



# LAW SOCIETY OF NEW BRUNSWICK CODE OF PROFESSIONAL CONDUCT

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## PREFACE

Self-regulatory powers have been granted to the legal profession on the understanding that the profession will exercise those powers in the public interest. Part of that responsibility is ensuring the appropriate regulation of the professional conduct of lawyers. Members of the legal profession who draft, argue, interpret and challenge the law of the land can attest to the robust legal system in Canada. They also acknowledge the public's reliance on the integrity of the people who work within the legal system and the authority exercised by the governing bodies of the profession. While lawyers are consulted for their knowledge and abilities, more is expected of them than forensic acumen. A special ethical responsibility comes with membership in the legal profession. This Code attempts to define and illustrate that responsibility in terms of a lawyer's professional relationships with clients, the Justice system and the profession.

The Code sets out statements of principle followed by exemplary rules and commentaries, which contextualize the principles enunciated. The principles are important statements of the expected standards of ethical conduct for lawyers and inform the more specific guidance in the rules and commentaries. The Code assists in defining ethical practice and in identifying what is questionable ethically. Some sections of the Code are of more general application, and some sections, in addition to providing ethical guidance, may be read as aspirational. The Code in its entirety should be considered a reliable and instructive guide for lawyers that establishes only the minimum standards of professional conduct expected of members of the profession. Some circumstances that raise ethical considerations may be sufficiently unique that the guidance in a rule or commentary may not answer the issue or provide the required direction. In such cases, lawyers should consult with the Law Society, senior practitioners or the courts for guidance.

A breach of the provisions of the Code may or may not be sanctionable. The decision to address a lawyer's conduct through disciplinary action based on a breach of the Code will be made on a case-by-case basis after an assessment of all relevant information. The rules and commentaries are intended to encapsulate the ethical standard for the practice of law in Canada. A failure to meet this standard may result in a finding that the lawyer has engaged in conduct unbecoming or professional misconduct.

The Code of Conduct was drafted as a national code for Canadian lawyers. It is recognized, however, that regional differences will exist in respect of certain applications of the ethical standards. Lawyers who practise outside their home jurisdiction should find the Code useful in identifying these differences.



The practice of law continues to evolve. Advances in technology, changes in the culture of those accessing legal services and the economics associated with practising law will continue to present challenges to lawyers. The ethical guidance provided to lawyers by their regulators should be responsive to this evolution. Rules of conduct should assist, not hinder, lawyers in providing legal services to the public in a way that ensures the public interest is protected. This calls for a framework based on ethical principles that, at the highest level, are immutable, and a profession that dedicates itself to practise according to the standards of competence, honesty and loyalty. The Law Society intends and hopes that this Code will be of assistance in achieving these goals.





## CHAPTER 1 – DEFINITIONS AND INTERPRETATION

## 1.1 DEFINITIONS

1.1-1 In this Code, unless the context indicates otherwise,

“**Act**” means the *Law Society Act, 1996*;

“**associate**” includes any lawyer who practises law in a law firm through an employment or other contractual relationship;

“**client**” means a person who:

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

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

### Commentary

[1] A lawyer-client relationship may be established without formality.

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

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

A “**conflict of interest**” means the existence of a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person;

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

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

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

- (a) in a sole proprietorship;
- (b) in a partnership;
- (c) in any approved organization providing legal aid in the Province of New Brunswick;
- (d) in a government, a Crown corporation or any other public body; or
- (e) in a corporation or other organization;

**“lawyer”** means a member of the Society and student-at-law applicants for membership and persons referred to in subsections 33(4) and 33(5) of the *Law Society Act, 1996*, including a Visiting Lawyer and a Foreign Legal Consultant;

**“limited scope retainer”** means the provision of legal services for part, but not all, of a client’s legal matter by agreement with the client;

**“Society”** means the Law Society of New Brunswick;

**“tribunal”** includes a court, board, arbitrator, mediator, administrative agency or other body that resolves disputes, regardless of its function or the informality of its procedures.

## 1.2 APPLICATION

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**1.2-1** In accordance with paragraph 16(2)(r) of the Act, Council of the Law Society approved this *Law Society of New Brunswick Code of Professional Conduct* effective July 1, 2016 and requires all members, students-at-law, applicants for membership, persons referred to in subsection 33(4) of the Act, including visiting lawyers and Canadian legal advisers, and persons referred to in subsection 33(5) of the Act, including foreign legal consultants, to comply with it, as amended from time to time.

**1.2-2** Conduct of a lawyer that occurred between January 1, 2004 and June 30, 2016 continues to be governed by the *Law Society of New Brunswick Code of Professional Conduct* adopted by the Society effective January 1, 2004, as amended from time to time.

**1.2-3** Conduct of a lawyer that occurred before January 1, 2004, continues to be governed by the *Code of Professional Conduct* approved by the Canadian Bar Association on August 25, 1974, and revised and updated August 1987, and the *Professional Conduct Handbook* adopted by the Society in 1971, both amended from time to time.

## 1.3 INTERPRETATION

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### 1.3-1 In this Code

- (a) chapters are assigned a single digit, as in **Chapter 1 – Definitions and Interpretation**;
- (b) sections are assigned two digits separated by a decimal point, the second digit beginning with 1 as in **2.1 – Integrity**;
- (c) rules include the section number and are assigned an additional digit, beginning with 1 preceded by a dash as in **3.6-1 – Reasonable Fees and Disbursements**;
- (d) paragraphs of commentary are assigned a number in square brackets, beginning with 1 as in **[6]**;
- (e) rules or paragraphs of commentary in the *Federation of Law Societies of Canada Model Code of Professional Conduct* (the “Model Code”) not adopted in these rules are indicated as being deleted: **[deleted]**. Where portions of chapters, sections or rules are partially modified no such notation is indicated;
- (f) where portions of the Model Code were not adopted in the *Law Society of New Brunswick Code of Professional Conduct* and were marked **[deleted]**, the numbering used in the Model Code remains in place as in:

***“Incriminating Physical Evidence***

**5.1-2A**

**Commentary**

**[1]**

**[2]**

**[3]**

**(a)**

**(b) [deleted]**

**(c)”;**

- (g) new sections, rules or commentaries as a result of amendments to the Model Code will be assigned the appropriate capital letter suffix, for example, **rule 4.1-2A or commentary [6B]**.

**1.3-2** This Code includes a preface, chapters that contain rules and commentaries, which may contain footnotes, and appendices. All parts of this Code so identified shall be considered when an appropriate course of conduct is being sought by the lawyer or

when the conduct of the lawyer is being reviewed. Consequently, the conduct of the lawyer acting in a particular role (for example, such as advocate) shall be guided not only by the rule and commentaries specifically applicable to that role but also by more general and other rules and commentaries found in other chapters (for example, such as section 2.1 – Integrity).

The exception to this approach is where the general and other rules or commentaries are modified or overridden by law or by specific rules or commentaries.

**1.3-3** As in other Canadian codes of professional legal conduct, this Code does not attempt to foresee every possible situation arising in the professional and other lives of the lawyer. Rather, its intent is to provide the lawyer and the Society with guidance as to the conduct of the lawyer that is deemed by the Society to be acceptable.

### **Rules and Commentaries**

**1.3-4** The rules set out in each chapter of this Code are stated duties of conduct required of the lawyer by the Society. The commentaries following the rules are explanations and expansions of the rules preceding them and may contain further duties of conduct required of the lawyer by the Society.

**1.3-5** The rules and commentaries found in the chapters in this Code shall be interpreted in context with one another and in context with other relevant parts of this Code.


### **Liberal Interpretation**

**1.3-6** The provisions of this Code shall be interpreted in a liberal manner rather than a restricted manner, the underlying bias being in favour of the protection of the public interest, of the administration of justice and the institutions associated therewith and of the high standards of the legal profession.

### **Conflicting Standards**

**1.3-7** Save as may be provided by law, in the event of a conflict of standards in matters involving the conduct of the lawyer, the standards declared by this Code shall govern.

### **Relationship with the Law**



**1.3-8** This Code addresses certain matters that are also the subject of statutory or case law. In some instances this Code imposes obligations that are additional to those imposed by law. The lawyer shall meet these additional obligations unless they are clearly prohibited by a law that is directly applicable to a given situation.

**Relevance of Intention**

**1.3-9** The intention of the lawyer in relation to past conduct of the lawyer being reviewed by the Society or by a committee thereof shall be relevant in determining whether and to what extent the lawyer is to be sanctioned for the conduct.





## CHAPTER 2 – STANDARDS OF THE LEGAL PROFESSION

## 2.1 INTEGRITY

**2.1-1** The lawyer shall discharge with integrity every duty owed by the lawyer to the administration of justice and its institutions, clients, other lawyers, the legal profession and the public, and shall adhere to the principle of integrity in the non-professional life of the lawyer.

### Commentary

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

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

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


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

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

### Commentary

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

- (a) sharing knowledge and experience with colleagues and students informally in day-to-day practice as well as through contribution to professional journals



and publications, support of law school projects and participation in panel discussions, legal education seminars, bar admission courses and university lectures;

- (b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;
- (c) filling elected and volunteer positions with the Society;
- (d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and
- (e) acting as directors, officers and members of non-profit or charitable organizations.





## CHAPTER 3 – RELATIONSHIP TO CLIENTS

## 3.1 COMPETENCE

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### Definitions

**3.1-1** In this section,

**“competent lawyer”** means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement, including:

- (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;
- (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;
- (c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:
  - (i) legal research;
  - (ii) analysis;
  - (iii) application of the law to the relevant facts;
  - (iv) writing and drafting;
  - (v) negotiation;
  - (vi) alternative dispute resolution;
  - (vii) advocacy; and
  - (viii) problem solving;
- (d) communicating at all relevant stages of a matter in a timely and effective manner;
- (e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;
- (f) applying intellectual capacity, judgment and deliberation to all functions;
- (g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;
- (h) recognizing limitations in one’s ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

- (i) managing one's practice effectively;
- (j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and
- (k) otherwise adapting to changing professional requirements, standards, techniques and practices.

## Competence

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

### Commentary

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

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

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

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

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

**4[A]** To maintain the required level of competence, a lawyer should develop an

understanding of, and the ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in Rule 3.3.

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

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

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

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

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

**[7B]** In providing short-term summary legal services under rules 3.4-2A to 3.4-2D, a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term summary legal services may be required or are advisable, and encourage the client to seek such further

assistance.

**[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. A lawyer should only express his or her legal opinion when it is genuinely held and is provided to the standard of a competent lawyer.

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

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

**[11]** *[deleted]*

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

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

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

**[15] Incompetence, Negligence and Mistakes** – This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure, regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

## 3.2 QUALITY OF SERVICE

### Quality of Service

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

#### Commentary

**[1]** This rule should be read and applied in conjunction with section 3.1 regarding competence.

**[2]** A lawyer has a duty to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation. An ordinarily or otherwise competent lawyer may still occasionally fail to provide an adequate quality of service.

**[3]** A lawyer has a duty to communicate effectively with the client. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.

**[4]** A lawyer should ensure that matters are attended to within a reasonable time frame. If the lawyer can reasonably foresee undue delay in providing advice or services, the lawyer has a duty to so inform the client, so that the client can make an informed choice about his or her options, such as whether to retain new counsel.

#### Examples of Expected Practices

**[5]** The quality of service to a client may be measured by the extent to which a lawyer maintains certain standards in practice. The following list, which is illustrative and not exhaustive, provides key examples of expected practices in this area:

- (a) keeping a client reasonably informed;
- (b) answering reasonable requests from a client for information;
- (c) responding to a client's telephone calls;
- (d) keeping appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;

- (e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so;
- (f) ensuring, where appropriate, that all instructions are in writing or confirmed in writing;
- (g) answering, within a reasonable time, any communication that requires a reply;
- (h) ensuring that work is done in a timely manner so that its value to the client is maintained;
- (i) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;
- (j) maintaining office staff, facilities and equipment adequate to the lawyer's practice;
- (k) informing a client of a proposal of settlement, and explaining the proposal properly;
- (l) providing a client with complete and accurate relevant information about a matter;
- (m) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report when one might reasonably be expected;
- (n) avoiding the use of intoxicants or drugs that interferes with or prejudices the lawyer's services to the client;
- (o) being civil.

**[6]** A lawyer should meet deadlines, unless the lawyer is able to offer a reasonable explanation and ensure that no prejudice to the client will result. Whether or not a specific deadline applies, a lawyer should be prompt in handling 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.

## Limited Scope Retainers

**3.2-1A** Before undertaking a limited scope retainer the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.

### Commentary

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

**[2]** A lawyer who is providing legal services under a limited scope retainer should be careful to avoid acting in a way that suggests that the lawyer is providing full services to the client.

**[3]** Where the limited services being provided include an appearance at discovery or before a tribunal a lawyer must be careful not to mislead the tribunal or the parties as to the scope of the retainer and should consider whether disclosure of the limited nature of the retainer is required by the rules of practice or the circumstances.

**[4]** A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed (see rule 7.2-6A).

**[5]** This rule does not apply to situations in which a lawyer is providing summary advice, for example over a telephone hotline or as duty counsel, or to initial consultations that may result in the client retaining the lawyer.

