



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

**PROPOSED AMENDED RULES IMPLEMENTING THE  
FEDERATION OF LAW SOCIETIES OF CANADA'S  
MODEL CODE OF PROFESSIONAL CONDUCT**

# **Rules of Professional Conduct**

*~Effective November 1, 2000~*

**Adopted by Convocation June 22, 2000**

## Table of Contents

Rules of Professional Conduct.....	1
Guide to the Rules of Professional Conduct.....	9
Chapter 1 Citation and Interpretation .....	10
Section 1.0 Citation .....	10
Section 1.1 Definitions .....	11
Chapter 2 Integrity.....	16
Section 2.1 Integrity .....	16
Chapter 3 Relationship to Clients.....	18
Section 3.1 Competence .....	18
Definitions.....	18
Competence.....	19
Section 3.2 Quality of Service.....	22
Quality of Service .....	22
Legal Services Under a Limited Scope Retainer .....	22
Honesty and Candour.....	24
When Client an Organization.....	24
Encouraging Compromise or Settlement .....	25
Threatening Criminal Proceedings .....	26
Dishonesty, Fraud etc. by Client or Others.....	26
Dishonesty, Fraud, etc. when Client an Organization .....	29
Client with Diminished Capacity.....	30
Medical-Legal Reports.....	31
Title Insurance in Real Estate Conveyancing .....	32
Reporting on Mortgage Transactions.....	33

Section 3.3	Confidentiality .....	34
	Confidential Information .....	34
	Justified or Permitted Disclosure .....	36
SECTION 3.4	Conflicts .....	39
	Duty to Avoid Conflicts of Interest .....	39
	Consent .....	41
	Dispute .....	42
	Joint Retainers.....	43
	Acting Against Former Clients .....	45
	Affiliations Between Lawyers and Affiliated Entities.....	46
	Acting for Borrower and Lender.....	47
	Multi-discipline Practice.....	48
	Short-term Limited Legal Services.....	48
	Lawyers Acting for Transferor and Transferee in Transfers of Title .....	51
	Conflicts from Transfer Between Law Firms .....	51
	Interpretation and Application of Rule .....	51
	Law Firm Disqualification.....	53
	Transferring Lawyer Disqualification.....	54
	Determination of Compliance.....	54
	Due Diligence .....	54
	Doing Business with A Client.....	58
	Transactions with Clients.....	58
	Borrowing from Clients .....	59
	Certificate of Independent Legal Advice .....	60
	Lawyers in Loan or Mortgage Transactions .....	60

Disclosure .....	61
No Advertising.....	61
Guarantees by a Lawyer.....	62
Testamentary Instruments and Gifts .....	62
Judicial Interim Release .....	62
Section 3.5     Preservation of Clients’ Property .....	63
Preservation of Client’s Property.....	63
Notification of Receipt of Property.....	63
Identifying Client’s Property .....	64
Accounting and Delivery .....	64
Section 3.6     Fees and Disbursements .....	65
Reasonable Fees and Disbursements .....	65
Contingency Fees and Contingency Fee Agreements .....	66
Statement of Account.....	67
Joint Retainer .....	67
Division of Fees and Referral Fees.....	67
Exception for Multi-discipline Practices and Interprovincial and International Law Firms	68
Payment and Appropriation of Funds .....	68
Section 3.7     Withdrawal From Representation.....	70
Withdrawal from Representation .....	70
Optional Withdrawal.....	70
Non-payment of Fees .....	71
Withdrawal from Criminal Proceedings .....	71
Mandatory Withdrawal .....	72
Manner of Withdrawal.....	73

Duty of Successor Licensee .....	74
Chapter 4    The Practice of Law .....	75
Section 4.1    Making Legal Services Available.....	75
Making Legal Services Available.....	75
Restrictions .....	75
Section 4.2    Marketing.....	77
Marketing of Professional Services .....	77
Advertising of Fees .....	77
Section 4.3    Advertising Nature Of Practice .....	79
Certified Specialist.....	79
Chapter 5    Relationship to The Administration of Justice.....	80
Section 5.1    The Lawyer as Advocate .....	80
Advocacy .....	80
Duty as Prosecutor .....	83
Discovery Obligations .....	84
Disclosure of Error or Omission.....	84
Courtesy .....	84
Undertakings.....	85
Agreement on Guilty Plea.....	85
Section 5.2    The Lawyer as Witness.....	86
Submission of Evidence.....	86
Appeals .....	86
Section 5.3    Interviewing Witnesses.....	87
Section 5.4    Communication with Witnesses Giving Evidence .....	88
Section 5.5    Relations with Jurors .....	90

Communications Before Trial.....	90
Disclosure of Information.....	90
Communication During Trial.....	90
Section 5.6    The Lawyer and the Administration of Justice.....	92
Encouraging Respect for the Administration of Justice .....	92
Seeking Legislative or Administrative Changes.....	92
Security of Court Facilities .....	93
Section 5.7    Lawyers as Mediators.....	94
Role of Mediator .....	94
Chapter 6    Relationship to Students, Employees, and Others .....	95
Section 6.1    Supervision .....	95
Direct Supervision Required.....	95
Electronic Registration of Title Documents .....	96
Title Insurance .....	97
Signing E-Reg™ Documents.....	97
Section 6.2    Students .....	98
Recruitment and Engagement Procedures .....	98
Duties of Principal .....	98
Duties of Articling Student .....	98
Section 6.3    Sexual Harassment .....	99
Definition .....	99
Prohibition on Sexual Harassment.....	100
Section 6.3.1    Discrimination .....	101
Special Responsibility.....	101
Services.....	103

Employment Practices .....	103
Chapter 7    Relationship to the Law Society and Other Lawyers.....	105
Section 7.1    Responsibility to the Profession, the Law Society and Others.....	105
Communications from the Law Society .....	105
Meeting Financial Obligations.....	105
Duty to Report Misconduct.....	105
Encouraging Client to Report Dishonest Conduct.....	107
Duty to Report Certain Offences .....	107
Section 7.2    Responsibility to Lawyers and Others.....	108
Courtesy and Good Faith .....	108
Communications .....	108
Communications with a Represented Person.....	109
Second Opinions .....	109
Communications with a Represented Corporation or Organization.....	110
Inadvertent Communications .....	114
Undertakings and Trust Conditions .....	115
Section 7.3    Outside Interests and the Practice of Law .....	117
Maintaining Professional Integrity and Judgment .....	117
Section 7.4    The Lawyer in Public Office .....	118
Standard of Conduct .....	118
Section 7.5    Public Appearances and Public Statements.....	119
Communication with the Public.....	119
Interference with Right to Fair Trial or Hearing.....	120
Section 7.6    Preventing Unauthorized Practice .....	121
Preventing Unauthorized Practice.....	121

Working With or Employing Unauthorized Persons .....	121
Practice by Suspended Lawyers Prohibited .....	121
Undertakings Not to Practise Law .....	122
Undertakings to Practise Law Subject to Restrictions .....	122
Section 7.7 Retired Judges Returning to Practice.....	123
Definitions.....	123
Appearance as Counsel.....	123
Section 7.8 Errors and Omissions.....	124
Informing Client of Error or Omission .....	124
Notice of Claim.....	124
Co-operation .....	125
Responding to Client’s Claim.....	125
Section 7.8.1 Responsibility in Multi-Discipline Practices .....	126
Compliance with these Rules.....	126
Section 7.8.2 Discipline.....	127
Disciplinary Authority .....	127
Professional Misconduct.....	127
Conduct Unbecoming a Lawyer .....	127

# **Guide to the Rules of Professional Conduct**

## **Amended by Convocation October 24, 2013**

### **Amendments Effective October 1, 2014**

IN THESE RULES:

- a. Chapters are assigned a single digit, as in **Chapter 1 – Citation and Interpretation**
- b. Sections are assigned two digits separated by a decimal point, the second number beginning with 1 (subject to paragraph g.) as in **Section 3.1 – Competence**
- c. Rules include the section number and are assigned an additional number, beginning with 1 (subject to paragraph g.) preceded by a dash, as in **Reasonable Fees and Disbursements 3.6-1**
- d. Paragraphs of commentary are assigned a number in square brackets, beginning with 1 (subject to paragraph g.) as in **[6]**.
- e. Rules or paragraphs of commentary in the Federation of Law Societies of Canada Model Code of Professional Conduct (“Model Code”) not adopted in these rules are assigned the phrase **[FLSC - not in use]**
- f. Sections, rules or paragraphs of commentary in these rules that do not appear in the Model Code are assigned a numerical suffix preceded by a decimal point, as in **Section 7.8.1, rule 3.4-11.1 and commentary [4.1]**.
- g. If a section, rule or paragraph of commentary described in paragraph f. is, at a given location, the first section, rule or paragraph of commentary, it is assigned the number 0, as in **Section 1.0 or rule 4.2-0**.
- h. New sections, rules or commentaries as a result of amendments to the Model Code are assigned the appropriate capital letter suffix, for example, **rule 4.1-2A or commentary [6B]**.
- i. Deletions are assigned the word “deleted” in square brackets following the relevant section, rule or commentary number, for example, **6.4-1 [deleted]**.

# Chapter 1 Citation and Interpretation

## SECTION 1.0 CITATION

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

## SECTION 1.1 DEFINITIONS

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

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

*[New – May 2001]*

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

*[New – May 2001]*

**“associate”** includes:

- (a) a licensee who practises law in a law firm through an employment or other contractual relationship, and
- (b) a non-licensee employee of a multi-discipline practice providing services that support or supplement the practice of law;

*[Amended – September 2010, October 2014]*

**“client”** means a person who:

- (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
- (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf

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

*[Amended – October 2014]*

### Commentary

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

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

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

*[Amended – October 2014]*

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

- (a) committing a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer,
- (b) taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of another, or
- (c) engaging in conduct involving dishonesty or conduct which undermines the administration of justice;

*[Amended – May 2008, October 2014]*

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

*[New – October 2014]*

#### **Commentary**

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

*[New – October 2014]*

**“consent”** means fully informed and voluntary consent after disclosure

- (a) in writing, provided that, where more than one person consents, each signs the same or a separate document recording the consent, or
- (b) orally, provided that each person consenting receives a separate written communication recording their consent as soon as practicable.

**“independent legal advice”** means a retainer where

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client’s transaction,
- (b) the client’s transaction involves doing business with
  - (i) another lawyer,
  - (ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded, or
  - (iii) a client of the other lawyer,
- (c) the retained lawyer has advised the client that the client has the right to independent legal representation,
- (d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from the other lawyer,
- (e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and
- (f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of the proposed investment from a business point of view;

**“independent legal representation”** means a retainer where

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client’s transaction, and
- (b) the retained lawyer will act as the client’s lawyer in relation to the matter;

**Commentary**

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

**“interprovincial law firm”** means a law firm that carries on the practice of law in more than one province or territory of Canada;

**“law firm”** includes one or more lawyers practising

- (a) in a sole proprietorship,
- (b) in a partnership,
- (c) as a clinic under the *Legal Aid Services Act 1998*,
- (d) in a government, a Crown corporation, or any other public body, or
- (e) in a corporation or other body;

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

**“legal practitioner”** means a person

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

[New – June 2009]

**“licensee”** means a lawyer or a paralegal;

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

**“professional misconduct”** means conduct in a lawyer’s professional capacity that tends to bring discredit upon the legal profession including

- (a) violating or attempting to violate one of these rules, a requirement of the *Law Society Act* or its regulations or by-laws,
- (b) knowingly assisting or inducing another legal practitioner to violate or attempt to violate the rules in these rules, the *Paralegal Rules of Conduct* or a requirement of the *Law Society Act* or its regulations or by-laws,
- (c) knowingly assisting or inducing a non-licensee partner or associate of a multi-discipline practice to violate or attempt to violate the rules in rules or a requirement of the *Law Society Act* or its regulations or by-laws,
- (d) misappropriating or otherwise dealing dishonestly with a client’s or a third party’s money or property,
- (e) engaging in conduct that is prejudicial to the administration of justice,
- (f) stating or implying an ability to influence improperly a government agency or official, or

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

*[Amended – June 2009]*

**“Law Society”** means The Law Society of Upper Canada;

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

# Chapter 2 Integrity

## SECTION 2.1 INTEGRITY

**2.1-1** A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

### Commentary

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

[2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

[3] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Law Society may be justified in taking disciplinary action.

[4] Generally, however, the Law Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

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

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

- (a) subsection 19(1) of the *Constitution Act*, 1982 on the use of French or English in any court established by Parliament,
- (b) section 530 of the *Criminal Code* about an accused's right to a trial before a court that speaks the official language of Canada that is the language of the accused,
- (c) section 126 of the *Courts of Justice Act* that requires that a proceeding in which the client is a party be conducted as a bilingual (English and French) proceeding,

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

**2.1-2** A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

**Commentary**

[1] Collectively, lawyers are encouraged to enhance the profession through activities such as:

(a) sharing knowledge and experience with colleagues and students informally in day-to-day practice as well as through contribution to professional journals and publications, support of law school projects and participation in panel discussions, legal education seminars and university lectures;

(b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;

(c) filling elected and volunteer positions with the Law Society;

(d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and

(e) acting as directors, officers and members of non-profit or charitable organizations.

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

*[New – October 2014]*

# Chapter 3 Relationship to Clients

## SECTION 3.1 COMPETENCE

### Definitions

**3.1-1** In this rule,

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

*[Amended – October 2014]*

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

*[Amended – June 2007]*

- (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action,

- (c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including;

- (i) legal research,
- (ii) analysis,
- (iii) application of the law to the relevant facts,
- (iv) writing and drafting,
- (v) negotiation,
- (vi) alternative dispute resolution,
- (vii) advocacy, and
- (viii) problem-solving,

- (d) communicating at all relevant stages of a matter in a timely and effective manner;

*[Amended – October 2014]*

- (e) performing all functions conscientiously, diligently, and in a timely and cost-effective manner;

- (f) applying intellectual capacity, judgment, and deliberation to all functions;
- (g) complying in letter and in spirit with all requirements pursuant to the *Law Society Act*;  
*[Amended – October 2014]*
- (h) recognizing limitations in one’s ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served;
- (i) managing one’s practice effectively;
- (j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and
- (k) otherwise adapting to changing professional requirements, standards, techniques, and practices.

## Competence

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

### Commentary

**[1]** As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client’s behalf.

**[2]** Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles; it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

**[3]** In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include

- (a) the complexity and specialized nature of the matter;
- (b) the lawyer’s general experience;
- (c) the lawyer’s training and experience in the field;
- (d) the preparation and study the lawyer is able to give the matter; and
- (e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a licensee of established competence in the field in question.

**[4]** In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

**[5]** A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

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

- (a) decline to act;
- (b) obtain the client's instructions to retain, consult, or collaborate with a licensee who is competent for that task; or
- (c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

**[7]** The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in such a situation, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

**[7A]** When a lawyer considers whether to provide legal services under a limited scope retainer, he or she must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement to provide such services does not exempt a lawyer from the duty to provide competent representation. As in any retainer, the lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rules 3.2-1A to 3.2-1A.2.

**[8]** A lawyer should clearly specify the facts, circumstances, and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.

**[8.1]** What is effective communication with the client will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

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

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

[11] In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-licensure. Advice or services from non-licensure members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the relevant by-laws and regulations governing multi-discipline practices.

[12] The requirement of conscientious, diligent, and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed, so that the client can make an informed choice about their options, such as whether to retain new counsel.

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

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

[15] **Incompetence, Negligence and Mistakes** – This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described in the rule. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

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

- (a) the lawyer's knowledge, skill, or judgment,
- (b) the lawyer's attention to the interests of clients,
- (c) the records, systems, or procedures of the lawyer's professional business, or
- (d) other aspects of the lawyer's professional business, and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected.

[Amended – June 2009, October 2014]

## SECTION 3.2      QUALITY OF SERVICE

### Quality of Service

**3.2-1** A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.

*[New – October 2014]*

#### **Commentary**

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

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

[3] to [5] FLSC – not in use.

[6] A lawyer should meet deadlines, unless the lawyer is able to offer a reasonable explanation and ensure that no prejudice to the client will result. Whether or not a specific deadline applies, a lawyer should be prompt in prosecuting a matter, responding to communications and reporting developments to the client. In the absence of developments, contact with the client should be maintained to the extent the client reasonably expects.

*[New – October 2014]*

### Legal Services Under a Limited Scope Retainer

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

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

#### **Commentary**

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

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

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

[3] [FLSC – not in use]

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

[5] [FLSC – not in use]

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

- (a) legal services or summary advice provided as a duty counsel under the *Legal Aid Services Act, 1998* or through any other duty counsel or other advisory program operated by a not-for-profit organization;
- (b) summary advice provided in community legal clinics, student clinics or under the *Legal Aid Services Act, 1998*;
- (c) summary advice provided through a telephone-based service or telephone hotline operated by a community-based or government funded program;
- (d) summary advice provided by the lawyer to a client in the context of an introductory consultation, where the intention is that the consultation, if the client so chooses, would develop into a retainer for legal services for all aspects of the legal matter; or
- (e) *pro bono* summary legal services provided in a non-profit or court-annexed program.

[New – September 2011]

**Commentary**

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

[New – September 2011]

## Honesty and Candour

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

#### Commentary

[1] [FLSC – not in use]

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

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

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

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

[3] [FLSC – not in use]

*[Amended – October 2014]*

### When Client an Organization

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

### **Commentary**

[1] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors, and employees. While the organization or corporation will act and give instructions through its officers, directors, employees, members, agents, or representatives, the lawyer should ensure that it is the interests of the organization that are to be served and protected. Further, given that an organization depends upon persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

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

*[New – March 2004]*

### **Encouraging Compromise or Settlement**

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

*[Amended – October 2014]*

### **Commentary**

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

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

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

*[Amended – October 2014]*

## **Threatening Criminal Proceedings**

**3.2-5** A lawyer shall not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:

- (a) to initiate or proceed with a criminal or quasi-criminal charge; or
- (b) to make a complaint to a regulatory authority.

