

## FOR DECISION

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

#### MOTION

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

#### INTRODUCTION

3. The Federation of Law Societies of Canada (FLSC), the national coordinating body of Canada's 14 provincial and territorial law societies, adopted the Model Code of Professional Conduct ("the Model Code") in December 2011 and revised the Model Code with the addition of a new numbering scheme in December 2012. The Law Society of Upper Canada's *Rules of Professional Conduct* ("the Rules") were used as the basis for the Model Code.<sup>1</sup>
4. The primary impetus for the Model Code was the increased mobility of lawyers in Canada and the need to have uniform ethical standards for the practice of law in Canada. This was based on a belief that there are national, and international ethical standards for the practice of law which should be reflected in consistent conduct rules across the country.
5. Law Societies in Canada are now implementing the Model Code as the rules or codes of professional conduct of their jurisdictions.<sup>2</sup>

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<sup>1</sup> Background to the development of the Model Code is described at [Tab 3.1.1](#).

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

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

## **THE LAW SOCIETY'S REVIEW OF THE MODEL CODE**

### **The Committee's Process**

7. Since the fall of 2011, the Committee has been reviewing the Model Code for the purpose of implementing it in Ontario. In keeping with the goal of achieving national standards, the Committee focused on making changes to the Rules to achieve consistency with the Model Code and only varying from that approach when necessary.
8. The Committee reviewed the Model Code against the current Rules and incorporated its suggestions and proposals for amendments to the Rules based on the Model Code in a blackline version of the rules.

### Call for Input

9. Early in its deliberations, the Committee determined that a call for input on the proposed changes to the Rules would be required. The purpose was to obtain comments from the profession and relevant legal organizations and institutions on the merits of the amendments, particularly the more substantive ones.
  10. In May of 2012 the Committee received Convocation's approval to issue a Call for Input on the proposed changes to the Rules and request submissions by August 31, 2012. A Call for Input document to accompany the blackline version of the Rules was prepared which discussed the more substantive rule changes and included a separate part devoted
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exclusively to the conflicts rule, as many of the substantive changes were in this rule.

11. The Call for Input was published on the Law Society's website and in the *Ontario Reports*, and letters were sent to relevant legal organizations<sup>3</sup>, requesting comments on the proposed amendments.
12. By the fall of 2012, the Law Society had received 34 submissions from individuals, government, legal organizations, equality-seeking groups, and academia. The Committee wishes to thank all of the respondents for their thoughtful contributions to the review. A summary of all of the responses received appears at [Tab 3.1.5](#).<sup>4</sup>

## **INTRODUCTORY COMMENT ON THE AMENDMENTS**

### **Nature of the Amendments**

13. The report discusses the more substantive rule changes which will result from implementing the Model Code. In certain cases, the amendments introduce new standards. One of the more significant changes is to the rule on conflict of interest. As such, the report does not discuss every rule change. The blackline version of the Rules should be reviewed for this purpose.
14. To the extent possible, the Committee adopted the Model Code Rules without modification. However, the amended Rules include some rules that are not included in the Model Code, do not include some Model Code provisions and in some cases, vary the language of the Model Code's provisions. In the Committee's view, this approach was appropriate to ensure that rules unique to Ontario's practice environment and specific terminology important to ethical guidance based on Ontario's experience were preserved.

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

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

15. Beyond the changes to the conflict of interest rule, the following highlights some of the more substantive proposed changes based on the Model Code:
  - a. Provisions regarding integrity, which currently appear in Law Society Rule 1.03 with the heading “Interpretation – Standards of the Legal Profession”, now appear in a discrete Rule with the title “Integrity”. Commentary that previously appeared elsewhere in the Rules has been moved to this rule. Certain components of the existing commentary under Rule 1.03 are included in the new rules’ commentary, including references to the diversity of Ontario and the obligation to advise a client regarding their French-language rights, where appropriate.
  - b. A new commentary in the new Integrity rule encourages lawyers to become involved in community and other activities to enhance the profession. The commentary also notes that in engaging in these activities, lawyers must be mindful of the perception that they are providing legal advice and that a lawyer-client relationship has been created.
  - c. There is new commentary regarding competence and quality of service.
  - d. New commentary has been proposed to the rule on honesty and candour.
  - e. The prohibition on lawyers threatening criminal proceedings is extended to include making a complaint to a regulatory authority in analogous circumstances.
  - f. The exceptions to the circumstances in which a lawyer may disclose confidential information concerning the business and affairs of a client are expanded. For example, the Rules will now permit a lawyer to disclose confidential information to another lawyer to secure legal advice about the lawyer’s proposed conduct.
  - g. The Rules now include commentary under the joint retainer rule regarding retainers in which different lawyers in the same firm act for clients who are competing for the same opportunity.
  - h. The commentary regarding a lawyer’s duty to preserve a client’s property has been amended.
  - i. There are new rules regarding withdrawal from representation and new

- commentary regarding optional withdrawal.
- j. There is new commentary regarding making legal services available.
  - k. The rules dealing with the submission by a lawyer of affidavit evidence are now combined with the previous rule regarding providing lawyers providing testimony.
  - l. A new rule requires lawyers to notify the sender if in the course of client representation they receive a document that they know or reasonably should know was inadvertently sent.
16. The rules regarding retired Judges returning to practice are streamlined.

