THE LAW SOCIETY OF SASKATCHEWAN

CODE OF PROFESSIONAL CONDUCT

Adopted by The Law Society of Saskatchewan
in Convocation on September 26, 1991,
to be effective on October 1, 1991

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FORWARD

The Law Society of Saskatchewan wishes to acknowledge the invaluable assistance of Donald S. McKercher, Q.C., Professor Russell Buglass and the staff of The Law Society, particularly A. Kirsten Logan, Deputy Secretary-Treasurer and Allan T. Snell, In-house Counsel. These four individuals were active participants in the work of the Committee of the Benchers which prepared the draft for consideration by the Benchers in Convocation. Mr. McKercher was a member of the special committee of the Canadian Bar Association which drafted The Canadian Bar Association Code of Professional Conduct which was adopted by Council in August, 1987. Professor Buglass is a Professor Law at the University of Saskatchewan and has, for a number of years, taught the Professional Responsibility classes in the College of Law.

The Law Society also wishes to gratefully acknowledge the prior work of the special committee of the Canadian Bar Association and notes that The Law Society of Saskatchewan Code of Professional Conduct is based, in large part, on The Canadian Bar Association Code of Professional Conduct.

Lyle V. Cundall, Q.C.
President
Regina, September 26, 1991

PREFACE[1]

[Amended December 11, 1992]

The legal profession has developed over the centuries to meet a public need for legal services on a professional basis. Traditionally, this has involved the provision of advice and representation to protect or advance the rights, liberties and property of a client by a trusted adviser with whom the client has a personal relationship and whose integrity, competence and loyalty are assured.[2]

In order to satisfy this need for legal services adequately, lawyers and the quality of service they provide must command the confidence and respect of the public. This can only be achieved if lawyers establish and maintain a reputation for both integrity and high standards of legal skill and care. The lawyers of many countries in the world, despite differences in their legal systems, practices, procedures and customs, have all imposed upon themselves substantially the same basic standards. Those standards invariably place their main emphasis on integrity and competence.

The Legislature has entrusted responsibility for maintaining standards of professional conduct and discipline for lawyers to the Benchers of The Law Society of Saskatchewan. This responsibility is carried out through the Rules of the Law Society, this Code and the discipline process.

The Legal Profession Act, 1990, describes the conduct which subjects a lawyer to discipline. A lawyer may be disciplined for "conduct unbecoming". This is an act or conduct inimical to the best interests of the public or the members of the society; or, which tends to harm the standing of the legal profession.[3]

With these exceptions the Act and Rules do not specify the conduct which would subject a lawyer to discipline. This Code does not define conduct unbecoming. That responsibility is given under the Act to committees of the Benchers. However, the duties stated in this Code are relied on by the Benchers in making Professional Conduct Rulings and violations have been the basis for findings of conduct unbecoming by hearing committees. The rules, principles and commentaries are intended both to provide general guidance and prohibit some forms of conduct.

The essence of professional responsibility is that the lawyer must act at all times *uberrimae fidei*, with utmost good faith to the court, to the client, to other lawyers, and to members of the public. Given the many and varied demands to which the lawyer is subject, it is inevitable that problems will arise. No set of rules can foresee every possible situation, but the ethical principles set out in the Code are intended to provide a framework within which the lawyer may, with courage and dignity, provide the high quality of legal services that a complex and ever-changing society demands.[4].

The extent to which each lawyer's conduct should rise above the minimum standards set by the Code is a matter of personal decision. The lawyer who would

enjoy the respect and confidence of the community as well as of other members of the legal profession must strive to maintain the highest possible degree of ethical conduct. The greatness and strength of the legal profession depend on high standards of professional conduct that permit no compromise.

The Code of Professional Conduct is to be understood and applied in the light of the public interest, which is its primary purpose. This principle is implicit in the legislative grant of self-government. The application of the Code to the diverse situations that confront an active professional in a changing society will reveal gaps, ambiguities and apparent inconsistencies. The Code should not be construed as a denial of the existence of other duties equally imperative although not mentioned. The principle of protection of the public interest will serve to guide the practitioner to the intent of the Code and the applicable principles of ethical conduct.

The lawyer is more than a mere citizen. The lawyer is an officer of the courts, the client's adviser and advocate and a member of an ancient, honourable and learned profession. The lawyer's duty is to promote the public interest, serve the cause of justice, maintain the authority of the law, be faithful to the client's trust, be candid and courteous with others and be true to good conscience.

NOTES

1. The footnotes relate the provisions of the Code to pertinent earlier Codes, rulings, by-laws, statutes, judicial dicta, text books and articles, as well as to certain other materials. They are not exhaustive.

2. "The core of the proposition is that problems of . . . rights or property call for a personal relationship with a trusted adviser, whose discretion is absolute, who serves no master but his client, and whose competence is assured. The codes and traditions of the professions who supply these services support the basic proposition. They also display the uniformity that its truth would lead one to expect." *Bennion,* p. 16.

3. *The Legal Profession Act, 1990,* c. L-10.1, 2(1)(c)

   Cordery on Solicitors, 7th ed. 1981, p. 333:
   ". . . because he has been guilty of an act or omission for which the Act or some other statute prescribes that penalty, or because he has committed an act of misconduct which renders him unfit to be permitted to continue in practice."

. . . p. 335: "Misconduct which makes a solicitor unfit to continue in practice may be divided into three kinds: criminal conduct, professional misconduct and unprofessional conduct."

. . . p. 336: "The jurisdiction is not limited to cases where the misconduct charged amounts to an indictable offence, or is professional in character, but extends to all cases where the solicitor's conduct is 'unprofessional', i.e., such as renders him unfit to be an officer of the court."

4. "The law and its institutions change as social conditions change. They must change if they are to preserve, much less advance, the political and social values from which they derive their purposes and their life. This is true of the most important of legal

institutions, the profession of law. The profession, too, must change when conditions change in order to preserve and advance the social values that are its reason for being." Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and the Organized Bar* (1965) 12 U.C.L.A.L. Rev. 438, 440.

INTERPRETATION

In this Code the field of professional conduct and ethics is divided into nineteen chapters, each of which contains a short statement of a rule or principle followed by commentary and notes. Although this division gives rise to some overlapping of subjects, the principle of integrity enunciated in Chapter I underlies the entire Code so that some of the rules in subsequent chapters represent particular applications of the basic rule set out in Chapter I. Again there are instances where substantially the same comment appears more than once. Such duplication is considered desirable in order to provide clarity and emphasis and to reduce cross-references.

The commentary and notes to each rule contain a discussion of the ethical considerations involved, explanations, examples and other material designed to assist in the interpretation and understanding of the rule itself. Each rule should therefore be read with and interpreted in the light of the related commentary and notes.

Certain terms used in the Code require definition as follows:

"client"	means a person on whose behalf a lawyer renders or undertakes to render professional services;
"court"	includes conventional law courts and generally all judicial and quasi-judicial tribunals;
"Governing Body"	means the Benchers of The Law Society of Saskatchewan;
"lawyer"	means an individual who is duly authorized to practise law;
"legal profession"	refers to lawyers collectively;
"person"	includes a corporation or other legal entity, an association, partnership or other organization, the Crown in right of Canada or a province and the government of a state or any political subdivision thereof.

It will be noted that the term "lawyer" as defined above extends not only to those engaged in private practice but also to those who are employed on a full-time basis by governments, agencies, corporations and other organizations. An employer-employee relationship of this kind may give rise to special problems in the area of conflict of interest,[1] but in all matters involving integrity[2] and generally in all professional matters, if the requirements or demands of the employer conflict with the standards declared by the Code, the latter must govern.

NOTES

1. See Chap. V.

2. See Chap. I. The Involvement of various lawyers in The Watergate Affair most graphically illustrates some of the hazards.

CHAPTER I

INTEGRITY

RULE

The lawyer shall discharge with integrity all duties owed to the clients, the court, other members of the profession and the public.[1]

Commentary

Guiding Principles

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

2. The principle of integrity is a key element of each rule of the Code.

Disciplinary Action

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

Non-professional Activities

4. Generally speaking, however, a governing body will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the integrity of the legal profession or the lawyer's professional integrity or competence.

NOTES

1. Cf. CBA-COD 1. *O.E.D.*: "Integrity...soundness of moral principle, esp. in relation to truth and fair dealing; uprightness, honesty, sincerity, candour."
Cf. IBA. "Introductory". "The rules of professional conduct enforced in various countries...uniformly place the main emphasis upon the essential need for integrity and, thereafter, upon the duties owed by a lawyer to his client, to the Court, to other members of the legal profession and to the public at large."