*[Amended – October 2014]*

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

*[New – October 2014]*

### **Commentary**

**[1]** It is an abuse of the court or regulatory authority's process to threaten to make or advance a complaint in order to secure the satisfaction of a private grievance. Even if a client has a legitimate entitlement to be paid monies, threats to take criminal or quasi-criminal action are not appropriate.

**[2]** It is not improper, however, to notify the appropriate authority of criminal or quasi-criminal activities while also taking steps through the civil system. Nor is it improper for a lawyer to request that another lawyer comply with an undertaking or trust condition or other professional obligation or face being reported to the Law Society. The impropriety stems from threatening to use criminal or quasi-criminal proceedings to gain a civil advantage.

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

*[New – October 2014]*

**3.2-6** [FLSC - not in use]

## **Dishonesty, Fraud etc. by Client or Others**

**3.2-7** A lawyer shall not knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct or instruct a client or any other person on how to violate the law and avoid punishment.

*[Amended – October 2014]*

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

[New – April 2012]

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

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

[Amended – April 2011]

#### **Commentary**

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

[2] A lawyer should be alert to and avoid unwittingly becoming involved with a client or any other person who is engaged in criminal activity such as mortgage fraud or money laundering. Vigilance is required because the means for these and other criminal activities may be transactions for which lawyers commonly provide services such as

- (a) establishing, purchasing or selling business entities;
- (b) arranging financing for the purchase or sale or operation of business entities;
- (c) arranging financing for the purchase or sale of business assets; and
- (d) purchasing and selling real estate.

[3] To obtain information about the client and about the subject matter and objectives of the retainer, the lawyer may, for example, need to verify who are the legal or beneficial owners of property and business entities, verify who has the control of business entities, and clarify the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries. It is especially important to obtain this information where a lawyer has suspicions or doubts about whether he or she might be assisting a client or any other person in dishonesty, fraud, crime or illegal conduct.

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

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

[4] A *bona fide* test case is not necessarily precluded by rule 3.2-7 and, so long as no injury to the person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

[Amended – October 2014]

### **Red Flags in Real Estate Transactions**

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

- (a) purchase price manipulations (revealed by, for example, deposits purportedly paid directly to the vendor, price escalations and “flips” in which a property is sold and re-sold within a short period of time for a substantially higher price, reductions in the balance due on closing in consideration of extra credits or deposits not required by the purchase agreement, amendments to the purchase price not disclosed to the mortgage lender, the acceptance on closing of an amount less than the balance due, a mortgage advance which approximates or exceeds the balance due resulting in surplus mortgage proceeds, and so on);
- (b) a nominal role for one or more parties (fraud is sometimes effected through the use of “straw people”, who may not exist or whose identities have either been purchased or stolen, as well as through the suspicious use of powers of attorney);
- (c) the purchaser contributes no funds or only a nominal amount towards the purchase price or the balance due on closing;
- (d) signs that the parties are concealing a non-arm's length relationship or are colluding with respect to the purchase price;
- (e) suspicious or repeated third-party involvement (for example, giving instructions, supplying client directions or identification, and providing or receiving funds on closing); and
- (f) the proceeds of sale are disbursed or directed to be paid to parties who are unrelated to the transaction.

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

### **Dishonesty, Fraud, etc. when Client an Organization**

**3.2-8** A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally, shall do the following, in addition to their obligations under rule 3.2-7:

- (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;
- (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and
- (c) if the organization, despite the lawyer's advice, continues with or intends to pursue the wrongful conduct, withdraw from acting in the matter in accordance with rules in Section 3.7.

[Amended – October 2014]

#### **Commentary**

[1] The past, present, or intended misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency but also for the public, who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences for the public at large. This rule addresses some of the professional responsibilities of a lawyer acting for an organization, including a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (Section 3.3)

[2] This rule speaks of conduct that is dishonest, fraudulent, criminal or illegal.

[3] Such conduct includes acts of omission. Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct inaccurate disclosures that constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes this rules.

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

[5] A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner may advise the chief executive officer and shall advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer shall report the matter “up the ladder” of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer’s advice, continues with the wrongful conduct, the lawyer shall withdraw from acting in the particular matter in accordance with rule 3.7-1. In some but not all cases, withdrawal means resigning from their position or relationship with the organization and not simply withdrawing from acting in the particular matter.

[6] This rule recognizes that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organizations’ and the public’s interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization, not only about the technicalities of the law, but also about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable, and consistent with the organization’s responsibilities to its constituents and to the public.

*[Amended – October 2014]*

### **Client with Diminished Capacity**

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

#### **Commentary**

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

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

[2] [FLSC – not in use]

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

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

*[Amended – September 2011]*

[4] [FLSC – not in use]

[5] When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances. (See Commentary under rule 3.3-1 (Confidentiality) for a discussion of the relevant factors). If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer’s relationship with the person lacking capacity.

*[Amended – October 2014]*

## **Medical-Legal Reports**

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

### **Commentary**

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

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

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

### **Title Insurance in Real Estate Conveyancing**

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

#### **Commentary**

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

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

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

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

#### **Commentary**

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

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

## **Reporting on Mortgage Transactions**

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

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

*[New - February 2007]*

## SECTION 3.3 CONFIDENTIALITY

### Confidential Information

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

- (a) expressly or impliedly authorized by the client;
- (b) required by law or by order of a tribunal of competent jurisdiction to do so;
- (c) required to provide the information to the Law Society; or
- (d) otherwise permitted by rules 3.3-2 to 3.3-6.

*[Amended – October 2014]*

#### Commentary

**[1]** A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

**[2]** This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

**[3]** A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.

**[4]** A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter. (See Section 3.4 Conflicts.)

**[5]** Generally, unless the nature of the matter requires such disclosure, a lawyer should not disclose having been:

- (a) retained by a person about a particular matter; or
- (b) consulted by a person about a particular matter, whether or not the lawyer-client relationship has been established between them.

**[6]** A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.

**[7]** Sole practitioners who practise in association with other licensees in cost-sharing, space-sharing or other arrangements should be mindful of the risk of advertent or inadvertent disclosure of confidential information, even if the lawyers institute systems and procedures that are designed to insulate their respective practices. The issue may be heightened if a lawyer in the association represents a client on the other side of a dispute with the client of another licensee in the association. Apart from conflict of interest issues such a situation may raise, the risk of such disclosure may depend on the extent to which the licensees' practices are integrated, physically and administratively, in the association.

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

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

**[9]** In some situations, the authority of the client to disclose may be inferred. For example, some disclosure may be necessary in court proceedings, in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to administrative staff and to others whose services are used by the lawyer. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, and students and other licensees engaged under contract with the lawyer or with the firm of the lawyer the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

**[10]** The client's authority for the lawyer to disclose confidential information to the extent necessary to protect the client's interest may also be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer's belief that the person lacks capacity, the potential harm that may come to the client if no action is taken, and any instructions the client may have given to the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.

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

**[11.1]** The fiduciary relationship between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer’s use of a client’s confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client’s or former client’s consent before disclosing confidential information.

*[Amended - October 2014]*

### **Justified or Permitted Disclosure**

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

**3.3-2** [FLSC - not in use]

**3.3-3** A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

*[Amended – October 2014]*

### **Commentary**

**[1]** Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, in some very exceptional situations identified in this rule, disclosure without the client’s permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.

**[2]** The Supreme Court of Canada has considered the meaning of the words “serious bodily harm” in certain contexts, which may inform a lawyer in assessing whether disclosure of confidential information is warranted. In *Smith v. Jones*, [1999] 1 S.C.R. 455 at paragraph 83, the Court observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

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

- (a) the likelihood that the potential injury will occur and its imminence;
- (b) the apparent absence of any other feasible way to prevent the potential injury; and
- (c) the circumstances under which the lawyer acquired the information of the client’s intent or prospective course of action.

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

[5] If confidential information is disclosed under rule 3.3-3, the lawyer should prepare a written note as soon as possible, which should include:

- (a) the date and time of the communication in which the disclosure is made;
- (b) the grounds in support of the lawyer's decision to communicate the information, including the harm intended to be prevented, the identity of the person who prompted communication of the information as well as the identity of the person or group of persons exposed to the harm; and
- (c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

*[Amended – October 2014]*

[5.1] A lawyer employed or retained to act for an organization, including a corporation, confronts a difficult problem about confidentiality when he or she becomes aware that the organization may commit a dishonest, fraudulent, criminal, or illegal act. This problem is sometimes described as the problem of whether the lawyer should “blow the whistle” on their employer or client. Although the rules make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 3.2-7) and provide a rule for how a lawyer should respond to conduct by an organization that was, is or may be dishonest, fraudulent, criminal, or illegal (rule 3.2-8), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions. Assuming the exceptions do not apply, there are, however, several steps that a lawyer should take when confronted with the difficult problem of proposed misconduct by an organization. The lawyer should recognise that their duties are owed to the organization and not to the officers, employees, or agents of the organization (rule 3.2-3)) and the lawyer should comply with rule 3.2-8, which sets out the steps the lawyer should take in response to proposed, past or continuing misconduct by the organization.

*[Amended – March 2004]*

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

- (a) have committed a criminal offence involving a client's affairs;
  - (b) are civilly liable with respect to a matter involving a client's affairs;
  - (c) have committed acts of professional negligence; or
  - (d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,
- the lawyer may disclose confidential information in order to defend against the allegations, but shall not disclose more information than is required.

*[Amended – October 2014]*

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

**3.3-6** A lawyer may disclose confidential information to another lawyer to secure legal advice about the lawyer's proposed conduct.

*[New – October 2014]*

## **SECTION 3.4        CONFLICTS**

### **Duty to Avoid Conflicts of Interest**

**3.4-1** A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

#### **Commentary**

[1] As defined in rule 1.1-1, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. In this context, "substantial risk" means that the risk is significant and plausible, even if it is not certain or even probable that the material adverse effect will occur. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

[2] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.

[3] In order to assess whether there is a conflict of interest, the lawyer is required to consider the lawyer's duties to current, former and joint clients, third persons, as well as the lawyer's own interests.

#### **Representation**

[4] Representation means acting for a client and includes the lawyer's advice to and judgment on behalf of the client.

#### **The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests**

[5] The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Aspects of the duty of loyalty owed to a current client are the duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests. Current clients must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship.

[6] [FLSC - not in use]

[7] Accordingly, factors for the lawyer's consideration in determining whether a conflict of interest exists include

- (a) the immediacy of the legal interests;

- (b) whether the legal interests are directly adverse;
- (c) whether the issue is substantive or procedural;
- (d) the temporal relationship between the matters;
- (e) the significance of the issue to the immediate and long-term interests of the clients involved; and
- (f) the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

### **Examples of Conflicts of Interest**

**[8]** Conflicts of interest can arise in many different circumstances. The following are examples of situations in which conflicts of interest commonly arise requiring a lawyer to take particular care to determine whether a conflict of interest exists:

- (a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.
- (b) A lawyer provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.
- (c) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.
  - (i) A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.
- (d) A lawyer has a sexual or close personal relationship with a client.
  - (i) Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning their affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by their lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.
- (e) A lawyer or their law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

These two roles may result in a conflict of interest or other problems because they may

- (i) affect the lawyer's independent judgment and fiduciary obligations in either or both roles,
- (ii) obscure legal advice from business and practical advice,

(iii) jeopardize the protection of lawyer and client privilege, and

(iv) disqualify the lawyer or the law firm from acting for the organization.

(f) Sole practitioners who practise with other licensees in cost-sharing or other arrangements represent clients on opposite sides of a dispute. See rule 3.3-1, Commentary [7]

*[New and amended – October 2014]*

## **Consent**

**3.4-2** A lawyer shall not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and it is reasonable for the lawyer to conclude that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

- (a) Express consent must be fully informed and voluntary after disclosure.
- (b) Consent may be implied and need not be in writing where all of the following apply:
  - (i) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel,
  - (ii) the matters are unrelated,
  - (iii) the lawyer has no relevant confidential information from one client that might reasonably affect the representation of the other client, and
  - (iv) the client has commonly consented to lawyers acting for and against it in unrelated matters.

## **Commentary**

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

## **Disclosure and consent**

**[1]** Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

### **Consent in advance**

[4] A lawyer may be able to request that a client consent in advance to conflicts that might arise in the future. As the effectiveness of such consent is generally determined by the extent to which the client reasonably understands the material risks that the consent entails, the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. A general, open-ended consent will ordinarily be ineffective because it is not reasonably likely that the client will have understood the material risks involved. If the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, for example, the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.

[5] While not a pre-requisite to advance consent, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide consent. Advance consent must be recorded, for example in a retainer letter.

### **Implied consent**

[6] In some cases consent may be implied, rather than expressly granted. As the Supreme Court held in *R. v. Neil* and in *Strother v. 3464920 Canada Inc.*, however, the concept of implied consent is applicable in exceptional cases only. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the representation of the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

[New – October 2014]

## **Dispute**

**3.4-3** Despite rule 3.4-2, a lawyer shall not represent opposing parties in a dispute.

### **Commentary**

[1] A lawyer representing a client who is a party in a dispute with another party or parties must competently and diligently develop and argue the position of the client. In a dispute, the parties' immediate legal interests are clearly adverse. If the lawyer were permitted to act for opposing parties in such circumstances even with consent, the lawyer's advice, judgment and loyalty to one client would be materially and adversely affected by the same duties to the other client or clients. In short, the lawyer would find it impossible to act without offending the rules in Section 3.4.

[Amended – October 2014]

### **3.4-4 [FLSC - not in use]**

### **Joint Retainers**

**3.4-5** Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

- (a) the lawyer has been asked to act for both or all of them;
- (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

### **Commentary**

[1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

[2] A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with this rule. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will

- (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
- (b) in accordance with rules 3.3-1 to 3.3-6 (Confidentiality), the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and
- (c) the lawyer would have a duty to decline the new retainer, unless:
  - (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as

- the case may be;
- (ii) the other spouse or partner had died; or
  - (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

**[3]** After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-7.

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

*[Amended – October 2014]*

**3.4-6** If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

**3.4-7** When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer shall obtain their consent.

**Commentary**

**[1]** Consent in writing, or a record of the consent in a separate written communication to each client is required. Even if all the parties concerned consent, a lawyer should avoid acting for more than one client when it is likely that a contentious issue will arise between them or their interests, rights or obligations will diverge as the matter progresses.

**3.4-8** Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer, the lawyer shall not advise either of them on the contentious issue and the following rules apply:

- (a) The lawyer shall
  - (i) refer the clients to other lawyers for that purpose; or

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

*[Amended – October 2014]*

#### **Commentary**

[1] This rule does not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

[2] If, after the clients have consented to a joint retainer, an issue contentious between them or some of them arises, the lawyer is not necessarily precluded from advising them on non-contentious matters.

**3.4-9** Despite rule 3.4-8, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and shall refer the other or others to another lawyer for that purpose.

#### **Acting Against Former Clients**

**3.4-10** Unless the former client consents, a lawyer shall not act against a former client in

- (a) the same matter,
- (b) any related matter, or
- (c) save as provided by rule 3.4-11, any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

#### **Commentary**

[1] Unlike rules 3.4-1 through 3.4-9, which deal with current client conflicts, rules 3.4.10 and 3.4-11 address conflicts where the lawyer acts against a former client. Rule 3.4-10 guards against the misuse of confidential information from a previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client's position on a matter that was central to a previous retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

*[Amended – October 2014]*

**3.4-11** When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer (“the other lawyer”) in the lawyer’s firm may act in the new matter against the former client provided that:

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

*[Amended – October 2014]*

#### **Commentary**

[1] The guidelines at the end of the Commentary to rule 3.4-26 regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for another lawyer in the lawyer’s firm to act against the former client.

#### **Affiliations Between Lawyers and Affiliated Entities**

**3.4-11.1** Where there is an affiliation, before accepting a retainer to provide legal services to a client jointly with non-legal services of an affiliated entity, a lawyer shall disclose to the client

- (a) any possible loss of solicitor and client privilege because of the involvement of the affiliated entity, including circumstances where a non-lawyer or non-lawyer staff of the affiliated entity provide services, including support services, in the lawyer’s office;
- (b) the lawyer’s role in providing legal services and in providing non-legal services or in providing both legal and non-legal services, as the case may be;
- (c) any financial, economic or other arrangements between the lawyer and the affiliated entity that may affect the independence of the lawyer’s representation of the client, including whether the lawyer shares in the revenues, profits or cash flows of the affiliated entity; and
- (d) agreements between the lawyer and the affiliated entity, such as agreements with respect to referral of clients between the lawyer and the affiliated entity, that may affect the independence of the lawyer’s representation of the client.

**3.4-11.2** Where there is an affiliation, after making the disclosure as required by rule 3.4-11.1, the lawyer shall obtain the client’s consent before accepting a retainer under rule 3.4-11.1.

**3.4-11.3** Where there is an affiliation, a lawyer shall establish a system to search for conflicts of interest of the affiliation.

### **Commentary**

[1] Lawyers practising in an affiliation are required to control the practice through which they deliver legal services to the public. They are also required to address conflicts of interest in respect of a proposed retainer by a client as if the lawyer's practice and the practice of the affiliated entity were one where the lawyers accept a retainer to provide legal services to that client jointly with non-legal services of the affiliated entity. The affiliation is subject to the same conflict of interest rules as apply to lawyers and law firms. This obligation may extend to inquiries of offices of affiliated entities outside of Ontario where those offices are treated economically as part of a single affiliated entity.

[2] In reference to paragraph (a) of rule 3.4-11.1, see also subsection 3(2) of By-Law 7.1 (Operational Obligations and Responsibilities).

