90.

3. B.C. B-8 identifies the dangers: ". . . that make it difficult for a client to distinguish in which capacity [the lawyer] 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. *Re Weare* (1893), [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 18

1. Cf. CBA-COD 9; IBA E-3; ABA-MR 1.11; 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) 129.

3. In *Barreau du Montreal v. Claude Wagner* (1968), Q.B. 235 (Que.) 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 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.

4. 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: American Judicature Society, 1956) at 179.

5. For example, Premier Davis of Ontario issued "Conflict of Interest Guidelines" to provincial ministers in September 1972, requiring them "while holding office . . . [to] abstain from day-to-day participation in any . . . professional activity." Specific "conflict of interest" laws have been introduced in several Canadian jurisdictions.

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

8. Cf. ABA DR 9-101(B).

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

Rule 19

1. Cf. CBA-COD 15; CBA 5(1),(2); IBA E-5 and E-6; ABA Canon 3, DRs 3-101 (A),(B) and 3-103(2).

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. 1987, c. 25, s. 1.

Man. *Law Society Act*, R.S.M. 1987, c. L-100, s. 56(2).

N.B. *Law Society Act*, S.N.B. 1973, c. 80, s. 15.

Nfld. *Law Society Act*, S.N. 1977, c. 77, s. 85.(1)(c)-(e).

N.W.T. *Legal Profession Ordinance*, S.N.W.T. 1976 (2nd), c. 4, s. 2(i).

N.S. *Barristers and Solicitors Act*, R.S.N.S. 1967, c. 18, s. 4(2).

P.E.I. *Law Society and Legal Profession Act*, R.S.P.E.I. 1974, c. L-9, s. 21.

Que. *Bar Act*, R.S.Q. 1977, c. B-1, s. 128.

Y.T. *Legal Profession Act*, R.S.Y.T. 1986, c. 100, s. 1.(2),(3).

The statutes of all provinces and territories prohibit the practice of law by unauthorized persons:

Alta. *Legal Profession Act*, R.S.A. 1980, c. L-9, s. 93.

B.C. *supra*, s. 26.

Man. *supra*, s. 56(1).

N.B. *supra*, ss. 14(2) and 15.

Nfld. *supra*, s. 85.(1)(a),(b).

N.W.T. *supra*, ss. 67-71.

N.S. *supra*, 4(1).

Ont. *Law Society Act*, R.S.O. 1980, c. 233, s. 50.(1)

P.E.I. *supra*, s. 19.

Que. *supra*, ss. 132 ff.

Sask. *Legal Profession Act*, R.S.S. 1978, c. L-10, s. 5(1) and s. 76 as am. S.S. 1983-84, c. 43, s. 8.

Y.T. *supra*, s. 102

"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." *R. ex rel. Smith v. Ott* (1950), O.R. 493 at 496 (C.A.), Robertson C.J.O.

"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." *R. v. Woods* (1961), [1962] O.W.N. 27 at 30, Miller C.C.J. And see, generally, *Orkin* at 350-53, *Bennion* at 54.

3. Cf. B.C. G-2; Alta. 40; IBA E-4 and E-6; ABA ECs 3-5 and 3-6. See also "Delegation of Authority by Solicitors" (1968) 3 Law Soc. U.C. Gaz. 23.

Rule 20

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 unnecessarily to inhibit individuals.

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