### **New Numbering Scheme and Drafting Protocols**

#### Numbering

17. The Committee is proposing that the Model Code numbering scheme be adopted. The purpose of matching the Model Code scheme is to ensure consistency with the Model Code approach, and to make it easier to search for the equivalent provision in the Law Society's Rules to a Model Code provision.
18. Primarily because of the new rule on Integrity, the amendments have shifted the Rules' chapter numbers up by one. For example, the provisions which previously appeared in Rule 1.03 are now in Rule 2 on Integrity, and current Rule 2 (Relationship to Clients) has become Chapter 3 in the Model Code.
19. The Model Code is divided into chapters, sections, rules and commentaries, as follows:
- a. Chapter numbers have a single digit, as in Chapter 1 – Citation and Interpretation.
  - b. Section numbers include two digits separated by a decimal point, as in Section 3.1 – Competence.
  - c. Rules repeat the section number and are designated with the addition of a number preceded by a dash, as in Reasonable Fees and Disbursements 3.6-1.
  - d. Each paragraph in a commentary is preceded by a number in square brackets, as in [6]. Subject to paragraph 20, sections, rules and paragraphs of commentary all

begin with the number 1.

20. Where the Law Society Rules do not include a Model Code section, rule or paragraph of commentary, the phrase “[FLSC - not in use]” will appear.<sup>5</sup>
21. Additions to the Model Code’s rules or commentaries are shown and will be shown with a capital letter suffix, for example, 3.4-1A. As such, where the Law Society Rules include a rule or add a rule that does not appear in the Model Code, a *numerical* suffix preceded by a decimal point will be used in order to maintain consistency between the Law Society Rules numbering scheme and the Model Code numbering scheme. For example, rule 3.4-11.1 on affiliations between lawyers and affiliated entities does not appear in the Model Code. A similar format is used in the commentary. Where the Law Society includes a paragraph of commentary that does not appear in the Model Code, it will be designated, for example, as “[4.1]”.
22. Where the Law Society’s section, rule or paragraph of commentary is the first provision at that location, the number 0 is assigned to that particular section, rule or paragraph, as in Section 1.0 or rule 4.2-0.

#### Drafting Protocols

23. The Law Society’s Rules drafter, Donald Revell, reviewed all of the amendments and provided helpful guidance and suggestions to improve the draft. The Committee thanks Mr. Revell for his contribution to this initiative.
24. Based on advice from the drafter, the following drafting protocols have been observed in the amended Rules:
  - a. Gender-neutral language has been adopted, so that references to “her or her” have

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<sup>5</sup> The amended Rules do not indicate “FLSC – not in use” for FLSC commentary that in its entirety is not included. This occurs very infrequently.

- been replace with “their”;
- b. “Law Society” replaces “Society” in the definitions rule;
- c. The word “Section” is added before the appropriate section numbers;
- d. The word “rules” where applicable is used to refer to the *Rules of Professional Conduct*;
- e. All subparagraphs in commentary begin with a bracketed lower-case letter, as in “(a)”.

### **IMPLEMENTATION**

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

### **LOOKING AHEAD**

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

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

### **DISCUSSION OF THE PROPOSED AMENDMENTS**

29. All amendments to the Rules proposed by the Committee are shown in the blackline version of the Rules found at [Tab 3.1.2](#). Unless otherwise indicated, this document refers to the Model Code December 2012 version, at [Tab 3.1.6](#).
30. The title headings in the report correspond to the new *Rules of Professional Conduct* as they appear with the new numbering system based on the Model Code, and discussed in more detail below. The titles to the various sections discussing the new Rules indicate the new rule number, the title of the chapter, section or rule, and the current Law Society rule number.
31. The many changes to the Law Society's current conflicts rules made the preparation of a blackline showing changes against the Model Code rule impractical. However, as the Committee is proposing some changes to the Model Code's conflicts rules, a blackline version of those rules has been prepared. Definitions in the amended rules that relate to the new conflict of interest rules are discussed in the section of the report on conflicts.