*[Amended – January 2008]*

### **Acting for Borrower and Lender**

**3.4-12** Subject to rule 3.4-14, a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

**3.4-13** In rules 3.4-14 to 3.4-16 “lending client” means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

**3.4-14** Provided there is compliance with this rule and rules 3.4-15 to 3.4-19, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

- (a) the lender is a lending client;
- (b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;
- (c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction;
  - (c.1) the consideration for the mortgage or loan does not exceed \$50,000; or
- (d) the lender and borrower are not at “arm’s length” as defined in section 251 of the *Income Tax Act* (Canada).

**3.4-15** When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

### **Commentary**

[1] What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or “flip”, where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

**3.4-16** If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client’s consent is deemed to exist upon the lawyer’s receipt of written instructions from the lending client to act and the lawyer is not required to

- (a) provide the advice described in rule 3.4-5 to the lending client before accepting the retainer;
- (b) provide the advice described in rule 3.4-6; or
- (c) obtain the consent of the lending client as required by rule 3.4-7, including confirming the lending client’s consent in writing, unless the lending client requires that its consent be reduced to writing.

### **Commentary**

[1] Rules 3.4-13 and 3.4-16 are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.

[2] Rule 3.4-16 applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

### **Multi-discipline Practice**

**3.4-16.1** A lawyer in a multi-discipline practice shall ensure that non- licensee partners and associates observe the rules in Section 3.4 for the legal practice and for any other business or professional undertaking carried on by them outside the legal practice.

*[Amended - June 2009]*

### **Short-term Limited Legal Services**

**3.4-16.2** In this rule and rules 3.4-16.3 to 3.4-16.6,

“*pro bono* client” means a client to whom a lawyer provides short-term limited legal services;

“short-term limited legal services” means *pro bono* summary legal services provided by a lawyer to a client under the auspices of Pro Bono Law Ontario’s Law Help Ontario program for matters in the Superior Court of Justice or in Small Claims Court, with the expectation by the lawyer and the client that the lawyer will not provide continuing legal representation in the matter.

**3.4-16.3** A lawyer engaged in the provision of short-term limited legal services may provide legal services to a *pro bono* client unless

- (a) the lawyer knows or becomes aware that the interests of the *pro bono* client are directly adverse to the immediate interests of another current client of the lawyer, the lawyer’s firm or Pro Bono Law Ontario; or
- (b) the lawyer has or, while providing the short-term limited legal services, obtains confidential information relevant to a matter involving a current or former client of the lawyer, the lawyer’s firm or Pro Bono Law Ontario whose interests are adverse to those of the *pro bono* client.

**3.4-16.4** A lawyer who is a partner, an associate, an employee or an employer of a lawyer providing short-term limited legal services to a *pro bono* client may act for other clients of the law firm whose interests are adverse to the *pro bono* client so long as adequate and timely measures are in place to ensure that no disclosure of the *pro bono* client’s confidential information is made to the lawyer acting for the other clients.

**3.4-16.5** A lawyer who is unable to provide short-term limited legal services to a *pro bono* client because of the operation of rules 3.4-16.3(a) or 3.4-16.3(b) shall cease to provide short term limited legal services to the *pro bono* client as soon as the lawyer actually becomes aware of the adverse interest or as soon as he or she has or obtains the confidential information referred to in rule 3.4-16.3 and the lawyer shall not seek the *pro bono* client’s waiver of the conflict.

**3.4-16.6** In providing short-term limited legal services, a lawyer shall

- (a) ensure, before providing the legal services, that the appropriate disclosure of the nature of the legal services has been made to the client; and
- (b) determine whether the client may require additional legal services beyond the short-term limited legal services and if additional services are required or advisable, encourage the client to seek further legal assistance.

## Commentary

[1] Short term limited legal service programs are usually offered in circumstances in which it may be difficult to systematically screen for conflicts of interest in a timely way, despite the best efforts and existing practices and procedures of Pro Bono Law Ontario (PBLO) and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the *pro bono* services described in rule 3.4-16.2 are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided. The time required to screen for conflicts may mean that qualifying individuals for whom these brief legal services are available are denied access to legal assistance.

[2] Rules 3.4-16.2 to 3.4-16.6 apply in circumstances in which the limited nature of the legal services being provided by a lawyer significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term limited legal services only if the lawyer has actual knowledge of a conflict of interest between the *pro bono* client and an existing or former client of the lawyer, the lawyer's firm or PBLO. For example, a conflict of interest of which the lawyer has no actual knowledge but which is imputed to the lawyer because of the lawyer's membership in or association or employment with a firm would not preclude the lawyer from representing the client seeking short-term limited legal services.

[3] The lawyer's knowledge would be based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of the consultation and in the client's application to PBLO for legal assistance.

[4] The personal disqualification of a lawyer participating in PBLO's program does not create a conflict for the other lawyers participating in the program, as the conflict is not imputed to them.

[5] Confidential information obtained by a lawyer representing a *pro bono* client, as defined in rule 3.4-16.2, will not be imputed to the lawyer's licensee partners, associates and employees or non-licensee partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services, and may act in future for another client adverse in interest to the *pro bono* client who is obtaining or has obtained short-term limited legal services.

[6] Appropriate screening measures must be in place to prevent disclosure of confidential information relating to the client to the lawyer's partners, associates, employees or employer (in the practice of law). Rule 3.4-16.4 extends, with necessary modifications, the rules and guidelines about conflicts arising from a lawyer transfer between law firms (rules 3.4-17 to 3.4-26) to the situation of a law firm acting against a current client of the firm in providing short term limited legal services. Measures that the lawyer providing the short-term limited legal services should take to ensure the confidentiality of information of the client's information include

(a) having no involvement in the representation of or any discussions with others in the firm about another client whose interests conflict with those of the *pro bono* client;

(b) identifying relevant files, if any, of the *pro bono* client and physically segregating access to them to those working on the file or who require access for specifically identified or approved reasons; and

(c) ensuring that the firm has distributed a written policy to all licensees, non-licensee partners and associates and support staff, explaining the screening measures that are in place.

[7] Rule 3.4-16.5 precludes a lawyer from obtaining a waiver in respect of conflicts of interest that arise in providing short-term legal services.

[New – April 22, 2010]

### **Lawyers Acting for Transferor and Transferee in Transfers of Title**

**3.4-16.7** Subject to rule 3.4-16.8, an individual lawyer shall not act for or otherwise represent both the transferor and the transferee in a transfer of title to real property.

**3.4-16.8** Rule 3.4-16.7 does not prevent a law firm of two or more lawyers from acting for or otherwise representing a transferor and a transferee in a transfer of title to real property so long as the transferor and transferee are represented by different lawyers in the firm and there is no violation of rule 3.4.

**3.4-16.9** So long as there is no violation of the rules in Section 3.4, an individual lawyer may act for or otherwise represent both the transferor and the transferee in a transfer of title to real property if

- (a) the *Land Registration Reform Act* permits the lawyer to sign the transfer on behalf of the transferor and the transferee;
- (b) the transferor and transferee are “related persons” as defined in section 251 of the *Income Tax Act (Canada)*; or
- (c) the lawyer practices law in a remote location where there are no other lawyers that either the transferor or the transferee could without undue inconvenience retain for the transfer.

[Effective March 31, 2008]

### **Conflicts from Transfer Between Law Firms**

#### **Interpretation and Application of Rule**

**3.4-17** In rules 3.4-17 to 3.4-26

“client”, includes anyone to whom a lawyer owes a duty of confidentiality, whether or not a solicitor-client relationship exists between them, and those defined as a client in the definitions part of this Code;

“confidential information” means information that is not generally known to the public obtained from a client; and

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

#### **Commentary**

[1] The duties imposed by rules 3.4-18 to 3.4-26 concerning confidential information should be distinguished from the general ethical duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the information or to the fact that others may share the knowledge.

**3.4-18** Rules 3.4-17 to 3.4-26 apply when a lawyer transfers from one law firm (“former law firm”) to another (“new law firm”), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that

- (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client (“former client”);
- (b) the interests of those clients in that matter conflict; and
- (c) the transferring lawyer actually possesses relevant information respecting that matter.

**3.4-19** Rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial attorney general or department of justice who, after transferring from one department, ministry or agency to another, continues to be employed by that attorney general or department of justice.

#### **Commentary**

[1] The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification.

[2] **Lawyers and support staff** — This rule is intended to regulate lawyers and articling law students who transfer between law firms. It also imposes a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer’s firm and confidences of clients of other law firms in which the person has worked.

[3] **Government employees and in-house counsel** — The definition of “law firm” includes one or more lawyers practising in a government, a Crown corporation, any other public body or a corporation. Thus, the rule applies to lawyers transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same.

[4] **Law firms with multiple offices** — This rule treats as one “law firm” such entities as the various

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

## Law Firm Disqualification

**3.4-20** If the transferring lawyer actually possesses confidential information relevant to a matter referred to in rule 3.4-18(a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless

- (a) the former client consents to the new law firm's continued representation of its client; or
- (b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including
  - (i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur,
  - (ii) the extent of prejudice to any party,
  - (iii) the good faith of the parties,
  - (iv) the availability of suitable alternative counsel, and
  - (v) issues affecting the public interest.

## Commentary

[1] The circumstances enumerated in rule 3.4-20(b) are drafted in broad terms to ensure that all relevant facts will be taken into account. While subparagraphs (ii) to (iv) are self-explanatory, subparagraph (v) includes governmental concerns respecting issues of national security, cabinet confidences and obligations incumbent on Attorneys General and their agents in the administration of justice.

**3.4-21** For greater certainty, rule 3.4-20 is not intended to interfere with the discharge by an Attorney General or their counsel or agent (including those occupying the offices of Crown Attorney, Assistant Crown Attorney or part-time Assistant Crown Attorney) of their constitutional and statutory duties and responsibilities.

**3.4-22** If the transferring lawyer actually possesses information relevant to a matter referred to in rule 3.4-18(a) respecting the former client that is not confidential information but that may prejudice the former client if disclosed to a member of the new law firm

- (a) the lawyer must execute an affidavit or solemn declaration to that effect; and
- (b) the new law firm must

- (i) notify its client and the former client or, if the former client is represented in the matter, the former client’s lawyer, of the relevant circumstances and the firm’s intended action under rules 3.4-17 to 3.4-26, and
- (ii) deliver to the persons notified under subparagraph (i) a copy of any affidavit or solemn declaration executed under paragraph (a).

### **Transferring Lawyer Disqualification**

**3.4-23** Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 or 3.4-22 must not

- (a) participate in any manner in the new law firm’s representation of its client in the matter; or
- (b) disclose any confidential information respecting the former client.

**3.4-24** Unless the former client consents, members of the new law firm must not discuss the new law firm’s representation of its client or the former law firm’s representation of the former client in that matter with a transferring lawyer referred to in rule 3.4-20 or 3.4-22.

### **Determination of Compliance**

**3.4-25** Anyone who has an interest in, or who represents a party in, a matter referred to in rules 3.4-17 to 3.4-26 may apply to a tribunal of competent jurisdiction for a determination of any aspect of those rules.

### **Due Diligence**

**3.4-26** A lawyer must exercise due diligence in ensuring that each member and employee of the lawyer’s law firm, and each other person whose services the lawyer has retained

- (a) complies with rules 3.4-17 to 3.4-26, and
- (b) does not disclose confidential information of
  - (i) clients of the firm, and
  - (ii) any other law firm in which the person has worked.

#### **Commentary**

#### **MATTERS TO CONSIDER**

[1] When a law firm (“new law firm”) considers hiring a lawyer or an articling student (“transferring lawyer”) from another law firm (“former law firm”), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with

respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time. The transferring lawyer and the new law firm need to identify, first, all cases in which

- (a) the new law firm represents a client in a matter that is the same as or related to a matter in which the former law firm represents its client;
- (b) the interests of the clients of the two law firms conflict; and
- (c) the transferring lawyer actually possesses relevant information.

[2] The new law firm must then determine whether, in each such case, the transferring lawyer actually possesses relevant information respecting the client of the former law firm (“former client”) that is confidential and that may prejudice the former client if disclosed to a member of the new law firm. If this element exists, the new law firm is disqualified unless the former client consents or the new law firm establishes that its continued representation is in the interests of justice, based on relevant circumstances.

[3] In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences.

#### **MATTERS TO CONSIDER BEFORE HIRING A POTENTIAL TRANSFEREE**

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

##### **A. If a conflict exists**

[5] If the transferring lawyer actually possesses relevant information respecting a former client that is confidential and that may prejudice the former client if disclosed to a member of the new law firm, the new law firm will be prohibited from continuing to represent its client in the matter if the transferring lawyer is hired, unless

- (a) the new law firm obtains the former client’s consent to its continued representation of its client in that matter; or
- (b) the new law firm complies with rule 3.4-20(b) and, in determining whether continued representation is in the interests of justice, both clients’ interests are the paramount consideration.

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

[7] Alternatively, if the new law firm applies under rule 3.4-25 for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of rule 3.4-20(b). Ideally, this process should be completed before the transferring person is hired.

##### **B. If no conflict exists**

[8] Although the notice required by rule 3.4-22 need not necessarily be made in writing, it would be prudent for the new law firm to confirm these matters in writing. Written notification eliminates any later dispute about whether notice has been given or its timeliness and content.

[9] The new law firm might, for example, seek the former client's consent to the transferring lawyer acting for the new law firm's client because, in the absence of such consent, the transferring lawyer may not act.

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

[11] A transferring lawyer who possesses no such confidential information puts the former client on notice by executing an affidavit or solemn declaration and delivering it to the former client. A former client who disputes the allegation of no such confidential information may apply under rule 3.4-25 for a determination of that issue.

### **C. If the new law firm is not sure whether a conflict exists**

[12] There may be some cases in which the new law firm is not sure whether the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm. In such circumstances, it would be prudent for the new law firm to seek guidance from the Law Society before hiring the transferring lawyer.

### **REASONABLE MEASURES TO ENSURE NON-DISCLOSURE OF CONFIDENTIAL INFORMATION**

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

- (a) when the transferring lawyer actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new law firm, and
- (b) when the new law firm is not sure whether the transferring lawyer actually possesses such confidential information, but it wants to strengthen its position if it is later determined that the transferring lawyer did in fact possess such confidential information.

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

[15] In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be an important factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-provincial law firm, or a legal aid program may be able to demonstrate that, because of its institutional structure, reporting relationships, function, nature of work, and geography, relatively fewer "measures" are necessary to ensure the non-disclosure of client confidences. If it can be shown that, because of factors such as the above, lawyers in separate units, offices or departments do not "work together" with other lawyers in other units, offices or departments, this will be taken into account in the determination of what screening measures are "reasonable."

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

**[17]** When a transferring lawyer joining a government legal services unit or the legal department of a corporation actually possesses confidential information respecting a former client that may prejudice the former client if disclosed to a member of the new “law firm”, the interests of the new client or the corporation must continue to be represented. Normally, this will be effected by instituting satisfactory screening measures, which could include referring the conduct of the matter to counsel in a different department, office or legal services unit. As each factual situation will be unique, flexibility will be required in the application of rule 3.4-20(b), particularly subparagraph (v). Only when the entire firm must be disqualified under rule 3.4-20 will it be necessary to refer conduct of the matter to outside counsel.

**[18] GUIDELINES**

- (a) The screened lawyer should have no involvement in the new law firm’s representation of its client.
- (b) The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
- (c) No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
- (d) The current matter should be discussed only within the limited group that is working on the matter.
- (e) The files of the current client, including computer files, should be physically segregated from the new law firm’s regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.
- (f) No member of the new law firm should show the screened lawyer any documents relating to the current representation.
- (g) The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
- (h) Appropriate law firm members should provide undertakings setting out that they have adhered to and will continue to adhere to all elements of the screen.
- (i) The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised
  - (i) that the screened lawyer is now with the new law firm, which represents the current client; and
  - (ii) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.
- (j) The screened lawyer’s office or work station and that of the lawyer’s support staff should be

located away from the offices or work stations of lawyers and support staff working on the matter.

- (k) The screened lawyer should use associates and support staff different from those working on the current matter.
- (l) In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

## **Doing Business with A Client**

### **3.4-27** [FLSC – not in use]

**3.4-28** A lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

### **Commentary**

[1] This provision applies to any transaction with a client, including

- (a) lending or borrowing money;
- (b) buying or selling property;
- (c) accepting a gift, including a testamentary gift;
- (d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;
- (e) recommending an investment; and
- (f) entering into a common business venture.

[2] The relationship between lawyer and client is a fiduciary one, and no conflict between the lawyer's own interest and the lawyer's duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

## **Transactions with Clients**

**3.4-29** Subject to rule 3.4-30, if a client intends to enter into a transaction with their lawyer or with a corporation or other entity in which the lawyer has an interest other than a corporation or other entity whose securities are publicly traded, before accepting any retainer, the lawyer must

- (a) disclose and explain the nature of the conflicting interest to the client or, in the case of a potential conflict, how and why it might develop later;

- (b) recommend and require that the client receive independent legal advice and
- (c) if the client requests the lawyer to act, obtain the client's consent.

### **Commentary**

[1] If the lawyer does not choose to disclose the conflicting interest or cannot do so without breaching confidence, the lawyer must decline the retainer.

[2] A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that, if the lawyer accepts the retainer, the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined.

[3] Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, and that the client's consent was obtained.

[4] If the investment is by borrowing from the client, the transaction may fall within the requirements of rule 3.4-31.

**3.4-30** When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a non-material interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

### **Borrowing from Clients**

**3.4-31** A lawyer must not borrow money from a client unless

- (a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or
- (b) the client is a related person as defined in section 251 of the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

### **Commentary**

[1] Whether a person is considered a client within this rule when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

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## Certificate of Independent Legal Advice

**3.4-32** A lawyer retained to give independent legal advice relating to a transaction in which funds are to be advanced by the client to another lawyer must do the following before the client advances any funds:

- (a) provide the client with a written certificate that the client has received independent legal advice, and
- (b) obtain the client's signature on a copy of the certificate of independent legal advice and send the signed copy to the lawyer with whom the client proposes to transact business.