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

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

   (a) committing any personally disgraceful or morally reprehensible offence that reflects upon the lawyer's integrity (whereof a conviction by a competent court would be *prima facie* evidence);
   (b) committing, whether professionally or in the lawyer's personal capacity, any act of fraud or dishonesty, e.g., by knowingly making a false tax return or falsifying a document, even without fraudulent intent, and whether or not prosecuted therefor;
   (c) making untrue representations or concealing material facts from a client with dishonest or improper motives;
   (d) taking improper advantage of the youth, inexperience, lack of education or sophistication, ill health, or unbusinesslike habits of a client;
   (e) misappropriating or dealing dishonestly with the client's monies;
   (f) receiving monies from or on behalf of a client expressly for a specific purpose and failing, without the client's consent, to pay them over for that purpose;
   (g) knowingly assisting, enabling or permitting any person to act fraudulently, dishonestly or illegally toward the lawyer's client;
   (h) failing to be absolutely frank and candid in all dealings with the Court, fellow lawyers and other parties to proceedings, subject always to not betraying the client's cause, abandoning the client's legal rights or disclosing the client's confidences;
   (i) failing, when dealing with a person not legally represented, to disclose material facts, e.g., the existence of a mortgage on a property being sold, or supplying false information, whether the lawyer is professionally representing a client or is concerned personally;

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

Other examples are specifically dealt with in subsequent chapters.
(The foregoing are drawn largely from IBA A-A to A-24 and from disciplinary records. For illustrative cases in the same area see, e.g., 36 *Halsbury* (3d) pp. 222-26 and *Orkin*, pp. 204-14. In *Re Weare* (1893), 2 Q.B. 439 (C.A.) the striking off of a solicitor who had knowingly rented his premises for use as a brothel was upheld by the Court.)
As to the distinction between "professional misconduct" and "unprofessional conduct" in disciplinary proceedings, see note 3 to the *Preface, supra.*

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

CHAPTER II

COMPETENCE AND QUALITY OF SERVICE

RULE

(a) A competent lawyer meets the needs of clients, other lawyers, the legal system and the public by:

i) acquiring and maintaining an appropriate level of qualifications, skills, and knowledge;
ii) acting with diligence and honesty;
iii) maintaining a satisfactory level of practice management; and
iv) fostering professional relationships in which reasonable expectations are met, appropriate strategies are adopted, strong communication links are maintained, and the interest of the public is the prime consideration. (See attached Appendix A "Competency Profile")

(clause (a) added September, 2003)

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

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

Commentary

Knowledge and Skill

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

2. As members of the legal profession, lawyers hold themselves out as being knowledgeable, skilled and capable in the practice of law. The client is entitled to assume that the lawyer has the ability and capacity to deal adequately with any legal matters undertaken on the client's behalf.[4]

3. The lawyer should not undertake a matter without honestly feeling either competent to handle it, or 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 to be distinguished from the standard of care that a court would apply for purposes of determining negligence.

4. 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 branches of law wherein the lawyer's practice lies.

5. In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include the complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and 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. 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.

Seeking Assistance

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

Quality of Service

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

(a) failure to keep the client reasonably informed;
(b) failure to answer reasonable requests from the client for information;
(c) unexplained failure to respond to the client's telephone calls;
(d) failure to keep appointments with clients without explanation or apology;
(e) informing the client that something will happen or that some step will be taken by a certain date, then letting the date pass without follow-up information or explanation;
(f) failure to answer within a reasonable time a communication that requires a reply;
(g) doing the work in hand but doing it so belatedly that its value to the client is diminished or lost;

(h) slipshod work, such as mistakes or omissions in statements or documents prepared on behalf of the client;
(i) failure to maintain office staff and facilities adequate to the lawyer's practice;
(j) failure to inform the client of proposals of settlement, or to explain them properly;
(k) withholding information from the client or misleading the client about the position of a matter in order to cover up the fact of neglect or mistakes;
(l) failure to make a prompt and complete report when the work is finished or, if a final report cannot be made, failure to make an interim report where one might reasonably be expected;
(m) self-induced disability, for example from the use of intoxicants or drugs, which interferes with or prejudices the lawyer's services to the client.[5]
(n) failure to maintain an adequate limitation reminder or tickler system to ensure an effective follow-up procedure with respect to the lawyer's files.

[Chapter II Commentary 7(n) added February 4 & 5, 1993]

Promptness

8. The requirement of conscientious, diligent and efficient service means that the lawyer must make every effort to provide prompt service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.[6]

Consequences of Incompetence

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

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

Appendix A

Competence Profile

The issue of competence is on the agenda of several of the Law Society Committees. Thus it was with interest that the Benchers reviewed the competence profile developed by the Western Law Societies Education Task Force. The Task Force developed this profile for newly called lawyers in order that common Bar Admission Course programs can be designed. The profile is being considered by the Law Societies in the four Western Provinces.

The Benchers adopted the profile, without amendment. While the Task Force intended the profile to describe newly called lawyers, it was noted that this could be used as a standard definition of competence.

The following is the profile as developed by the Western Law Societies Education Task Force:

> This competency profile outlines the knowledge, skills and behaviours expected of entry-level lawyers. It lays the foundation for a renewed bar admission course and is a building block in the Western Canada Law Societies' mobility initiative.
>
> A newly called lawyer must demonstrate competency in the following four areas:
>
> 1. Lawyering skills;
> 2. Practice and management skills;
> 3. Ethics and professionalism;
> 4. Legal knowledge.

1. Lawyering Skills

A newly called lawyer shall have and maintain the following lawyering skills:

(i) Problem Solving

A newly called lawyer must:

- identify relevant facts
- identify legal, practical and client issues and conduct the necessary research arising from those issues
- ascertain the clients' goals and objectives
- analyze the results of research
- apply the law to the facts
- form an opinion as to the client's legal entitlements
- identify and assess possible remedies
- develop and implement a plan of action

(ii) Legal Research

A newly called lawyer must:

- identify the question(s) of law
- select sources and methods and conduct research
- select sources and methods and conduct search(es)
- analyze and apply guiding principles of case law
- analyze and apply statutes
- identify, interpret and apply results of research
- effectively communicate the results of research

(iii) Writing

A newly called lawyer must:

- clearly identify the purpose of the proposed communication
- use correct grammar and spelling and use language suitable to the comprehension of the reader and the purpose of the communication
- present the subject of the communication, advice, or submissions in a logical, organized, clear and succinct manner
- be persuasive where appropriate
- be accurate and well-reasoned in legal content and analysis
- communicate with civility

(iv) Drafting

A newly called lawyer must:

- identify the purpose of the document
- effectively organize the document
- be able to draft an original transactional document without a precedent
- use precedents appropriately
- use clear language appropriate to the document
- understand and be able to explain a legal document
- identify and implement all necessary steps to enforce a legal document

(v) Interviewing and Advising

A newly called lawyer must:

- determine the clients' goals, objectives and legal entitlements
- use appropriate questioning techniques to ensure the interview is thorough, effective and efficient
- be understood by the interviewee
- manage client expectations
- establish and maintain rapport and an open communication relationship with the client
- clarify instructions and retainers
- explain and assess possible courses of action with the client
- document the interview

(vi) Advocacy and Dispute Resolution

A newly called lawyer must:

- advocate persuasively to advance a client's position
- represent the client effectively in trial or hearing
- effectively prepare, present and test evidence
- represent the client effectively at a mediation
- negotiate effectively on behalf of a client
- advocate effectively on behalf of a client
- know and observe procedures and etiquette of the forum

2. Practice and Management Skills

A newly called lawyer shall have and maintain the following practice and management skills:

(i) Personal and Practice Management

A newly called lawyer must implement effective practices, procedures or systems for:

- time management
- project management
- diaries/limitation reminders
- timely and on-going client communications
- client development
- risk avoidance
- technological proficiency
- balancing professional life with personal life
- effectively managing documents

(ii) Office Management

A newly called lawyer must understand and be able to implement effective practices, procedures or systems for:

- quality control
- billing and collection
- trust and general accounting
- file and precedent organization
- avoiding conflicts of interest
- diaries/limitation reminders
- record-keeping/archiving/file destruction

3. Ethics and Professionalism

A newly called lawyer shall:

(i) with respect to professionalism:

- demonstrate professional courtesy and good character in all dealings
- maintain and enhance the reputation of the profession
- recognize an obligation to pursue professional development to maintain and enhance legal knowledge and skills
- act in a respectful, non-discriminatory manner
- recognize the limitations on one's abilities to handle a matter and seek help where appropriate

(ii) with respect to ethics:

- recognize circumstances that give rise to ethical problems or conflicts

- recognize and discharge all duties and undertakings
- protect confidences
- know and apply professional ethical standards

4. Legal Knowledge

A newly called lawyer shall have a general knowledge of the substantive law and current practice and procedures of the areas of law that are likely to be encountered in the early years of a general practice.1

NOTES

1. Cf. CBA-COD 2; IBA B-1; ABA-MR 1.1; ABA Canon 6, ECs 6-1 to 6-5, DR 6-101 (a).
"The public looks for a hallmark bestowed by a trusted professional body, and evidenced by entry on a register or members' list (p. 36)...Having bestowed a hallmark of competence, a professional institute has some responsibility for ensuring that it remains valid.", *Bennion,* p. 48.
See also Bastedo, *A Note on Lawyers' Malpractice,* (1970) 7 Osg. Hall L.J. 311.

2. While historically English and Canadian courts held that actions against lawyers for breach of duty were in contract or fiduciary obligation, there has developed an alternative negligence basis for liability: see, Groom v. Crocker (1939) 1 K.B. 194, (1938) 2 All E.R. 394 (C.A.); Nocton v. Lord Ashburton (1914) A.C. 932, 83 LJ Ch 784 (H.L.); Central Trust Co. v. Rafuse et al. (1986) 2 S.C.R. 147, 31 D.L.R. (4th) 481.

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1 The "areas of law likely to be encountered in the early years of a general practice" include:

- Real Estate – which may include, for example, builders' liens, undertakings, contracts, aboriginal lands, tax, foreclosure;
- Civil Procedure – which may include, for example, mediation, negotiation, arbitration, administrative tribunals, evidence, contracts, torts;
- Death and Disability – which may include, for example, wills, estates, planning, probate, representation agreements, wills variation, capacity, aboriginal issues, tax;
- Business – which may include, for example, corporate, commercial, personal property, securities, intellectual property, tax, aboriginal business;
- Criminal Procedure – which may include, for example, Charter of Rights and Freedoms, bail, sentencing, elections, evidence and aboriginal issues;
- Debtor/Creditor – which may include, for example, collections, aboriginal issues, bankruptcy and insolvency;
- Family Relationships – which may include, for example, divorce, custody, maintenance, access, aboriginal issues, same-sex unions, common-law relationships, tax, property rights and distribution, settlement.

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

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

5. Cf. *Orkin,* pp. 123-25, and para. 9, *post.*
"A client has a right to honest explanations for delay on the part of his solicitor, and it is clear that the Benchers...concluded that the solicitor had not given an honest explanation for the delay, but on the contrary had deceived his client as to the reason for such delay...", per Farris, C.J.S.C. in *Re Legal Professions Act; Sandverg v. "F"* (1945), 4 d.l.r. 446 at 447 (B.C. Visitorial Tribunal). Cf. IBA-D1. *The Legal Profession Act, 1990* provides that "conduct unbecoming" includes the practice of law in an incompetent manner (Section 2(1)(d)) and further allows the Law Society to apply to the court for the appointment of a trustee to manage the practice of a member who, inter alia, is unable for any reason to practice as a lawyer (Section 61).