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

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

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

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

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

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

### **Section 3.1 – Competence (Law Society Rule 2.01)**

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

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

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

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

38. The Model Code adds the following underlined phrase to the Rule regarding honesty and candour (2.02(2)): “when advising clients, a lawyer shall be honest and candid and shall inform the client of all information known to the lawyer that may affect the interests of the client in the matter”. After careful consideration, the Committee decided not to adopt this addition, as the principle is captured in the first paragraph of the commentary.
39. The Committee also determined that the commentary to the rule should be varied from that appearing in the Model Code. This is because the Committee believes that it is important to address circumstances in which the duty to disclose may be properly limited e.g. litigation dealing with confidential information.
40. The Committee's proposed commentary, which incorporates one paragraph of existing commentary, is as follows:

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

In some limited circumstances, it may be appropriate to withhold information from a client with consent. For example, with client consent, a lawyer may act where the lawyer receives information on a “for counsel's eyes only” basis. However, it would not be appropriate to act for a client where the lawyer has relevant

material information received through a retainer for another client. In those circumstances the lawyer cannot be honest and candid with the client and should not act.

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

A lawyer who is acting for both the borrower and the lender in a mortgage or loan transaction should also refer to Rule 3.4-15, which continues to apply.<sup>6</sup>

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

41. The Model Code includes rule 3.2-6 which prohibits a lawyer from offering or advising an accused to offer or give any valuable consideration to another person in exchange for influencing the withdrawal of criminal or regulatory proceedings.
42. One respondent to the Call for Input indicated that in their view, it was unnecessary to amend the Rules in this area in the manner proposed by the Model Code, since the *Criminal Code* already has offences relating to improper interference with the administration of justice and the Crown is involved in any negotiation relating to the withdrawal of charges.
43. Based on submissions received during the Call for Input, the Committee determined that

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

the Model Code provision should not be adopted.

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

[1.1] In criminal, quasi-criminal or regulatory complaint proceedings, it is not improper for a lawyer for an accused or potential accused to communicate with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. See also Rule 7.2-6 – Communications with a represented person.

[1.2] When the complainant or potential complainant is unrepresented, the lawyer should have regard to the rules respecting unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused. If the complainant or potential complainant is vulnerable, the lawyer should take care not to take unfair or improper advantage of the circumstances. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

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

45. The Model Code rule expands the prohibition against threatening or advising a client to threaten criminal proceedings to include a complaint made to a “regulatory authority”.
46. As noted in the Call for Input document, some regulatory authorities are engaged in matters analogous to the civil jurisdiction of the courts while other regulatory authorities are engaged in matters analogous to criminal proceedings.
47. Two of the respondents to the Call for Input suggested that the wording of this rule be amended to refer only to regulatory authorities whose proceedings are criminal or quasi-

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

48. The Committee carefully considered the submissions received on this point. While the Committee is generally in agreement with the Model Code approach, the Committee notes that there may be circumstances in which the threat of a regulatory complaint is appropriate. For example, it may be appropriate in some circumstances to threaten a civil claim (e.g. an overtime claim under the *Employment Services Act*).
49. The Committee proposes to add a new rule which provides that “rule 3.2-5(b) does not apply to an application made in good faith to a regulatory authority for a benefit to which a client may be legally entitled”. The Committee also proposes the addition of a paragraph in the commentary which begins with the following phrase: “where a regulatory authority exercises a jurisdiction that is essentially civil, it is not improper to threaten to make a complaint pursuant to that authority to achieve a benefit for the client...”

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

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

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<sup>7</sup> The Committee proposes to address in future comments received during the Call for Input regarding issues particular to in-house counsel.

**Section 3.3 - Confidentiality (Law Society Rule 2.03)**

51. A number of changes to the confidentiality rule are proposed by the Committee.
52. The Model Code adds a paragraph to current Law Society rule 2.03(1) that provides another exception to the prohibition on the disclosure of confidential information which would permit a lawyer to disclose required information to the Law Society. In the Committee's view, this adds an important feature consistent with statutory provisions on disclosure of information to the Law Society.<sup>8</sup>
53. The Committee proposes to add the following paragraph from the Model Code to become paragraph 4 of the commentary. This paragraph provides:
- A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter.
54. The Committee also proposes that Model Code commentary be added that addresses:
- a. the circumstances that are presented when sole practitioners join together in space-sharing arrangements in one office location, providing guidance on the need to protect confidential client information in such arrangements;
  - b. the unique circumstances of disclosure of confidential information when action needs to be taken to protect a person under disability; and
  - c. the prohibition on benefiting from confidential information with the example of literary works (now in current rule 2.03(6)).

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<sup>8</sup> *Law Society Act*, R.S.O. 1990, c. L.8, s. 49.8.