**3.4-33** Subject to rule 3.4-31, if a lawyer's spouse or a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrow money from a client, the lawyer must ensure that the client's interests are fully protected by the nature of the case and by independent legal representation.

## Lawyers in Loan or Mortgage Transactions

**3.4-34** If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must:

- (a) disclose and explain the nature of the conflicting interest to the client;
- (b) require that the client receive independent legal representation; and
- (c) obtain the client's consent.

“related persons” means related persons as defined in section 251 of the *Tax Act* (Canada); and

“syndicated mortgage” means a mortgage having more than one investor.

**3.4-34.1** A lawyer engaged in the private practice of law in Ontario shall not directly, or indirectly through a corporation, syndicate, partnership, trust, or other entity in which the lawyer or a related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities

- (a) hold a syndicated mortgage or loan in trust for investor clients unless each investor client receives
  - (i) a complete reporting letter on the transaction,
  - (ii) a trust declaration signed by the person in whose name the mortgage or any security instrument is registered, and
  - (iii) a copy of the duplicate registered mortgage or security instrument,

- (b) arrange or recommend the participation of a client or other person as an investor in a syndicated mortgage or loan where the lawyer is an investor unless the lawyer can demonstrate that the client or other person had independent legal advice in making the investment, or
- (c) sell mortgages or loans to, or arrange mortgages or loans for, clients or other persons except in accordance with the skill, competence, and integrity usually expected of a lawyer in dealing with clients.

### **Commentary**

#### **ACCEPTABLE MORTGAGE OR LOAN TRANSACTIONS**

[1] A lawyer may engage in the following mortgage or loan transactions in connection with the practice of law

- (a) a lawyer may invest in mortgages or loans personally or on behalf of a related person or a combination thereof;
- (b) a lawyer may deal in mortgages or loans as an executor, administrator, committee, trustee of a testamentary or inter vivos trust established for purposes other than mortgage or loan investment or under a power of attorney given for purposes other than exclusively for mortgage or loan investment; and
- (c) a lawyer may collect, on behalf of clients, mortgage or loan payments that are made payable in the name of the lawyer under a written direction to that effect given by the client to the mortgagor or borrower provided that such payments are deposited into the lawyer's trust account.

[2] A lawyer may introduce a borrower (whether or not a client) to a lender (whether or not a client) and the lawyer may then act for either, and when rule 3.4-14 applies, the lawyer may act for both.

### **Disclosure**

**3.4-34.2** Where a lawyer sells or arranges mortgages for clients or other persons, the lawyer shall disclose in writing to each client or other person the priority of the mortgage and all other information relevant to the transaction that is known to the lawyer that would be of concern to a proposed investor.

### **No Advertising**

**3.4-34.3** A lawyer shall not promote, by advertising or otherwise, individual or joint investment by clients or other persons who have money to lend, in any mortgage in which a financial interest is held by the lawyer, a related person, or a corporation, syndicate, partnership, trust or other entity in which the lawyer or related person has a financial interest, other than an ownership interest of a corporation or other entity offering its securities to the public of less than five per cent (5%) of any class of securities.

### **Guarantees by a Lawyer**

**3.4-35** Except as provided by rule 3.4-36, a lawyer must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender.

**3.4-36** A lawyer may give a personal guarantee in the following circumstances

- (a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;
- (b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or
- (c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and
  - (i) the lawyer has complied with the rules in Section 3.4 (Conflicts), in particular, rules 3.4-27 to 3.4-36 (Doing Business with a Client), and
  - (ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

### **Testamentary Instruments and Gifts**

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

**3.4-38** Unless the client is a family member of the lawyer or the lawyer's partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

*[New – October 2014]*

**3.4-39** [FLSC - not in use]

### **Judicial Interim Release**

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

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

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

*[New – October 2014]*

## **SECTION 3.5            PRESERVATION OF CLIENT'S PROPERTY**

### **Preservation of Client's Property**

**3.5-1** [FLSC - not in use]

**3.5-2** A lawyer shall care of a client's property as a careful and prudent owner would when dealing with like property and shall observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

#### **Commentary**

[1] The duties concerning safekeeping, preserving, and accounting for clients' monies and other property are set out in the by-laws made under the *Law Society Act*.

[2] These duties are closely related to those regarding confidential information. A lawyer is responsible for maintaining the safety and confidentiality of the files of the client in the possession of the lawyer and should take all reasonable steps to ensure the privacy and safekeeping of a client's confidential information. The lawyer should keep the client's papers and other property out of sight as well as out of reach of those not entitled to see them and should, subject to any rights of lien, promptly return them to the client upon request or at the conclusion of the lawyer's retainer.

[3] [FLSC - not in use]

[4] If the lawyer withdraws from representing a client, the lawyer is required to comply with the rules in Section 3.7 (Withdrawal from Representation).

*[Amended – October 2014]*

### **Notification of Receipt of Property**

**3.5-3** A lawyer shall promptly notify the client of the receipt of any money or other property of the client, unless satisfied that the client is aware that they have come into the lawyer's custody.

### **Identifying Client's Property**

**3.5-4** A lawyer shall clearly label and identify the client's property and place it in safekeeping distinguishable from the lawyer's own property.

**3.5-5** A lawyer shall maintain such records as necessary to identify a client's property that is in the lawyer's custody.

### **Accounting and Delivery**

**3.5-6** A lawyer shall account promptly for a client's property that is in the lawyer's custody and upon request shall deliver it to the order of the client or, if appropriate, at the conclusion of the retainer.

**3.5-7** If a lawyer is unsure of the proper person to receive a client's property, the lawyer shall apply to a tribunal of competent jurisdiction for direction.

#### **Commentary**

[1] The lawyer should be alert to the duty to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority or in respect of third party claims made against the property. In this regard, the lawyer should be familiar with the nature of the client's common law privilege and with relevant constitutional and statutory provisions such as those found in the *Income Tax Act (Canada)* and the *Criminal Code*.

[2], [3] and [4] [FLSC - not in use]

*[Amended – October 2014]*

## SECTION 3.6 FEES AND DISBURSEMENTS

### Reasonable Fees and Disbursements

**3.6-1** A lawyer shall not charge or accept any amount for a fee or disbursement unless it is fair and reasonable and has been disclosed in a timely fashion.

**3.6-1.1** A lawyer shall not charge a client interest on an overdue account save as permitted by the *Solicitors Act* or as otherwise permitted by law.

#### Commentary

[1] What is a fair and reasonable fee will depend upon such factors as

- (a) the time and effort required and spent,
- (b) the difficulty of the matter and the importance of the matter to the client,
- (c) whether special skill or service has been required and provided,
- (c.1) the amount involved or the value of the subject-matter,
- (d) the results obtained,
- (e) fees authorized by statute or regulation,
- (f) special circumstances, such as the loss of other retainers, postponement of payment, uncertainty of reward, or urgency,
- (g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment,
- (h) any relevant agreement between the lawyer and the client,
- (i) the experience and ability of the lawyer,
- (j) any estimate or range of fees given by the lawyer, and
- (k) the client's prior consent to the fee.

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

[3] A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

[4] A lawyer should be ready to explain the basis of the fees and disbursements charged to the client. This is particularly important concerning fee charges or disbursements that the client might not reasonably be expected to anticipate. When something unusual or unforeseen occurs that may substantially affect the amount of a fee or disbursement, the lawyer should give to the client an immediate explanation. A lawyer should confirm with the client in writing the substance of all fee discussions that occur as a matter progresses, and a lawyer may revise an initial estimate of fees and disbursements.

[4.1] A lawyer should inform a client about their rights to have an account assessed under the *Solicitors Act*.

[Amended – October 2014]

### Contingency Fees and Contingency Fee Agreements

**3.6-2** Subject to rule 3.6-1, except in family law or criminal or quasi-criminal matters, a lawyer may enter into a written agreement in accordance with the *Solicitors Act* and the regulations thereunder, that provides that the lawyer's fee is contingent, in whole or in part, on the successful disposition or completion of the matter for which the lawyer's services are to be provided.

[Amended – November 2002, October 2004]

#### Commentary

[1] In determining the appropriate percentage or other basis of the contingency fee, the lawyer and the client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that in addition to the fee payable under the written agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer. Such agreement under the *Solicitors Act* must receive judicial approval. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee in all of the circumstances is fair and reasonable.

[New - October 2002, Amended October 2004, October 2014]

[2] [FLSC - not in use]

## Statement of Account

**3.6-3** In a statement of an account delivered to a client, a lawyer shall clearly and separately detail the amounts charged as fees and as disbursements.

## Joint Retainer

**3.6-4** Where a lawyer is acting for two or more clients in the same matter, the lawyer shall divide the fees and disbursements equitably between them, unless there is an agreement by the clients otherwise.

## Division of Fees and Referral Fees

**3.6-5** With the client's consent, fees for a matter may be divided between licensees who are not in the same firm, if the fees are divided in proportion to the work done and the responsibilities assumed.

**3.6-6** A lawyer who refers a matter to another licensee because of the expertise and ability of the other licensee to handle the matter and the referral was not made because of a conflict of interest, the referring lawyer may accept and the other licensee may pay a referral fee provided that

- (a) the fee is reasonable and does not increase the total amount of the fee charged to the client, and
- (b) the client is informed and consents.

**3.6-7** A lawyer shall not

- (a) directly or indirectly share, split, or divide their fees with any person who is not a licensee, or
- (b) give any financial or other reward to any person who is not a licensee for the referral of clients or client matters.

*[Amended - April 2008, October 2014]*

### Commentary

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

- (a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;
- (b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

(c) paying an employee for services, other than for referring clients, based on the revenue of the lawyer's firm or practice.

(d) [FLSC - not in use]

[New - May 2001, Amended – October 2014]

### **Exception for Multi-discipline Practices and Interprovincial and International Law Firms**

**3.6-8** Rule 3.6-7 does not apply to

(a) multi-discipline practices of lawyer and non-licensee partners where the partnership agreement provides for the sharing of fees, cash flows or profits among members of the firm; and

(b) sharing of fees, cash flows or profits by lawyers who are

(i) members of an interprovincial law firm, or

(ii) members of a law partnership of Ontario and non-Canadian lawyers who otherwise comply with the rules in Section 3.6.

[Amended – June 2009]

#### **Commentary**

[1] An affiliation is different from a multi-discipline practice established in accordance with the by-laws under the *Law Society Act*, an interprovincial law partnership or a partnership between Ontario lawyers and foreign lawyers. An affiliation is subject to rule 3.6-7. In particular, an affiliated entity is not permitted to share in the lawyer's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

[New - May 2001]

### **Payment and Appropriation of Funds**

**3.6-9** [FLSC - not in use]

**3.6-10** A lawyer shall not appropriate any funds of the client held in trust or otherwise under the lawyer's control for or on account of fees except as permitted by the by-laws under the *Law Society Act*.

### **Commentary**

[1] The rule is not intended to be an exhaustive statement of the considerations that apply to payment of a lawyer's account from trust. The handling of trust money is generally governed by the by-laws of the Law Society.

[2] Refusing to reimburse any portion of advance fees for work that has not been carried out when the contract of professional services with the client has terminated is a breach of the obligation to act with integrity.

**3.6-11** If the amount of fees or disbursements charged by a lawyer is reduced on an assessment, the lawyer must repay the monies to the client as soon as is practicable.

**3.6-12** [FLSC - not in use]

*[Amended – October 2014]*

## SECTION 3.7 WITHDRAWAL FROM REPRESENTATION

### Withdrawal from Representation

**3.7-1** A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.

*[Amended – October 2014]*

#### Commentary

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

[2] An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

[3] Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

[4] When a law firm is dissolved or a lawyer leaves a firm to practise elsewhere, it usually results in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the change. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles set out in this rule, and, in particular, should try to minimize expense and avoid prejudice to the client. The client's interests are paramount and, accordingly, the decision whether the lawyer will continue to represent a given client must be made by the client in the absence of undue influence or harassment by either the lawyer or the firm. That may require either or both the departing lawyer and the law firm to notify clients in writing that the lawyer is leaving and advise the client of the options available: to have the departing lawyer continue to act, have the law firm continue to act, or retain a new lawyer.

*[Amended – October 2014]*

### Optional Withdrawal

**3.7-2** Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

## **Commentary**

[1]A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by their client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, there is a material breakdown in communications, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

*[Amended – October 2014]*

## **Non-payment of Fees**

**3.7-3** Subject to the rules about criminal proceedings and the direction of the tribunal, where, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

*[Amended – October 2014]*

## **Withdrawal from Criminal Proceedings**

**3.7-4** A lawyer who has agreed to act in a criminal case may withdraw because the client has not paid the agreed fee or for other adequate cause if the interval between a withdrawal and the date set for the trial of the case is sufficient to enable the client to obtain another licensee to act in the case and to allow the other licensee adequate time for preparation, and the lawyer

*[Amended – June 2007]*

- (a) notifies the client, preferably in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;
- (b) accounts to the client for any monies received on account of fees and disbursements;
- (c) notifies Crown counsel in writing that the lawyer is no longer acting;
- (d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and
- (e) complies with the applicable rules of court.

*[Amended – October 2014]*

### **Commentary**

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

**3.7-5** A lawyer who has agreed to act in a criminal case may not withdraw because of non-payment of fees if the date set for the trial of the case is not far enough removed to enable the client to obtain another licensee or to enable the other licensee to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests.

**3.7-6** In circumstances where a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees, and there is not sufficient time between a notice to the client of the lawyer's intention to withdraw and the date set for trial to enable the client to obtain another licensee and to enable such licensee to prepare adequately for trial:

- (a) the lawyer should, unless instructed otherwise by the client, attempt to have the trial date adjourned;
- (b) the lawyer may withdraw from the case only with the permission of the court before which the case is to be tried.

*[Amended – June 2007, October 2014]*

### **Commentary**

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

### **Mandatory Withdrawal**

**3.7-7** Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

- (a) discharged by the client;
- (b) the client's instructions require the lawyer to act contrary these rules or by-laws under the *Law Society Act*;
- (c) the lawyer is not competent to continue to handle the matter.

*[Amended – March 2004, October 2014]*

## **Manner of Withdrawal**

**3.7-8** When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor legal practitioner.

**3.7-9** Upon discharge or withdrawal, a lawyer shall

- (a) notify the client in writing, stating
  - (i) the fact that the lawyer has withdrawn;
  - (ii) the reasons, if any, for the withdrawal; and
  - (iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain a new legal practitioner promptly;
- (b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;
- (c) subject to any applicable trust conditions give the client all information that may be required in connection with the case or matter;
- (d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;
- (e) promptly render an account for outstanding fees and disbursements; and
- (f) co-operate with the successor legal practitioner so as to minimize expense and avoid prejudice to the client; and
- (g) comply with the applicable rules of court.

*[Amended – June 2009, October 2014]*

### **Commentary**

[1] If the lawyer who is discharged or withdraws is a member of a firm, the client should be notified that the lawyer and the firm are no longer acting for the client.

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

[3] The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

[4] Co-operation with the successor legal practitioner will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client.

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

*[Amended – June 2009, October 2014]*

### **Duty of Successor Licensee**

**3.7-10** Before agreeing to represent a client, a successor licensee shall be satisfied that the former licensee approves, has withdrawn, or has been discharged by the client.

*[Amended – June 2007]*

### **Commentary**

[1] It is quite proper for the successor licensee to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former licensee, especially if the latter withdrew for good cause or was capriciously discharged. But if a trial or hearing is in progress or imminent or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor licensee acting for the client.

*[Amended – June 2007]*

# Chapter 4 The Practice of Law

## SECTION 4.1 MAKING LEGAL SERVICES AVAILABLE

### Making Legal Services Available

**4.1-1** A lawyer shall make legal services available to the public in an efficient and convenient way.

#### Commentary

[1] A lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services and by engaging in programmes of public information, education or advice concerning legal matters.

[2] As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services *pro bono* and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.

[3] A lawyer who knows or has reasonable grounds to believe that a client is entitled to Legal Aid should advise the client of the right to apply for Legal Aid, unless the circumstances indicate that the client has waived or does not need such assistance.

[4] **Right to Decline Representation** - A lawyer may decline a particular representation (except when assigned as counsel by a tribunal), but that discretion should be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not decline representation merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another licensee qualified in the particular field and able to act. When a lawyer offers assistance to a client or prospective client in finding another licensee, the assistance should be given willingly and, except where a referral fee is permitted by rule 3.6-6, without charge.

[Amended – October 2014]

### Restrictions

**4.1-2** In offering legal services, a lawyer shall not use means

- (a) that are false or misleading;
- (b) that amount to coercion, duress, or harassment;

- (c) that take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover;
- (d) that are intended to influence a person who has retained another lawyer for a particular matter to change their lawyer for that matter, unless the change is initiated by the person or the other lawyer; or
- (e) that otherwise bring the profession or the administration of justice into disrepute.

**Commentary**

[1] A person who is vulnerable or who has suffered a traumatic experience and has not yet had a chance to recover may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering their assistance to such a person. A lawyer is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the lawyer for this purpose, and to offer assistance to a person with whom the lawyer has a close family or professional relationship. The rule prohibits the lawyer from using unconscionable or exploitive or other means that bring the profession or the administration of justice into disrepute.

*[Amended – October 2014]*

## SECTION 4.2

## MARKETING

### Marketing of Professional Services

**4.2-0** In this rule, "marketing" includes advertisements and other similar communications in various media as well as firm names (including trade names), letterhead, business cards and logos.

**4.2-1** A lawyer may market legal services if the marketing

- (a) is demonstrably true, accurate and verifiable;
- (b) is neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive; and
- (c) is in the best interests of the public and is consistent with a high standard of professionalism.