## Honesty and Candour

**3.2-2** When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

### Commentary

**[1]** A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the matter, if any that might influence whether the client selects or continues to retain the lawyer.

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

**[3]** Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's perspective, or may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.

### Language Rights

**3.2-2A** A lawyer must, when appropriate, advise a client of the client's language rights, including the right to proceed in the official language of the client's choice.

**3.2-2B** Where a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer must not undertake the matter unless the lawyer is competent to provide the required services in that language.

### Commentary

**[1]** The lawyer should advise the client of the client's language rights as soon as possible.

**[2]** The choice of official language is that of the client not the lawyer. The lawyer should be aware of relevant statutory and Constitutional law relating to language rights including the *Canadian Charter of Rights and Freedoms*, s.19(1) and Part XVII of the *Criminal Code* regarding language rights in courts under federal jurisdiction and in criminal proceedings. The lawyer should also be aware that provincial or territorial legislation may provide additional language rights, including in relation to aboriginal languages.

**[3]** When a lawyer considers whether to provide the required services in the official language chosen by the client, the lawyer should carefully consider whether it is possible to render those services in a competent manner as required by rule 3.1-2 and related commentary.

**[4]** A lawyer shall, when appropriate, inform the client of the client's language rights relating to a client's matter, including where applicable:

- (a) subsection 19(1) of the *Canadian Charter of Rights and Freedoms* which relates to the right of usage of English or French in every tribunal established by Parliament;
- (b) subsection 19(2) of the *Canadian Charter of Rights and Freedoms* which provides that either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick;
- (c) section 530 of the *Criminal Code* relating to the rights of an accused to be tried in either of the two official languages and to be heard and understood by a court in the language of the accused;
- (d) section 20.2 of the *Insurance Act* which provides for the rights of an insured to be represented by a lawyer who is fluent in the official language of choice of the insured;
- (e) section 17 of the *Official Languages Act* which provides that any person appearing or giving evidence may be heard in the official language of his or her choice without being placed at a disadvantage by reason of such choice (section 18);
- (f) section 19 of the *Official Languages Act* which provides that any person who is party to proceedings before a judicial, quasi-judicial and administrative tribunal, has the right to be heard by a court or tribunal that understands the official language in which the person intends to proceed, without the need for translation;
- (g) subsection 20(1) of the *Official Languages Act* which provides that any person accused of a provincial or municipal offence has the right to have the proceedings conducted in the official language of his or her choice.

### **When the Client Is an Organization**

**3.2-3** Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.

#### **Commentary**

**[1]** A lawyer acting for an organization should keep in mind that the organization, as

such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should ensure that it is the interests of the organization that are served and protected. Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

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

### **Encouraging Compromise or Settlement**

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

#### **Commentary**

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

### **Threatening Criminal or Regulatory Proceedings**

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

- (a) to initiate or proceed with a criminal or quasi-criminal charge or make a complaint to a regulatory authority; or
- (b) to offer to seek or to procure the withdrawal of a criminal or quasi-criminal charge or regulatory complaint.

#### **Commentary**

[1] It is an abuse of the court or regulatory authority's process to threaten to make or advance such a charge or 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, quasi-criminal or regulatory action are not appropriate.

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

### **Inducement for Withdrawal of Criminal or Regulatory Proceedings**

**3.2-6** A lawyer must not:

- (a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;
- (b) accept or offer to accept, or advise a person to accept or offer to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or regulatory authority to enter such discussions; or
- (c) wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

#### **Commentary**

**[1]** "Regulatory authority" includes professional and other regulatory bodies.

**[2]** A lawyer for an accused or potential accused must never influence a complainant or potential complainant not to communicate or cooperate with the Crown. However, this rule does not prevent a lawyer for an accused or potential accused from communicating with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. When a

proposed resolution involves valuable consideration being exchanged in return for influencing the Crown or regulatory authority not to proceed with a charge or to seek a reduced sentence or penalty, the lawyer for the accused must obtain the consent of the Crown or regulatory authority prior to discussing such proposal with the complainant or potential complainant. Similarly, lawyers advising a complainant or potential complainant with respect to any such negotiations can do so only with the consent of the Crown or regulatory authority.

**[3]** A lawyer cannot provide an assurance that the settlement of a related civil matter will result in the withdrawal of criminal or quasi-criminal charges, absent the consent of the Crown or regulatory authority.

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

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

**3.2-7** A lawyer must never:

- (a) knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct;
- (b) do or omit to do anything that the lawyer ought to know assists in or encourages any dishonesty, fraud, crime, or illegal conduct by a client or others; or
- (c) instruct a client or others on how to violate the law and avoid punishment.

#### **Commentary**

**[1]** A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

**[2]** A lawyer should be alert to and avoid unwittingly becoming involved with a client or others engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these and other criminal activities may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or

operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

**[3]** If a lawyer has suspicions or doubts about whether he or she might be assisting a client or others in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client or others and, in the case of a client, about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

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

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

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

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

## Commentary

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

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

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

**[4]** In considering his or her responsibilities under this section, a lawyer should consider whether it is feasible and appropriate to give any advice in writing.

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

**[6]** This rule recognizes that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organization’s and the public’s interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of

the organization, not only about the technicalities of the law, but also about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable and consistent with the organization's responsibilities to its constituents and to the public.

### **Clients with Diminished Capacity**

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

#### **Commentary**

**[1]** A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions depends on such factors as age, intelligence, experience and mental and physical health and on the advice, guidance and support of others. A client's ability to make decisions may change, for better or worse, over time. A client may be mentally capable of making some decisions but not others. The key is whether the client has the ability to understand the information relative to the decision that has to be made and is able to appreciate the reasonably foreseeable consequences of the decision or lack of decision. Accordingly, when a client is, or comes to be, under a disability that impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

**[2]** A lawyer who believes a person to be incapable of giving instructions should decline to act. However, if a lawyer reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, the lawyer may take action on behalf of the person lacking capacity only to the extent necessary to protect the person until a legal representative can be appointed. A lawyer undertaking to so act has the same duties under these rules to the person lacking capacity as the lawyer would with any client.

**[3]** If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect the interests of the client. Whether that should be

done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

**[4]** In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests of the client under a disability. So long as there is no lack of good faith or authority, the judgment of the legal representative should prevail. If a lawyer becomes aware of conduct or intended conduct of the legal representative that is clearly in bad faith or outside that person's authority, and contrary to the best interests of the client with diminished capacity, the lawyer may act to protect those interests. This may require reporting the misconduct to a person or institution such as a family member or the Public Trustee.

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

### 3.3 CONFIDENTIALITY

#### Confidential Information

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

- (a) expressly or impliedly authorized by the client;
- (b) required by law or a court to do so;
- (c) required to deliver the information to the Law Society; or
- (d) otherwise permitted by this rule.

#### Commentary

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

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

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

**[4]** A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter (see rule 3.4-1 – Conflicts).

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

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

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

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

**[8]** A lawyer should avoid indiscreet conversations and other communications, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shoptalk among lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover, the respect of the listener, for lawyers and the legal profession, will probably be lessened. Although the rule may not apply to facts that are public knowledge, a lawyer should guard against participating in or commenting on speculation concerning clients' affairs or business.

**[9]** In some situations, the authority of the client to disclose may be inferred. For example, in court proceedings some disclosure may be necessary in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to administrative staff and to others whose services are used by the lawyer.

But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, students and other lawyers engaged under contract with the lawyer or with the firm of the lawyer the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

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

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

### **Use of Confidential Information**

**3.3-2** A lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.

#### **Commentary**

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

## Future Harm / Public Safety Exception

**3.3-3A** A lawyer must 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.

**3.3-3B** 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 substantial financial injury to an individual caused by an unlawful act that is likely to be committed, and disclosure is necessary to prevent the injury.

### 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 is warranted where the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.

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

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

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

**[4]** How and when disclosure should be made under this rule will depend upon the

circumstances. A lawyer who believes that disclosure may be warranted should contact the Society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.

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

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

**3.3-4** If it is alleged that a lawyer or the lawyer's associates or students-at-law or others engaged under contract with the lawyer or with the firm of the lawyer:

- (a) have committed a criminal offence involving a client's affairs;
- (b) are civilly liable with respect to a matter involving a client's affairs;
- (c) have committed acts of professional negligence; or
- (d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

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

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

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

**3.3-7** A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.

## Commentary

**[1]** As a matter related to clients' interests in maintaining a relationship with counsel of choice and protecting client confidences, lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice.

**[2]** In these situations (see rules 3.4-17 to 3.4-23 on Conflicts from Transfer Between Law Firms), rule 3.3-7 permits lawyers and law firms to disclose limited information. This type of disclosure would only be made once substantive discussions regarding the new relationship have occurred.

**[3]** This exchange of information between the firms needs to be done in a manner consistent with the transferring lawyer's and new firm's obligations to protect client confidentiality and privileged information and avoid any prejudice to the client. It ordinarily would include no more than the names of the persons and entities involved in a matter. Depending on the circumstances, it may include a brief summary of the general issues involved, and information about whether the representation has come to an end.

**[4]** The disclosure should be made to as few lawyers at the new law firm as possible, ideally to one lawyer of the new firm, such as a designated conflicts lawyer. The information should always be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

**[5]** As the disclosure is made on the basis that it is solely for the use of checking conflicts where lawyers are transferring between firms and for establishing screens, the disclosure should be coupled with an undertaking by the new law firm to the former law firm that it will:

- (a) limit access to the disclosed information;
- (b) not use the information for any purpose other than detecting and resolving conflicts; and
- (c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established.

**[6]** The client's consent to disclosure of such information may be specifically addressed in a retainer agreement between the lawyer and client. In some circumstances, however, because of the nature of the retainer, the transferring lawyer and the new law firm may be required to obtain the consent of clients to such disclosure or the disclosure of any further information about the clients. This is especially the case where disclosure would compromise solicitor-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge).

## 3.4 CONFLICTS

### Duty to Avoid Conflicts of Interest

**3.4-1** A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

#### Commentary

**[1]** Lawyers have an ethical duty to avoid conflicts of interest. Some cases involving conflicts of interest will fall within the scope of the bright line rule as articulated by the Supreme Court of Canada. The bright line rule prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate legal interests of another client even if the matters are unrelated unless the clients consent. However, the bright line rule cannot be used to support tactical abuses and will not apply in the exceptional cases where it is unreasonable for the client to expect that the lawyer or law firm will not act against it in unrelated matters. See also rule 3.4-2 and commentary [6].

**[2]** In cases where the bright line rule is inapplicable, the lawyer or law firm will still be prevented from acting if representation of the client would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. 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.

**[3]** This rule applies to a lawyer's representation of a client in all circumstances in which the lawyer acts for, provides advice to or exercises judgment on behalf of a client. Effective representation may be threatened where a lawyer is tempted to prefer other interests over those of his or her own client: the lawyer's own interests, those of a current client, a former client, or a third party.

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

**[5]** 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 based on trust. It is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers

respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests.

**[6]** A client must be assured of the lawyer's undivided loyalty, free from any material impairment of the lawyer and client relationship. The relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate legal interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client.

#### **Other Duties Arising from the Duty of Loyalty**

**[7]** The lawyer's duty of confidentiality is owed to both current and former clients, with the related duty not to attack the legal work done during a retainer or to undermine the former client's position on a matter that was central to the retainer.

**[8]** The lawyer's duty of commitment to the client's cause prevents the lawyer from summarily and unexpectedly dropping a client to circumvent conflict of interest rules. The client may legitimately feel betrayed if the lawyer ceases to act for the client to avoid a conflict of interest.

**[9]** The duty of candour requires a lawyer or law firm to advise an existing client of all matters relevant to the retainer.

#### **Identifying Conflicts**

**[10]** 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. 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 Areas Where Conflicts of Interest May Occur**

**[11]** Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive.

- (a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.
- (b) A lawyer 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, 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 his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.
- (e) A lawyer or his or her law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.
  - (i) These two roles may result in a conflict of interest or other problems because they may

- (A) affect the lawyer's independent judgment and fiduciary obligations in either or both roles,
  - (B) obscure legal advice from business and practical advice,
  - (C) jeopardize the protection of lawyer and client privilege, and
  - (D) disqualify the lawyer or the law firm from acting for the organization.
- (f) Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute.
- (i) The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

### **The Role of the Court and Law Societies**

**[12]** These rules set out ethical standards to which all members of the profession must adhere. The courts have a separate supervisory role over court proceedings. In that role, the courts apply fiduciary principles developed by the courts to govern lawyers' relationships with their clients, to ensure the proper administration of justice. A breach of the rules on conflicts of interest may lead to sanction by a law society even where a court dealing with the case may decline to order disqualification as a remedy.

### **Consent**

**3.4-2** A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all affected clients and the lawyer reasonably believes that he or she is able to represent the client without having a material adverse effect upon the representation of or loyalty to the client or another client.

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

- (iv) the client has commonly consented to lawyers acting for and against it in unrelated matters.

## **Commentary**

### **Disclosure and Consent**

**[1]** Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. 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]** Disclosure means full and fair disclosure of all information relevant to a person's decision in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. The lawyer therefore 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.