[Chapter II Footnote 5 Amended December 11, 1992]

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

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

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

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CHAPTER III

ADVISING CLIENTS

RULE

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

Commentary

Scope of Advice

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

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

3. The lawyer should clearly indicate the facts, circumstances and assumptions upon which the lawyer's opinion is based, particularly where the circumstances do not justify an exhaustive investigation with 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 merely make comments with many qualifications.

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

Second Opinion

5. If the client so desires, the lawyer should assist in obtaining an independent second opinion.

Compromise or Settlement

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

Dishonesty or Fraud by Client

7. When advising the client the lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment. The lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or of persons associated with such a client.[6]

Test Cases

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

Threatening Criminal Proceedings

9. Apart altogether from the substantive law on the subject, it is improper for the lawyer to advise, threaten or bring a criminal or quasi-criminal prosecution in order to secure some civil advantage for the client, or to advise, seek or procure the withdrawal of a prosecution in consideration of the payment of money, or transfer of property to, or for the benefit of the client.[8]

Advise on Non-Legal Matters

10. In addition to opinions on legal questions, the lawyer may be asked for or expected to give advise on non-legal matters such as the business, policy or social implications involved in a 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 advises on such matters should, where and to the extent necessary, point out the lawyer's lack of experience or other qualification in the particular field and should clearly distinguish legal advice from such other advise.[9]

Errors and Omissions

11. The duty to give honest and candid advise requires the lawyer to inform the client promptly of the facts, but without admitting liability, upon discovering that an error or omission has occurred in a matter for which the lawyer was engaged and that is or may be damaging to the client and cannot readily be rectified. When so informing the client the lawyer should be careful not to prejudice any rights of indemnity that either of them may have under any insurance, client's protection or

indemnity plan, or otherwise. At the same time the lawyer should recommend that the client obtain legal advice elsewhere about any rights the client may have arising from such error or omission and whether it is appropriate for the lawyer to continue to act in the matter. The lawyer should also give prompt notice of any potential claim to the lawyer's insurer and any other indemnitor so that any projection from that source will not be prejudiced and, unless the client objects, should assist and co-operate with the insurer or other indemnitor to the extent necessary to enable any claim that is made to be deal with promptly. If the lawyer is not so indemnified, or to the extent that the indemnity may not fully cover the claim, the lawyer should expeditiously deal with any claim that may be made and must not, under any circumstances, take unfair advantage that might defeat or impair the client's claim. In cases where liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, the lawyer is under a duty to arrange for payment of the balance.[10]

Giving Independent Advice

12. Where the lawyer is asked to provide independent advice or representation to another lawyer's client in a situation where a conflict exists and whether or not that lawyer's fees are being paid by some other party, the provision of such advice or representation is an undertaking to be taken seriously and not lightly assumed or perfunctorily discharged. It involves a duty to the client for whom the independent advice or representation is provided that is the same as in any other lawyer and client relationship and ordinarily extends to the nature and result of the transaction.

NOTES

1. CF. CBA-COD 3; CBA 3(1); Que. 3.01.01; IBA A-10; *Orkin* at pp. 78-79.

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

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

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

5. Cf. CBA 3(3) and *Orkin* at pp. 95-97. N.B. C-3: "The lawyer has a duty to discourage a client from commencing useless litigation; but the lawyer is not the judge of his client's case and if there is a reasonable prospect of success the lawyer is justified in proceeding to trial. To avoid needless expense it is the lawyer's duty to investigate and evaluate the proofs or evidence upon which the client relies *before* the institution of proceedings. Similarly, when possible the lawyer must encourage the client to compromise or settle the dispute."

   "[The litigation process] operates to bring about a voluntary settlement of a large proportion of disputes.... This fact of voluntary settlement is an essential feature of the judicial system", Jackett, C.J.F.C.C., *The Federal Court of Canada, A Manual of Practice* (1971) at pp. 41-42.

Clients with Diminished Capacity

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

Commentary:

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.

A lawyer who believes a person to be incapable of giving instructions should decline to act. Where, however, 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.

Where 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 appointed, for example, a litigation guardian, 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 an appointment of a legal representative occurs, a lawyer should act to preserve and protect the client's interests.

Where there is a legal representative, in some circumstances, 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.

Where a lawyer takes protective action on behalf of a person or client lacking capacity the lawyer should be guided by the provisions under Chapter 4 (Confidentiality). If the court or other counsel become involved, they ought to be informed of the nature of the lawyer's relationship with the person lacking capacity.

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

[Chapter III Footnote 6 Amended December 11, 1992]

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

8. See article, "Criminal Law May Not be Used to Collect Civil Debts" (1968) Vol. 2, No. 4 Law Soc. U.C. Gaz. 36; and cf. B.C. E-5; Alta. 41; ABA DR 7-105(A).

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

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

CHAPTER IV

CONFIDENTIAL INFORMATION

RULE

The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and shall not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law[1] or otherwise permitted or required by this Code.

Commentary

Guiding Principles

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

[Chapter IV Commentary 1 Amended December 11, 1992]

2. This ethical rule must be distinguished from the evidentiary rule of lawyer and client privilege with respect to oral or written 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 to the fact that others may share the knowledge.[3]

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

4. The lawyer owes a duty of secrecy to every client without exception, regardless of whether it be a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.[4]

Confidential Information Not to be Used

5. The fiduciary relationship between lawyer and client forbids the lawyer to use any confidential information covered by the ethical rule for the benefit of the lawyer or a third person, or to the disadvantage of the client. The lawyer who engages in literary works, such as an autobiography, memoirs and the like, should avoid disclosure of confidential information.[5]

6. The lawyer shall not disclose to one client confidential information concerning or received from another client and should decline employment that might require such disclosure.[6]

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

8. Although the Rule may not apply to facts that are public knowledge, the lawyer should guard against participating in or commenting upon speculation concerning the client's affairs or business.

Disclosure Authorized by Client

9. Confidential information may be divulged with the express authority of the client concerned and, in some situations, the authority of the client to divulge may be implied. For example, some disclosure may be necessary in a pleading or other document delivered in litigation being conducted for the client. Again, the lawyer may (unless the client directs otherwise) disclose the client's affairs to partners and associates in the firm and, to the extent necessary, to non-legal staff such as secretaries and filing clerks. This implied authority to disclose places the lawyer under a duty to impress upon associates, students and employees 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.[8]

Disclosure Where Lawyer's Conduct in Issue

10. Disclosure may also be justified in order to establish or collect a fee, or to defend the lawyer or the lawyer's associates or employees against any allegation of malpractice or misconduct, but only to the extent necessary for such purposes. (As to potential claims for negligence, see Commentary 10 of the Rule relating to Advising Clients.)[9]

Disclosure to Prevent a Crime

11. Disclosure of information necessary to prevent a crime will be justified if the lawyer has reasonable grounds for believing that a crime is likely to be committed and will be mandatory when the anticipated crime is one involving violence against the person.[10]

[Chapter IV, Commentary 11, amended March 27, 1992]

12. The lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility shall inform the person having responsibility for security at the facility and give particulars. Where possible the lawyer should suggest solutions to the anticipated problem such as:

(a) the need for further security;
(b) that judgement be reserved;
(c) such other measures as may seem advisable.

Disclosure Required by Law

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

14. The lawyer who has information known to be confidential government information about a person, acquired when the lawyer was a public officer or employee, shall not represent a client (other than the agency of which the lawyer was a public officer or employee) whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.

[Chapter IV Commentary 14 Amended December 11, 1992]

NOTES

1. Cf. CBA-COD 4; CBA 3(7); Que. 3.05.01, .02, .03; Ont. 4; Alta. 15; N.B. C-3; IBA B-8; ABA-MR 1.6; ABA Canon 4; DRs 4-101(A), (B), (C).

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

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

4. "...[A] fundamental rule, namely the duty of a solicitor to refrain from disclosing confidential information unless his client waives the privilege... Because the solicitor owes to his former client a duty to claim the privilege when applicable, it is improper for him not to claim it without showing that it has been properly waived.", per Spence, J. in *Bell et al. v. Smith et al.* (1968), S.C.R. 644 at 671. To waive, the

client must know of his rights and show a clear intention to forgo them: *Kulchar v. March & Benkert* (1950), 1 W.W.R. 272 (Sask. K.B.).

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

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

7. See Baton, "Practising Ethics" (1967), 10 Can. B.J. 528.

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

8(a) The practice of law assumes and requires the extensive use of electronic word processing, data entry storage and retrieval, communications by e-mail, Internet, etc. In order to maintain the electronic systems necessary to this, it may be necessary for the lawyer to obtain the services of independent hardware and software technicians who may have consequential access to privileged or confidential information. It is the lawyer's responsibility to ensure that such persons are aware of the requirement for confidentiality, that they undertake to maintain it, and that they are allowed access to client information only insofar as it is necessary to perform the necessary maintenance or repair. The implied consent by the client to allow access by such persons is not absolute and it may be, in specific circumstances, that client information must be deleted prior to allowing access by such technicians.

[Footnote 8(a) added September, 2001]

9. There is not duty or privilege where a client conspires with or deceives his lawyer: *The Queen v. Cox* (1885), L.R. 14 Q.B.D. 153 (C.C.R.). Cf. Orkin at p. 86 as to the exceptions of crime, fraud and national emergency.

10. Although the ethical duty is broader than the evidentiary privilege it is subject to similar limits. Communications which are an element of a crime or used to facilitate a crime are not privileged: *Descoteaux v. Mierzwinski* (1982) 1 S.C.R. 860, 141 D.L.R. (3d) 590. A communication which is criminal in its purpose must be distinguished from obtaining legal advice concerning past conduct and its consequences: *R. v. Bennett* (1964), 41 C.R. 227 (B.C.S.C.). Professional Conduct Ruling A.1.(b) states "that if there is more than a reasonable apprehension in a custody matter that the child may be taken out of the jurisdiction, counsel cannot stand" on the solicitor-client relationship.