#### Commentary

[1] Examples of marketing that may contravene this rule include

- (a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;
- (b) suggesting qualitative superiority to other lawyers;
- (c) raising expectations unjustifiably;
- (d) suggesting or implying the lawyer is aggressive;
- (e) disparaging or demeaning other persons, groups, organizations or institutions;
- (f) taking advantage of a vulnerable person or group;
- (g) using testimonials or endorsements which contain emotional appeals.

### Advertising of Fees

**4.2-2** A lawyer may advertise fees charged by the lawyer for legal services if

- (a) the advertising is reasonably precise as to the services offered for each fee quoted;
- (b) the advertising states whether other amounts, such as disbursements and taxes will

be charged in addition to the fee; and

- (c) the lawyer strictly adheres to the advertised fee in every applicable case.

*[Amended – October 2014]*

## SECTION 4.3

## ADVERTISING NATURE OF PRACTICE

### Certified Specialist

**4.3-1** A lawyer shall not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Law Society.

*[Amended – October 2014]*

#### Commentary

[1] Lawyer's advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.

[2] In accordance with s. 20(1) of the Law Society's By-law 15 on Certified Specialists, the lawyer who is not a Certified Specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist.

[3] In a case where a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm which makes reference to the status of a firm member as a specialist, in media circulated concurrently in the other jurisdiction(s) and the certifying jurisdiction, shall not be considered as offending this rule if the certifying authority or organization is identified.

[4] A lawyer may advertise areas of practice, including preferred areas of practice or that their practice is restricted to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

# Chapter 5 Relationship to The Administration of Justice

## SECTION 5.1 THE LAWYER AS ADVOCATE

### Advocacy

**5.1-1** When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

#### Commentary

**[1] Role in Adversarial Proceedings** – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer’s duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties’ right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

**[2]** This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.

**[3]** The lawyer’s function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client’s case.

**[4]** In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client.

**[5]** A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal.

**[6]** When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client’s case so as to ensure that the tribunal is not misled.

**[7]** The lawyer should never waive or abandon the client’s legal rights, such as an available defence under a statute of limitations, without the client’s informed consent.

**[8]** In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

**[9] Duty as Defence Counsel** - When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.

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

*[Amended – October 2014]*

**5.1-2** When acting as an advocate, a lawyer shall not

- (a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,
- (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,
- (c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence, or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice,
- (d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,

- (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,
- (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,
- (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,
- (h) make suggestions to a witness recklessly or knowing them to be false;
- (i) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,
- (j) improperly dissuade a witness from giving evidence or advise a witness to be absent,
- (k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,
- (l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation;
- (m) needlessly abuse, hector, or harass a witness,
- (n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge,
- (o) needlessly inconvenience a witness; or
- (p) appear before a court or tribunal while under the influence of alcohol or a drug.

*[Amended – October 2014]*

### **Commentary**

[1] In civil proceedings, a lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

[2] A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, where the complainant or potential complaint is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. Where the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in the interests of the accused or potential accused. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

[3] It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to secure a civil advantage for the client. See also rules 3.2-5 and 3.2-5.1 and accompanying commentary.

[4] When examining a witness, a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.

*[Amended – October 2014]*

### **Duty as Prosecutor**

**5.1-3** When acting as a prosecutor, a lawyer shall act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

### **Commentary**

[1] When engaged as a prosecutor, the lawyer's prime duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

## Discovery Obligations

**5.1-3.1** Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate

- (a) shall explain to their client
  - (i) the necessity of making full disclosure of all documents relating to any matter in issue, and
  - (ii) the duty to answer to the best of their knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal;
- (b) shall assist the client in fulfilling their obligations to make full disclosure; and
- (c) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

## Disclosure of Error or Omission

**5.1-4** A lawyer who has unknowingly done or failed to do something that if done or omitted knowingly would have been in breach of the rules in Section 5.1 and who discovers it, shall, subject to the rules in Section 3.3 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

### Commentary

[1] If the client desires that a course be taken that would involve a breach of the rules in Section 5.1, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done the lawyer should, subject to the rules in Section 3.7 (Withdrawal from Representation), withdraw or seek leave to do so.

## Courtesy

**5.1-5** A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings.

*[Amended – October 2014]*

### Commentary

[1] Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative, or disruptive conduct by the lawyer, even though unpunished as contempt, may constitute professional misconduct.

*[Amended – October 2014]*

## Undertakings

**5.1-6** A lawyer must strictly and scrupulously fulfill any undertakings given by him or her and honour any trust conditions accepted in the course of litigation.

*[Amended – June 2009]*

### Commentary

**[0.1]** Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility.

**[1]** A lawyer should also be guided by the provisions of rule 7.2-11 (Undertakings and Trust Conditions).

## Agreement on Guilty Plea

**5.1-7** Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

**5.1-8** A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,

- (a) the lawyer advises the client about the prospects for an acquittal or finding of guilt;
- (b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;
- (c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and
- (d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

*[Amended – October 2014]*

### Commentary

**[1]** The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

## SECTION 5.2 THE LAWYER AS WITNESS

### Submission of Evidence

**5.2-1** A lawyer who appears as advocate shall not testify or submit their own affidavit evidence before the tribunal unless

- (a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or
- (b) the matter is purely formal or uncontroverted.

*[Amended – October 2014]*

#### Commentary

[1] A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination, or challenge. The lawyer should not in effect appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect to receive special treatment because of professional status.

### Appeals

**5.2-2** A lawyer who is a witness in proceedings shall not appear as advocate in any appeal from the decision in those proceedings unless the matter about which he or she testified is purely formal or uncontroverted.

*[Amended – October 2014]*

## **SECTION 5.3            INTERVIEWING WITNESSES**

### **Interviewing Witnesses**

**5.3-1** Subject to the rules on communication with a represented party set out in rules 7.2-4 to 7.2-8.2, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer shall disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

*[Amended – November 2007]*

## SECTION 5.4 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

### Communication with Witnesses Giving Evidence

#### 5.4-1 [FLSC - not in use]

**5.4-2** Subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence:

(a) during examination-in-chief, the examining lawyer may discuss with the witness any matter that has not been covered in the examination up to that point;

(a.1) during examination-in-chief by another legal practitioner of a witness who is unsympathetic to the lawyer's cause, the lawyer not conducting the examination-in-chief may discuss the evidence with the witness;

(a.2) between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness, the lawyer ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(b) during cross-examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding;

(c) [FLSC - not in use]

(c.1) between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination;

(c.2) during cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause, the lawyer may discuss the witness's evidence with the witness;

(c.3) during cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness; and

(c.4) during re-examination of a witness called by an opposing legal practitioner, if the witness is sympathetic to the lawyer's cause the lawyer ought not to discuss the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.

*[Amended – June 2009]*

**Commentary**

**[0.1]** If any question arises whether the lawyer's behaviour may be in violation of this rule, it will often be appropriate to obtain the consent of the opposing legal practitioner or leave of the tribunal before engaging in conversations that may be considered improper.

**[1] to [6]** [FLSC - not in use]

**[7]** This rule applies with necessary modifications to examinations out of court.

*[Amended – June 2009]*

## SECTION 5.5

## RELATIONS WITH JURORS

### Communications Before Trial

**5.5-1** When acting as an advocate, before the trial of a case, a lawyer shall not communicate with or cause another to communicate with anyone that the lawyer knows to be a member of the jury panel for that trial.

#### Commentary

[1] A lawyer may investigate a prospective juror to ascertain any basis for challenge, provided that the lawyer does not directly or indirectly communicate with the juror or with any member of the juror's family. But a lawyer should not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror.

### Disclosure of Information

**5.5-2** Unless the judge and opposing counsel have previously been made aware of the information, a lawyer acting as an advocate shall disclose to them any information of which the lawyer is aware that a juror or prospective juror

- (a) has or may have an interest, direct or indirect, in the outcome of the case;
- (b) is acquainted with or connected in any manner with the presiding judge, any counsel or any litigant; or
- (c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness.

**5.5-3** A lawyer shall promptly disclose to the court any information that the lawyer reasonably believes discloses improper conduct by a member of a jury panel or by a juror.

*[Amended – October 2014]*

### Communication During Trial

**5.5-4** Except as permitted by law, when acting as an advocate, a lawyer shall not during a trial of a case communicate with or cause another to communicate with any member of the jury.

**5.5-5 and 5.5-6** [FLSC - not in use]

**Commentary**

[1] The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of members of their family.

## SECTION 5.6 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

### Encouraging Respect for the Administration of Justice

**5.6-1** A lawyer shall encourage public respect for and try to improve the administration of justice.

#### Commentary

[1] The obligation set out in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet for the same reason, a lawyer should not hesitate to speak out against an injustice.

[2] The admission to and continuance in the practice of law implies on the part of a lawyer a basic commitment to the concept of equal justice for all within an open, ordered, and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.

[3] **Criticizing Tribunals** - Although proceedings and decisions of tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate, or unsupported by a *bona fide* belief in its real merit, bearing in mind that in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, where a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to and should support the tribunal, both because its members cannot defend themselves and because in doing so the lawyer is contributing to greater public understanding of and therefore respect for the legal system.

[4] A lawyer, by training, opportunity, and experience is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions, and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be *bona fide* and reasoned.

### Seeking Legislative or Administrative Changes

**5.6-2** A lawyer who seeks legislative or administrative changes shall disclose the interest being advanced, whether the lawyer's interest, the client's interest, or the public interest.

### **Commentary**

[1] The lawyer may advocate legislative or administrative changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes that the lawyer conscientiously believes to be in the public interest.

### **Security of Court Facilities**

**5.6-3** A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility shall inform the persons having responsibility for security at the facility and give particulars.

*[Amended – October 2014]*

### **Commentary**

[1] Where possible, the lawyer should suggest solutions to the anticipated problem such as (a) the necessity for further security, and (b) that judgment ought to be reserved.

[2] Where possible, the lawyer should also notify other lawyers who are known to be involved in proceedings at the court facility where the dangerous situation is likely to develop. Beyond providing a warning of danger, this notice is desirable because it may allow them to suggest security measures that do not interfere with an accused's or a party's right to a fair trial.

[3] If client information is involved in those situations, the lawyer should be guided by the provisions of the rules 3.3-1 to 3.3-6 (Confidentiality).

## SECTION 5.7      LAWYERS AS MEDIATORS

### Role of Mediator

**5.7-1** A lawyer who acts as a mediator shall, at the outset of the mediation, ensure that the parties to it understand fully that

- (a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and
- (b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by the solicitor-client privilege.

#### **Commentary**

**[1]** In acting as a mediator, generally a lawyer should not give legal advice as opposed to legal information to the parties during the mediation process. This does not preclude the mediator from giving information on the consequences if the mediation fails.

**[2]** Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of the rules in Section 3.4 (Conflicts) and its commentaries and the common law authorities.

**[3]** Generally a lawyer-mediator should suggest and encourage the parties to seek the advice of separate counsel before and during the mediation process if they have not already done so.

**[4]** Where in the mediation process the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract.

*[Amended – October 2014]*

# Chapter 6 Relationship to Students, Employees, and Others

## SECTION 6.1 SUPERVISION

### Direct Supervision Required

**6.1-1** A lawyer shall in accordance with the By-Laws

- (a) assume complete professional responsibility for their practice of law, and
- (b) shall directly supervise non-lawyers to whom particular tasks and functions are assigned.

#### Commentary

[1] By-Law 7.1 governs the circumstances in which a lawyer may assign certain tasks and functions to a non-lawyer within a law practice. Where a non-lawyer is competent to do work under the supervision of a lawyer, a lawyer may assign work to the non-lawyer. The non-lawyer must be directly supervised by the lawyer. A lawyer is required to review the non-lawyer's work at frequent intervals to ensure its proper and timely completion.

[1.1] A lawyer may permit a non-lawyer to perform tasks assigned and supervised by the lawyer as long as the lawyer maintains a direct relationship with the client or, if the lawyer is in a community legal clinic funded by Legal Aid Ontario, as long as the lawyer maintains a direct supervisory relationship with each client's case in accordance with the supervision requirements of Legal Aid Ontario and assumes full professional responsibility for the work.

[2] A lawyer who practices alone or operates a branch or part-time office should ensure that all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise.

[3] to [5] [FLSC - not in use]

[5.1] A lawyer should ensure that the non-lawyer is identified as such when communicating orally or in writing with clients, licensees, public officials, or with the public generally whether within or outside the offices of the law practice.

[5.2] The following examples, which are not exhaustive, illustrate situations where it may be appropriate to assign work to non-lawyers subject to direct supervision.

[5.3] **Real Estate** – A lawyer may permit a non-lawyer to attend to all matters of routine administration, assist in more complex transactions, draft statements of account and routine documents and correspondence and attend to registrations. The lawyer must not assign to a non-lawyer the ultimate responsibility for review of a title search report or of documents before signing or for review and signing of a letter of requisition, review and signing of a title opinion or review and signing of a reporting letter to the client.

**[5.4]** In real estate transactions using the system for the electronic registration of title documents (“e-reg”<sup>TM</sup>) only a lawyer may sign for completeness of any document that requires compliance with law statements.

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

**[5.6] Wills, Trusts and Estates** – A lawyer may permit a non-lawyer to attend to all matters of routine administration, to assist in more complex matters, to collect information, draft routine documents and correspondence, to prepare income tax returns, to calculate such taxes, to draft executors’ accounts and statements of account, and to attend to filings.

*[New- November 2007]*

**6.1-2 to 6.1-4** [FLSC - not in use.]

### **Electronic Registration of Title Documents**

**6.1-5** When a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents (“e-reg”<sup>TM</sup>), the lawyer

- (a) shall not permit others, including a non-lawyer employee, to use the lawyer’s diskette; and
- (b) shall not disclose their personalized e-reg<sup>TM</sup> pass phrase to others.

**6.1-6** When a non-lawyer employed by a lawyer has a personalized specially encrypted diskette to access the system for the electronic registration of title documents, the lawyer shall ensure that the non-lawyer

- (a) does not permit others to use the diskette, and
- (b) does not disclose their personalized e-reg<sup>TM</sup> pass phrase to others.

## **Commentary**

[1] The implementation across Ontario of a system for the electronic registration of title documents imposes special responsibilities on lawyers and others using the system. Each person in a law office who accesses the e-reg™ system must have a personalized specially encrypted diskette and personalized e-reg™ pass phrase. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Moreover, under the system, only lawyers entitled to practise law may make certain prescribed statements. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. Only lawyers entitled to practise law may approve electronic documents containing these statements. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized specially encrypted diskette used to access the system and the personalized electronic registration pass phrase. When in a real estate practice it is permissible for a lawyer to delegate responsibilities to a non-lawyer who has a personalized specially encrypted diskette and a personalized electronic registration pass phrase, the lawyer should ensure that the non-lawyer maintains and understands the importance of maintaining the security of the personalized specially encrypted diskette and the pass phrase.

[2] In real estate transactions using the e-reg™ system, a lawyer who approves the electronic registration of title documents by a non-lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

*[Amended – November 2007]*

## **Title Insurance**

### **6.1-6.1** A lawyer shall not permit a non-lawyer to

- (a) provide advice to the client concerning any insurance, including title insurance, without supervision,
- (b) present insurance options or information regarding premiums to the client without supervision,
- (c) recommend one insurance product over another without supervision, and
- (d) give legal opinions regarding the insurance coverage obtained.

*[New - March 31, 2008]*

## **Signing E-Reg™ Documents**

**6.1-6.2** A lawyer who electronically signs a document using e-reg™ assumes complete professional responsibility for the document.

*[New - March 31, 2008, Amended – October 2014]*

## **SECTION 6.2          STUDENTS**

### **Recruitment and Engagement Procedures**

**6.2-1** A lawyer shall observe the procedures of the Law Society about the recruitment of articling students and the engagement of summer students.

### **Duties of Principal**

**6.2-2** A lawyer acting as a principal to a student shall provide the student with meaningful training and exposure to and involvement in work that will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession.

#### **Commentary**

[1] A principal or supervising lawyer is responsible for the actions of students acting under their direction.

*[New – October 2014]*

### **Duties of Articling Student**

**6.2-3** An articling student shall act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

## SECTION 6.3      SEXUAL HARASSMENT

### Definition

**6.3-0** In rules 6.3-1 and 6.3-3, sexual harassment is one incident or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature

- (a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the recipient(s) of the conduct;
- (b) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services;
- (c) when submission to such conduct is made implicitly or explicitly a condition of employment;
- (d) when submission to or rejection of such conduct is used as a basis for any employment decision (including, but not limited to, allocation of files, matters of promotion, raise in salary, job security, and benefits affecting the employee); or
- (e) when such conduct has the purpose or the effect of interfering with a person's work performance or creating an intimidating, hostile, or offensive work environment.

### Commentary

[1] Types of behaviour that constitute sexual harassment include, but are not limited to,

- (a) sexist jokes causing embarrassment or offence, or that are by their nature clearly embarrassing or offensive;  

*[Amended - January 2009]*
- (b) leering;
- (c) the display of sexually offensive material;
- (d) sexually degrading words used to describe a person;
- (e) derogatory or degrading remarks directed towards members of one sex or one's sexual orientation;
- (f) sexually suggestive or obscene comments or gestures;
- (g) unwelcome inquiries or comments about a person's sex life;
- (h) unwelcome sexual flirtations, advances, or propositions;
- (i) persistent unwanted contact or attention after the end of a consensual relationship;

- (j) requests for sexual favours;
- (k) unwanted touching;
- (l) verbal abuse or threats; and
- (m) sexual assault.

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

**6.3-1 to 6.3-2** [FLSC - not in use]

### **Prohibition on Sexual Harassment**

**6.3-3** A lawyer shall not sexually harass a colleague, a staff member, a client, or any other person.

**6.3-4 and 6.3-5** [FLSC - not in use]

## SECTION 6.3.1 DISCRIMINATION

### Special Responsibility

**6.3.1-1** A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, 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, articulated students, or any other person or in professional dealings with other licensees or any other person.