**[2A]** While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable or not sophisticated.

**[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 limited circumstances consent may be implied, rather than expressly granted. In some cases it may be unreasonable for a client to claim that it expected that the loyalty of the lawyer or law firm would be undivided and that the lawyer or law firm would refrain from acting against the client in unrelated matters. In considering whether the client's expectation is reasonable, the nature of the relationship between the lawyer and client, the terms of the retainer and the matters involved must be considered. Governments, chartered banks and entities that might be considered sophisticated consumers of legal services may accept that lawyers may act against them in unrelated matters where there is no danger of misuse of confidential information. The more sophisticated the client is as a consumer of legal services, the more likely it will be that an inference of consent can be drawn. The mere nature of the client is not, however, a sufficient basis upon which to assume implied consent; the matters must be unrelated, the lawyer must not possess confidential information from one client that could affect the other client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

### **Short-Term Summary Legal Services**

**3.4-2A** In rules 3.4-2B to 3.4-2D "Short-term summary legal services" means advice or representation to a client under the auspices of pro bono or not-for-profit legal service with the expectation by the lawyer and the client that the lawyer will not provide continuing legal services in the matter.

**3.4-2B** A lawyer may provide short-term summary legal services without taking steps to determine whether there is a conflict of interest.

**3.4-2C** Except with consent of the clients as provided in rule 3.4-2, a lawyer must not provide, or must cease providing short-term summary legal services to a client where the lawyer knows or becomes aware that there is a conflict of interest.

**3.4-2D** A lawyer who provides short-term summary legal services must take reasonable measures to ensure that no disclosure of the client's confidential information is made to another lawyer in the lawyer's firm.

#### **Commentary**

**[1]** Short-term summary legal service and duty counsel 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 the not-for-profit legal services provider and the lawyers and law firms who provide these services. Performing a full conflicts screening in circumstances in which the short-term summary services described in these rules are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided.

**[2]** The limited nature of short-term summary legal services 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 summary legal services only if the lawyer has actual knowledge of a conflict of interest between the client receiving short-term summary legal services and an existing client of the lawyer or an existing client of the *pro bono* or not for profit legal services provider or between the lawyer and the client receiving short-term summary legal services.

**[3]** Confidential information obtained by a lawyer providing the services described in rules 3.4-2A to 2D will not be imputed to the lawyers in the lawyer's firm or to associates. As such, these individuals may continue to act for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services, and may act in future for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services.

**[4]** In the provision of short-term summary legal services, the lawyer's knowledge about possible conflicts of interest is based on the lawyer's reasonable recollection and

information provided by the client in the ordinary course of consulting with the *pro bono* or not-for-profit legal services provider to receive its services.

## **Dispute**

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

### **Commentary**

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

## **Concurrent Representation with Protection of Confidential Client Information**

**3.4-4** Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:

- (a) disclosure of the risks of the lawyers so acting has been made to each client;
- (b) the lawyer recommends each client receive independent legal advice, including on the risks of concurrent representation;
- (c) the clients each determine that it is in their best interests that the lawyers so act and consent to the concurrent representation;
- (d) each client is represented by a different lawyer in the firm;
- (e) appropriate screening mechanisms are in place to protect confidential information; and
- (f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

## Commentary

**[1]** This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the rule prohibiting representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs.

**[2]** An example is a law firm acting for a number of sophisticated clients in a matter such as competing bids in a corporate acquisition in which, although the clients' interests are divergent and may conflict, the clients are not in a dispute. Provided that each client is represented by a different lawyer in the firm and there is no real risk that the firm will not be able to properly represent the legal interests of each client, the firm may represent both even though the subject matter of the retainers is the same. Whether or not a risk of impairment of representation exists is a question of fact.

**[3]** The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other.

**[4]** In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see rule 3.4-20).

## Joint Retainers

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

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

## Commentary

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

**[2]** A lawyer who receives instructions from spouses or partners to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with rule 3.4-5. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will:

- (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
- (b) in accordance with rule 3.3-1, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and
- (c) the lawyer would have a duty to decline the new retainer, unless:
  - (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;
  - (ii) the other spouse or partner had died; or
  - (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

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

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

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

**Commentary**

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

**3.4-8** Except as provided by rule 3.4-9, if a contentious issue arises between clients who have consented to a joint retainer,

- (a) the lawyer must not advise them on the contentious issue and must:
  - (i) refer the clients to other lawyers; or
  - (ii) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:
    - (A) no legal advice is required; and
    - (B) the clients are sophisticated.
- (b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

**Commentary**

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

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

**3.4-9** Subject to this rule, if clients consent to a joint retainer and also agree that if a contentious issue arises the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer. (The form contained in appendix A – Lawyer Acting for More than One

Client in a Real Estate Transaction must be used in circumstances when clients consent that the lawyer acts for both the purchaser and vendor in a real estate transaction.)

#### **Commentary**

**[1]** This rule does not relieve the lawyer of the obligation when the contentious issue arises to obtain the consent of the clients when there is or is likely to be a conflict of interest, or if the representation on the contentious issue requires the lawyer to act against one of the clients.

**[2]** When entering into a joint retainer, the lawyer should stipulate that, if a contentious issue develops, the lawyer will be compelled to cease acting altogether unless, at the time the contentious issue develops, all parties consent to the lawyer's continuing to represent one of them. Consent given before the fact may be ineffective since the party granting the consent will not at that time be in possession of all relevant information.

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

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

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

#### **Commentary**

**[1]** This rule guards against the misuse of confidential information from a previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client's position on a matter that was central to a previous retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

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

- (a) the former client consents to the other lawyer acting; or
- (b) the law firm has:
  - (i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the lawyer to any other lawyer, any other member or employee of the law firm, or any other person whose services the lawyer or the law firm has retained in the new matter; and
  - (ii) advised the lawyer's former client, if requested by the client, of the measures taken.

#### **Commentary**

[1] The commentary to rules 3.4-17 to 3.4-23 regarding conflicts from transfer between law firms provide valuable guidance for the protection of confidential information in the rare cases in which it is appropriate for another lawyer in the lawyer's firm to act against the former client.

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

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

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

**3.4-14** Provided there is compliance with this rule, and in particular rules 3.4-5 to 3.4-9, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction in any of the following situations:

- (a) the lender is a lending client;
- (b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;
- (c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or
- (d) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act* (Canada).

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

#### **Commentary**

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

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

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

#### **Commentary**

**[1]** Rules 3.4-15 and 3.4-16 are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g., mortgage loan instructions) and the consent is generally acknowledged by such clients when the lawyer is requested to act.

**[2]** Rule 3.4-16 applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without

restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

## Conflicts from Transfer Between Law Firms

### Application of Rule

**3.4-17** In rules 3.4-17 to 3.4-23,

“**matter**” means a case, a transaction, or other client representation, but within such representation does not include offering general “know-how” and, in the case of a government lawyer, providing policy advice unless the advice relates to a particular client representation.

**3.4-18** Rules 3.4-17 to 3.4-23 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) it is reasonable to believe the transferring lawyer has confidential information relevant to the new law firm’s matter for its client; or
- (b) all of the following circumstances exist:
  - (i) 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 or represented its client (“former client”);
  - (ii) the interests of those clients in that matter conflict; and
  - (iii) the transferring lawyer actually possesses relevant information respecting that matter.

### Commentary

**[1]** The purpose of the rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in *MacDonald Estate v. Martin*, [1990] 3 SCR 1235, with respect to the partners or associates of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the era of the mega-firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in rule 3.4-20, have been taken to

ensure that no disclosure will occur by the transferring lawyer to the member or members of the firm who are engaged against a former client.

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

**[3] 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 and an interjurisdictional law firm.

**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 government who, after transferring from one department, ministry or agency to another, continues to be employed by that government.

#### **Commentary**

**[1] 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.

#### **Law Firm Disqualification**

**3.4-20** If the transferring lawyer actually possesses confidential information relevant to a matter 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 has:
  - (i) taken reasonable measures to ensure that there will be no disclosure of the former client’s confidential information by the transferring lawyer to any member of the new law firm; and

- (ii) advised the lawyer's former client, if requested by the client, of the measures taken.

### **Commentary**

**[1]** 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 there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm." Such measures may include timely and properly constructed confidentiality screens.

**[2]** For example, the various legal services units of a government, a corporation with separate regional legal departments, an inter-jurisdictional 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."

**[3]** The guidelines that follow 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.

### **Guidelines: How to Screen / Measures to Be Taken**

1. The screened lawyer should have no involvement in the new law firm's representation of its client in the matter.
2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
4. The firm should take steps to preclude the screened lawyer from having access to any part of the file.
5. The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better),

and should advise all affected lawyers and support staff of the measures taken.

6. These Guidelines apply with necessary modifications to situations in which non-lawyer staff leave one law firm to work for another and a determination is made, before hiring the individual, on whether any conflicts of interest will be created and whether the potential new hire actually possesses relevant confidential information.

#### **How to Determine If a Conflict Exists Before Hiring a Potential Transferee**

**[4]** When a law firm (“new law firm”) considers hiring a lawyer, or an articulated law student (“transferring lawyer”) from another law firm (“former law firm”), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a firm in which the transferring lawyer worked at some earlier time.

**[5]** After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether any conflicts exist. In determining whether the transferring lawyer actually possesses relevant 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. See rule 3.3-7 which provides that a lawyer may disclose confidential information to the extent the lawyer reasonably believes necessary to detect and resolve conflicts of interest where lawyers transfer between firms.

**[6]** A lawyer’s duty to the lawyer’s firm may also govern a lawyer’s conduct when exploring an association with another firm and is beyond the scope of these rules.

#### **Transferring Lawyer Disqualification**

**3.4-21** Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 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 except as permitted by rule 3.3-7.

**3.4-22** 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 except as permitted by rule 3.3-7.

### **Lawyer Due-Diligence for Non-Lawyer Staff**

**3.4-23** A lawyer or a law firm must exercise due diligence in ensuring that each member and employee of the law firm, and each other person whose services the lawyer or the law firm has retained:

- (a) complies with rules 3.4-17 to 3.4-23; and
- (b) does not disclose confidential information of clients of:
  - (i) of clients of the firm; or
  - (ii) any other law firm in which the person has worked.

#### **Commentary**

**[1]** This rule is intended to regulate lawyers and articulated law students who transfer between law firms. It also imposes a general duty on lawyers and law firms 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.

**[2]** Certain non-lawyer staff in a law firm routinely have full access to and work extensively on client files. As such, they may possess confidential information about the client. If these staff move from one law firm to another and the new firm acts for a client opposed in interest to the client on whose files the staff worked, unless measures are taken to screen the staff, it is reasonable to conclude that confidential information may be shared. It is the responsibility of the lawyer / law firm to ensure that staff who may have confidential information that if disclosed, may prejudice the interests of the client of the former firm, have no involvement with and no access to information relating to the relevant client of the new firm.

**3.4-24 [deleted]**

**3.4-25 [deleted]**

**3.4-26 [deleted]**

## Doing Business with a Client

### Definitions

**3.4-27** In rules 3.4-27 to 3.4-41,

**“independent legal advice”** means a retainer in which:

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

**“independent legal representation”** means a retainer in which

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

#### Commentary

**[1]** If a client elects to waive independent legal representation and to rely on independent legal advice only, the retained lawyer has a responsibility that should not be

lightly assumed or perfunctorily discharged.

A “**lawyer**” includes an associate, related persons as defined by the *Income Tax Act* (Canada), and a trust or estate in which the lawyer has a beneficial interest or for which the lawyer acts as a trustee or in a similar capacity;

“**related persons**” means related persons as defined in the *Income Tax Act* (Canada).

### **Transactions with Clients**

**3.4-28** A lawyer must not enter into a transaction with a client unless the transaction with the client is fair and reasonable to the client.

**3.4-29** Subject to rules 3.4-30 to 3.4-36, where a transaction involves: lending or borrowing money, buying or selling property or services having other than nominal value, giving or acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment, or entering into a common business venture, a lawyer must, in sequence,

- (a) disclose the nature of any conflicting interest or how a conflict might develop later;
- (b) consider whether the circumstances reasonably require that the client receive independent legal advice with respect to the transaction; and
- (c) obtain the client’s consent to the transaction after the client receives such disclosure and legal advice.

**3.4-30** Rule 3.4-29 does not apply where:

- (a) a client intends to enter into a transaction with a corporation or other entity whose securities are publicly traded in which the lawyer has an interest, or
- (b) a lawyer borrows money from a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business.

### **Commentary**

**[1]** The relationship between lawyer and client is a fiduciary one. The lawyer has a duty to act in good faith. A lawyer should be able to demonstrate that the transaction with the client is fair and reasonable to the client.

**[2]** In some circumstances, the lawyer may also be retained to provide legal services for the transaction in which the lawyer and a client participate. 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. This is because the lawyer cannot act in a transaction with a client where there is a substantial risk that the lawyer's loyalty to or representation of the client would be materially and adversely affected by the lawyer's own interest, unless the client consents and the lawyer reasonably believes that he or she is able to act for the client without having a material adverse effect on loyalty or the representation.

**[3]** If the lawyer chooses not to disclose the conflicting interest or cannot disclose without breaching confidence, the lawyer must decline the retainer.

**[4]** 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, that independent legal advice was received by the client, where required, and that the client's consent was obtained.