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

CHAPTER V

IMPARTIALITY AND CONFLICT OF INTEREST BETWEEN CLIENTS

RULE

The lawyer shall not advise or represent both sides of a dispute and, save after adequate disclosure to and with the consent of the clients or prospective clients concerned, shall not act or continue to act in a matter when there is or is likely to be a conflicting interest.

Commentary

Guiding Principles

1. A conflicting interest is one that would be likely to affect adversely the lawyer's judgement or advice on behalf of, or loyalty to a client or prospective client.[1]

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

3. Conflicting interests include, but are not limited to the duties and loyalties of the lawyer or a partner or professional associate of the lawyer to any other client, whether involved in the particular transaction or not, including the obligation to communicate information.[3]

[Chapter V Commentary 3 Amended December 11, 1992]

Disclosure of Conflicting Interest

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

sort of situation is when the client and another party to a commercial transaction are continuing clients of the same law firm but are regularly represented by different lawyers in that firm.

5. Before the lawyer accepts employment from more than one client in the same matter, the lawyer must advise the clients that the lawyer has been asked to act for both or all of them, that no information received in connection with the matter from one can be treated as confidential so far as any of the others is concerned and that, if a dispute develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.[4] If one of the clients is a person with whom the lawyer has a continuing relationship and for whom the lawyer acts regularly, this fact should be revealed to the other or others at the outset.[5] If, following such disclosure, all parties are content that the lawyer act for them, the lawyer should obtain their consent, preferably in writing, or record their consent in a separate letter to each. If following such disclosure, a party raises an objection, the lawyer shall advise the party that the party is free to obtain independent representation. The lawyer should, however, guard against acting for more than one client where, despite the fact that all parties concerned consent, it is reasonably obvious that an issue contentious between them may arise or their interests, rights or obligations will diverge as the matter progresses.[6]

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

Lawyer as Arbitrator

7. The Rule will not prevent a lawyer from arbitrating or settling, or attempting to arbitrate or settle, a dispute between two or more clients or former clients who are *sui juris* and who wish to submit the dispute to the lawyer.[7]

Acting Against Former Client

8. A lawyer who has acted for a client in a matter should not thereafter act against the client (or against persons who were involved in or associated with the client in that matter) in the same or any related matter, or take a position where the lawyer might be tempted or appear to be tempted to breach the Rule relating to confidential information. It is not, however, improper for the lawyer to act against

a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person.[8]

9. For the sake of clarity the foregoing paragraphs are expressed in terms of the individual lawyer and client. However, the term "client" includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client's work. It also includes the client of a lawyer who is associated with the lawyer in such a manner as to be perceived as practising in partnership or association with the first lawyer, even though in fact no such partnership or association exists.

Acting For More Than One Client

10. There are also many situations where more than one person may wish to retain the lawyer to handle a transaction and, although their interests appear to coincide, in fact a potential conflict of interest exists. Examples are co-purchasers of real property and persons forming a partnership or corporation. Such cases will be governed by Commentaries 4 and 5 of this Rule.

11. Notwithstanding any other provisions of The Code of Professional Conduct, a lawyer shall not act for both the builder or developer and the purchaser in a real estate transaction resulting from the construction of a new home, even if the parties consent.

12. It is improper for a lawyer to act on a mortgage foreclosure if the lawyer or his or her firm were involved in placing the original mortgage and advising the mortgagor.

This prohibition does not apply in the following cases:

1. Where foreclosure proceedings are based upon events subsequent and unrelated to the preparation, execution and registration of the mortgage;

2. Where the lawyer who is acting for the mortgagee attended on the mortgagor merely for the purposes of executing the mortgage documentation;

3. Where the mortgagor for whom the lawyer has acted has not been a party to the foreclosure proceedings;

4. Where the mortgagor has no beneficial interest in the mortgaged lands and no claim has been made against the mortgagor personally;

5. Where the mortgagor consents in writing.

In this commentary, mortgagor includes purchaser and mortgagee includes vendor under an agreement for sale.

[Commentaries 11 and 12 added June 8, 1995]

13. A lawyer who is employed or retained by an organization represents that organization acting through its duly authorized constituents. In dealing with the organization's directors, officers, employees, members, shareholders or other constituents, the lawyer shall make clear that it is the organization that is the client when it becomes apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing. The lawyer representing an organization may also represent any of the directors, officers, employees, members, shareholders or other constituents, subject to the provisions of this Rule dealing with conflicts of interests.

Burden of Proof

14. Generally speaking, in disciplinary proceedings arising from a breach of this Rule the lawyer has the burden of showing good faith and that adequate disclosure was made in the matter and the client's consent was obtained.

NOTES

1. Cf. CBA-COD 5; CBA 3(2), 3(7); Que. 3.05.04; Ont. 5; B.C. B-1, B-2, B-9(b); N.B. C-9; IBA B-7; ABA-MR 1.7, 1.8, 1.9; ABA DRs 5-101(A), 5-105; *Orkin* at pp. 98-101.

2. Cf. ABA EC 5-1.

3. "A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as it is relevant...What he cannot do is to act for the client and at the same time withhold from him any relevant knowledge that he has...", per Megarry, J. in *Spector v. Ageda* (1971), 3 All E.R. 417 at 430 (Ch. D.).

   "Applying this [*dictum* of Cozens-Hardy, M.R. in *Moody v. Cox et al.* (1917), 2 Ch. D. 71] to a simple circumstance which arises in every conveyancing transaction, does a solicitor acting for both parties disclose the previous purchase price to the purchase...? If he does there may be a breach of duty... This example alone faces a solicitor with an unanswerable dilemma, which may only be resolved by his refusing to act for one...or...possibly stepping back from a situation in which both clients really need positive advise", article in (1970) Law Soc. Gazette 332; and see thirteen examples of difficulties there listed. In *Cornell v. Jaeger* (1968), 63 W.W.R. 747 (Man.) the non-disclosure by a solicitor of his personal interest in a property to the clear detriment of his client was held to amount to fraud.

4. This includes a situation where a lawyer proposes to represent both a lender and a borrower whether or not the loan is to be secured by a mortgage or security agreement.

5. This includes a situation where one of the parties is a commercial lender and the lawyer has previously represented that commercial lender. "Notwithstanding that [the solicitor] had acted for the plaintiff and had been introduced to the defendants by the plaintiff and acted for both the plaintiff and R while they were negotiating the purchase...he divorced himself from his responsibilities...and acted for the defendants while they acquired the property...and, after the writ was issued...acted for both defendants...I refer to *Bowstead on Agency:* 'It is the duty of a solicitor...(8) not to act for the opponent of his client, of or a former client, in any case in which his knowledge of the affairs of such client or former client will give him an undue

advantage...' *This is a principle of ethical standards which admits to no fine distinctions but should be applied in its broadest sense,* and it makes no difference whether the solicitor was first acting for two parties jointly who subsequently disagreed and became involved over the subject-matter of his joint retainer, or acted for one party with respect to a matter and took up a case for another party against his former client about the same matter.", per McRuer, C.J.H.C. in *Sinclair v. Ridout & Moran* (1955), 1 O.R. 167 at 182-83 (Ont. H.C.) (emphasis added). See Knepper, "Conflicts of Interest in Defending Insurance Cases" (1970), Defence L.J. 515, and "Guiding Principles", *ibid.*, pp. 540-44.

6. Cf. Ont. 5(5). Common "multiple client" situations where there is real danger of divergence of interest arising between clients include the defending of co-accused, the representation of co-plaintiffs in tort cases or of insureds and their insurers, the representation of classes or groups such as beneficiaries under a will or trust and construction lien and bankruptcy claimants.
See for examples *Orkin* at p. 100.
[Leave to appeal granted] "...by reason of the same solicitor appearing for R and D, and it being apparent that there was a conflict of interest between R and D, each one blaming the other for the injuries of the children, he should not have acted for D after having acted for R.", *Regina v DePatie* (1971), 1 O.R. 698 at 699 (Ont. C.A.).

[Chapter V Footnote 6 Amended December 11, 1992]

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

8. The Supreme Court of Canada in *MacDonald Estate v. Martin* [1991] 1 WWR 705; (1990) 77 DLR (4th) 249, set the standard which will be used by the courts in determining whether a lawyer ought to be disqualified as a result of a conflicting
interest. In order for the lawyer to continue acting "a reasonably informed person" (must be) satisfied that no use of confidential information would incur". The Martin decision involved a lawyer moving from one firm to another and is dealt with in the following subchapter VA. There are other instances where concerns about acting against a former client's interest arise.

> "The appellant had for many years been the respondent's solicitor, and a quarrel...brought about a rupture...It was then...that the appellant by his letters to the wife incited her and improperly encouraged her to prosecute an action... thus stirring up a litigation against the respondent.", per Taschereau, J. in *Sheppard v. Frind* (1941), S.C.R. 531 at 535 (S.C.C.).
>
> "The solicitor acting for the defendant...drew the mortgage and advised the said defendant on the effect thereof. Later the same solicitor acting for the mortgagee bank brought action against his former client based on a claim arising out of and related to that mortgage. Solicitors should not so conduct themselves even with the knowledge and consent of all parties...", *La Banque Provinciale v. Adjutor Levesque Roofing* (1968), 68 D.L.R. (2d) 340 at 345 (N.B.C.A.).