55. The Model Code also revises current subrule 2.03(3) on justified or permitted disclosure where there is a risk of imminent harm or death. The Committee agrees with this change, which makes the rule more concise and adds new commentary.
56. The Model Code rules reorganize current subrule 2.03(4) to include four paragraphs with separate provisions, noting acts of misconduct and acts of negligence for the purposes of disclosure. The Model Code also adds a rule to permit disclosure to seek legal advice about a proposed course of conduct. The Committee agrees with these changes.
57. With respect to the proposal in Model Code Rule 3.3-1 to add the words “or a court” to the carve-out permitting disclosure of confidential information where required by law, the Committee accepts the suggestion made by one of the respondents to the Call for Input that the words “tribunal of competent jurisdiction” be used instead of “court”, as “tribunal” is a defined term in the Rules.

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

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

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

59. The Model Code significantly changes the rules on conflict of interest. The changes in this area include:
  - a. a new definition of “conflict of interest”;

- b. a new general rule that prohibits acting where there is a conflict of interest;
- c. new commentary that refers to the fiduciary relationship, the duty of loyalty, and conflicting interests;
- d. examples of situations in which conflicts of interest commonly arise requiring a lawyer to take particular care to determine whether a conflict of interest exists.

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

#### Call for Input

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

#### **Section 1.1 - Definitions (Law Society Rule 1.02)**

##### "Client"

61. The current Law Society rule 1.02 definition of "client" reads: " "client" includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work."
62. In the Model Code, "client" means a person who
- (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
  - (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf.
63. In the document prepared for the Call for Input, the Committee suggested that the language in the current definition in the Rules remain. Respondents to the Call for Input

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

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

“Conflict of Interest”

65. Current rule 2.04 of the Rules provides that “a conflict of interest” or a “conflicting interest” means an interest
- (a) that would be likely to affect adversely a lawyer’s judgment on behalf of, or loyalty to, a client or prospective client, or
  - (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.
66. The adoption of the Model Code provision would result in a new definition of conflict of interest in rule 1.1-1. The definition is central to the meaning of the governing rule on conflicts. The commentary to the Model Code’s rule refers to the definition and elaborates on the meaning of “substantial risk”. Paragraph 1 of the Model Code commentary to rule 3.4-1 reads:
- As defined in these rules, a “conflict of interest” exists when there is a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s duties to another client, a former client, or a third person. *The risk must be more*

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

[emphasis added]

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

“Disclosure”

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

“disclosure” means full and fair disclosure of all information relevant to a person's decision (including, where applicable, those matters referred to in commentary to this Model Code), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed.

69. As noted in the Committee's Call for Input document, this definition appears to have relevance only to the Model Code's rule on conflicts of interest and does not fit well with other rules that use the term “disclosure”. For example, current rule 2.03 (now rule 3.3) on confidentiality prohibits disclosure of client information.
70. The Committee's initial view was that the definition of “disclosure” should not be added to the Rules, but it invited comment on the new definition.
71. After consideration of the submissions received, the Committee is of the view that the definition of the term “disclosure” should not be incorporated into the Rules but that the elements of disclosing a conflict appear in commentary. This has been accomplished in the commentary following Rule 3.4-2, which deals with consent.

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

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

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

73. New paragraphs 5 and 6 of the commentary to Rule 3.4-1 emphasize the fiduciary relationship and the fiduciary duty of loyalty. Paragraph 6 makes specific reference to Supreme Court of Canada case law on current client conflicts. It refers to a duty of a lawyer to not represent a client whose legal interests are directly adverse to the immediate legal interests of another client without consent, and that this duty arises even if the matters are unrelated.
74. Since the Model Code commentary was drafted, the Supreme Court of Canada issued its judgment in *Canadian National Railway Co. v. McKercher LLP*.<sup>9</sup> The decision dealt squarely with the bright line test for conflicts first articulated by the Supreme Court in *R. v. Neil*.<sup>10</sup> In *McKercher*, the Court said:

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

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

<sup>10</sup> [2002] 3 SCR 631, online at <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2012/index.do?r=AAAAAQAKUi4gdi4gTmVpbAAAAAEE>

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

75. It is expected that the Standing Committee of the FLSC will review this decision and consider whether the rule and commentary set out in the Model Code should be amended. Once the FLSC completes this review, any changes the FLSC may propose will be referred to law societies for review.
76. In order to facilitate the implementation of the Model Code in Ontario, the Committee proposes that at present, paragraph 5 of the commentary be adopted but not paragraph 6. Language for paragraph 6 will be added at a later date following the Committee’s review of the any changes from the FLSC.