#### **Documenting Independent Legal Advice**

**[5]** A lawyer retained to give independent legal advice relating to a transaction should document the independent legal advice by doing the following:

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

#### **Borrowing from Clients**

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

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

(b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer:

- (i) discloses to the client the nature of the conflicting interest; and
- (ii) requires that the client receive independent legal advice or, where the circumstances reasonably require, independent legal representation.

**3.4-32** Subject to rule 3.4-31, if 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 borrows money from a client, the lawyer must:

- (a) disclose to the client the nature of the conflicting interest; and
- (b) require that the client obtain independent legal representation.

#### **Commentary**

**[1]** Whether a person is considered a client within rules 3.4-32 and 3.4-33 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.

**[2]** Given the definition of "lawyer" applicable to these Doing Business with a Client rules, a lawyer's spouse or a corporation controlled by the lawyer would be prohibited from borrowing money from a lawyer's unrelated client. Rule 3.4-33 addresses situations where a conflicting interest may not be immediately apparent to a potential lender. As such, in the transactions described in the rule, the lawyer must make disclosure and require that the unrelated client from whom the entity in which the lawyer or the lawyer's spouse has a direct or indirect substantial interest is borrowing has independent legal representation.

#### **Lending to Clients**

**3.4-33** A lawyer must not lend money to a client unless before making the loan, the lawyer

- (a) discloses to the client the nature of the conflicting interest;
- (b) requires that the client
  - (i) receive independent legal representation, or

- (ii) if the client is a related person receive independent legal advice; and
- (c) obtains the client's consent.

**3.4-33A** For the purposes of rule 3.4-33 and subject to section 3.6, the payment of necessary expenses in a legal matter that the lawyer is handling for the client shall not be deemed to constitute the lending of money to the client, whether the lawyer charges interest to the client or not.

### **Guarantees by a Lawyer**

**3.4-34** Except as provided by rule 3.4-36, a lawyer retained to act with respect to a transaction in which a client is a borrower or a lender must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is the borrower or lender.

**3.4-35** A lawyer may give a personal guarantee in the following circumstances:

- (a) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business, 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 rules 3.4-28 to 3.4-36; and
  - (ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

### **Payment for Legal Services**

**3.4-36** 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 nonmaterial 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.

#### **Commentary**

**[1]** 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.

#### **Gifts and Testamentary Instruments**

**3.4-37** A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

**3.4-38** A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

**3.4-39** Unless the client is a family member of the lawyer, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer a gift or benefit from the client, including a testamentary gift.

#### **Judicial Interim Release and Release Pending Determination of Appeal**

**3.4-40** A lawyer must not act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to a person for whom the lawyer acts.

**3.4-41** A lawyer may act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to a person who is in a family relationship with the lawyer when the person is represented by the lawyer's partner or associate.

## 3.5 PRESERVATION OF CLIENTS' PROPERTY

### Preservation of Clients' Property

**3.5-1** In this rule, “**property**” includes a client’s money, securities as defined in *The Securities Act*, original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client’s correspondence, files, reports, invoices and other such documents, as well as personal property including precious and semi-precious metals, jewellery and the like.

**3.5-2** A lawyer must:

- (a) care for a client’s property as a careful and prudent owner would when dealing with like property; and
- (b) observe all relevant rules and law about the preservation of a client’s property entrusted to a lawyer.

#### Commentary

**[1]** The duties concerning safekeeping, preserving, and accounting for clients’ monies and other property are set out in the *Uniform Trust Account Rules* under the *Law Society Act, 1996*.

**[2]** These duties are closely related to those regarding confidential information. A lawyer is responsible for maintaining the safety and confidentiality of the files of the client in the possession of the lawyer and should take all reasonable steps to ensure the privacy and safekeeping of a client’s confidential information. A lawyer should keep the client’s papers and other property out of sight as well as out of reach of those not entitled to see them.

**[3]** Subject to any rights of lien, the lawyer should promptly return a client’s property to the client on request or at the conclusion of the lawyer’s retainer.

**[4]** If the lawyer withdraws from representing a client, the lawyer is required to comply with rule 3.7-1 – *Withdrawal from Representation*.

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

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

### **Identifying Clients' Property**

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

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

### **Accounting and Delivery**

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

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

#### **Commentary**

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

## 3.6 FEES AND DISBURSEMENTS

### Reasonable Fees and Disbursements

**3.6-1** A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.

#### Commentary

- [1]** What is a fair and reasonable fee depends on such factors as:
- (a) the time and effort required and spent;
  - (b) the difficulty of the matter and the importance of the matter to the client;
  - (c) whether special skill or service has been required and provided;
  - (d) the results obtained;
  - (e) fees authorized by statute or regulation;
  - (f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;
  - (g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;
  - (h) any relevant agreement between the lawyer and the client;
  - (i) the experience and ability of the lawyer;
  - (j) any estimate or range of fees given by the lawyer; and
  - (k) the client's prior consent to the fee.
- [2]** The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, extra fees, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person.
- [3]** A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees, disbursements,

taxes and interest, as is reasonable and practical in the circumstances, including the basis on which fees will be determined.

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

### **Contingent Fees and Contingent Fee Agreements**

**3.6-2** Subject to rule 3.6-1, a lawyer may enter into a written agreement in accordance with governing legislation that provides that the lawyer's fee is contingent, in whole or in part, on the outcome of the matter for which the lawyer's services are to be provided.

#### **Commentary**

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

**[2]** Although a lawyer is generally permitted to terminate the professional relationship with a client and withdraw services if there is justifiable cause as set out in rule 3.7-1, special circumstances apply when the retainer is pursuant to a contingent fee agreement. In such circumstances, the lawyer has impliedly undertaken the risk of not being paid in the event the suit is unsuccessful. Accordingly, a lawyer cannot withdraw from representation for reasons other than those set out in rule 3.7-7 (Obligatory Withdrawal) unless the written contingent fee agreement specifically states that the

lawyer has a right to do so and sets out the circumstances under which this may occur.

### **Statement of Account**

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

### **Commentary**

**[1]** A lawyer's duty of candour to a client requires the lawyer to disclose to the client at the outset, in a manner that is transparent and understandable to the client, the basis on which the client is to be billed for both professional time (lawyer, student-at-law and paralegal) and any other charges.

**[2]** Party-and-party costs received by a lawyer are the property of the client and should therefore be accounted for to the client. While an agreement that the lawyer will be entitled to costs is not uncommon, it does not affect the lawyer's obligation to disclose the costs to the client.

### **Joint Retainer**

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

### **Division of Fees and Referral Fees**

**3.6-5** If there is consent from the client, fees for a matter may be divided between lawyers who are not in the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

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

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

**3.6-7** A lawyer must not:

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

#### **Commentary**

**[1]** This rule does not prevent a lawyer from engaging in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients generally by a non-lawyer.

**[2]** The lawyer may accept payment for fees for professional legal services provided by the lawyer to or on behalf of the client, and for disbursements incurred by the lawyer on behalf of the client, in any medium of monetary exchange including by way of a credit card or debit card.

#### **Exception for Inter-Jurisdictional Law Firms**

**3.6-8** Rule 3.6-7 does not apply to sharing of fees, cash flows or profits by lawyers who are members of an inter-jurisdictional law firm.

#### **Commentary**

**[1]** An affiliation is different from an inter-jurisdictional law firm, however structured. An affiliation is subject to rule 3.6-7. In particular, an affiliated entity is not permitted to share in the lawyer's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

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

**3.6-9** If a lawyer and client agree that the lawyer will act only if the lawyer's retainer is paid in advance, the lawyer must confirm that agreement in writing with the client and specify a payment date.

**3.6-10** A lawyer must not appropriate any client funds held in trust or otherwise under the lawyer's control for or on account of fees, except as permitted by the governing legislation.

## Commentary

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

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

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

### Prepaid Legal Services Plan

**3.6-12** A lawyer who accepts a client referred by a prepaid legal services plan must advise the client in writing of:

- (a) the scope of work to be undertaken by the lawyer under the plan; and
- (b) the extent to which a fee or disbursement will be payable by the client to the lawyer.

## 3.7 WITHDRAWAL FROM REPRESENTATION

### Withdrawal from Representation

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

#### Commentary

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

**[2]** An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. When the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question (see rule 3.7-8 – Manner of Withdrawal).

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

**[4]** *[deleted]*

### Optional Withdrawal

**3.7-2** If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

### **Commentary**

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

### **Non-Payment of Fees**

**3.7-3** If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

### **Commentary**

**[1]** When the lawyer withdraws because the client has not paid the lawyer's fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial.

### **Withdrawal from Criminal Proceedings**

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

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

### **Commentary**

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

**3.7-5** If a lawyer has agreed to act in a criminal case and the date set for trial is not such as to enable the client to obtain another lawyer or to enable another lawyer to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act must not withdraw because of non-payment of fees.

**3.7-6** If a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees and there is not a sufficient interval between a notice to the client of the lawyer's intention to withdraw and the date on which the case is to be tried to enable the client to obtain another lawyer and to enable such lawyer to prepare adequately for trial, the first lawyer, unless instructed otherwise by the client, should attempt to have the trial date adjourned and may withdraw from the case only with the permission of the court before which the case is to be tried.

### **Commentary**

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

### **Obligatory Withdrawal**

**3.7-7** A lawyer must withdraw if:

- (a) discharged by a client;
- (b) a client persists in instructing the lawyer to act contrary to professional ethics; or
- (c) the lawyer is not competent to continue to handle a matter.

## Leaving a Law Firm

**3.7-7A** When a lawyer leaves a law firm, the lawyer and the law firm must:

- (a) ensure that clients who have current matters for which the departing lawyer has conduct or substantial involvement are given reasonable notice that the lawyer is departing and are advised of their options for retaining counsel; and
- (b) take reasonable steps to obtain the instructions of each affected client as to who they will retain.

### Commentary

**[1]** When a lawyer leaves a firm to practise elsewhere, it may result in the termination of the lawyer-client relationship between that lawyer and a client.

**[2]** The client's interests are paramount. Clients must be free to decide whom to retain as counsel without undue influence or pressure by the lawyer or the firm. The client should be provided with sufficient information to make an informed decision about whether to continue with the departing lawyer, remain with the firm where that is possible, or retain new counsel.

**[3]** The lawyer and the law firm should cooperate to ensure that the client receives the necessary information on the available options. While it is preferable to prepare a joint notification setting forth such information, factors to consider in determining who should provide it to the client include the extent of the lawyer's work for the client, the client's relationship with other lawyers in the law firm and access to client contact information. In the absence of agreement, both the departing lawyer and the law firm should provide the notification.

**[4]** If a client contacts a law firm to request a departed lawyer's contact information, the law firm should provide the professional contact information where reasonably possible.

**[5]** Where a client chooses to remain with the departing lawyer, the instructions referred to in the rule should include written authorizations for the transfer of files and client property. In all cases, the situation should be managed in a way that minimizes expense and avoids prejudice to the client.

**[6]** In advance of providing notice to clients of their intended departure the lawyer

should provide such notice to the firm as is reasonable in the circumstances.

**[7]** When a client chooses to remain with the firm, the firm should consider whether it is reasonable in the circumstances to charge the client for time expended by another firm member to become familiar with the file.

**[8]** The principles outlined in this rule and commentary will apply to the dissolution of a law firm. When a law firm is dissolved the lawyer-client relationship may end with one or more of the lawyers involved in the retainer. The client should be notified of the dissolution and provided with sufficient information to decide who to retain as counsel. The lawyers who are no longer retained by the client should try to minimize expense and avoid prejudice to the client.

**[9]** See also rules 3.7-8 to 3.7-10 and related commentary regarding enforcement of a solicitor's lien and the duties of former and successor counsel.

**3.7-7B** Rule 3.7-7A does not apply to a lawyer leaving (a) a government, a Crown corporation or any other public body or (b) a corporation or other organization for which the lawyer is employed as in-house counsel.

### **Manner of Withdrawal**

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

**3.7-9** On discharge or withdrawal, a lawyer must:

- (a) notify the client in writing, stating:
  - (i) the fact that the lawyer has withdrawn;
  - (ii) the reasons, if any, for the withdrawal; and
  - (iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;
- (b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;
- (c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

- (d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;
- (e) promptly render an account for outstanding fees and disbursements;
- (f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and
- (g) comply with the applicable rules of court.

#### **Commentary**

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

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

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

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

**[5]** A lawyer who ceases to act for one or more clients should co-operate with the successor lawyer or lawyers and should seek to avoid any unseemly rivalry, whether real or apparent.

#### **Duty of Successor Lawyer**

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

#### **Commentary**

**[1]** It is quite proper for the successor lawyer to urge the client to settle or take

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



## CHAPTER 4 – MARKETING OF LEGAL SERVICES

## 4.1 MAKING LEGAL SERVICES AVAILABLE

### Making Legal Services Available

**4.1-1** A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 4.1-2, may offer legal services to a prospective client by any means.

#### Commentary

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

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

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

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

## Restrictions

**4.1-2** In offering legal services, a lawyer must not use means that:

- (a) are false or misleading;
- (b) amount to coercion, duress, or harassment;
- (c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered; or
- (d) otherwise bring the profession or the administration of justice into disrepute.