*[Amended – June 2007, January 2014]*

#### Commentary

[1] The Law Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

[2] This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

[3] Rule 6.3.1 will be interpreted according to the provisions of the Ontario *Human Rights Code* and related case law.

[4] The Ontario *Human Rights Code* defines a number of grounds of discrimination listed in rule 6.3.1. For example,

[5] Age is defined as an age that is eighteen years or more.

*[Amended - January 2009]*

[6] Disability is broadly defined in s. 10 of the Code to include both physical and mental disabilities.

*[Amended - January 2009]*

[7] Family status is defined as the status of being in a parent-and-child relationship.

[8] Marital status is defined as the status of being married, single, widowed, divorced, or separated and includes the status of living with a person in a conjugal relationship outside marriage.

*[Amended - January 2009]*

[9] Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the *Criminal Records Act* (Canada) and not revoked) or provincial offences.

**[10]** The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

**[11]** There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including

- (a) Differentiation on prohibited grounds that creates a disadvantage. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds.

*[Amended - January 2009]*

- (b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 6.3.1, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement should only be imposed if driving a vehicle is an essential requirement for the position. Such a requirement may have the effect of excluding from employment persons with disabilities that prevent them from obtaining a licence.

*[Amended - January 2009]*

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

**[13]** A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction or control.

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

**[15]** In addition to prohibiting discrimination, rule 6.3.1 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited.

*[Amended – January 2009, January 2014]*

**[16]** Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in rule 6.3.1. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

## Services

**6.3.1-2** A lawyer shall ensure that no one is denied services or receives inferior service on the basis of the grounds set out in this rule.

## Employment Practices

**6.3.1-3** A lawyer shall ensure that their employment practices do not offend rule 6.3.1-1 and 6.3.1-2.

### Commentary

[1] Discrimination in employment or in the provision of services not only fails to meet professional standards, it also violates the Ontario *Human Rights Code* and related equity legislation.

[2] In advertising a job vacancy, an employer may not indicate qualifications by a prohibited ground of discrimination. However, where discrimination on a particular ground is permitted because of an exception under the Ontario *Human Rights Code*, such questions may be raised at an interview. For example, if an employer has an anti-nepotism policy, the employer may inquire about the applicant's possible relationship to another employee as that employee's spouse, child or parent. This is in contrast to questions about applicant's marital status by itself. Since marital status has no relevance to employment within a law firm, questions about marital status should not be asked.

[Amended - January 2009]

[3] An employer should consider the effect of seemingly "neutral" rules. Some rules, while applied to everyone, can bar entry to the firm or pose additional hardships on employees of one sex or of a particular creed, ethnic origin, marital or family status, or on those who have (or develop) disabilities. For example, a law office may have a written or unwritten dress code. It would be necessary to revise the dress code if it does not already accept that a head covering worn for religious reasons must be considered part of acceptable business attire. The maintenance of a rule with a discriminatory effect breaches rule 6.3.1 unless changing or eliminating the rule would cause undue hardship.

[4] If an applicant cannot perform all or part of an essential job requirement because of a personal characteristic listed in the Ontario *Human Rights Code*, the employer has a duty to accommodate. Only if the applicant cannot do the essential task with reasonable accommodation may the employer refuse to hire on this basis. A range of appropriate accommodation measures may be considered. An accommodation is considered reasonable unless it would cause undue hardship.

[5] The Supreme Court of Canada has confirmed that what is required is equality of result, not just of form. Differentiation can result in inequality, but so too can the application of the same rule to everyone, without regard for personal characteristics and circumstances. Equality of result requires the accommodation of differences that arise from the personal characteristics cited in rule 6.3.1.

**[6]** The nature of accommodation as well as the extent to which the duty to accommodate might apply in any individual case are developing areas of human rights law. However, the following principles are well established.

**[7]** If a rule, requirement, or expectation creates difficulty for an individual because of factors related to the personal characteristics noted in rule 6.3.1, the rule, requirement or expectation must be examined to determine whether it is “reasonable and *bona fide*”. The following must be taken into account:

(a) if the rule, requirement or expectation is not imposed in good faith and is not strongly and logically connected to a business necessity, it cannot be maintained. There must be objectively verifiable evidence linking the rule, requirement, or expectation with the operation of the business; and

(b) if the rule, requirement, or expectation is imposed in good faith and is strongly logically connected to a business necessity, then the next step is to consider whether the individual who is disadvantaged by the rule can be accommodated.

**[8]** The duty to accommodate operates as both a positive obligation and as a limit to obligation. Accommodation must be offered to the point of undue hardship. Some hardship must be tolerated to promote equality; however, if the hardship occasioned by the particular accommodation at issue is "undue," that accommodation need not be made.

*[Amended – October 2014]*

# Chapter 7 Relationship to the Law Society and Other Lawyers

## SECTION 7.1 RESPONSIBILITY TO THE PROFESSION, THE LAW SOCIETY AND OTHERS

### Communications from the Law Society

**7.1-1** A lawyer shall reply promptly and completely to any communication from the Law Society in which a response is requested.

*[Amended – October 2014]*

### Meeting Financial Obligations

**7.1-2** A lawyer shall promptly meet financial obligations incurred in the course of practice on behalf of clients unless, before incurring such an obligation, the lawyer clearly indicates in writing to the person to whom it is to be owed that it is not to be a personal obligation.

*[Amended - January 2009]*

#### Commentary

**[1]** In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed, or undertaken on behalf of clients unless the lawyer clearly indicates otherwise in advance.

*[Amended - January 2009]*

**[2]** When a lawyer retains a consultant, expert, or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided, and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so.

**[3]** If there is a change of lawyer, the lawyer who originally retained a consultant, expert, or other professional should advise him or her about the change and provide the name, address, telephone number, fax number, and e-mail address of the new lawyer.

### Duty to Report Misconduct

**7.1-3** A lawyer shall report to the Law Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege,

- (a) the misappropriation or misapplication of trust monies;

- (b) the abandonment of a law or legal services practice;
- (c) participation in serious criminal activity related to a licensee's practice;
- (d) the mental instability of a licensee of such a serious nature that the licensee's clients are likely to be materially prejudiced; and
- (e) [FLSC - not in use]
- (f) any other situation where a licensee's clients are likely to be severely prejudiced.

[Amended – June 2007, October 2014]

### **Commentary**

[1] Unless a licensee who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Law Society any instance involving a breach of these rules or the rules governing paralegals. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Law Society directly or indirectly (e.g., through another lawyer).

[2] Nothing in this rule is meant to interfere with the traditional solicitor-client relationship. In all cases the report must be made *bona fide* without malice or ulterior motive.

[Amended – June 2007]

[3] Often, instances of improper conduct arise from emotional, mental, or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Law Society supports Homewood Human Solutions (HHS) and similar support services that are committed to the provision of confidential counselling for licensees. Therefore, lawyers acting in the capacity of peer counsellors for HHS, the Ontario Lawyers Assistance Program (OLAP) or corporations providing similar support services will not be called by the Law Society or by any investigation committee to testify at any conduct, capacity, or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Law Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice. The Law Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

[Amended – January 2013]

## **Encouraging Client to Report Dishonest Conduct**

**7.1-4** In addition to other advice appropriate in the circumstances, a lawyer shall encourage a client who has a claim or complaint against an apparently dishonest licensee to report the facts to the Law Society as soon as reasonably practicable.

*[Amended – October 2014]*

**7.1-4.1** If the client refuses to report their claim against an apparently dishonest licensee to the Law Society, the lawyer shall inform the client of the policy of the Compensation Fund and shall obtain instructions in writing to proceed with the client's claim without notice to the Law Society.

**7.1-4.2** A lawyer shall inform a client of the provision of the *Criminal Code of Canada* dealing with the concealment of an indictable offence in return for an agreement to obtain valuable consideration (section 141).

**7.1-4.3** If the client wishes to pursue a private agreement with the apparently dishonest lawyer, the lawyer shall not continue to act if the agreement constitutes a breach of section 141 of the *Criminal Code of Canada*.

## **Duty to Report Certain Offences**

**7.1-4.4** If a lawyer is charged with an offence described in By-law 8 of the Law Society, he or she shall inform the Law Society of the charge and of its disposition in accordance with the By-law.

*[Amended – June 2007]*

### **Commentary**

[1] By-law 8 relates to the reporting of serious criminal charges under the *Criminal Code* and charges under other Acts that bring into question the honesty of a lawyer or that relate to a lawyer's practice of law. Such a charge may be a red flag that clients may need protection. The Law Society must be in a position to determine what, if any, action is required by it if a lawyer is charged with an offence described in By-law 8 and what, if any, action is required if the lawyer is found guilty.

*[Amended - June 2007]*

## SECTION 7.2 RESPONSIBILITY TO LAWYERS AND OTHERS

### Courtesy and Good Faith

**7.2-1** A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice.

#### Commentary

[1] The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their function properly.

[2] Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward other legal practitioners or the parties. The presence of personal animosity between legal practitioners involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

[3] A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice, or charges of other legal practitioners, but should be prepared, when requested, to advise and represent a client in a complaint involving another legal practitioner.

[4] [FLSC - not in use]

*[Amended – June 2009]*

**7.2-1.1** A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client.

**7.2-2** A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights.

**7.2-3** A lawyer shall not use any device to record a conversation between the lawyer and a client or another legal practitioner, even if lawful, without first informing the other person of the intention to do so.

*[Amended - June 2009, October 2014]*

### Communications

**7.2-4** A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

**7.2-5** A lawyer shall answer with reasonable promptness all professional letters and communications from other legal practitioners that require an answer, and a lawyer shall be punctual in fulfilling all commitments.

### **Communications with a Represented Person**

**7.2-6** Subject to rules 7.2-6A and 7.2-7, if a person is represented by a legal practitioner in respect of a matter, a lawyer shall not, except through or with the consent of the legal practitioner

*[Amended – September 2011]*

- (a) approach or communicate or deal with the person on the matter; or
- (b) attempt to negotiate or compromise the matter directly with the person.

*[Amended – June 2009]*

**7.2-6A** Subject to rule 7.2-7, if a person is receiving legal services from a legal practitioner under a limited scope retainer on a particular matter, a lawyer may, without the consent of the legal practitioner, approach, communicate or deal directly with the person on the matter, unless the lawyer receives written notice of the limited nature of the legal services being provided by the legal practitioner and the approach, communication or dealing falls within the scope of the limited scope retainer.

*[New – September 2011]*

### **Second Opinions**

**7.2-7** A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a legal practitioner with respect to that matter.

*[Amended - June 2009]*

#### **Commentary**

[1] Rule 7.2-6 applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by a legal practitioner concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This rule does not prevent parties to a matter from communicating directly with each other.

[2] The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other legal practitioner by closing their eyes to the obvious.

[3] Where notice as described in rule 7.2-6A has been provided to a lawyer for an opposing party, the lawyer is required to communicate with the legal practitioner who is representing the person under a limited scope retainer, but only to the extent of the matter or matters within the scope of the retainer as identified by the legal practitioner. The lawyer may communicate with the person on matters outside of the limited scope retainer.

*[New – September 2011]*

[4] Rule 7.2-7 deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first legal practitioner involved. The lawyer should advise the client accordingly, and if necessary consult the first legal practitioner unless the client instructs otherwise.

*[Amended - June 2009]*

### **Communications with a Represented Corporation or Organization**

**7.2-8** A lawyer retained to act on a matter involving a corporation or organization that is represented by a legal practitioner shall not, without the legal practitioner's consent or unless otherwise authorized or required by law, communicate, facilitate communication with or deal with a person

- (a) who is a director or officer, or another person who is authorized to act on behalf of the corporation or organization;
- (b) who is likely involved in decision-making for the corporation or organization or who provides advice in relation to the particular matter;
- (c) whose act or omission may be binding on or imputed to the corporation or organization for the purposes of its ability; or
- (d) who supervises, directs or regularly consults with the legal practitioner and who makes decisions based on the legal practitioner's advice.

**7.2-8.1** If a person described in rule 7.2-8(a), (b), (c) or (d) is represented in the matter by a legal practitioner, the consent of the legal practitioner is sufficient to allow a lawyer to communicate, facilitate communication with or deal with the person.

**7.2-8.2** In rule 7.2-8, "organization" includes a partnership, limited partnership, association, union, fund, trust, co-operative, unincorporated association, sole proprietorship and a government department, agency, or regulatory body.

## **Commentary**

**[1]** The purpose of rule 7.2-8 and rules 7.2-8.1 and 7.2-8.2 is to protect the lawyer-client relationship of corporations and other organizations by specifying persons with whom a lawyer may not communicate, facilitate communication or deal if the lawyer represents a client in a matter involving a corporation or organization and the corporation or organization is represented by a legal practitioner. They apply to litigation as well as to transactional and other non-litigious matters. A lawyer may communicate with a person in a corporation or other organization, other than those referred to in rule 7.2-8, even if the corporation or organization is represented by a legal practitioner. These rules are intended to advance the public policy of promoting efficient discovery and favours the revelation of the truth by addressing the circumstances in which a corporation or organization is allowed to prevent the disclosure of relevant evidence. They are not intended to protect a corporation or organization from the revelation of prejudicial facts.

**[2]** Generally, rule 7.2-8 precludes contact only with those actively involved in a matter. For example, in a litigation matter, it does not preclude contact with mere witnesses. Further, communications with persons within the corporation or organization are not barred merely by virtue of the possibility that their information might constitute “admissions” in the evidentiary sense. To proscribe contact with any person within a corporation or organization on the basis that he or she may make a statement that might be admitted in evidence against the corporation or organization would be overly protective of the corporation or organization and too restrictive of an opposing counsel’s ability to contact and interview potential witnesses. Fairness does not require the presence of a corporation’s or organization’s legal practitioner whenever a person within the corporation or organization may make a statement admissible in evidence against it.

**[3]** Rule 7.2-8 prohibits communications by a lawyer for another person or entity concerning the matter in question with persons likely involved in the decision-making process about the matter. These individuals are so closely identified with the interests of the corporation or organization as to be indistinguishable from it. They would have the authority to commit the corporation or organization to a position with regard to the subject matter of the representation. This person would have such authority as a corporate officer or because for some other reason the law cloaks him or her with authority, including making decisions affecting the outcome of the matter, including litigation decisions, or because their duties include answering the type of inquiries posed. These individuals include those to who the organization’s legal practitioner looks for decisions with respect to the matter.

**[4]** Thus, subject to the exceptions set out in it, rule 7.2-8 would prohibit contact with those persons who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

**[5]** A lawyer is not prohibited from communicating with a person in a litigation matter unless the person’s act or omission is believed, on reasonable grounds, to be so central and obvious to a determination of liability that the person’s conduct may be imputed to the corporation or organization. If it is not reasonably likely that the person is an active participant for liability purposes or a decision-maker respecting the outcome of the matter, nothing in rule 7.2-8 precludes informal contact with such a person.

[6] An individual who regularly consults with the corporation's or organization's legal practitioner concerning a matter will not necessarily be a person who also directs the legal practitioner. In some large corporations and organizations, some management personnel may direct or control counsel for some matters but not others. The mere fact that a person holds a management position does not trigger the protections of the rule.

[7] A person who is simply interviewed or questioned by a corporation's or organization's legal practitioner about a matter to gather factual information does not "regularly consult" with the legal practitioner. While a person's duties within a corporation or organization may include answering litigation-related inquiries, rules 7.2-8 to 7.2-8.2 do not prohibit an inquiry of this person by opposing counsel that is related to the person's knowledge of the historical aspects leading up to the alleged injury or damage which give rise to the subject matter of the representation.

[8] The prohibition on communications with a represented corporation or organization applies only where the lawyer knows that the entity is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise where it is reasonable to believe that the entity with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing their eyes to the obvious.

[9] Rule 7.2-8 does not prevent a lawyer from communicating with employees or agents concerning matters outside the representation.

[10] As a practical matter, to avoid eliciting privileged or confidential information and ensure that the communications are proper, the lawyer should identify himself or herself as representing an interested party in the matter when approaching a potential witness or other person in the corporation or organization. The lawyer should also advise the person whom he or she is hoping to interview that they are free to decline to respond. See also Section 5.3 (Interviewing Witnesses).

[11] A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of the rules in Section 3.4 (Conflicts), and particularly rule 3.4-5 to rule 3.4-9. A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of the rules in Section 3.4 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

[12] If the representation by the legal practitioner described in rule 7.2-8.1 is only with respect to the personal interests of the individual, consent of the corporation's or organization's counsel would be required with respect to the corporation's or organization's interests.

[13] **Unions** – Rule 7.2-8 is not intended to prohibit a lawyer for a union from contacting employees of a represented corporation or organization in circumstances where proper representation of the union's interests requires communication with certain employees who are the holders of information. For example, a lawyer retained by a union with respect to a termination grievance in which the union alleges that the employer, who is represented, has breached the collective agreement, is not prohibited from contacting employees who may have information on the termination or events leading up to the termination.

[14] Similarly, a management-side labour lawyer would not offend rule 7.2-8 if the lawyer contacted an employee who is a member of a bargaining unit represented by a legal practitioner.

[15] **Governments** –The concept of the individual who may “bind the organization” may not apply in the government context in the same way as in the corporate environment. For government departments, ministries and similar groups, rules 7.2-8 to 7.2-8.2 are intended to cover individuals who participate in a significant way in decision-making or who provide advice in relation to a particular matter.

[16] In government, because of its complexity and despite its hierarchy, it may not always be clear to whom a lawyer is authorized to communicate on a particular matter and who is involved in the decision-making process. The roles of these individuals may not be discrete, as different officials at different levels in different departments provide advice and recommendations. For example, in a contract negotiation, employees from one ministry may be directly involved, but those from another ministry may also have sensitive information relevant to the matter that may require protection under rule 7.2-8.