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

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

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

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

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

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

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

79. The Law Society's current general rule on conflicts (Rule 2.04(3)), also addresses the issue of consent. In the Model Code, consent is now the subject of a separate rule (3.4-2).
  
80. Extensive commentary follows rule 3.4-2, much of which is new when compared to the Law Society's current Rules. There are, however, some minor similarities between the Model Code's commentary and the commentary to current Rule 2.04(3). The concepts of freedom of judgment and action, appearing in the current commentary, also appear in the Model Code's commentary. Some of the examples in the Model Code's commentary of situations in which conflicts may arise reflect portions of commentary to the current rule, but much of the text in the Model Code's commentary is new and newly formatted.
  
81. Generally, the Committee agrees with the content and structure of the Model Code's rule. Some proposed changes are discussed below.
  
82. Rule 3.4-2 provides an exception to the prohibition against acting in a conflict of interest where there is "express or implied consent" from all clients, and the lawyer "reasonably believes" that there will be no "material adverse effect" on the representation of or

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

83. The Committee proposes that the words “reasonably believes” in the first paragraph of the Rule be replaced with “it is reasonable for the lawyer to conclude” as a more appropriate threshold for this rule.
84. The Committee proposes that a paragraph be added as the first paragraph of commentary, as follows:

Rule 3.4-2 permits a client to accept a risk of material impairment of representation or loyalty. However, the lawyer would be unable to act where it is reasonable to conclude that representation or loyalty will be materially impaired even with client consent. Possible material impairment may be waived but actual material impairment cannot be waived.
85. The Committee proposes that the second sentence of the now second paragraph of commentary to Rule 3.4-2 be changed to provide that “ “However, the lawyer would be unable to act where it is reasonable to conclude that representation or loyalty will be materially impaired even with client consent.”
86. The Committee agrees with the suggestion from a respondents to the Call for Input to replace the words in the last sentence of rule 3.4-2(b)(iii) (that is, “the lawyer has no relevant confidential information from one client that could affect the other client) with “the lawyer has no relevant confidential information from one client that might reasonably affect the representation of the other client”.
87. The new rule, unlike the current Law Society rules, explains what constitutes express and implied consent, and prescribes the circumstances in which consent may be implied.
88. Some respondents indicated that the references to both “implied” and “inferred” consent

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

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

89. The Model Code Rule prohibits the representation of opposing parties in a dispute. The equivalent Law Society rule is similar, but uses the words “advise or represent more than one side” of a dispute.
90. The Committee proposes that the Model Code’s rule be adopted, together with the new commentary that appears below the rule.

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

91. The Model Code adds a new rule (3.4-4), permitting different lawyers in a law firm to act in a matter for different current clients with “competing” interests as long as there is no dispute among the clients about the matter. The Model Code does not define “competing interests”. In such a case, the rule states the lawyers may treat information received from each client as confidential and not disclose it to the other clients.
92. The rule sets out a number of requirements to be met, including disclosure of the risk of the such representation to each client, consent by the clients after having received independent legal advice on those risks, representation of each client by a different lawyer of the firm, screening mechanisms to protect confidential information and withdrawal of all lawyers in the law firm from the matter if a dispute that cannot be resolved develops among the clients. The commentary that follows the rule emphasizes that these retainers are intended in cases where all the clients are equally sophisticated.

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

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

94. While some respondents to the Call for Input agreed with the view that there should be a separate rule for these types of retainers, the Committee has concluded that adding a paragraph to the commentary under the joint retainer rule is sufficient.
95. The Committee also reviewed suggestions from respondents that the current wording of the rule ("where one of the clients is less sophisticated or more vulnerable than the other") was too restrictive. The Committee has concluded that because these retainers are a new concept in the Rules, this language should remain in the commentary.

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

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

97. Other than some variations in the wording and organization of the rule, the Model Code's rule and the current joint retainer rules are generally the same. The Model Code breaks out the duties in this rule in a different way, although the substance of the current rule remains. The Model Code adds a new requirement in rule 3.4-8(b) which requires the lawyer to withdraw if the contentious issues are not resolved. The Committee agrees with this addition.
98. The commentaries following the rules are largely identical. The minor differences are as follows:
- a. The current commentary following unlike the Model Code in rule 3.4-5, refers to the *Substitute Decisions Act, 1992*, S.O. 1992 c. 30.
  - b. The Model Code adds a sentence to the commentary now under Law Society rule 2.04(6) that specifies that the consent of each client to the joint retainer should be in a separate written communication. This reiterates what is already required in the definition of "consent" in the current rules.
99. The Committee proposes that the Model Code's version of this rule be adopted except that
- a. The reference to the *Substitute Decisions Act* should remain in the Law Society's rules in the commentary to Rule 3.4-5; and
  - b. To ensure clarity, the Committee proposes that Law Society Rule 3.4-8 read as follows:

Except as provided by this rule, if a contentious issue arises between clients who have consented to a joint retainer, the lawyer must not advise either of them on the contentious issue and the following rules apply:

- (a) The lawyer shall
  - (i) refer the clients to other lawyers for that purpose; or
  - (ii) if no legal advice is required and the clients are sophisticated, advise them that they have the option to settle the contentious issue by direct negotiation in which the lawyer does not participate;
- (b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

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

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

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

101. The Model Code rule prohibits a lawyer from acting against a former client unless the former client consents. The wording is similar to current rule 2.04(4), except that, unlike the Model Code, the current rule includes “persons who were involved in or associated with the client”. The Committee proposes that the Model Code’s version of the rule be adopted.
102. The Model Code adds the following sentence to the commentary under this rule:

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

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

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

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

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

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

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

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

provided that:

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

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

108. Except for minor variations, the rules in the Model Code mirror the current Law Society rules. However, the Model Code reorganizes some of the rules relating to mortgage and loan transactions.
109. In the existing rules, the rules on acting for borrower and lender are located in the joint retainers section, but the Model Code includes them under the “Acting for Borrower and Lender” heading. The rules include a definition of “lending client” currently in Law Society subrule 2.04(8.1), applicable to rules 3.4-14 through 3.4-16. The Model Code rule also includes the provisions on consent for a joint retainer with a lending client currently found in Law Society subrule 2.04(8.1). The Committee agrees with these changes.
110. The Model Code does not include a limit of \$50,000 for the consideration of the mortgage or loan where a lawyer acts jointly for the borrower and lender. The Committee proposes to keep that limit, which is in current Law Society rule 2.04(12).

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

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

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

112. The FLSC Standing Committee is currently reviewing proposed changes to the Model Code provisions on this subject and as part of the review has asked all Canadian Law Societies for comment.
113. As the FLSC review in this area is not yet completed, any amendments to these rules will be reported separately to Convocation at a future date.

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

114. Currently, rules on doing business with a client are located in Rule 2.06, which is separate from the conflicts rules. The Model Code includes them in the conflicts chapter. The Model Code's rules 3.4-27 to 41 generally reorganize the Law Society's rules.
115. The definitions of "independent legal advice" and "independent legal representation" are imported into the Model Code rule itself, whereas the current Law Society rules rely on the same definitions in new rule Rule 1.1-1. In the Committee's view, those definitions should remain in Rule 1.1-1.
116. There is no definition of "syndicated mortgage" in the Model Code's rule, as the rules that include these words are not included in the Model Code, as discussed below. The Law Society's current subrule 2.06(1) provides that a "syndicated mortgage" means a mortgage having more than one investor). The Committee proposes that this definition remain in the rules.
117. Rule 3.4-28 and commentary is new based on the Model Code. It provides a general rule and guidance respecting a lawyer's transactions with clients. The second paragraph of the new commentary includes language regarding the fiduciary relationship which appears in the current commentary under current rule 2.06(4). The following sentence is

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

118. The Model Code adds a new rule 3.4-28 that addresses the obligations where a lawyer lends money to a client.
119. As mentioned above, the Model Code does not include the equivalent of subrules (6) through (8) of Law Society rule 2.06. These rules deal in some detail with a lawyer holding mortgages in which clients invest, a lawyer arranging mortgages for clients, disclosure obligations, and advertising restrictions. These rules appear to be unique to Ontario and the Committee is proposing that they remain.
120. Based on consideration of the Call for Input submissions, the Committee recommends the following amendments to the Model Code rules:
  - a. the words “subject to this rule” at the beginning of rule 3.4-28 should be removed; and
  - b. the heading for Rules 3.4-29 to 3.4-36 should be “Transactions with Clients” rather than “Investment by Client when Lawyer has an Interest” as this heading is more descriptive of the subject.

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

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

122. Several submissions received by the Committee in response to the Call for Input cautioned against implementing the Model Code Rules in this area. It was suggested that the rules would restrict a testator's ability to communicate wishes concerning their choice of counsel to administer the estate. The views expressed were that clients benefit from using a lawyer who is already familiar with their family background, assets, and other relevant matters. The respondents said that this rule, if implemented in its current form, would make it difficult for the client to make use of the lawyer's knowledge. They indicated that clients might find it more cost-effective if the drafter of a will were also permitted to execute it in accordance with the testator's intentions. They urged that for these public policy reasons, including the importance of testamentary freedom, the rules should not be adopted as drafted.
123. The Committee agrees with the approach suggested by the respondents and is recommending the following wording to address these concerns:
- 3.4-37 If a will contains a clause directing that the lawyer who drafted the will be retained to provide services in the administration of the client's estate, the lawyer shall, before accepting that retainer, provide the trustees with advice, in writing, that the clause is a non-binding direction and the trustees can decide to retain other counsel.
124. Comment was also received on Model Code rule 3.4-38 which reads:
- Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.
125. One respondent suggested that the rule should use the term "related persons" rather than "family member". In the Committee's view, the intent of the Rule is to permit a lawyer to draft a will for a parent, grandparent etc. leaving a gift to the lawyer (or his children, for example). The ordinary definition of "family" would be broad enough to include