[Chapter V Footnote 8 Amended December 11, 1992 and April 27, 1995]

CHAPTER VA

CONFLICTS OF INTEREST

[Chapter VA Added April 27, 1995]

A. Definitions

(1) In this Rule:

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

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

"**law firm**" includes one or more members practising:

(a) in a sole proprietorship,
(b) in a partnership,
(c) in association for the purpose of sharing common expenses but who are otherwise independent practitioners,
(d) as a professional law corporation,
(e) in a government, a Crown corporation or any other public body, and
(f) in a corporation or other body;

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

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

B. Application of Rule

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

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

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

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

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

Firm Disqualifications

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

(a) the former client provides written consent to the new law firm's continued representation of its client, or

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

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

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

(B) the extent of prejudice to any party,

(C) the good faith of the parties,

(D) the availability of alternative suitable counsel, and

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

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

Transferring lawyer disqualification

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

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

(b) the new law firm shall:

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

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

(iii) notify its client and former client that if they have any objection to the new law firm's continued representation of its client that they may apply to the Law Society or a court of competent jurisdiction under subrule (8) within thirty (30) days of receipt of the material provided under this Rule and if no objection is taken within thirty days, they lose the right to apply to the Law Society under this Rule.

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

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

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

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

Determination of compliance

(8) Anyone who has an interest in, or who represents a party in, a matter referred to in this Rule may apply to the Society or to a court of competent jurisdiction for a determination of any aspect of this Rule. Anyone who is in receipt of the material provided under subrule (5)(b) has thirty days (30) from the date of receipt of such material to make an application under this subrule or will lose the right to make application to the Law Society under this Rule.

Due diligence

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

(a) complies with this Rule, and

(b) does not disclose:

(i) confidences of clients of the firm, and

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

Commentary

1. Application of this Rule

a. Lawyers and support staff

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

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

b. Government employees and in-house counsel

The definition of "law firm" includes one or more members of the Society practising in a government, a Crown corporation, any other public body and a corporation. Thus, the Rule applies to members transferring to or from government service and into or out of an in-house counsel position, but does not extend to purely internal transfers in which, after transfer, the employer remains the same. Subrule (3) was included to reflect the particular employment structure of the federal government, but is not meant to alter the general principle that internal transfers within the government are not subject to review under the Rule.

c. Law firms with multiple offices

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

d. Practising in association

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

2. Matters to consider when interviewing a potential transferee

When a law firm considers hiring a lawyer or articled law student ("transferring member") from another law firm, the transferring member and the new law firm need to determine, before transfer, whether any conflicts of interest will be created. Conflicts can arise with respect to clients of the firm which the transferring member is leaving, and with respect to clients of a firm in which the transferring member worked at some earlier time.

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

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

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

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

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

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

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

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

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

3. Matters to consider before hiring a potential transferee

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

a. Where a conflict does exist

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

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

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

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

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

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

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

b. Where no conflict exists

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

- the transferring member should execute an affidavit or solemn declaration to that effect, and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

GUIDELINES

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

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

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

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

5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support

staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.

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

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

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

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

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

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

10. The screened member should not participate in the fees generated by the current client matter.

11. The screened member's office or work station should be located away from the offices or work stations of those working on the matter.

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

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CHAPTER VI

CONFLICT OF INTEREST BETWEEN LAWYER AND CLIENT

RULE

(a) The lawyer shall not enter into or continue a business transaction with the client if:

(i) the client expects or might reasonably be assumed to expect that the lawyer is protecting the client's interest; and

(ii) there is a significant risk that the interests of the lawyer and the client may differ.

(b) The lawyer shall not act for the client where the lawyer's duty to the client and the personal interests of the lawyer or an associate are in conflict.

(c) Unless the client is a family member and there is no appearance of undue influence, the lawyer shall not prepare or cause to be prepared an instrument giving the lawyer or an associate a substantial gift from the client, including a testamentary gift.

(d) The lawyer should not enter into a business transaction[1] with the client or knowingly give to or acquire from the client an ownership, security or other pecuniary interest unless:

(i) the transaction is a fair and reasonable one and its terms are fully disclosed to the client in writing in a manner that is reasonably understood by the client;

(ii) the client is given a reasonable opportunity to seek independent legal advice about the transaction;

(iii) the client consents in writing to the transaction; and

(iv) there is no appearance of undue influence.

Commentary

1. The guiding principles enunciated in the Rule relating to impartiality and conflict of interest between clients apply *mutatis mutandis* to this Rule.

2. A conflict of interest between lawyer and client may exist in cases where the lawyer gives property to or acquires it from the client by way of purchase, gift, testamentary disposition or otherwise. In cases of inter vivos gifts or purchases, it *may* be sufficient to ensure that the client has independent legal advice before proceeding with the transaction. However, in cases of testamentary dispositions or where there is any indication that the client is in a weakened state or is not able for any reason to understand the consequences of a purchase or gift or there is a perception of undue influence, the lawyer must not prepare the instrument in question and the client must be independently represented. Independent representation and preparation of the instrument will not be required where the gift, purchase or testamentary disposition is insubstantial or of a minor nature having regard to all of the circumstances, including the size of the testator's estate.

3. This Rule applies also to situations involving associates of the lawyer. Associates of the lawyer within the meaning of the Rule may include the lawyer's spouse, children, any relative of the lawyer (or of the lawyer's spouse) living under the same roof, any partner or associate of the lawyer in the practice of law, a trust or estate in which the lawyer has a substantial beneficial interest or for which the lawyer acts as a trustee or in a similar capacity, and a corporation of which the lawyer is a director or in which the lawyer or an associate owns or controls, directly or indirectly, a significant number of shares.[2]

Debtor-Creditor Relationship to be Avoided

4. The lawyer should avoid entering into a debtor-creditor relationship with the client. The lawyer should not borrow money from a client who is not in the business of lending money.[3] It is undesirable that the lawyer lend money to the client except by way of advancing necessary expenses in a legal matter that the lawyer is handling for the client.

Joint Ventures

5. The lawyer who has a personal interest in a joint business venture with others may represent or advise the business venture in legal matters between it and third parties, but save with respect to compliance with this rule shall not represent or advise either the joint business venture or the joint venturers in respect of legal matters as between them.

When Person to be Considered a Client

6. The question of whether a person is to be considered a client of the lawyer when such person is lending money to the lawyer, or buying, selling, making a loan to or investment in, or assuming an obligation in respect of a business, security or property in which the lawyer or an associate of the lawyer has an interest, or in respect of any other transaction, is to be determined having regard to all the circumstances. A person who is not otherwise a client may be deemed to be a client for purposes of this Rule if such person might reasonably feel entitled to look to the lawyer for guidance and advice in respect of the transaction. In those circumstances the lawyer must consider such person to be client and will be bound by the same fiduciary obligations that attach to a lawyer in dealings with a client.

NOTES

1. This is not intended to apply to the ordinary commercial transactions in the conduct of the lawyer's practice.

2. Cf. ABA-COD 5. As to corporations, cf. ABA-MR 1.13; ABA EC 5-38: "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests..."

3. Cf. Ont. 5; Alta. 34; and B.C. B-13: "...in a number of instances of professional misconduct...the borrowing of money by [the lawyers] in question has been a factor leading to the...misconduct. [A lawyer] should not borrow money from his clients save in exceptional circumstances, and in that case the onus of proving that the client's interests were fully protected by the nature of the case or by independent legal advise will rest upon [the lawyer]... [Attention is called to] the various transactions and dealings that the courts have held to be improper or reprehensible conduct in violation of these principles, and which, in addition to their consequences at law, constitute professional misconduct."
Cf. ABA EC 5-8.

CHAPTER VII

OUTSIDE INTERESTS AND THE PRACTICE OF LAW

RULE

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

Commentary

Guiding Principles

1. The term "outside interest" covers the widest possible range 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 the lawyer may properly engage in the outside interest and to what extent the lawyer will be subject to any applicable law or rule of the governing body.[2]

2. Whenever an overriding social, political, economic or other consideration arising from the outside interest might influence the lawyer's judgement, the lawyer should be governed by the considerations declared in the Rule relating to conflict of interest between lawyer and client.[3]

3. Where the outside interest is in no way related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct brings either the lawyer or the profession into disrepute,[4] or impairs the lawyer's competence as, for example, where the outside interest occupies so much time that clients suffer because of the lawyer's lack of attention or preparation.

4. The lawyer must not carry on, manage or be involved in any outside business, investment, property or occupation 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.[5] When acting or dealing in respect of a transaction involving an outside interest in a business, investment, property or occupation, the lawyer must disclose any personal interest, must declare to all parties

in the transaction or to their solicitors whether the lawyer is acting on the lawyer's own behalf or in a professional capacity or otherwise, and should adhere throughout the transaction to standards of conduct as high as those that this Code requires of a lawyer engaged in the practice of law.

5. The lawyer who has an outside interest in a business, investment, property or occupation:

(a) must not be identified as a lawyer when carrying on, managing or being involved in such outside interest; and

(b) must ensure that monies received in respect of the day-to-day carrying on, operation and management of such outside interest are deposited in an account other than the lawyer's trust account, unless such monies are received by the lawyer when acting in a professional capacity as a lawyer on behalf of the outside interest.

6. In order to be compatible with the practice of law the other profession, business or occupation:

(a) must be an honourable one that does not detract from the status of the lawyer or the legal profession generally; and

(b) must not be such as would likely result in a conflict of interest between the lawyer and a client.

NOTES

1. Cf. CBA-COD 6; B.C. B-8; N.B. F-3; IBA D-1. This Rule is closely connected with the Rule relating to conflict of interest between lawyer and client.

2. In Quebec, s. 122(1)(b) of the *Bar Act* provides that a person shall become disqualified from practising as an advocate when "he holds a position or an office incompatible with the practice or dignity of the profession of advocate."
Sask. 7 and Que. 4.01.01(c) prohibit lawyers from having an interest in collection agencies. Cf. *Orkin* at pp. 188-90.

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

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

5. Further examples of outside interests that could, unless clearly disclosed and defined, confuse or mislead persons dealing with a lawyer engaging in them include:
   - professions such as accountancy and engineering;
   - occupations such as those of merchant, land developer or speculator, building contractor, real estate, insurance or financial agent, broker, financier, property manager, or public relations adviser.