### Commentary

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

## 4.2 MARKETING

### Marketing of Professional Services


- 4.2-1** A lawyer may market professional services, provided that the marketing is:
- (a) demonstrably true, accurate and verifiable;
  - (b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;
  - (c) in the best interests of the public and consistent with a high standard of professionalism.

#### Commentary

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

### Advertising of Fees

- 4.2-2** A lawyer may advertise fees charged for their services provided that:
- (a) the advertising is reasonably precise as to the services offered for each fee quoted;
  - (b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee; and



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

### 4.3 ADVERTISING NATURE OF PRACTICE

**4.3-1** The marketing of legal services by a practising lawyer or law firm shall not use the words “specialist”, “specializing”, “expert”, “expertise”, or synonyms thereof.

#### Commentary

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

**[2]** A lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist. A claim that a lawyer is a specialist or expert, or specializes in an area of law, implies that the lawyer has met some objective standard or criteria of expertise, presumably established or recognized by the Society. In the absence of the Society’s recognition or a certification process, an assertion by a lawyer that the lawyer is a specialist or expert is misleading and improper.

**[3]** If a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm that makes reference to the status of a firm member as a specialist or expert, in media circulated concurrently in New Brunswick and the certifying jurisdiction, does not offend this rule if the certifying authority or organization is identified.

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



#### **4.4 DUTY REGARDING ADVERTISING BY FIRM**

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**4.4-1** A lawyer who knows or ought to know that the advertising of the firm within which the lawyer practises law violates rule 4.2 or 4.3 must take the reasonable steps to put an end to such a violation.



CHAPTER 5 – RELATIONSHIP TO THE ADMINISTRATION OF  
JUSTICE

## 5.1 THE LAWYER AS ADVOCATE

### Advocacy

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

#### Commentary

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

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

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

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

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

**[6]** When opposing interests are not represented, for example, in without notice or

uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

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

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

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

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

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

- (a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;
- (b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;
- (c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;
- (d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;
- (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
- (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;
- (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;
- (h) make suggestions to a witness recklessly or knowing them to be false;
- (i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;
- (j) improperly dissuade a witness from giving evidence or advise a witness to be absent;
- (k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;
- (l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation;
- (m) needlessly abuse, hector or harass a witness;
- (n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal or quasi-

criminal charge or a complaint to a regulatory authority or by offering to seek or to procure the withdrawal of a criminal or quasi-criminal charge or complaint to a regulatory authority;

(o) needlessly inconvenience a witness; or

(p) appear before a court or tribunal while under the influence of alcohol or a drug.

### **Commentary**

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

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

**[3]** It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to gain a benefit. See also rules 3.2-5 and 3.2-6 and accompanying commentary.

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

### **Incriminating Physical Evidence**

**5.1-2A** A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

## Commentary

**[1]** In this rule, "evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

**[2]** This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is wholly exculpatory, and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

**[3]** A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its mere existence. Possession of illegal things could constitute an offence. A lawyer in possession of incriminating physical evidence should carefully consider his or her options. These options include, as soon as reasonably possible:

- (a) delivering the evidence to law enforcement authorities or the prosecution, either directly or anonymously;
- (b) **[deleted]**
- (c) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

**[4]** A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the evidence. A lawyer cannot merely continue to keep possession of the incriminating physical evidence.

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. The lawyer's advice to a client that the client has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary or electronic information is needed. A lawyer should ensure that there is no concealment, destruction or any alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.

### **Duty as Prosecutor**

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

### **Commentary**

[1] When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect. In reviewing matters involving the exercise of prosecutorial discretion by a Crown prosecutor, the Executive Director or the Registrar of Complaints will be guided by the following from the Supreme Court of Canada decision in *Krieger v. Law Society of Alberta*, 2002 SCC 65.

"There is clear distinction between prosecutorial discretion and professional conduct. It is only the latter that can be regulated by the Society. The Society has the jurisdiction to investigate any alleged breach of its ethical standards, even those committed by the Crown prosecutors in connection with their prosecutorial discretion.

Review by the Society for bad faith or improper purpose by a prosecutor does not constitute a review of the exercise of prosecutorial discretion per se, since an official action which is undertaken in bad faith or for improper motives is not within the scope of the Attorney General. As stated by McIntyre J. in his concurrence in *Nelles v. Ontario*, 1989 CanLII 77 (SCC) supra, at p.211: "public officers are entitled to no special

immunities or privileges when they act beyond the powers which are accorded to them by law in their official capacities.” We agree with the observation of MacKenzie J. that “conduct amounting to bad faith or dishonesty is beyond the pale of prosecutorial discretion” (para 55).

**[2]** The duties in this Code generally apply, *mutatis mutandis*, to lawyers acting as prosecutors who are not full-time or part-time Crown Attorneys. This will include a lawyer who has conduct of proceedings in the name of a complainant in any proceeding against an accused who may be convicted of any offence or charge and as a result face fine, punishment or any other penalty including reprimand or suspension or dismissal from any employment, activity or organization.

### **Disclosure of Error or Omission**

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

#### **Commentary**

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

### **Courtesy**

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

#### **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 a lawyer, even though unpunished as contempt, may constitute professional misconduct.

## Undertakings

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

### Commentary

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

## Agreement on Guilty Plea

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

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

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

### Commentary

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

## 5.2 THE LAWYER AS WITNESS

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### Submission of Evidence

**5.2-1** A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

#### Commentary

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

### Appeals

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



**5.3** *[deleted]*

## 5.4 COMMUNICATING WITH WITNESSES

**5.4-1** A lawyer may seek information from any potential witness, provided that:

- (a) before doing so, the lawyer discloses the lawyer's interest in the matter;
- (b) the lawyer does not encourage the witness to suppress evidence or to refrain from providing information to other parties in the matter; and
- (c) the lawyer observes rules 7.2-6 to 7.2-8 on communicating with represented parties.

### Commentary

**[1]** There is generally no property in a witness. To achieve the truth-seeking goal of the justice system, any person having information relevant to a proceeding should be free to impart it voluntarily and in the absence of improper influence. A lawyer should not advise a potential witness to refrain from speaking to other parties except as provided in this rule.

### Expert Witnesses

**[2]** Special considerations may apply when communicating with expert witnesses. Depending on the area of practice and the jurisdiction, there may be legal or procedural limitations on the permissible scope of a lawyer's contact with an expert witness, including the application of litigation or solicitor-client privilege. This may include notifying an opposing party's counsel prior to communicating with that party's expert witness.

### Conduct During Witness Preparation and Testimony

**5.4-2** A lawyer must not influence a witness or potential witness to give evidence that is false, misleading or evasive.

**5.4-3** A lawyer involved in a proceeding must not obstruct an examination or cross-examination in any manner.

### Commentary

#### General Principles

**[1]** The ethical duty against improperly influencing a witness or a potential witness applies at all stages of a proceeding, including while preparing a witness to give evidence or to make a statement, and during testimony under oath or affirmation. The role of an advocate is to assist the witness in bringing forth the evidence in a manner

that ensures fair and accurate comprehension by the tribunal and opposing parties.

**[2]** A lawyer may prepare a witness for discovery and for appearances before tribunals, by discussing courtroom and questioning procedures and the issues in the case, reviewing facts, refreshing memory, and by discussing admissions, choice of words and demeanour. It is, however, improper to direct or encourage a witness to misstate or misrepresent the facts or to give evidence that is intentionally evasive or vague.

### **Communicating with Witnesses Under Oath or Affirmation**

**[3]** During any witness testimony under oath or affirmation, a lawyer should not engage in conduct designed to improperly influence the witness' evidence.

**[4]** The ability of a lawyer to communicate with a witness at a specific stage of a proceeding will be influenced by the practice, procedures or directions of the relevant tribunal and may be modified by agreement of counsel with the approval of the tribunal. Lawyers should become familiar with the rules and practices of the relevant tribunal governing communication with witnesses during examination-in-chief and cross-examination, and prior to or during re-examination.

**[5]** A lawyer may communicate with a witness during examination-in-chief. However, there may be local exceptions to this practice.

**[6]** It is generally accepted that a lawyer is not permitted to communicate with the witness during cross-examination except with leave of the tribunal or with the agreement of counsel. The opportunity to conduct a full-ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing advocate's ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer's witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objections to proper questions, attempts to have the witness change or tailor evidence or other similar conduct while the examination is ongoing.

**[7]** A lawyer should seek approval from the tribunal before speaking with a witness after cross-examination and before re-examination.

### **Discoveries and Other Examinations**

**[8]** Rule 5.4 also applies to examinations under oath or affirmation that are not before a tribunal including examinations for discovery, examinations on affidavits and

examinations in aid of execution. Lawyers should scrupulously avoid any attempts to influence witness testimony, particularly as the tribunal is unable to directly monitor compliance. This rule is not intended to prevent discussions between a lawyer and the lawyer's own witness during adjournments of examination for discovery for the purpose of clarifying issues, fulfilling undertakings, or correcting the earlier testimony of the witness.

## 5.5 RELATIONS WITH JURORS

### Communications Before Trial

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

#### Commentary

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

### Disclosure of Information

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

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

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

### Communication During Trial

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

**5.5-5** A lawyer who is not connected with a case before the court must not communicate with or cause another to communicate with any member of the jury about the case.

**5.5-6** A lawyer must not have any discussion after trial with a member of the jury about its deliberations.

<b>Commentary</b>
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<p><b>[1]</b> The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of members of his or her family.</p>
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## 5.6 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

### Encouraging Respect for the Administration of Justice

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

#### Commentary

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

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

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

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

### **Seeking Legislative or Administrative Changes**

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

#### **Commentary**

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

### **Security of Court Facilities**

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

#### **Commentary**

**[1]** If possible, the lawyer should suggest solutions to the anticipated problem such as:

- (a) further security, or
- (b) reserving judgment.

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

**[3]** If client information is involved in those situations, the lawyer should be guided by

the provisions of section 3.3 – Confidentiality.

## 5.7 LAWYERS AND MEDIATORS

### Role of Mediator

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

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

#### Commentary

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

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

**[3]** If the parties have not already done so, a lawyer-mediator generally should suggest that they seek the advice of separate counsel before and during the mediation process, and encourage them to do so.

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





CHAPTER 6 – RELATIONSHIP TO STUDENTS, EMPLOYEES, AND  
OTHERS

## 6.1 SUPERVISION

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### Direct Supervision Required

**6.1-1** A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.

#### Commentary

**[1]** A lawyer may permit a non-lawyer to act only under the supervision of a lawyer. The extent of supervision will depend on the type of legal matter, including the degree of standardization and repetitiveness of the matter, and the experience of the non-lawyer generally and with regard to the matter in question. The burden rests on the lawyer to educate a non-lawyer concerning the duties that the lawyer assigns to the non-lawyer and then to supervise the manner in which such duties are carried out. A lawyer should review the non-lawyer's work at sufficiently frequent intervals to enable the lawyer to ensure its proper and timely completion.

**[2]** A lawyer who practises alone or operates a branch or part-time office should ensure that

- (a) all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work; and
- (b) no unauthorized persons give legal advice, whether in the lawyer's name or otherwise.

**[3]** If a non-lawyer has received specialized training or education and is competent to do independent work under the general supervision of a lawyer, a lawyer may delegate work to the non-lawyer.

**[4]** A lawyer in private practice may permit a non-lawyer to perform tasks delegated and supervised by a lawyer, so long as the lawyer maintains a direct relationship with the client and the lawyer has provided direct supervision of the tasks performed by the non-lawyer.

**[5]** Subject to the provisions of any statute, rule or court practice in that regard, the question of what the lawyer may delegate to a non-lawyer generally turns on the distinction between any special knowledge of the non-lawyer and the professional and

legal judgment of the lawyer, which, in the public interest, must be exercised by the lawyer whenever it is required.

## **Application**

**6.1-2** In chapter 6, a non-lawyer does not include a student-at-law.

## **Delegation**

**6.1-3** A lawyer must not permit a non-lawyer to:

- (a) accept cases on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer approves before any work commences;
- (b) give legal advice;
- (c) give or accept undertakings or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;
- (d) act finally without reference to the lawyer in matters involving professional legal judgment;
- (e) be held out as a lawyer;
- (f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above or except in a supporting role to the lawyer appearing in such proceedings;
- (g) be named in association with the lawyer in any pleading, written argument or other like document submitted to a court;
- (h) be remunerated on a sliding scale related to the earnings of the lawyer, unless the non-lawyer is an employee of the lawyer;
- (i) conduct negotiations with third parties, other than routine negotiations if the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken;

- (j) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;
- (k) sign correspondence containing a legal opinion;
- (l) sign correspondence, unless
  - (i) it is of a routine administrative nature,
  - (ii) the non-lawyer has been specifically directed to sign the correspondence by a supervising lawyer,
  - (iii) the fact the person is a non-lawyer is disclosed, and
  - (iv) the capacity in which the person signs the correspondence is indicated;
- (m) forward to a client or third party any documents, other than routine, standard form documents, except with the lawyer's knowledge and direction;
- (n) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do; or
- (o) issue statements of account.

#### **Commentary**

**[1]** A lawyer is responsible for any undertaking given or accepted and any trust condition accepted by a non-lawyer acting under his or her supervision.