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

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

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

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

3.4-40 Subject to Rule 3.4-41, a lawyer shall not in respect to any accused person for whom the lawyer acts

- (a) act as a surety for the accused;
- (b) deposit with a court the lawyer’s own money or that of any firm in which the lawyer is a partner to secure the accused’s release;
- (c) deposit with any court any other valuable security to secure the accused’s release; or
- (d) act in a supervisory capacity to the accused.

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

### **Law Society Ontario-Specific Rules**

129. The Committee proposed that the following Law Society rules be retained as part of the conflicts chapter, as there are no equivalent Model Code provisions:
- a. Affiliations Between Lawyers and Affiliated Entities (3.4-11.1 to 3.4-11.3);
  - b. Multi-Discipline Practice (3.4-16.1);
  - c. Short-term Limited Legal Services (3.4-16.2 to 3.4-16.6); and
  - d. Lawyers Acting For Transferor and Transferee in Transfers of Title (3.4-16.7 to 3.4-16.9)

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

130. The Model Code makes a number of helpful additions and some amendments to the Fees and Disbursements Rule, with which the Committee agrees. The commentary following current subrule (2) respecting what constitutes a fair and reasonable fee is enhanced. The Code reorganizes the second half of the commentary under current subrule 2.08(2) that follows the individual paragraphs, and makes some deletions. The additions include providing information in writing on fees and disbursements and the substance of all fee discussions.
131. The Model Code moves the last paragraph of the commentary under current subrule 2.08(2) to the rule dealing with making legal services available (now Rule 4.1).
132. The Model Code adds new commentary to current subrule 2.08(7) to elaborate on matters related to division of fees and referral fees, with some examples that illustrate some permitted activities.

133. The Model Code adds commentary to current subrule 2.08(10) that elaborates on the rule prohibiting appropriation of funds except in accordance with the by-laws that govern trust funds. The commentary indicates that refusal to refund advance fees for work not carried out when the retainer terminates is a breach of integrity.
134. The Model Code adds a new rule that requires a lawyer to repay funds owing as a result of a reduction of a fee at assessment.
135. The Committee proposes the adoption of these Model Code changes.
136. There are two changes included in Model Code Rule 3.8 that the Committee has decided not to recommend.
137. The first change is the last paragraph of commentary to rule 3.6-2 added by the Model Code discussing the on the termination of a contingency fee arrangement. The Model Code provides that

Although a lawyer is generally permitted to terminate the professional relationship with a client and withdraw services if there is justifiable cause as set out in Rule 3.7-1, special circumstances apply when the retainer is pursuant to a contingency agreement. In such circumstances, the lawyer has impliedly undertaken the risk of not being paid in the event the suit is unsuccessful. Accordingly, a lawyer cannot withdraw from representation for reasons other than those set out in Rule 3.7-7 (Mandatory Withdrawal) unless the written contingency contract specifically states that the lawyer has a right to do so and sets out the circumstances under which this may occur.

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

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

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

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

This rule prohibits lawyers from entering into arrangements to compensate or reward non-licensees for the referral of clients. However, this rule does not prohibit a lawyer from:

- (a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes as percentage of revenues generated from the practice sold;
- (b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;
- (c) paying an employee for services, other than for referring clients, based on the revenue of the lawyer’s firm or practice.

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

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

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

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

143. The Committee proposes that the commentary to the Model Code rule 3.7-2 regarding optional withdrawal from representation be adopted but amended by adding the words "a material breakdown in communications" as another example of the circumstances in which an optional withdrawal may be permitted.
144. The Committee proposes that the Model Code rule 3.7-7 on mandatory withdrawal be adopted but with modification to paragraph (b), so that it would provide: "Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if the client's instructions require the lawyer to act contrary to these rules or by-laws of the Society".
145. The Model Code in rules 3.7-8 and 3.7-9 amends the language of current subrule 2.09(9) regarding the manner of withdrawal by adding a requirement to notify the client, and by adding some additional descriptive or clarifying language to other provisions that do not change the substance of the guidance. A minor addition is also made to the commentary following these rules respecting the withdrawal of a lawyer who is part of a law firm. The Committee agrees with these changes.