CHAPTER VIII

PRESERVATION OF CLIENTS' PROPERTY

RULE

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

Commentary

Guiding Principles

1. The lawyer's duties with respect to safekeeping, preserving and accounting for the clients' monies and other property are generally the subject of special rules.[2] In the absence of such rules the lawyer should adhere to the minimum standards set out in the note.[3] "Property", apart from clients' monies, includes securities such as mortgages, negotiable instruments, stocks, bonds, etc., original documents such as wills, title deeds, minute books, licences, certificates, etc., other papers such as clients' correspondence files, reports, invoices, etc., as well as chattels such as jewelry, silver, etc.[4]

2. The lawyer should promptly notify the client upon receiving any property of or relating to the client unless satisfied that the client knows that it has come into the lawyer's custody.[5]

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

4. The lawyer should maintain adequate records of clients' property in the lawyer's custody so that it may be promptly accounted for, or delivered to, or to the order of, the client upon request. The lawyer should ensure that such property is delivered to the right person and, in case of dispute as to the person entitled, may have recourse to the courts.[6]

5. The duties here expressed are closely related to those concerning confidential information.[7] The lawyer should keep clients' papers and other property out of sight as well as out of reach of those not entitled to see them and should, subject to any

right of lien,[8] return them promptly to the clients upon request or at the conclusion of the lawyer's retainer.

Privilege

6. The lawyer should be alert to claim on behalf of clients any lawful privilege respecting information about their affairs, including their files and property if seized or attempted to be seized by a third party. In this regard the lawyer should be familiar with the nature of clients' privilege, and with relevant statutory provisions such as those in the *Income Tax Act*,[9] the *Criminal Code*, the *Canadian Charter of Rights and Freedoms* and other statutes.

Criminal Activity

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

Before accepting a retainer or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer, including verifying who are the legal or beneficial owners of the property and business entities, verifying who has the control of the 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.

[Chapter VIII, Commentary 7 added September 2005]

NOTES

1. Cf. CBA-COD 7; CBA 3(8); Que. 3.02.06; ABA-MR 1.15; ABA DR 9-102(B). Although the basic duty here declared may parallel the legal duty under the law of bailment, it is reiterated as being a matter of professional responsibility quite apart from the position in law.

2. See Part 13 of The Rules of The Law Society of Saskatchewan.

[Chapter VIII Footnote 2 Amended September 11, 1992]

3. The minimum standards are:
   (a) paying into and keeping monies received or held by the lawyer for or on behalf of clients in a trust bank account or accounts separate from the bank account of the lawyer or the lawyer's firm;
   (b) keeping properly written books and accounts of all monies received, held or paid by the lawyer for or on behalf of each of the lawyer's clients which clearly distinguish such monies from the monies of every other client and from the monies of the lawyer and the lawyer's firm;

(c) not retaining for an unnecessarily long period, without the express authority of the client, monies received for or on behalf of such client:

(d) subject to rules prescribed by the governing body of the province, no lawyer shall take fees, as opposed to disbursements, from funds held in trust for a client without the client's express authority unless the work being done by the lawyer for the client has been performed and a proper account in respect thereof has been rendered to the client. Where a client authorizes the payment of fees from trust funds before an account has been rendered, this arrangement should be recorded in writing and an interim account sent to the client forthwith;

(e) the lawyer should not estimate a lump sum that may in the aggregate be owed by a number of clients and then transfer that sum in bulk from a trust account to the lawyer's general account without allocating specific amounts to each client and rendering an account to each client.

4. In some provinces statutes authorize the depositing of valuable documents with public officials for safekeeping. As to wills, see *Comment* in (1970) 4 Law Soc. U.C. Gaz. 117.

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

6. For example, by seeking leave to interplead.

7. Cf. the Rule relating to confidential information.

8. Cf. para. 10 of the Rule relating to withdrawal. As to the proper disposition of papers, which is frequently a perplexing problem, see *Cordery on Solicitors* (6th ed. 1968) at pp. 118-20 for a discussion of law and principles and a table of categories with supporting authorities.
The lawyer's arrangements and procedures for the storage and eventual destruction of completed files should reflect the foregoing considerations and particularly the continuing obligation as to confidentiality.
Further, statutes such as the *Income Tax Act* and the operation of limitations statutes pertinent to the client's position may preclude the destruction of files or particular papers. Section 61 of *The Legal Profession Act, 1990*, provides for the appointment of a trustee of the property of a member pertaining to the practice of the member where the member has died, absconded, has neglected the practice or is unable to practice. The trustee is to respect a solicitor's lien (Section 62).

[Chapter VIII Footnote 8 Amended December 11, 1992]

9. See Freedman, "Solicitor-Client Privilege under the Income Tax Act" (1969) 12 Can. B.J. 93.

CHAPTER IX

THE LAWYER AS ADVOCATE

RULE

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

Commentary

Guiding Principles

1. The advocate's duty to the client "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case" and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law"[2] must always be discharged by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the court with candour, fairness, courtesy and respect.[3]

[Chapter IX Commentary 1 Amended December 11, 1992]

Prohibited Conduct

2. The lawyer must not, for example:

(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 another party;[4]

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

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with such officer that give rise to real or apparent pressure, influence or inducement affecting the impartiality of such officer;[6]

(d) attempt or allow anyone else to attempt, directly or indirectly, to influence the decision or actions of a tribunal or any of its officials by any means except open persuasion as an advocate;[7]

(e) knowingly attempt to deceive or participate in the deception of a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive

affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;[8]

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

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

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

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

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

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

(l) needlessly inconvenience a witness.

Errors and Omissions

3. The 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 discovers it, has a duty to the court, subject to the Rule relating to confidential information, to disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.[13]

Duty to Withdraw

4. If the client wishes to adopt a course that would involve a breach of this Rule, the lawyer must refuse and do everything reasonably possible to prevent it. If the client persists in such a course the lawyer should, subject to the Rule relating to withdrawal, withdraw or seek leave of the court to do so.[14]

The Lawyer as Witness

5. The lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a tribunal save as permitted by local rule or practice, or as to purely formal or uncontroverted matters. This also applies to the lawyer's partners and associates; generally speaking, they should not testify in such proceedings except as to merely formal matters. The lawyer should not express personal opinions or beliefs, or assert as fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer must not in effect become 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 someone else. Similarly, the lawyer who was a witness in the proceedings should not appear as advocate in any

appeal from the decision in those proceedings.[15] There are no restrictions upon the advocate's right to cross-examine another lawyer, and the lawyer who does appear as a witness should not expect to receive special treatment by reason of professional status.

Interviewing Witnesses

6. The lawyer may properly seek information from any potential witness (whether under subpoena or not) but should disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.[16] The lawyer shall not approach or deal with an opposite party who is professionally represented save through or with the consent of that party's lawyer.[17]

[Chapter IX, Commentary 6, amended March 27, 1992]

Unmeritorious Proceedings

7. The lawyer should never waive or abandon the client's legal rights (for example an available defence under a statute of limitations) without the client's informed consent. In civil matters it is desirable that the lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections or attempts to gain advantage from slips or oversights not going to the real merits, or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.[18]

Encouraging Settlements

8. Whenever the case can be settled fairly, the lawyer should advise and encourage the client to do so rather than commence or continue legal proceedings.[19]

Duties of Prosecutor

9. When engaged as a prosecutor, the lawyer's prime duty is not to seek a conviction, but to present before the trial court all available credible evidence relevant to the alleged crime in order that justice may be done through a fair trial upon the merits.[20] The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to the accused or defence counsel (or to the court if the accused is not represented) of all relevant facts and known witnesses, whether tending to show guilt or innocence, or that would affect the punishment of the accused.[21]

Duties of Defence Counsel

10. When defending an accused person, the lawyer's duty is to protect the client as far as possible from being convicted except by a court of competent

jurisdiction and upon legal evidence sufficient to support a conviction for the offence charged. Accordingly, and notwithstanding the lawyer's private opinion as to credibility or merits, the lawyer may properly rely upon all available evidence or defences including so-called technicalities not known to be false or fraudulent.[22]

11. Admissions made by the accused to the lawyer may impose strict limitations on the conduct of the defence and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, or to the form of the indictment, or to the 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 had not done, the act. Such admissions will also impose a limit upon the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.[23]

Agreement on Guilty Plea

12. Where, following investigation,

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

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

(c) the lawyer fully advises the client of the implications and possible consequences of a guilty plea and that the matter of sentence is solely in the discretion of the trial judge, and

(d) the client so instructs the lawyer, preferably in writing, it is proper for the lawyer to discuss and agree tentatively with the prosecutor to enter a plea of guilty on behalf of the client to the offence charged or to a lesser or included offence or to another offence appropriate to the admissions, and also on a disposition or sentence to be proposed to the court. The public interest and the client's interests must not, however, be compromised by agreeing to a guilty plea.[24]

Undertakings

13. An undertaking given by the lawyer to the court or to another lawyer in the course of litigation or other adversary proceedings must be strictly and scrupulously carried out. Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility.[25]

Courtesy

14. The lawyer should at all times be courteous and civil to the court and to those engaged on the other side. Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern or rude, provocative or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit disciplinary action.[26]

Role in Adversary Proceedings

15. In adversary proceedings, the lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (save as required by law or under paragraphs 2(h) or 7 above) to assist an adversary or advance matters derogatory to the client's case. When opposing interests are not represented, for example in *ex parte* or uncontested matters, or in other situations where the full proof and argument inherent in the adversary system cannot be obtained, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the court is not misled.[27]

Communicating with Witnesses

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

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

(b) During examination-in-chief by another lawyer of a witness who is unsympathetic to the lawyer's cause the lawyer not conducting the examination-in-chief may properly discuss the evidence with the witness;

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

(d) During cross-examination by an opposing lawyer the lawyer ought not to have any conversation with the witness respecting the witness' evidence or relative to any issue in the proceeding;

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

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

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

(h) During re-examination of a witness called by an opposing lawyer if the witness is sympathetic to the lawyer's cause there ought to be no communication relating to the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.

(i) When an examination for discovery of a party is in progress there ought to be no communication between the party under oath and his or her lawyer without the consent of the examining lawyer. Such consent is required only during the actual examination and not during any adjournment in the examination.