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

**[3]** In real estate transactions using a system for the electronic submission or registration of documents, a lawyer who approves the electronic registration of documents by a non-lawyer is responsible for the content of any document that contains the electronic signature of the non-lawyer.

#### **Law Students**

**6.1-3A** Notwithstanding Rule 6.1-3, a lawyer may delegate particular tasks and functions to a student of the Faculty of Law of the University of New Brunswick or the Université de Moncton during the period the student is participating in a legal aid or clinical law

program operated by or under the supervision of the Faculty or under the authority of an enactment, provided the student:

- (a) is acting under the direct supervision of the lawyer;
- (b) is sufficiently competent and prepared to perform the task; and
- (c) where appropriate, has the informed consent of the client.

### **Suspended or Disbarred Lawyers**

**6.1-4** Without the express approval of the lawyer's governing body, a lawyer must not retain, occupy office space with, use the services of, partner or associate with or employ in any capacity having to do with the practice of law any person who, in any jurisdiction, has been disbarred, suspended, undertaken not to practise or who has been involved in disciplinary action and been permitted to resign and has not been reinstated or readmitted.

### **Electronic Registration of Documents**

**6.1-5** A lawyer who has personalized encrypted electronic access to any system for the electronic submission or registration of documents must not


- (d) permit others, including a non-lawyer employee, to use such access; or
- (e) disclose his or her password or access phrase or number to others.

**6.1-6** When a non-lawyer employed by a lawyer has a personalized encrypted electronic access to any system for the electronic submission or registration of documents, the lawyer must ensure that the non-lawyer does not

- (a) permit others to use such access; or
- (b) disclose his or her password or access phrase or number to others.

#### **Commentary**

**[1]** The implementation of systems for the electronic registration of documents imposes special responsibilities on lawyers and others using the system. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. It



is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized access code, diskettes, etc., used to access the system and the personalized access pass phrase or number.

**[2]** In a real estate practice, when it is permissible for a lawyer to delegate responsibilities to a non-lawyer who has such access, the lawyer should ensure that the non-lawyer maintains and understands the importance of maintaining the security of the system.

## 6.2 STUDENTS

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### Recruitment and Engagement Procedures

**6.2-1** A lawyer must observe any procedures of the Society about the recruitment and engagement of articling or other students.

### Duties of Principal

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

<b>Commentary</b>
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<p><b>[1]</b> A principal or supervising lawyer is responsible for the actions of students acting under his or her direction.</p>
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### Duties of Articling Student

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

## 6.3 DISCRIMINATION AND HARASSMENT

### Discrimination

**6.3-1** A lawyer must not directly or indirectly discriminate against a colleague, employee, client or any other person.

#### Commentary

**[1]** Lawyers are uniquely placed to advance the administration of justice, requiring lawyers to commit to equal justice for all within an open and impartial system. Lawyers are expected to respect the dignity and worth of all persons and to treat all persons fairly and without discrimination. A lawyer has a special responsibility to respect and uphold the principles and requirements of human rights and workplace health and safety laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in such laws.

**[2]** In order to reflect and be responsive to the public they serve, a lawyer must refrain from all forms of discrimination and harassment, which undermine confidence in the legal profession and our legal system. A lawyer should foster a professional environment that is respectful, accessible, and inclusive, and should strive to recognize their own internal biases and take particular care to avoid engaging in practices that would reinforce those biases, when offering services to the public and when organizing their workplace.

**[3]** Indigenous peoples may experience unique challenges in relation to discrimination and harassment as a result of the history of the colonization of Indigenous peoples in Canada, ongoing repercussions of the colonial legacy, systemic factors, and implicit biases. Lawyers should take particular care to avoid engaging in, allowing, or being willfully blind to actions which constitute discrimination or any form of harassment against Indigenous peoples.

**[4]** Lawyers should be aware that discrimination includes adverse effect and systemic discrimination, which arise from organizational policies, practices and cultures that create, perpetuate, or unintentionally result in unequal treatment of a person or persons. Lawyers should consider the distinct needs and circumstances of their colleagues, employees, and clients, and should be alert to unconscious biases that may inform these relationships and that serve to perpetuate systemic discrimination and harassment. Lawyers should guard against any express or implicit assumption that

another person's views, skills, capabilities, and contributions are necessarily shaped or constrained by their gender, race, Indigeneity, disability or other personal characteristic.

**[5]** Discrimination is a distinction, intentional or not, based on grounds related to actual or perceived personal characteristics of an individual or group, which has the effect of imposing burdens, obligations or disadvantages on the individual or group that are not imposed on others, or which withhold or limit access to opportunities, benefits and advantages that are available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will typically constitute discrimination. Intersecting grounds of discrimination require consideration of the unique oppressions that result from the interplay of two or more protected grounds in a given context.

**[6]** The principles of human rights and workplace health and safety laws and related case law apply to the interpretation of this Rule and to Rules 6.3-2 to 6.3-4. A lawyer has a responsibility to stay apprised of developments in the law pertaining to discrimination and harassment, as what constitutes discrimination, harassment, and protected grounds continue to evolve over time and may vary by jurisdiction.

**[7]** Examples of behaviour that constitute discrimination include, but are not limited to:

- (a) harassment (as described in more detail in the Commentary to Rules 6.3-2 and 6.3-3);
- (b) refusing to employ or to continue to employ any person on the basis of any personal characteristic protected by applicable law;
- (c) refusing to provide legal services to any person on the basis of any personal characteristic protected by applicable law;
- (d) charging higher fees on the basis of any personal characteristic protected by applicable law;
- (e) assigning lesser work or paying an employee or staff member less on the basis of any personal characteristic protected by applicable law;
- (f) using derogatory racial, gendered, or religious language to describe a person or group of persons;
- (g) failing to provide reasonable accommodation to the point of undue hardship;
- (h) applying policies regarding leave that are facially neutral (i.e. that apply to all

employees equally), but which have the effect of penalizing individuals who take parental leave, in terms of seniority, promotion or partnership;

- (i) providing training or mentoring opportunities in a manner which has the effect of excluding any person from such opportunities on the basis of any personal characteristic protected by applicable law;
- (j) providing unequal opportunity for advancement by evaluating employees on facially neutral criteria that fail to take into account differential needs and needs requiring accommodation;
- (k) comments, jokes or innuendos that cause humiliation, embarrassment or offence, or that by their nature, and in their context, are clearly embarrassing, humiliating or offensive;
- (l) instances when any of the above behaviour is directed toward someone because of their association with a group or individual with certain personal characteristics; or
- (m) any other conduct which constitutes discrimination according to any applicable law.

**[8]** It is not discrimination to establish or provide special programs, services or activities which have the object of ameliorating conditions of disadvantage for individuals or groups who are disadvantaged for reasons related to any characteristic protected by applicable laws.

**[9]** Lawyers are reminded that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice.

## **Harassment**

**6.3-2** A lawyer must not harass a colleague, employee, client or any other person.

### **Commentary**

**[1]** Harassment includes an incident or a series of incidents involving physical, verbal or non-verbal conduct (including electronic communications) that might reasonably be expected to cause humiliation, offence or intimidation to the person who is subjected to the conduct. The intent of the lawyer engaging in the conduct is not determinative. It is harassment if the lawyer knew or ought to have known that the conduct would be unwelcome or cause humiliation, offence or intimidation. Harassment

may constitute or be linked to discrimination.

**[2]** Examples of behaviour that constitute harassment include, but are not limited to:

- (a) objectionable or offensive behaviour that is known or ought reasonably to be known to be unwelcome, including comments and displays that demean, belittle, intimidate or cause humiliation or embarrassment;
- (b) behaviour that is degrading, threatening or abusive, whether physically, mentally or emotionally;
- (c) bullying;
- (d) verbal abuse;
- (e) abuse of authority where a lawyer uses the power inherent in their position to endanger, undermine, intimidate, or threaten a person, or otherwise interfere with another person's career;
- (f) comments, jokes or innuendos that are known or ought reasonably to be known to cause humiliation, embarrassment or offence, or that by their nature, and in their context, are clearly embarrassing, humiliating or offensive; or
- (g) assigning work inequitably.

**[3]** Bullying, including cyberbullying, is a form of harassment. It may involve physical, verbal or non-verbal conduct. It is characterized by conduct that might reasonably be expected to harm or damage the physical or psychological integrity of another person, their reputation or their property. Bullying includes, but is not limited to:

- (a) unfair or excessive criticism;
- (b) ridicule;
- (c) humiliation;
- (d) exclusion or isolation;
- (e) constantly changing or setting unrealistic work targets; or
- (f) threats or intimidation.

**[4]** Lawyers are reminded that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice.

## **Sexual Harassment**

**6.3-3** A lawyer must not sexually harass a colleague, employee, client or any other person.

### **Commentary**

**[1]** Sexual harassment is an incident or series of incidents involving unsolicited or unwelcome sexual advances or requests, or other unwelcome physical, verbal, or nonverbal conduct (including electronic communications) of a sexual nature. Sexual harassment can be directed at others based on their gender, gender identity, gender expression, or sexual orientation. The intent of the lawyer engaging in the conduct is not determinative. It is sexual harassment if the lawyer knew or ought to have known that the conduct would be unwelcome. Sexual harassment may occur:

- (a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the person who is subjected to the conduct;
- (b) when submission to such conduct is implicitly or explicitly made a condition for the provision of professional services;
- (c) when submission to such conduct is implicitly or explicitly made a condition of employment;
- (d) when submission to or rejection of such conduct is used as a basis for any employment decision, including;
  - (i) Loss of opportunity;
  - (ii) The allocation of work;
  - (iii) Promotion or demotion;
  - (iv) Remuneration or loss of remuneration;
  - (v) Job security; or
  - (vi) Benefits affecting the employee;
- (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;

- (f) when a position of power is used to import sexual requirements into the workplace and negatively alter the working conditions of employees or colleagues; or
- (g) when a sexual solicitation or advance is made by a lawyer who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the lawyer making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

**[2]** Examples of behaviour that constitute sexual harassment include, but are not limited to:

- (a) displaying sexualized or other demeaning or derogatory images;
- (b) sexually suggestive or intimidating comments, gestures or threats;
- (c) comments, jokes that cause humiliation, embarrassment or offence, or which by their nature, and in their context, are clearly embarrassing, humiliating or offensive;
- (d) innuendoes, leering or comments about a person's dress or appearance;
- (e) gender-based insults or sexist remarks;
- (f) communications with sexual overtones;
- (g) inquiries or comments about a person's sex life;
- (h) sexual flirtations, advances, propositions, invitations or requests;
- (i) unsolicited or unwelcome physical contact or touching;
- (j) sexual violence; or
- (k) unwanted contact or attention, including after the end of a consensual relationship.

**[3]** Lawyers should avoid condoning or being willfully blind to conduct in their workplaces that constitutes sexual harassment.

**[4]** Lawyers are reminded that the provisions of this Rule do not only apply to conduct related to, or performed in, the lawyer's office or in legal practice.

## Reprisal

**6.3-4** A lawyer must not engage or participate in reprisals against a colleague, employee, client or any other person because that person has:

- (a) inquired about their rights or the rights of others;
- (b) made or contemplated making a complaint of discrimination, harassment or sexual harassment;
- (c) witnessed discrimination, harassment or sexual harassment; or
- (d) assisted or contemplated assisting in any investigation or proceeding related to a complaint of discrimination, harassment or sexual harassment.

### Commentary

**[1]** The purpose of this Rule is to enable people to exercise their rights without fear of reprisal. Conduct which is intended to retaliate against a person, or discourage a person from exploring their rights, can constitute reprisal. Examples of such behaviour include, but are not limited to:

- (a) refusing to employ or to continue to employ any person;
- (b) penalizing any person with respect to that person's employment or changing, in a punitive way, any term, condition or privilege of that person's employment;
- (c) intimidating, retaliating against or coercing any person;
- (d) imposing a pecuniary or any other penalty, loss or disadvantage on any person;
- (e) changing a person's workload in a disadvantageous manner, or withdrawing opportunities from them; or
- (f) threatening to do any of the foregoing.





CHAPTER 7 – RELATIONSHIP TO THE SOCIETY AND OTHER  
LAWYERS

## 7.1 RESPONSIBILITY TO THE SOCIETY AND THE PROFESSION GENERALLY

### Communications from the Society

**7.1-1** A lawyer must reply promptly and completely to any communication from the Society.

### Meeting Financial Obligations

**7.1-2** A lawyer must promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy, when called upon to do so.

#### Commentary

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

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

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

### Duty to Report

**7.1-3** Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society any situation in which another lawyer's clients are likely to be materially prejudiced, including:

- (a) the misappropriation or misapplication of trust monies;
- (b) the abandonment of a law practice;

- (c) participation in criminal activity related to a lawyer's practice;
- (d) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer and;
- (e) conduct that raises a substantial question about the lawyer's capacity to provide professional services because of mental, physical or emotional conditions, disorders or addictions.

#### **Commentary**

**[1]** Unless a lawyer who departs from proper professional conduct or competence is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of this Code. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer). In all cases, the report must be made without malice or ulterior motive.

**[2]** Nothing in this rule is meant to interfere with the lawyer-client relationship.

**[3]** Instances of conduct described in this rule can arise from a variety of stressors, physical, mental or emotional conditions, disorders or addictions. Lawyers who face such challenges should be encouraged by other lawyers to seek assistance as early as possible.