[17] In addition, the legal branch at the particular ministry is usually considered to always be “retained”. There may be circumstances where the only appropriate action is to contact the legal branch. In all cases, appropriate judgment must be exercised.

[18] In general, rules 7.2-8 to 7.2-8.2 are not intended to

- (a) constrain lawyers who wish to contact government officials for a discussion of policy or similar matters on behalf of a client;
- (b) affect access to information requests under such legislation as the *Freedom of Information and Protection of Privacy Act* (Ontario) or the federal *Access to Information Act*, including situations where a litigant has named the provincial or federal Crown, respectively, as a defendant; or
- (c) affect the exercise of the duties of public servants under the *Public Service of Ontario Act, 2006* with respect to disclosure of information.

[19] **Municipalities** – Similar to government, in the municipal context, it is recognized that no one individual has the authority to bind the municipality. Each councillor is representative of the entire council for the purposes of decision-making. Rule 7.3-9, for example, would not permit the lawyer for an applicant on a controversial planning matter that is before the Ontario Municipal Board to contact individual members of council on the matter without the consent of the municipal solicitor.

[20] Rules 7.2-8 to 7.2-8.2 are not intended to:

- (a) prevent lawyers appearing before council on a client’s behalf and making representations to a public meeting held pursuant to the *Planning Act*;
- (b) affect access to information requests under such legislation as the *Municipal Freedom of Information and Protection of Privacy Act*, including situations where a litigant has named the municipality as a defendant; or

(c) restrain communications by persons having dealings or negotiations, including lobbying, with municipalities with the elected representatives (councillors) or municipal staff.

*[Amended – November 2010]*

**7.2-9** When a lawyer deals on a client's behalf with an unrepresented person, the lawyer shall:

- (a) [FLSC - not in use]
- (b) take care to see that the unrepresented person is not proceeding under the impression that their interests will be protected by the lawyer; and
- (c) take care to see that the unrepresented person understand that the lawyer is acting exclusively in the interests of the client and accordingly their comments may be partisan.

*[Amended – October 2014]*

**Commentary**

[1] If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in these rules about joint retainers.

*[New – October 2014]*

**Inadvertent Communications**

**7.2-10** A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably ought to know that the document was inadvertently sent shall promptly notify the sender.

### **Commentary**

[1] Lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or legal practitioners acting for them. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to notify the sender promptly in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of this rule, as is the question of whether the privileged status of a document has been lost. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, “document” includes email or other electronic modes of transmission subject to being read or put into readable form.

[2] [FLSC - not in use]

*[New – October 2014]*

## **Undertakings and Trust Conditions**

**7.2-11** A lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given and honour every trust condition once accepted.

*[Amended – October 2014]*

### **Commentary**

[1] Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally. The use of such words as “on behalf of my client” or “on behalf of the vendor” does not relieve the lawyer giving the undertaking of personal responsibility.

[1.1] In real estate transactions using the system for the electronic registration of title documents (“e-reg”<sup>TM</sup>), the lawyers acting for the parties (with their consent) will sign and be bound by a Document Registration Agreement that will contain undertakings. When entering into a Document Registration Agreement, a lawyer should have regard to and strictly comply with their obligations under rule 7.2-11.

[2] Trust conditions should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed in writing and communicated to the other party at the time the property is delivered. Trust conditions should be accepted in writing and, once accepted, constitute an obligation on the accepting lawyer that the lawyer must honour personally. The lawyer who delivers property without any trust condition cannot retroactively impose trust conditions on the use of that property by the other party.

[3] The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper for a lawyer to ignore or breach a trust condition he or she has accepted on the basis that the condition is not in accordance with the contractual obligations of the clients. It is also improper to unilaterally impose cross conditions respecting one's compliance with the original trust conditions.

[4] If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis.

[5] Trust conditions can be varied with the consent of the person imposing them. Any variation should be confirmed in writing. Clients or others are not entitled to require a variation of trust conditions without the consent of the legal practitioner who has imposed the conditions and the lawyer who has accepted them.

[6] Any trust condition that is accepted is binding upon a lawyer, whether imposed by another legal practitioner or by a lay person. A lawyer may seek to impose trust conditions upon a non-licensee, whether an individual or a corporation or other organization, but great caution should be exercised in so doing since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical obligations that exist between licensees.

[7] A lawyer should treat money or property that, on a reasonable construction, is subject to trust conditions or an undertaking in accordance with this rule.

*[Amended - November 2007, October 2014]*

## SECTION 7.3      OUTSIDE INTERESTS AND THE PRACTICE OF LAW

### Maintaining Professional Integrity and Judgment

**7.3-1** A lawyer who engages in another profession, business, or occupation concurrently with the practice of law shall not allow such outside interest to jeopardize the lawyer's professional integrity, independence, or competence.

#### Commentary

[1] A lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client.

[2] When acting or dealing in respect of a transaction involving an outside interest, the lawyer should be mindful of potential conflicts and the applicable standards referred to in the conflicts rule and disclose any personal interest.

*[New – October 2014]*

**7.3-2** A lawyer shall not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

#### Commentary

[1] The term “outside interest” covers the widest possible range of activities and includes activities that may overlap or be connected with the practice of law such as engaging in the mortgage business, acting as a director of a client corporation, or writing on legal subjects, as well as activities not so connected such as, for example, a career in business, politics, broadcasting or the performing arts. In each case the question of whether and to what extent the lawyer may be permitted to engage in the outside interest will be subject to any applicable law or rule of the Law Society.

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

## SECTION 7.4 THE LAWYER IN PUBLIC OFFICE

### Standard of Conduct

**7.4-1** A lawyer who holds public office shall, in the discharge of official duties, adhere to standards of conduct as high as those that these rules require of a lawyer engaged in the practice of law.

#### Commentary

[1] The rule applies to a lawyer who is elected or appointed to a legislative or administrative office at any level of government, regardless of whether the lawyer attained the office because of professional qualifications. Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by a failure to observe its ethical standards.

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

[3] [FLSC - not in use]

*[Amended – October 2014]*

## SECTION 7.5 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

### Communication with the Public

**7.5-1** Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

#### Commentary

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

[2] A lawyer's duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.

[3] Public communications about a client's affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that the lawyer's real purpose is self-promotion or self-aggrandizement.

[4] Given the variety of cases that can arise in the legal system, particularly in civil, criminal, and administrative proceedings, it is impossible to set down guidelines that would anticipate every possible circumstance. Circumstances will arise where the lawyer should have no contact with the media and other cases where the lawyer is under a specific duty to contact the media to properly serve the client.

*[Amended – October 2014]*

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

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

*[Amended – June 2009]*

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

[7] Lawyers should be aware that when they make a public appearance or give a statement they will ordinarily have no control over any editing that may follow or the context in which the appearance or statement may be used, or under what headline it may appear.

### **Interference with Right to Fair Trial or Hearing**

**7.5-2** A lawyer shall not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party's right to a fair trial or hearing.

#### **Commentary**

[1] Fair trials and hearings are fundamental to a free and democratic society. It is important that the public, including the media, be informed about cases before courts and tribunals. The administration of justice benefits from public scrutiny. It is also important that a person's, particularly an accused person's, right to a fair trial or hearing not be impaired by inappropriate public statements made before the case has concluded.

## **SECTION 7.6            PREVENTING UNAUTHORIZED PRACTICE**

### **Preventing Unauthorized Practice**

**7.6-1** A lawyer shall assist in preventing the unauthorized practice of law and the unauthorized provision of legal services.

*[Amended – June 2007]*

#### **Commentary**

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

### **Working With or Employing Unauthorized Persons**

**7.6-1.1** Without the express approval of a committee of Convocation appointed for the purpose, a lawyer shall not retain, occupy office space with, use the services of, partner or associate with, or employ in any capacity having to do with the practice of law or provision of legal services any person who, in Ontario or elsewhere, has been disbarred and struck off the Rolls, has had their license to practise law or to provide legal services revoked, has been suspended, has had their license to practise law or to provide legal services suspended, has undertaken not to practise law or to provide legal services, or who has been involved in disciplinary action and been permitted to resign or to surrender their license to practise law or to provide legal services, and has not had their license restored.

### **Practice by Suspended Lawyers Prohibited**

**7.6-1.2** A lawyer whose license to practise law is suspended shall comply with the requirements of the By-laws and shall not

- (a) practise law;
- (b) represent or hold himself or herself out as a person entitled to practise law; or
- (c) represent or hold himself or herself out as a person entitled to provide legal services.

*[New - January 2008]*

### **Commentary**

[1] Part II of By-Law 7.1 (Operational Obligations and Responsibilities) and Part II.1 of By-Law 9 (Financial Transactions and Records) set out the obligations of a lawyer whose license to practise law is suspended.

*[Amended - May 2008]*

### **Undertakings Not to Practise Law**

**7.6-1.3** A lawyer who gives an undertaking to the Law Society not to practise law shall not

- (a) practise law;
- (b) represent or hold himself or herself out as a person entitled to practise law; or
- (c) represent or hold himself or herself out as a person entitled to provide legal services.

*[New - January 2008]*

### **Undertakings to Practise Law Subject to Restrictions**

**7.6-1.4** A lawyer who gives an undertaking to the Law Society to restrict their practise shall comply with the undertaking.

*[New - January 2008]*

## **SECTION 7.7 RETIRED JUDGES RETURNING TO PRACTICE**

**7.7-1** [FLSC – not in use]

### **Definitions**

**7.7-1.1** In rule 7.7-1.2 “retired appellate judge” means a lawyer

(a) who was formerly a judge of the Supreme Court of Canada, the Court of Appeal for Ontario, or the Federal Court of Appeal;

*[Amended - January 2009]*

(b) who has retired, resigned, or been removed from the Bench; and

(c) who has returned to practice.

### **Appearance as Counsel**

**7.7-1.2** A retired appellate judge shall not appear as counsel or advocate in any court, or in chambers, or before any administrative board or tribunal without the express approval of a committee of Convocation appointed for the purpose. This approval may only be granted in exceptional circumstances and may be restricted as the committee of Convocation sees fit.

**7.7-1.3** In rule 7.7-1.4, “retired judge” means a lawyer

(a) who was formerly a judge of the Federal Court, the Tax Court of Canada, the Supreme Court of Ontario, Trial Division, a County or District Court, the Ontario Court of Justice, or the Superior Court of Justice;

*[Amended - January 2009]*

(b) who has retired, resigned, or been removed from the Bench; and

(c) who has returned to practice.

**7.7-1.4** A retired judge shall not appear as counsel or advocate

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

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

for a period of three years from the date of their retirement, resignation, or removal, without the express approval of a committee of Convocation, appointed for the purpose, which approval may only be granted in exceptional circumstances and may be restricted as the committee of Convocation sees fit.

*[Amended – October 2014]*

## SECTION 7.8 ERRORS AND OMISSIONS

### Informing Client of Error or Omission

**7.8-1** When, in connection with a matter for which a lawyer is responsible, the lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer shall

- (a) promptly inform the client of the error or omission being careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise;
- (b) recommend that the client obtain legal advice from an independent lawyer concerning any rights the client may have arising from the error or omission; and
- (c) advise the client that in the circumstances, the lawyer may no longer be able to act for the client.

*[Amended – October 2014]*

### Notice of Claim

**7.8-2** A lawyer shall give prompt notice of any circumstance that the lawyer may reasonably expect to give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

#### Commentary

[1] Compulsory insurance imposes obligations on a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. The insurer's rights must be preserved. There may well be occasions when a lawyer believes that certain actions or the failure to take action have made the lawyer liable for damages to the client when, in reality, no liability exists. Further, in every case a careful assessment will have to be made of the client's damages arising from the lawyer's negligence.

[1.1] Many factors will have to be taken into account in assessing the client's claim and damages. As soon as a lawyer becomes aware that an error or omission may have occurred, that may reasonably be expected to involve liability to the client for professional negligence, the lawyer should take the following steps.

*[Amended - January 2009]*

- (a) immediately arrange an interview with the client and advise the client that an error or omission may have occurred, that may form the basis of a claim by the client against the lawyer.
- (b) advise the client to obtain an opinion from an independent lawyer and that, in the circumstances, the first lawyer might no longer be able to act for the client;

- (c) subject to the rules in Section 3.3 (Confidentiality), inform the insurer of the facts of the situation.
- (d) co-operate fully and as expeditiously as possible with the insurer in the investigation and eventual settlement of the claim; and
- (e) make arrangements to pay that portion of the client's claim that is not covered by the insurance immediately upon completion of the settlement of the client's claim. This would include payment of the deductible under a policy of insurance in accordance with By-Law 6 (Professional Liability Insurance).

*[Amended - January 2009]*

### **Co-operation**

**7.8-3** When a claim of professional negligence is made against a lawyer, he or she shall assist and co-operate with the insurer or other indemnitor to the extent necessary to enable the claim to be dealt with promptly.

### **Responding to Client's Claim**

**7.8-4** If a lawyer is not indemnified for a client's errors and omissions claim or to the extent that the indemnity may not fully cover the claim, the lawyer shall expeditiously deal with the claim and shall not take unfair advantage that would defeat or impair the client's claim.

**7.8-5** In cases where liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, a lawyer has a duty to pay the balance.

**SECTION 7.8.1      RESPONSIBILITY IN MULTI-DISCIPLINE PRACTICES**

**Compliance with these Rules**

**7.8.1-1**      A lawyer in a multi-discipline practice shall ensure that non-licensee partners and associates comply with these rules and all ethical principles that govern a lawyer in the discharge of their professional obligations.

*[Amended - June 2009]*

## **SECTION 7.8.2      DISCIPLINE**

### **Disciplinary Authority**

**7.8.2-1** A lawyer is subject to the disciplinary authority of the Law Society regardless of where the lawyer's conduct occurs.

### **Professional Misconduct**

**7.8.2-2** The Law Society may discipline a lawyer for professional misconduct.

### **Conduct Unbecoming a Lawyer**

**7.8.2-3** The Law Society may discipline a lawyer for conduct unbecoming a lawyer.

# INDEX

Advertising nature of practice.....	4.3
Affiliated entity, definition of.....	1.1-1
Affiliation, definition of.....	1.1-1
Alternative dispute resolution (ADR)	
Encouraging compromise or settlement.....	3.2-4
Appeals .....	5.2-2
Arbitrator, <i>see</i> Alternative dispute resolution (ADR)	
Articling student	
Duties of.....	6.2-3
Hiring of.....	3.4-19
Principal, duties of .....	6.2-2
Recruitment and engagement procedures .....	6.2-1
Associate, definition of.....	1.1-1
Borrower and lender, acting for .....	3.4-33
Borrowing from client.....	3.4-31
By-law 6.....	7.8-2
By-law 7.1.....	6.1-1, 7.6-1.2
By-law 8.....	7.1-4.4
By-law 9.....	7.6-1.2
Candour and honesty	
Advocacy and.....	5.1-1
Client service and.....	3.1-1
Duty of prosecutor and.....	5.1-3
Certificate of independent legal advice.....	3.4-32
Certified specialist, advertising of .....	4.3-1
Civil matters.....	5.1
Civil proceedings .....	5.1
Client	
Acting against former .....	3.4-10
Advocacy and.....	5.1
Borrowing from .....	3.4-33
Confidentiality and.....	3.3-1
Conflicts of interest.....	3.4
Confidential client information.....	3.4-4
Criminal activity and.....	3.3-4
Definition of.....	1.1-1, 3.4-17
Diminished capacity.....	3.1-9
Dishonesty and fraud by .....	3.2-7
Doing business with.....	3.4-27
Fees and disbursements.....	3.6
French language rights .....	2.1-1
Guilty plea, agreement on.....	5.1-7—5.1-8
Investment by where lawyer has an interest .....	3.4-29

Lending to client .....	3.4-12
Organization as .....	3.2-3
Paying for legal services .....	3.4-30
Preservation of property .....	3.5
Quality of service and .....	3.2
Reporting conduct to the Society .....	7.1-4—7.1-4.3
Trust accounts .....	3.2-7.3
Waives independent legal representation.....	3.2-9
With diminished capacity .....	3.2-9
Withdrawal of representation and .....	3.7
Competence	
Standard of .....	3.1
Competent lawyer, definition of .....	3.1-1
Communication	
Abusive communications .....	7.2-4
Cross-examination, during .....	5.4-2
Examination-in-chief, during .....	5.4-2
Jurors, relations with .....	5.5
Mediation process and .....	5.7-1
Professional letters and .....	7.2-5
Professional practice and .....	7.2-6—7.2-6A
Public appearances and .....	7.5
Public statements and .....	7.5-1
Punctual communication .....	7.2-5
Re-examination, during .....	5.4-2
Represented corporation or organization with .....	7.2-8
Represented person with .....	7.2-6—7.2-6A
Second opinions .....	7.2-7
Unrepresented person with .....	7.2-9
Witness with .....	5.3-1
Conduct	
Dishonourable or questionable .....	1.1-1
Misconduct, duty to report .....	7.1-4—7.1-4.3
Offences, duty to report .....	7.1-4.4
Unbecoming a barrister or solicitor, definition of .....	1.1-1
Confidential information	
Use of .....	3.3-2
General .....	3.3-1
Confidentiality	
Joint retainer and .....	3.4-5
Mediation and .....	5.7-1
Security of court facilities and .....	5.6-3
Transferring between law firms and .....	3.4-17
Conflict of interest, <i>see also</i> Doing business with a client, Transfer between law firms	
Avoidance of .....	3.4-2
Borrower and lender, acting for .....	3.4-12—3.4-14