[Chapter IX Commentary 16(i) Added December 11, 1992]

Agreements Guaranteeing Recovery

17. In civil proceedings the lawyer has a duty not to mislead the court about the position of the client in the adversary process. Thus, where a lawyer representing a client in litigation has made or is party to an agreement made before or during the trial whereby a plaintiff is guaranteed recovery by one or more parties notwithstanding the judgement of the court, the lawyer shall disclose full particulars of the agreement to the court and all other parties.[29]

Scope of the Rule

18. The principles of this Rule apply generally to the lawyer as advocate and therefore extend not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals and other bodies, regardless of their function or the informality of their procedures.[30]

NOTES

1. Cf. CBA-COD 8; CBA 2(1), 3(5); ABA-MR 3; ABA Canon 7.
"The concept that counsel is the mouth-piece of his client and that his speech is the speech of the client is as unfortunate as it is inaccurate. He is not the agent or delegate of his client. Within proper bounds, however, counsel must be fearless and independent in the defence of his client's rights.... He must be completely selfless in standing up courageously for his client's rights, and he should never expose himself to the reproach that he has sacrificed his client's interests on the altar of expediency...", per Schroeder, J.A., "Some Ethical Problems in Criminal Law" in Law Soc. U.C. Special Lectures (1963) 87 at 102.

2. The sources of the quotations are (a) per Lord Reid in *Rondel* v. *Worsley* (1969), 1 A.C. 191 at 227 and (b) CBA 3(5).

3. Cf. CBA 3(5). "...[H]e must be a man of character. The Court must be able to rely on the advocate's word; his word must indeed be his bond.... The advocate has a duty to his client, a duty to the Court, and a duty to the State; but he has above all a duty to himself that he shall be, as far as it lies in his power, a man of integrity. No profession calls for higher standards of honour and uprightness, and no

profession, perhaps offers greater temptations to forsake them....", from Hyde, *Lord Birkett* (1964, Hamish Hamilton, London) at p. 551. Courtesy and respect, as used herein, include the duty to be prompt and punctual.

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

5. Cf. IBA A-15.

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

7. Cf. CBA 2(4), 5(5); Que. 2.03, 3.05; N.B. B-6; ABA 9 ECs 7-34 and 7-35, DR 7-110; IBA A-16.
In *Toronto Transit* v. *Aqua Taxi* (1955) O.W.N. 857 (Ont. H.C.), where a sealed letter improperly attempting to influence a decision had been delivered to a judge, the Court, while exonerating the lawyers concerned, made it clear that any involvement in such conduct would be most improper.

8. Where a lawyer joined in a scheme to mislead the Court by arranging proceedings to result in an apparent acquittal which could then be used to answer prior pending proceedings for the same offence (a justice, a constable and another lawyer being misled in the process), the Court said: "These facts establish a stupid, but nevertheless unworthy, attempt to pervert the course of justice, and most certainly constitute conduct unbecoming a barrister and solicitor in the pursuit of his profession.", *Banks* v. *Hall* (1941), 2 W.W.R. 534 (Sask. C.A.).
A lawyer counselling false evidence would be guilty of perjury if it were given (*Criminal Code*, ss. 22, 120), and of counselling if it were not (*ibid.*, s. 422).
It is an offence to fabricate anything with intent that it be used as evidence by any means other than perjury or incitement to perjury (*ibid.*, s. 125).
Similarly, it is an offence wilfully to attempt in any manner to obstruct, pervert or defeat the course of justice (*ibid.*, s. 127).

"The swearing of an untrue affidavit...is perhaps the most obvious example of conduct which a solicitor cannot knowingly permit.... He cannot properly, still less can he consistently with his duty to the Court, prepare and place a perjured affidavit upon file.... A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act...". per Viscount Maugham in *Myers* v. *Elman* (1940), A.C. 282 at 293-94 (H.L.).
"[Counsel] had full knowledge of the impropriety of the paragraphs in the affidavit...[and] is bound to accept responsibility for [them].... If he knows that his client is making false statements under oath and does nothing to correct it, his silence indicates, at the very least, a gross neglect of duty.", per McLennan, J.A. in *Re Ontario Crime Commission* (1962), 37 D.L.R. (2d) 382 at 391 (Ont. C.A.).

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

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

11. Cf. CBA 1(1); N.B. B-3; IBA A-14; ABA EC 7-23, DR 7-106 (B) (1).
See *Glebe Sugar* v. *Greenock Trustees* (1921), W.N. 85 (H.L.) for a strong statement by Lord Birkenhead on the duty of counsel to disclose to the court authorities bearing one way or the other: "The extreme impropriety of such a course [withholding a known pertinent authority] could not be made too plain." See also *Plant* v. *Urquhart* (1922), 1 W.W.R. 632 (B.C.C.A.) per McPhillips, J. at 638-39.

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

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13. Cf N.B. B-8; ABA DRs 7-102(B) AND 4-101(C) (2).

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

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

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

17. Cf. B.C. D-1(b); N.B. D-7, D-8; ABA EC 7-19, DR 7-104(A)(1).
B.C. D-1(b) discusses situations where it is difficult to tell whether one is dealing with a witness (which is proper) or communicating with an opposite party who is legally represented (which is improper). The problem may arise where the opposite party is a corporation or government agency. The test suggested is: "Is he likely to be involved in the decision-making process of the party, or does he merely carry out the directions of others?"

"The principle was laid down long ago...that once it appears a person has an attorney there can be no effective dealing except through him." "...[A] lawyer 'should never in any way...attempt to negotiate or compromise the matter directly with any party represented by a lawyer, except *through* such lawyer'.... To notify the lawyer that the matter is settled is not to negotiate through him". per J.A. in *Nelson* v. *Murphy* (1957), 22 W.W.R. 137 at 142 (Man. C.A.).

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

19. Cf. CBA 3(3); *Orkin* at pp. 95-97; and see paragraph 5 of the Rule relating to advising clients.

20. But see para. 10, *post*.

21. Cf. CBA 1(2); N.B. C-12; ABA BCs 7-13, 7-14, DR 7-103; *Orkin* at pp. 116-20. "It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.", per Rand, J. in *Boucher v. The Queen* (1955, S.C.R. 16 at 23-24.
See also *Richard v. The Queen* (1960, 126 C.C.C. 255 per Bridges, J.A. at p. 280; *Regina v. Lalonde* (1972), 5 C.C.C. (2d) 168; and Martin, "Preparation for Trial", Law Soc. U.C. Special Lectures (1969) p. 221 at 235 *et seq.*
The Supreme Court of Canada in *R. v. Stinchcombe* (1991) 8 CR (4th) 277 reviewed and upheld the general duty of disclosure by prosecutors. Subject to certain exceptions such as privilege and protection of police informants, evidence gathered by the Crown in furtherance of a prosecution is not the property of the Crown and must be disclosed to the defence.

[Chapter IX Footnote 21 Amended December 11,1992]

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

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

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

25. Cf. CBA 4(3); IBA A-21, A-23; ABA EC 7-38, DR 7-106(C)(5);
N.B. D-5: "Undertakings should be written and the terms should be unambiguous. Counsel when giving an undertaking accepts personal responsibility unless expressly excepted."
"It has more than once been determined by the Court that if attorneys choose to practice upon loose understandings...they cannot expect aid from the Court if difficulties arise in carrying them out...", per Barry, J. in *Ferguson v. Swedish-Canadian* (1912), 41 N.B.R. 217 at 220 (N.B.C.A.).
Where solicitors wrote: "on behalf of our client...we undertake..." it was held that, in the circumstances, the solicitors were personally responsible: *Re Solicitors* (1971), 1 W.W.R. 529 (B.C.C.A.).
"...[O]ne's word should be one's bond...", Lund, 1950 Lecture to the Law Society (Law Society of Upper Canada, 1956, pp. 33-34).

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

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

28. See *J. & M. Chartrand Realty Ltd. v. Martin* (1981), 22 C.P.C. 186 (Ont. H.C.J.).

29. CF. ABA EC 7-15.

CHAPTER X

THE LAWYER IN PUBLIC OFFICE

RULE

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

Commentary

Guiding Principles

1. The Rule applies to the lawyer who is elected or appointed to legislative or administrative office at any level of government, regardless of whether the lawyer attained such office because of professional qualifications.[2] Because such a lawyer is in the public eye, the legal profession can more readily be brought into disrepute by failure on the lawyer's part to observe its professional standards of conduct.

Conflicts of Interest

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

3. In the context of the preceding paragraph, persons closely related to or associated with the lawyer include a spouse, child, or any relative of the lawyer (or of the lawyer's spouse) living under the same roof, a trust or estate in which the lawyer has a substantial beneficial interest or for which the lawyer acts as a trustee or in a similar capacity, and a corporation of which the lawyer is a director or in which

the lawyer or some closely related or associated person holds or controls, directly or indirectly, a significant number of shares.[4]

4. Subject to any special rules applicable to a particular public office, the lawyer holding such office who sees the possibility of a conflict of interest should declare such interest at the earliest opportunity and take no part in any consideration, discussion or vote with respect to the matter in question.[5]

Appearances before Official Bodies

5. When the lawyer or any of the lawyer's partners or associates is a member of an official body such as, for example, a school board, municipal council or governing body, the lawyer should not appear professionally before that body. However, subject to the rules of the official body it would not be improper for the lawyer to appear professionally before a committee of such body if such partner or associate is not a member of that committee.[6]

6. The lawyer should not represent in the same or any related matter any persons or interests that the lawyer has been concerned with in an official capacity. Similarly, the lawyer should avoid advising upon a ruling of an official body of which the lawyer either is a member or was a member at the time the ruling was made.[7]

Disclosure of Confidential Information

7. By way of corollary to the Rule relating to confidential information, the lawyer who has acquired confidential information by virtue of holding public office should keep such information confidential and not divulge or use it even though the lawyer has ceased to hold such office.[8] (As to the taking of employment in connection with any matter in respect of which the lawyer had substantial responsibility or confidential information, see Commentary 3 of the Rule relating to avoiding questionable conduct.)