**[4]** The Society supports professional support groups, such as the Lawyers' Assistance Program, in their commitment to the provision of confidential counselling. Therefore, lawyers providing peer support for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in serious misconduct or in criminal activity related to the lawyer's practice or there is a substantial risk that the lawyer may in the future engage in such conduct or activity. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.



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

**7.1-4** A lawyer must encourage a client who has a claim or complaint against an apparently dishonest lawyer to report the facts to the Society as soon as reasonably practicable.

## 7.2 RESPONSIBILITY TO LAWYERS AND OTHERS

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### Courtesy and Good Faith

**7.2-1** A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

#### Commentary

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

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

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

**[4]** A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

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

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

## Communications

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

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

**7.2-6** Subject to rules 7.2-6A and 7.2-7, if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:

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

### Commentary

**[1]** Rule 7.2-6 applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by a lawyer concerning the matter to which the representation 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.

**7.2-6A** Where a person is represented by a lawyer under a limited scope retainer on a matter, another lawyer may, without the consent of the lawyer providing the limited scope legal services, approach, communicate or deal with the person directly on the matter unless the lawyer has been given written notice of the nature of the legal services being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer.

### Commentary

**[1]** Where notice as described in rule 7.2-6A has been provided to a lawyer for an opposing party, the opposing lawyer is required to communicate with the person's lawyer, but only to the extent of the limited representation as identified by the lawyer. The opposing lawyer may communicate with the person on matters outside of the limited scope retainer.

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

**Commentary**

**[1]** *[deleted]*

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

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

**7.2-8** A lawyer retained to act on a matter involving a corporate or other organization represented by a lawyer must not approach an officer or employee of the organization:

- (a) who has the authority to bind the organization;
- (b) who supervises, directs or regularly consults with the organization's lawyer; or
- (c) whose own interests are directly at stake in the representation,

in respect of that matter, unless the lawyer representing the organization consents or the contact is otherwise authorized or required by law.

### **Commentary**

**[1]** This rule applies to corporations and other organizations. “Other organizations” include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals, regulatory bodies and sole proprietorships. This rule prohibits a lawyer representing another person or entity from communicating about the matter in question with persons likely involved in the decision-making process for a corporation or other organization. If an agent or employee of the organization is represented in the matter by a lawyer, the consent of that lawyer to the communication will be sufficient for purposes of this rule. A lawyer may communicate with employees or agents concerning matters outside the representation.

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

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

- (a) recommend to the unrepresented person to obtain legal representation,;
- (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
- (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

### **Commentary**

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

## Inadvertent Communications

**7.2-10** Where the lawyer has access to, or comes into possession of, a document or thing that the lawyer has or ought to have reasonable grounds to believe belongs to or is intended for another person and was not intended to be seen by the lawyer,

- (a) if the document or thing has been unread by the lawyer, shall direct it to the lawyer of the person for whom it was intended and shall destroy any copy made thereof, or
- (b) if the document or thing has been read in whole or in part the lawyer shall cease reading the same, shall destroy any copy made thereof and shall direct the document or thing to the lawyer of the person for whom it was intended, advising that lawyer of the extent to which the lawyer is aware of the contents thereof and of what use the lawyer intends to make of those contents.

### Commentary

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

**[2]** Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Unless a lawyer is required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.

## Undertakings and Trust Conditions

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

## Commentary

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

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

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

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

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

**[6]** Any trust condition that is accepted is binding upon a lawyer, whether imposed by another lawyer or by a lay person. A lawyer may seek to impose trust conditions upon

a non-lawyer, whether an individual or a corporation or other organization, but great caution should be exercised in so doing since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical obligations that exist between lawyers.

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

## 7.3 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

### Maintaining Professional Integrity and Judgment

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

#### Commentary

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

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

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

#### Commentary

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

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

## 7.4 THE LAWYER IN PUBLIC OFFICE

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### Standard of Conduct

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

#### Commentary

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

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

**[3]** Lawyers holding public office are also subject to the provisions of section 3.4 (Conflicts) when they apply.

## 7.5 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

### Communication with the Public

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

#### Commentary

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

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

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

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

**[5]** Lawyers are often involved in non-legal activities involving contact with the media to publicize such matters as fund-raising, expansion of hospitals or universities, programs of public institutions or political organizations. They sometimes act as spokespersons for organizations that, in turn, represent particular racial, religious or other special interest groups. This is a well-established and completely proper role for lawyers to play in view of the obvious contribution that it makes to the community.

**[6]** Lawyers are often called upon to comment publicly on the effectiveness of existing statutory or legal remedies or the effect of particular legislation or decided

cases, or to offer an opinion about cases that have been instituted or are about to be instituted. This, too, is an important role the lawyer can play to assist the public in understanding legal issues.

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

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

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

#### **Commentary**

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

## 7.6 PREVENTING UNAUTHORIZED PRACTICE

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### Preventing Unauthorized Practice

7.6 A lawyer must assist in preventing the unauthorized practice of law.

#### Commentary

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

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

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**7.7-1** A former judge who is reinstated as a practising member of the Society shall not for a period of three years, unless Council of the Society approves on the basis of exceptional circumstances, appear as counsel before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which the court on which the judge served exercised an appellate or judicial review jurisdiction.

## 7.8 ERRORS AND OMISSIONS

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### Informing Client of Errors or Omissions

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

- (a) promptly inform the client of the error or omission without admitting legal liability;
- (b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and
- (c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

#### Commentary

**[1]** In addition to the obligations imposed by rule 7.8-1, the lawyer has the contractual obligation to report to the lawyer's insurer. Rule 7.8-2 also imposes an ethical duty to report to the insurer(s). Rule 7.8-1 does not relieve a lawyer from the duty to report to the insurer or other indemnitor even if the lawyer attempts to rectify.

### Notice of Claim

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

#### Commentary

**[1]** Under the lawyer's compulsory professional liability insurance policy, a lawyer is contractually required to give written notice to the insurer immediately after the lawyer becomes aware of any actual or alleged error or any circumstances that could give rise to a claim. The duty to report is also an ethical duty which is imposed on the lawyer to protect clients. The duty to report arises whether or not the lawyer considers the claim to have merit.

**[2]** The introduction of compulsory insurance has imposed additional obligations

upon a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. A lawyer has an obligation to comply with the provisions of the policy of insurance. The insurer's rights must be preserved, and the lawyer, in informing the client of an error or omission, should be careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan, or otherwise. There may well be occasions when a lawyer believes that certain actions or a failure to take action have made the lawyer liable for damages to the client when, in reality, no liability exists. Further, in every case, a careful assessment will have to be made of the client's damages arising from a lawyer's negligence.

### **Co-Operation**

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

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

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

**7.8-5** If liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, a lawyer has a duty to pay the balance (see also rule 7.1-2).



APPENDIX A – FORM: LAWYER ACTING FOR MORE THAN ONE  
CLIENT IN A REAL ESTATE TRANSACTION

## APPENDIX A – Form: Lawyer Acting for More than One Client in a Real Estate Transaction

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Re: Property:  
Vendor:  
Purchaser:

Dear Sir / Madam:

This firm has been requested by you to act on your behalf in the proposed purchase / sale of certain real estate as above-noted. We have also been requested by the vendor / purchaser to act on their behalf as well in this transaction. Before we can act for both the vendor and the purchaser in the same real estate transaction, it is necessary that we bring to your attention an amendment to the *Code of Professional Conduct* adopted on July 1, 2016 by the Law Society of New Brunswick.

The amendment states that it may be considered to be improper and to constitute professional misconduct for a solicitor to act for both the vendor and purchaser in the same real estate transaction. However, a solicitor can so act for both parties if both parties concur thereto in writing, and the solicitor undertakes to make complete disclosure to both parties.

Although we do not anticipate that a conflict will arise in this transaction, should one arise it will then be necessary for us to withdraw entirely from the matter and refer both parties to separate solicitors.

If you are in agreement with this, kindly sign and return the enclosed copy of this letter signifying your consent thereto. A similar consent is being obtained from the vendor / purchaser.


Yours very truly,

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[Lawyer]

I / We have read over and understand the above and I / we do hereby concur and consent thereto.

Dated the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.



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*[Vendor / Purchaser]*



APPENDIX A-2 – EX PARTE PROCEEDINGS

## APPENDIX A-2 – Ex parte Proceedings

### EX PARTE PROCEEDINGS

**5.1-2B** In an *ex parte* proceeding, a lawyer must act with utmost good faith and inform the tribunal of all material facts, including adverse facts, known to the lawyer that will enable the tribunal to make an informed decision.

#### Commentary

[1] *Ex parte* proceedings are exceptional. The obligation to inform the tribunal of all material facts includes an obligation of full, fair and candid disclosure to the tribunal (see also Rules 5.1-1, 5.1-2).

[2] The obligation to disclose all relevant information and evidence is subject to a lawyer's duty to maintain confidentiality and privilege (see Rule 3.3).

[3] Before initiating *ex parte* proceedings, a lawyer should ensure that the proceedings are permitted by law and are justified in the circumstances. Where no prejudice would occur, a lawyer should consider giving notice to the opposing party or their lawyer (when they are represented), notwithstanding the ability to proceed *ex parte*.

### Single-Party Communications with a Tribunal

**5.1-2C** Except where authorized by law, and subject to rule 5.1-2B, a lawyer must not communicate with a tribunal in the absence of the opposing party or their lawyer (when they are represented) concerning any matter of substance, unless the opposing party or their lawyer has been made aware of the content of the communication or has appropriate notice of the communication.


#### Commentary

[1] It is improper for a lawyer to attempt to influence, discuss a matter with, or make submissions to, a tribunal without the knowledge of the other party or the lawyer for the other party (when they are represented). A lawyer should be particularly diligent to avoid improper single-party communications when engaging with a tribunal by electronic means, such as email correspondence.

[2] When a tribunal invites or requests a communication from a lawyer, the lawyer should inform the other party or their lawyer. As a general rule, the other party or their lawyer should be copied on communications to the tribunal or given advance notice of the communication.

**[3]** This rule does not prohibit single-party communication with a tribunal on routine administrative or procedural matters, such as scheduling hearing dates or appearances. A lawyer should consider notifying the other party or their lawyer of administrative communications with the tribunal. Routine administrative communications should not include any submissions dealing with the substance of the matter or its merits.

**[4]** When considering whether single-party communication with a tribunal is authorized by law, a lawyer should review local rules, practice directives, and other relevant authorities that may regulate such a communication.



APPENDIX B – GUIDELINES ON ETHICS AND THE NEW  
TECHNOLOGY

## APPENDIX B – Guidelines on Ethics and the New Technology

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<b>Part 4</b>	Software Piracy
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### Part 1 Technology and the Duty of Competence

A lawyer must maintain a state of competence on a continuing basis in all areas which the lawyer practises. This includes maintenance and improvement of knowledge and skills.

With the ever-increasing impact of technology on the practice of law, a lawyer using technology must either have reasonable understanding of the technology used in the lawyer's practice, or access to someone who has such understanding. As well, certain endeavours in the practice of law may require a lawyer to be technologically proficient. For example, it might be impossible to competently handle a complex child / spousal support case without recourse to support calculation software; similarly, it might be impossible to competently handle a complex litigation matter involving a large number of documents without litigation support software.

### Part 2 Practising Law on the Internet

#### 1. Upholding the Law of Other Jurisdictions

A lawyer must respect and uphold the law in personal conduct and in rendering advice and assistance to others. "The law" for these purposes is to be broadly interpreted and includes common law, such as tort law, in addition to criminal and quasi-criminal statutes.

A lawyer who practises law in another jurisdiction by providing legal services through the Internet must respect and uphold the law of the other jurisdiction, and must not engage in unauthorized practice in that jurisdiction.

## **2. Privileged Communications**

A lawyer who comes into possession of a privileged written communication of an opposing party through the lawyer's own impropriety, or with knowledge that the communication is not intended to be read by the lawyer, must not use the communication nor the information contained therein in any respect and must immediately return the communication to opposing counsel, or if received electronically, purge the communication from the system. This includes communications received through email.

## **3. Conflict of Interest**

To ensure that there is no breach of the obligations to avoid conflict of interest when delivering legal services using the Internet or email, a lawyer must determine the actual identity of parties with whom the lawyer is dealing.

## **4. Capacity in Which Lawyer is Acting**

Where there may be confusion as to the capacity in which a lawyer is acting, the lawyer must ensure that such capacity is made as clear as possible to anyone with whom the lawyer deals.

A lawyer who communicates with others in chat rooms, discussion groups or otherwise through electronic media such as the Internet must advise others participating in the communication when the lawyer does not intend to provide legal services.

## **Part 3 Confidentiality and the Internet**

A lawyer has a duty to keep confidential all information concerning a client's business, interests and affairs acquired in the course of a professional relationship.

1. A lawyer must not disclose any confidential information regardless of its source and whether or not it is a matter of public record.

2. A lawyer must not disclose the identity of a client nor the fact of the lawyer's representation.
3. A lawyer must take reasonable steps to ensure the maintenance of confidentiality by all persons engaged or employed by the lawyer.