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

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

**Current Law Society Rule 3.04 – Interprovincial Law Firms**

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

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

148. The Model Code reorganizes the commentary under current subrule 4.01(1) and moves one paragraph to follow rule 5.1-2. The Model Code also clarifies and amends the list of items in the paragraphs under current subrule 4.01(2) which describe what an advocate must not do.
149. In addition to the change to the commentary described above, the Model Code amends the wording and adds two short paragraphs to the commentary that deal with the withdrawal of a criminal charge to gain a civil advantage and pursuing a hypothesis with a witness that is not honestly advanced.
150. The Committee agrees with the changes described above.
151. Paragraph 4 of the commentary to Model Code rule 5.1-1 currently provides that “in adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client”. One respondent to the Call for Input recommended replacing this phrase with the following mandatory wording: “in adversarial proceedings that could impact the health, welfare or security of a

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

152. The Committee, following staff research, does not recommend this wording change on the basis that mandatory language should not appear in the commentary.<sup>11</sup>
153. The Model Code deletes the existing commentary under current subrule 4.01(7) on undertakings and instead provides a cross-reference to the undertakings and trust conditions in the Model Code rule 7.2-11 (current Law Society subrule 6.03(10)). The Committee believes that the existing commentary that highlights the “personal promise and responsibility” character of an undertaking, should remain but that the cross-reference above should be added.
154. In response to a suggestion from a respondent to the Call for Input on the undertaking rule, the Committee proposes the addition of the words “by her or him” to the wording of Model Code Rule 5.1-6 (Undertakings) to clarify that the obligation is clearly directed at personal undertakings given by the lawyer only and not, for example, undertakings given at discovery.
155. The Model Code re-organizes current subrule 4.01(9) on agreement on guilty plea, (now rules 5.1-7 and 5.1-8) without affecting the substance. The Committee considers this to be a useful change.

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

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

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

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

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

157. The Model Code modifies current subrule 4.05(3) on disclosure of information about improper conduct by a jury panel or juror, setting out a reasonable belief test that the improper conduct has occurred. The Committee agrees with this change.
158. The Model Code adds a new rule 5.5-5 that prohibits a lawyer’s discussion after trial with a member of the jury about its deliberations. The rule reads: “A lawyer who is not connected with a case before the court shall not communicate with or cause another to communicate with any member of the jury about the case”. Because the Committee is of the view that this subject is already covered in the *Criminal Code*, the Committee does not propose to include it.

**Section 6.2 - Students (Law Society Rule 5)**

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

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

160. The Model Code makes significant changes to the Law Society’s current rules on these subjects. It reduces the two rules and their extensive commentary to four brief rules that reference the application of human rights laws, definitions in human rights legislation and prohibitions on any form of harassment, including sexual harassment and discrimination.
161. The Committee considered the submissions it received on these proposed changes during the Call for Input. Some of the participants noted that if the definition of the term

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

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

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

163. Language which previously appeared in the Law Society’s Rule 6.01 on the subject of integrity has now been moved to new rule 2.1 under the heading “Integrity”, as previously noted. The Committee is in agreement with these changes.
164. The Model Code makes a minor, but important, wording change to this rule, now 7.1-3, replacing the word “severely” in paragraph (d) with “materially” to describe the threshold for prejudice that would invoke the rule in the circumstances described. The Committee recommends that this change be made.

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

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

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

**Rule 7.2-10 - Inadvertent Communications (New)**

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

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

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

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

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

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

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<sup>12</sup> This paragraph reads: "Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Unless a lawyer is required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer."

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

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

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

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

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

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

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

A judge who returns to practice after retiring, resigning or being removed from the bench must not, for a period of three years, unless the governing body approves on the basis of exceptional circumstances, appear as a lawyer before the court in which the former judge was a member or before

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

175. The Call for Input prompted some interesting comment on this rule. The Committee also noted that this issue forms part of an argument in a case before the Supreme Court of Canada this year.<sup>13</sup>
176. The Committee carefully considered the submissions it received and is of the view that the Model Code three year proposal be adopted but that it be incorporated in the current rule, which would otherwise remain unchanged. In other words, the distinction between retired appellate judges and retired judges would remain in the Rules.
177. Accordingly, in order to appear as counsel in any court, a retired appellate judge would continue to require express approval from a Committee of Convocation appointed for this purpose. With respect to retired judges, the Committee is recommending a three-year prohibition on appearing before the court in which the former judge served, or before a court or administrative tribunal over which the court exercised jurisdiction, unless the governing body approves that the judge appear on the basis of exceptional circumstances.

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