Client, investment by .....	3.4-29
Confidentiality and.....	1.1-1
Contentious issue .....	3.4-8—3.4-9
Consent .....	3.4-2
Definition of.....	3.4
Duty to avoid.....	3.4-1
Guarantees by a lawyer.....	3.4-35—3.4-36
Independent legal advice, definition .....	1.1-1
Independent legal representation, definition.....	1.1-1
Joint retainer and.....	3.4—3.4-9
Lawyer or articling student, hiring of .....	3.4-19
Potential transferee, hiring of.....	3.4-19
Public office and .....	7.4
Transferor and transferee, acting for.....	3.4-18
Transferring lawyer, disqualification.....	3.4-23
Transfers of title and .....	3.4-18
Confidential information, disclosure of .....	3.3-1
Consent	
Acting against client and.....	3.3-4—3.3-5
Affiliations between lawyers and affiliated entities and.....	3.4-9
Avoidance of conflicts of interest and .....	3.4-2
Definition of.....	1.1-1
Investment by client when lawyer has an interest .....	3.4-29
Joint retainer and.....	3.4-6
Law firm disqualification.....	3.4-20
Transfers of title.....	3.4-17—3.4-19
Contingent fees .....	3.6-2
Corporate and commercial matters .....	6.1-1
Counselling, for lawyer.....	7.1-3
Courtesy	
Advocacy and undertakings .....	5.1-6
Duty as prosecutor .....	5.1-3
General.....	7.2
Court facilities, security of.....	5.6-3
<i>Criminal Code</i> .....	7.1-4.2
Criminal proceedings	
Threatening .....	3.2-5
Withdrawal from.....	3.2-6
Crime, assisting in, <i>see</i> Dishonesty or fraud	
Cross-examination, communication during .....	5.4-2
Definitions.....	1.1
Delegation, <i>see</i> Supervision	
Disability	
Client with diminished capacity.....	3.2-9
Disbarred persons.....	7.6-1.2
Disbursements.....	3.6-1

Discipline	
Courtesy .....	5.1-5
Disclosure, <i>see also</i> Confidentiality	
Authorized by client.....	3.3-1
Juror's interest in the case and.....	5.5-2—5.5-3
Discrimination	
Definition .....	6.3.1-1
Employment practices and.....	6.3.1-1
Examples of .....	6.3.1-1
Law Society and.....	6.3.1-1
<i>Ontario Human Rights Code</i> and.....	6.3.1-1
Services .....	6.3.1-2
Special responsibility of lawyers .....	6.3.1-1
Discrimination in employment practices	
Due diligence .....	3.4-26
Guidelines for.....	3.4-26
Lawyer and.....	3.4-26
Potential transferee, of .....	3.4-26
Transferable lawyer, of .....	3.4-26
Dishonesty or fraud	
By client or organization.....	3.2-8
Real estate transactions .....	3.2-7
Trust accounts .....	3.2-7.3
When client an organization .....	3.2-8
Dispute, not representing opposing parties.....	3.4-3
Doing business with a client, <i>see also</i> Conflict of interest	
Certificate of independent legal advice.....	3.4-32
Client, borrowing from .....	3.4-31
Client, investment by .....	3.4-30
Guarantees by a lawyer.....	3.4-35—3.4-36
Shares or securities for fees .....	3.4-30
Duty to report	
Emotional, mental, family disturbances.....	7.1-3
Misconduct.....	7.1-3
E-reg <sup>TM</sup> (electronic registration of documents)	
Documents, signing of .....	6.1-6.2
Signing for completeness, direct supervision and.....	6.1-1
Title documents, registration of .....	6.1-5—6.1-6
Errors and omissions	
Co-operation with insurer .....	7.8-3
Disclosure of error or omission.....	5.1-4
Informing client of .....	7.8-1
Notice of claim.....	7.8-2
Responding to client's claim.....	7.8-4—7.8-5
Evidence, submission of .....	5.2-1
Examination-in-chief, communication during.....	5.4-2

Fees and disbursements	
Account statement.....	3.6-3
Advertising of .....	4.2-2
Appropriation of funds.....	3.6-10
Contingency fees.....	3.6-2
Declining retainer.....	3.4-30
Division of .....	3.6-5; 3.6-7
International or interprovincial law firms, exception for sharing of fees .....	3.6-8
Joint retainer for .....	3.6-7
Multi-discipline practice, exception for sharing of fees .....	3.6-8
Non-payment of .....	3.7-3
Optional withdrawal.....	3.7-2
Payment of and appropriation of funds.....	3.6-10—3.6-11
Referral fees .....	3.6-5
Withdrawal from representation .....	3.7
Fraud	
Client, by.....	3.2-7.1
Guarding against .....	3.2-7.2
Real estate transactions .....	3.2-7
Trust accounts .....	3.2-7.3
French language rights	
Client and .....	2.1-1
<i>Constitution Act, 1982</i> and.....	2.1-1
<i>Courts of Justice Act</i> and .....	2.1-1
<i>Criminal Code</i> and.....	2.1-1
<i>French Language Services Act</i> and.....	2.1-1
<i>French Language Services Act</i> .....	2.1-1
Future harm, public.....	3.3-3
Harassment and discrimination, <i>see also</i> Sexual harassment	
Definition of.....	6.3-0
Hiring, of lawyer or articling student.....	3.4-19
Human rights, special responsibility.....	6.3-1.1
HHS.....	7.1-3
Homewood Human Solutions.....	7.1-3
Illness, of lawyer.....	7.1-3
Independent legal advice	
Borrowing from clients.....	3.4-31
Certificate of independent legal advice.....	3.4-32
Definition of.....	1.1-1
Investment by client and joint retainer.....	3.4-6
Independent legal representation	
Borrowing from client and.....	3.4-31; 3.4-33
Definition of.....	1.1-1
Guarantees by a lawyer and .....	3.4-36
Investment by client and .....	3.4-29
Insurer	

Co-operation with insurer .....	7.8-3
Informing client of error or omission.....	7.8-1
Notice of claim.....	7.8-2
Responding to client's claim.....	7.8-4, 7.8-5
Integrity	
Lawyer and.....	2.1
Making legal services available .....	4.1
Outside interests and the practice of law .....	7.3
Standards of the legal profession .....	2.1-2
Interference with right to fair trial or hearing .....	7.5-2
International law firm, fees and exception from discipline practices .....	3.6-8
Interprovincial law firm	
Conduct unbecoming .....	2.1-1
Definition of.....	1.1-1
Fees and exception from discipline practices .....	3.6-8
Investment by client.....	3.4-29
Joint retainer	
Advising client .....	3.4-5
Confidentiality .....	3.5-5
Conflict of interest .....	3.4-5—3.4-9
Consent and.....	3.4-7
Contentious issue .....	3.4-8—3.4-9
Continuing relationship and.....	3.4-6
Fees for.....	3.4-6
Judicial interim release .....	3.4-40—3.4-41
Jurors	
Communication with during trial.....	5.5-4
Disclosure of information .....	5.5-2
Relations with .....	5.5
Law firm	
Definition of.....	1.1-1
International law firms .....	3.6-8
Name of.....	4.2-1
Law Society, <i>see</i> Society	
Lawyer	
Abusive communications and.....	7.2-4
Administration of justice and.....	5.6
Advertising.....	4.3-1
Advising client of French language rights .....	2.1-1
Advocate, as.....	5.1-1
Borrower and lender, acting for .....	3.4-14
Certified specialist .....	4.1-1
Client property, preservation of .....	3.5-2—3.5-7
Clients, borrowing from.....	3.4-31
Competence and standard of.....	3.1
Compromise, encouraging .....	3.2-4

Conflicts of interest, avoidance of .....	3.4
Courtesy and good faith .....	7.2-2
Declining representation .....	4.1-1
Defence counsel, duty as.....	5.1-1
Definition of.....	1.1-1
Duties of principal to student.....	6.2-2
Encouraging client to report misconduct .....	7.1-4—7.1-4.3
Fees and disbursements.....	3.6
Financial obligations of.....	7.1-2
Guarantees by.....	3.4-35
Lawyers, responsibility to .....	7.2
Legal aid plan, participation in .....	4.1-1
Loan or mortgage transactions, in.....	3.4-36
Mediator, as.....	5.7
Member of interprovincial law firms, as.....	3.6-8
Misconduct, duty to report.....	7.1-3
Offences, duty to report .....	7.1-4.4
Organization, acting for .....	3.2-3
Others, responsibility to .....	7.2
Outside interests and the practice of law .....	7.3
Practice of law.....	4.1
Principal, as.....	6.2-2
Profession, the Law Society and others, responsibility to .....	7.1
Prosecutor, duty as .....	5.1-3
Public appearances.....	7.5
Public office .....	7.4
Public, responsibility to .....	5.6-1
Public statements .....	7.5-1
Recording conversations .....	7.2-3
Report misconduct, duty to.....	7.1-3
Sharp practice.....	7.2-2
Special responsibilities of .....	6.3-0
Students and employees, relationship to.....	6.1
Submission of evidence .....	5.2-1
Supervision, duty of .....	6.1
Suspension .....	7.6-1.2
Threatening criminal or legal proceedings .....	3.2-5
Title insurance.....	3.2-9.4
Transfer between law firms, conflicts from.....	3.4-17
Transferring, due to disqualification.....	3.4-23
Transferor and transferee, acting for.....	3.4-16.7
Trust accounts .....	3.2-7.3
Unauthorized practice, preventing .....	7.6
Undertakings and trust conditions .....	7.2-11
Withdrawal from representation .....	3.7
Legal practitioner	

Definition of.....	1.1-1
Lawyer's responsibility to lawyers and others.....	7.2
Legal profession	
Lawyer's responsibility to.....	7.1
Legal services	
Making available.....	4.1-1
Offering of .....	4.1-2
Offering of, restrictions in the.....	4.1-2
Under a limited scope retainer .....	3.2.1A
Legislative change .....	5.6-2
Lending client .....	3.4-7
Licence, revoked or suspended, see Suspended or disbarred lawyers	
Licensee, definition of .....	1.1-1
Limited scope retainers .....	3.2.1A
Loan and mortgage transactions	
Lawyers in.....	3.4-34
Lending client and.....	3.4-7—3.4-9
Marketing, <i>see also</i> Advertising	
Advertising of fees .....	4.2-2
Definition of.....	4.2-0
Legal services of .....	4.2-1
Mediation, confidentiality and .....	5.7-1
Mediator	
Lawyer as .....	5.7
Role of.....	5.7-1
Medical-legal reports .....	3.2-9.1
Mental instability, of lawyer .....	7.1-3
Misconduct	
Duty to report.....	7.1-3
Encouraging client to report.....	7.1-4—7.1-4.3
Practice of law and.....	4.1-2
Professional misconduct, definition of .....	1.1-1
Sexual harassment.....	6.3
Mortgage	
Borrower or lender, prohibition against acting for .....	3.4-7—3.4-9
Multi-discipline practice	
Compliance with rules .....	7.8-1-1
Exception for fees and disbursements.....	3.6-8
Responsibility in .....	7.8.1
Non-lawyers	
By-law 7.1 and .....	6.1-1
Corporate and commercial matters and .....	6.1-1
Real estate and .....	6.1-1
Sexual harassment and.....	6.2-2
Supervision of .....	6.1-1
Title documents and.....	6.1-5—6.1-2

Title insurance and .....	6.1-1
Wills, trusts, estates and .....	6.1-1
Offences, duty to report .....	7.1-4.4
Office of the Children’s Lawyer .....	3.2-9
Office of the Public Guardian and Trustee .....	3.2-9
Omission, discovery of .....	5.1-4
<i>Ontario Human Rights Code</i> .....	6.3-1.1
OLAP, <i>see also</i> Homewood Human Solutions (HHS) .....	7.1-3
Ontario Lawyers’ Assistance Program .....	7.1-3
Organization	
As client .....	3.2-2
As organization .....	3.2-3
Dishonest or fraudulent .....	3.2-8
Lawyer acting for .....	3.2-8
Outside interests	
Independent judgment and .....	7.3-2
Integrity and .....	7.3-1
Paralegal, definition of .....	1.1-1
Permitted disclosure of confidential information .....	3.3-1
Plea	
Guilty, agreement on .....	5.1-7—5.1-8
Practice of law	
Advertising of fees .....	4.2-2
Certified specialist .....	4.1-1
Declining representation .....	4.1-1
Interprovincial law firms .....	3.6-8
Legal Aid Plan, participating in .....	4.1-1
Legal services, availability of .....	4.1-1
Marketing professional services .....	4.2
Name, of law firm .....	4.2-0
Offering professional services .....	4.1-1
Outside interests and .....	7.3
Restrictions in the offering of legal services .....	4.1-2
Suspended lawyers .....	7.6-1.2
Unauthorized practice of law, prevention of .....	7.6
Preservation of client’s property	
Accounting and delivery of .....	3.5-6—3.5-7
Care of client’s property .....	3.5-2—3.5-7
General .....	3.5-2—3.5-7
Identification of client’s property .....	3.5-4—3.5-5
Receipt of property .....	3.5-3
Professional misconduct	
Professional misconduct, definition of .....	1.1-1
Property	
Accounting and delivery .....	3.5-6
Identification of .....	3.5-4

Notification of receipt of.....	3.5-3
Preservation of .....	3.5
Prosecutor .....	5.1-3
Public appearances	
Communication, guidelines for.....	7.5-1
Interference with fair trial or hearing.....	7.5-2
Public office	
Criticizing tribunals .....	5.6-1
Encouraging respect for administration of justice .....	5.6-1
Lawyer in public office .....	7.4-1
Legislative change and.....	5.6-1
Standard of conduct .....	7.4-1
Public statements .....	7.5-1
Punctuality .....	7.2-5
Quality of service	
Alternative dispute resolution (ADR) and .....	3.2-4
Client under disability or with diminished capacity .....	3.2-9, 3.2-9.3
Compromise or settlement .....	3.2-4
Dishonesty or fraud.....	3.2-7
Limited scope retainer.....	3.2-1A—3.2-1A2
Medical-legal reports .....	3.2-9.1—3.2-9.3
Reporting on mortgage transactions .....	3.2-9.8, 3.2-9.9
Threatening criminal proceedings.....	3.2-5
Title insurance in real estate conveyancing .....	3.2-9.4
When client an organization .....	3.2-3
Real estate	
E-reg <sup>TM</sup> system and.....	6.1-6.2
Fraud, dishonesty etc. by client or others. ....	3.2-7
Non-lawyer and.....	6.1-1
Record-keeping	
Trust accounts .....	3.2-7
Recruitment and engagement procedures, <i>see</i> Articling students	
Re-examination, communication during.....	5.4-2
Referral fees .....	3.6-5
Related persons, duty to avoid conflict of interest.....	3.4-1
Relationship of lawyer to	
Administration of justice.....	5.1
Articling students .....	6.2-1—6.2-3
Clients .....	3.2-9.6
Legal practitioner	
Law Society .....	7.1
Non-lawyers.....	6.1-1
Other lawyers .....	7.1
Solicitor and client .....	7.1-3
Reports, medical-legal .....	3.2-9.1
Retainers, limited scope .....	3.2-1A

Retired judges, <i>see also</i> Undertakings and trust conditions	
Definition of, appellate retired judge .....	7.7-1.1
Definition of retired judge .....	7.7-1.3
Counsel, appearance as .....	7.7-1.2
Returning to practice.....	7.7-1.2
Safety exception.....	3.3-4—3.3-6
Second opinions.....	7.2-7
Sexual harassment and discrimination	
Definition of.....	6.3-0
Examples of .....	6.3-0
Prohibition on.....	6.3-3
Sharp practice.....	7.2-2
Society	
Definition of.....	1.1-1
Reporting misconduct to.....	7.1-3
Reporting dishonest conduct to.....	7.1-3—7.1-4.4
TitlePLUS insurance and .....	3.2-9.7
Solicitor’s lien.....	3.7-9
Standards of legal profession .....	2.1-2
Students, articling .....	6.2
Substance abuse, by lawyer .....	7.1-3
Successor licensee, duty of .....	3.7-10
Supervision	
Non-lawyers, of.....	6.1-1
Suspended or disbarred lawyers	
Lawyer .....	6.1-4
Licence.....	7.6
Testamentary instruments and gifts .....	3.4-37—3.4-38
Threatening criminal proceedings.....	3.2-5
Title documents	
Electronic registration of.....	6.1-5
Non-lawyer and.....	6.1-1
Title insurance	
Real estate conveyance and .....	3.2-9.4
TitlePLUS .....	3.2-9.7
Transfer between law firms, <i>see also</i> Conflict of interest	
Application of rules.....	3.4-18
Client, definition of.....	3.4-17
Compliance, determination of.....	3.4-25
Confidential information.....	3.3-1
Due diligence .....	3.4-26
Law firm, transferring lawyer, disqualification of.....	3.4-23—3.4-24
Tribunal	
Criticizing of .....	5.6-1
Definition of.....	1.1-1
Trust accounts	

When acting for a client.....	3.2-7.3
Unauthorized practice, <i>see</i> Suspended or disbarred persons	
Undertakings and trust conditions	
Advocacy in .....	5.1-6
Lawyer and.....	7.2-11
Not to practice law, retired judges .....	7.7-1.4
Subject to restriction, retired appellate judges .....	7.7-1.2
Unrepresented persons .....	7.2-9
Wills, trusts, and estates.....	6.1-1
Withdrawal from representation	
General.....	3.7
Discharge of withdrawal .....	3.7-9
Duty of successor licensee .....	3.7-10
Justifiable cause and .....	3.7-2
Loss of confidence and .....	3.7-2
Obligatory withdrawal .....	3.7-7
Manner of withdrawal.....	3.7-8
Non-payment of fees.....	3.7-3
Notice to client.....	3.7-1
Optional withdrawal.....	3.7-2
Prohibition against .....	3.7-2
Reasonable notice .....	3.7-1
Solicitor's lien.....	3.7-9
Successor licensee, duty of .....	3.7-10
Witness	
Advocates, duty of .....	5.1-2
Communication with.....	5.4-2
Interviewing .....	5.3-1
Lawyer as .....	5.2

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