A lawyer using electronic means of communication must ensure that communications with or about a client reflect the same care and concern for matters of privilege and confidentiality normally expected of a lawyer using any other form of communication. This would include email, whether via the Internet, internal email or otherwise, or the use of cellular telephones or fax machines to transmit confidential client information.

First, both the lawyer and the client can choose to use an electronic means of communication, including the Internet, cellular telephones and fax machines, as a means of communication in the solicitor-client relationship. The use on the part of the client or the lawyer may be said to be an implied invitation to use or respond via the same electronic means.

Second, while initially there seems to have been much debate on this topic, the better view today is that there is no basis to conclude that Internet communications are any less private than those using traditional land-line telephones. There does not seem to be a ready and apparent danger that email is less confidential than fax machines or cellular telephones, so anyone using the Internet to communicate has a reasonable and justified expectation of privacy, and it cannot be said as a simple rule that a lawyer must encrypt anything that the lawyer believes the client would not want to read in the local newspaper.

Third, lawyers communicating on the Internet without encrypting their transmissions do not violate the principle of confidentiality. While encryption makes theft or interception more difficult, even strong encryption can be technically defeated. The vulnerability to theft and interception therefore remains. However, in ordinary circumstances, a lawyer is not expected to anticipate the criminal activity of theft of solicitor-client communications on the Internet any more than mail theft.

The use of email and other electronic media presents opportunities for inadvertent discovery or disclosure of messages, given the manner in which information:

- (1) is transmitted within the network systems of an Internet;

(2) is kept as a permanent record if conscious efforts are not made to delete those messages and thereby destroy the prospect of inadvertent disclosure.

A lawyer using such technologies must develop and maintain a reasonable awareness of the risks of interception or inadvertent disclosure of confidential messages and how they can be minimized.

Encryption software is available and must be used, if electronic means of communication are used, for those confidences that may be so valuable or sensitive that it is in the client's interest to take the extraordinary step of encrypting to protect them. The challenge, as in so many ethical areas, is to recognize those extraordinary situations and exercise sound judgment in relation to them.

When using electronic means to communicate in confidence with clients or to transmit confidential messages regarding a client, a lawyer must:

- (1) develop and maintain an awareness of how technically best to minimize the risks of such communications being disclosed, discovered or intercepted;
- (2) use reasonably appropriate technical means to minimize such risks;
- (3) when the information is of extraordinary sensitivity, advise clients to use encryption software to communicate with their lawyer, and use such software; and
- (4) develop and maintain such law office management practices as offer reasonable protection against inadvertent discovery or disclosure of electronically transmitted confidential messages.

#### **Part 4 Software Piracy**

Software piracy is illegal and therefore unethical. Lawyers must respect and uphold the law and refrain from discreditable conduct, both as a lawyer and in other capacities.

Lawyers must maintain a standard of competence in their practice and ensure that those they employ or train act in a competent fashion. They must therefore ensure that support staff and students-at-law are aware of applicable licensing provisions. The management and organization of and compliance with licence agreements for all software used by a firm must not be left entirely in the hands of an office manager or support staff.

A lawyer can guard against accidental software piracy by carefully reviewing the provisions of the software licensing agreements for software used in the office. Where strict compliance with the licensing agreement may work a hardship, exemption must be sought from the licensor.

The Software Publishers Association suggests the following steps to staying "legal":

1. Appoint a software manager.
2. Create and implement a software policy and code of ethics.
3. Establish software policies and procedures.
4. Conduct internal controls analysis.
5. Conduct periodic software audits.
6. Establish and maintain a software log of licences and registration materials.
7. Teach software compliance.
8. Enjoy the benefits of software licensing compliance.
9. Thank employees and students for participating<sup>1</sup>.

## **Part 5 Advertising**

### **1. Applicability of *Code of Professional Conduct* to Electronic Media**

Advertising by lawyers either directly or through a medium or agent should be interpreted to include electronic media, including web sites, network bulletin boards, and direct email, and is governed by the *Code of Professional Conduct*.

General – Meaning of "advertisement" means any statement, oral, written, or electronic, made by a lawyer or firm to the public in general or to one or more individuals and having as a substantial purpose the promotion of the lawyer or firm.

These guidelines propose restrictions on advertising content which are directly applicable to electronic advertising and govern advertising initiated through new technology.

### **2. Identification of Lawyer in Internet Communications**

Electronic media are different from more traditional methods of communication because distribution of the advertisement is not limited geographically, nor is access to it always restricted or focused to a particular group of users. In these

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1 [Copying Software Is Illegal](#), SPA Education: Administrator Advice, p. 1.

circumstances, there is an enhanced potential that a viewer of a network bulletin or web site might view an advertisement and be confused as to a lawyer's identity, location, or qualifications.

A lawyer making representations in generally accessible electronic media must include the name, law firm, mailing address, licensed jurisdiction of practice, and email address of at least one lawyer responsible for the communication's content in the communication.

### **3. Multi-Jurisdictional Advertising**

Where a lawyer is entitled to practise in more than one jurisdiction, and these jurisdictions are identified in representations on electronic media, that lawyer must ensure that the advertisement complies with the advertising rules governing legal advertising in each of those jurisdictions.

### **4. Restrictions on Indiscriminate Distribution**

Some forms of direct solicitation via electronic media can produce widespread and unwanted communication. Although the existing Directive does not contemplate direct solicitation of potential clients, limits on contacts with potential clients who are recovering or are vulnerable as a result of a traumatic experience, and may be hospitalized or in custody must be observed.

The following provisions are examples of interactions with the public which are not compatible with the best interests of the profession, the administration of justice and society generally:

1. Advertisement of professional services using electronic media where the advertisement is directly and indiscriminately distributed to a substantial number of newsgroups or electronic mail addresses.
2. Posting of electronic messages to newsgroups, listservs or bulletin boards whose topic scope does not include the proposed advertisement.
3. Advertisement of professional services using electronic media where the advertisement substantially interferes with another's use of the media or invades the privacy of other users.

A lawyer's advertising activity is further governed by the provisions of these guidelines which direct that a lawyer in conducting the business aspects of the practice of law must adhere to the highest business standards of the community. Where indiscriminate electronic distribution of advertising information is unacceptable in the general business community that makes use of technology, the largely unwritten business practices governing conduct will apply to the advertising lawyer.

## **Part 6 General**

When interpreting these guidelines, the lawyer should have reference to the *Code of Professional Conduct*. Like the Code, these guidelines should be understood and followed in their spirit as well as in the letter.

The details of the fact situations in which the Code and these guidelines apply will change as technology changes, but the principles of ethical professional conduct will not.

### **Appendix B-1          Software Piracy**

#### **What is software piracy?**

Software piracy is the unauthorized copying, reproduction, use or manufacture of software products. Microsoft defines "copying" as: (1) downloading software (reproducing it) on your computer's temporary memory by running the programs from a floppy disk, hard disk, CD ROM, or other storage material; (2) downloading software onto another media such as a hard disk (e.g. a diskette) or your computer's hard disk (your computer's main information storage area); or (3) using software which has been placed on your office's network server<sup>2</sup>.

Software piracy is not contingent upon the value of the software copied. The unauthorized copying of a \$10 computer game and the unauthorized copying of a \$1,000 office management suite are both acts of software piracy.

Piracy does not include the sale of software in accordance with the terms of transfer characteristically contained in a license agreement.

#### **How does software piracy occur?**

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<sup>2</sup> Microsoft Licensing Policies: Answers to Frequently Asked Questions, p. 1.

There are several ways in which software can be pirated. Counterfeiting occurs whenever software is duplicated and sold by a person and in a manner not authorized by the owner as if it were the genuine article. Softlifting occurs whenever a single copy of the genuine article is purchased but it is then copied onto several computers, contrary to the terms of the license agreement. Hard-disk loading occurs when you purchase a computer which already has software copied onto its hard disk, contrary to the terms of the manufacturer's licensing agreement. A "certificate of authenticity" is not a license agreement.

Bulletin-board piracy occurs when software is placed on a BBS (Bulletin Board Service on the Internet) and it is downloaded onto a hard disk, contrary to the terms of the manufacturer's licensing agreement<sup>3</sup>. Software rental occurs when software is rented or borrowed (like a videotape) for temporary use, contrary to the terms of the licensing agreement<sup>4</sup>.

Pirating can occur whenever copying occurs. A person who receives email containing contraband software is now in possession of pirated software.

### **Are software licensing policies standardized?**

The short answer is, NO! There are at least 4 general types of licences (also referred to as "end user licence agreements» or "EULA's") used in the software industry:

*Node-locking* – a form of licence that restricts use of software to a particular computer only. While many may use the software, it can only be used on that computer;

*User-based licensing* – a form of licence that restricts use to a particular user only, commonly through some form of password. While anyone with the password may use the product, only that person can access the software at that time;

*Site licensing* – a form of licence that restricts use to a particular site or geographical area, such as an office;

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3 Note that some public domain software, "freeware" (software offered by the manufacturer for free use by anyone) and some forms of "shareware" are available via the Internet without licensing restrictions.

4 A recent amendment to the *Copyright Act* permits rental software only where the owner expressly authorizes it.

*Network licensing* – a form of licence that restricts (or the cost of licensing is calculated on) a particular number of users of the software. When usage exceeds a particular number of users, another licence must be paid for, This form of licence is generally used by larger corporations using many different forms of software.

Each of these licence forms may also make use of an expiration date, which can further limit its use. Each agreement must be scrutinized in order to ensure compliance with its individual terms<sup>5</sup>. While there is some controversy over the "*shrinkwrap licence*", it is certainly far from clear that this form of licensing agreement is always unenforceable<sup>6</sup>.

### **Is software piracy illegal?**

Yes. The Copyright Act, R.S.C. 1985, c. C-42 protects a developer or owner's intellectual property rights in all software created by her / him. The owner has the exclusive right to produce, reproduce or publish the work or any substantial part thereof. Copying software is illegal, regardless of whether the copied software is thereafter offered for sale, is given away free, or is retained for the copier's own use<sup>7</sup>. The copyright also exists automatically upon creation. That is to say, it is not necessary for the creator to place the

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- 5 QL Systems Limited's licensing agreement, for instance, places restrictions on the user's ability to store information downloaded from its database. A QL Contract Addendum provides that:  
"The Customer may save temporarily in machine-readable form within local storage medium forming part of the Customer's terminal equipment retrieved documents for non-consecutive periods of no longer duration than one-half hour for the purpose of printing single copies of those retrieved documents on a printer attached to the Customer's local terminal equipment. The Customer shall not save or permit all third party to save any database or any part thereof for use with any information retrieval or storage program operated on equipment forming part of the Customer's local terminal equipment or on any computer facility other than QL's computer facility. The Customer shall not retain nor permit any third party to retain for any period longer than one-half hour on magnetic or optical disks, diskettes, tapes, cassettes or other storage media any copy of any database or of any part thereof."
  - 6 Many, "shrinkwrap licence" transactions are actually sales, as opposed to licences. Since the licence agreement had not been introduced until after the purchase (or the contract) has been consummated, it may not be enforceable. This notion is problematic, however, and will depend on a variety of circumstances, including the nature of licensed use, price, the computing platform and competitor's actions.
  - 7 The *Copyright Act* makes an exception to the general rule against copying in order to create a backup disk (should your original be destroyed or damaged) or making a copy for the purpose of adapting, converting or modifying the software in order to adapt it to another computer or type of computer.

mark ©, the words "copyright", "All rights reserved" or any other words for the software to receive copyright protection.

Copyright infringement can result in liability for any damage caused to the copyright owner (including lost profits)<sup>8</sup>. Software piracy is also an indictable offence punishable by up to 5 years imprisonment and / or a fine of up to \$1 million<sup>9</sup>.

### **Are any of these provisions enforced?**

Yes. Software publishing is a multi-billion dollar industry. Software piracy has become a substantial industry as well. It has been estimated that more than \$8 billion worth of software is pirated annually; more than \$1 billion of which occurs in the United States alone<sup>10</sup>. With such substantial losses, concerted efforts are being made to enforce copyright and licensing provisions relating to software. These efforts include education of software users and the public at large, creation of an anti-piracy hotline, software audits and civil lawsuits against offending businesses or individuals. The Software Publishers Association (SPA) embarked upon an anti-piracy campaign in 1990 and reports that its efforts have resulted in more than \$16 million in penalties since then<sup>11</sup>. Enforcement actions have not been limited to the United States<sup>12</sup>.

Fortunately, the software industry appears to be moving towards more flexible methods of licensing designed to accommodate a variety of highly individual circumstances<sup>13</sup>. Use measurement software is available and is a viable alternative for the very large corporation or law firm.

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8 *Copyright Act*, s. 35.

9 *Copyright Act*, s. 42.

10 *Software Publishers Association (SPA)*, SPA Education: Administrator Advice, p. 1.

11 *Ibid.*, *SPA Increased Action Taken Against Software Pirates by 23% in 1995*, p. 1.

12 *The SPA reports that, as of July 16", 1996, it had filed lawsuits against 21 organizations in Canada for illegally renting software programs. 5 such lawsuits had been brought in 1995.*

*See: Ibid.*, *SPA Sues 21 Canadian Software Rental Stores*, p. 1

13 *Copying Software Is Illegal*, SPA Education: Administrator Advice, p. 1