Disciplinary Action

8. Generally speaking, a governing body will not be concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may subject the lawyer to disciplinary action.[9]

NOTES

1. Cf. CBA-COD 9; IBA E-3; ABA-MR 1.11; ABA EC 8-8, DR 8-101(A).

2. Common examples include Senators, Members of the House of Commons, members of provincial legislatures, cabinet ministers, municipal councillors, school trustees, members and officials of boards, commissions, tribunals and departments,

commissioners of inquiry, arbitrators and mediators, Crown prosecutors and many others. For a general discussion, see Woodman, "The Lawyer in Public Life", Pitblado Lectures (Manitoba, 1971) p. 129.

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

4. Both human and financial relationships are envisaged.

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

6. Cf. Ont. 13; B.C. B-9(a). The Ontario ruling related specifically to municipal councillors. Local authorities have increasingly been concerned with zoning, planning and development matters in which lawyers frequently act professionally.

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

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

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

CHAPTER XI

FEES

RULE

The lawyer shall not

(a) stipulate for, charge or accept any fee that is not fully disclosed, fair and reasonable;

(b) appropriate any funds of the client held in trust or otherwise under the lawyer's control for or on account of fees without the express authority of the client, save as permitted by the rules of The Law Society of Saskatchewan.[1]

Commentary

Factors to be Considered

1. A fair and reasonable fee will depend on and reflect such factors as:
   (a) the time and effort required and spent;
   (b) the difficulty and importance of the matter;
   (c) whether special skill or service has been required and provided;
   (d) the customary charges of other lawyers of equal standing in the locality in like matters and circumstances;
   (e) in civil cases the amount involved, or the value of the subject matter;
   (f) in criminal cases the exposure and risk to the client;
   (g) the results obtained;
   (h) tariffs or scales authorized by The Law Society of Saskatchewan;
   (i) such special circumstances as loss of other employment, urgency and uncertainty of reward;
   (j) any relevant agreement between the lawyer and the client.

A fee will not be fair and reasonable and may subject the lawyer to disciplinary proceedings if it is one that cannot be justified in the light of all pertinent circumstances, including the factors mentioned, or is so disproportionate to the services rendered as to introduce the element of fraud or dishonesty, or undue profit.[2]

2. It is in keeping with the best traditions of the legal profession to reduce or waive a fee in cases of hardship or poverty, or where the client or prospective client would otherwise effectively be deprived of legal advice or representation.[3]

Avoidance of Controversy

3. Breaches of this Rule and misunderstandings about fees and financial matters bring the legal profession into disrepute and reflect adversely upon the administration of justice. The lawyer should try to avoid controversy with the client over fees and should be ready to explain the basis for charges, especially if the client is unsophisticated or uninformed about the proper basis and measurements for fees. The lawyer should give the client an early and fair estimate of fees and disbursements, pointing out any uncertainties involved, so that the client may be able to make an informed decision. When something unusual or unforeseen occurs that may substantially affect the amount of the fee, the lawyer should forestall misunderstandings or disputes by explaining this to the client.[4]

Interest on Overdue Accounts

4. Save where permitted by law, the lawyer should not charge interest on an overdue account except by prior agreement with the client and then only at a reasonable rate.[5]

Apportionment and Division of Fees

5. The lawyer who acts for two or more clients in the same matter is under a duty to apportion the fees and disbursements equitably among them in the absence of agreement otherwise.

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

Hidden Fees

7. The fiduciary relationship that exists between lawyer and client requires full disclosure in all financial matters between them and prohibits the lawyer from accepting any hidden fees. No fee, reward, costs, commission, interest, rebate, agency or forwarding allowance or other compensation whatsoever related to the professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and consent of the client. 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, the consent of such other person will be required. So far as disbursements are concerned, only *bona fide* and specified payments to others may

be included. If the lawyer is financially interested in the person to whom the disbursements are made, such as an investigating, brokerage or copying agency, the lawyer shall expressly disclose this fact to the client.[7]

Sharing Fees with Non-lawyers

8. Any arrangement whereby the lawyer directly or indirectly shares, splits or divides fees with notaries public, law students, clerks or other non-lawyers who bring or refer business to the lawyer's office is improper and constitutes professional misconduct. It is also improper for the lawyer to give any financial or other reward to such persons for referring business.[8]

9. The lawyer shall not enter into a lease or other arrangement whereby a landlord or other person directly or indirectly shares in the fees or revenues generated by the law practice.[9]

Contingent Fees

10. Unless prohibited by The Law Society of Saskatchewan, it is not improper for the lawyer to enter into an arrangement with the client for a contingent fee, provided such fee is fair and reasonable and the lawyer adheres to any rules relating to such agreements.[10]

NOTES

1. Cf. CBA-COD 10; CBA 3(8), (9); Que. 3.08.01, .02; 81; B.C. B-5; Alta. 32; N.B. E-1; IBA A-8; ABA DR 2-106.

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

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

4. Cf. CBA 3(10). "The question of compensation for solicitors has long been the anxious concern of the Court, both in the interests of clients and their solicitors...[M]uch legislative and judicial activity was directed to the reform and settlement of procedures for fair and reasonable fees...[In Ontario] there is a procedure for determining in every case where it is invoked, that a solicitor's charges are fair and reasonable.", per Wright, J. in *Re Solicitor* (1972), 1 O.R. 694 at 697 (Ont. H.C.).
"The object of a bill of costs is to 'secure a mode by which the items of which the total bill is made up should be clearly and distinctly shown, so as to give the client an opportunity of exercising his judgment as to whether the bill was reasonable or not'.", per Riddell, J. A. in *Millar v. The King* (1922, 67 D.L.R. 119 at 120 (Ont. App. Div.).

In certain provinces local law requires that clients be expressly advised of their right to have any agreement agreeing to fees in advance judicially reviewed: see N.B. E-2; *Law Society Act* R.S.M. 1970, c. L-100, s. 49; Alberta Supreme Court Rule 616(1)(f).

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

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

7. See particularly the Rule and Commentary respecting conflict of interest between lawyer and client for the reasons underlying these proscriptions, and *Orkin* at pp. 154-55.
The lawyer may not profit from interest on clients' trust monies in the lawyer's hands. In some provinces payment of such interest to Law Foundations and legal aid plans is now authorized.
The general principles and fiduciary duties of the law of agency apply to the lawyer-client relationship, particularly with respect to fidelity, the obligation to account, and against "secret profits". See Pridman, *The Law of Agency* (3rd ed. 1971) at pp. 30-31, 132-39, and other standard authorities on agency. It would, for example, be improper for a lawyer without express disclosure and consent to take any commission, procuration or other fee or reward from a lender, a stockbroker, a real estate or insurance agent, a trust company, a bailiff or a collection agent in consideration of the introduction by the lawyer of business from which professional work resulted to the lawyer in which the lawyer acted for or the lawyer's fees were paid by the person whose business was so introduced.
As to disbursements: "In any case where there is liability upon the part of the solicitor and there is no dishonesty, the mere fact that the amount has not been paid ought not to prevent recovery. If there should be shown any dishonesty the case would be very different...", per Middleton, J. in *Re Solicitor* (1920), 47 O.L.R. 522 at 525 (Ont. H.C.).

8. Cf. Ont. 9(7).

9. *Ibid.*

10. Rule 95 of the Rules of The Law Society of Saskatchewan requires such agreements be in writing with a copy to be delivered to the client and a copy on file with the lawyer.
The term "fair" requires that the manner in which the agreement is created be fair, in the sense that the client fully understands its meaning and no undue advantage has been taken by the lawyer. The term "reasonable" relates to the appropriate quantum of remuneration, in the sense that the amount is justified where it reasonably relates to the service and the risk undertaken at the time of the agreement. See, *Speers v. Hagemeister* (1975), 52 D.L.R. (3d) 109 (S.C.A.); *Nagel v. Stevenson* (1979), 1 Sask. R. 221 (C.A.); *Gokavi and Gokavi v. Lojek, Jones & Company* (1986), 49 Sask. R. 82 (Q.B.).

CHAPTER XII

WITHDRAWAL

RULE

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

Commentary

Guiding Principles

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

2. The lawyer who withdraws from employment should act so as to minimize expense and avoid prejudice to the client, doing everything reasonably possible to facilitate the expeditious and orderly transfer of the matter to the successor lawyer.[3]

3. Where withdrawal is required or permitted by this Rule, the lawyer must comply with all applicable rules of court as well as local rules and practice.

Obligatory Withdrawal

4. In some circumstances, the lawyer will be under a duty to withdraw. The obvious example is following discharge by the client. Other examples are (a) if the lawyer is instructed by the client to do something inconsistent with the lawyer's duty to the court and, following explanation, the client persists in such instructions; (b) if the client is guilty of dishonourable conduct in the proceedings or is taking a position solely to harass or maliciously injure another; (c) if it becomes clear that the lawyer's continued employment will lead to a breach of these Rules such as, for example, a breach of the Rules relating to conflict of interest; or (d) if it develops that the lawyer is not competent to handle the matter. In all these situations there is a duty to inform the client that the lawyer must withdraw.[4]

Optional Withdrawal

5. Situations where a lawyer would be entitled to withdraw, although not under a positive duty to do so, will as a rule arise only where there has been a serious loss of confidence between lawyer and client. Such a loss of confidence goes to the very basis of the relationship. Thus, the lawyer who is deceived by the client will have justifiable cause for withdrawal. Again, the refusal of the client to accept and act upon the lawyer's advice on a significant point might indicate such a loss of confidence. At the same time, the lawyer should not use the threat of withdrawal as a device to force the client into making a hasty decision on a difficult question.[5] The lawyer may withdraw if unable to obtain instructions from the client.[6]

Non-payment of Fees

6. Failure on the part of the client after reasonable notice to provide funds on account of disbursements or fees will justify withdrawal by the lawyer unless serious prejudice to the client would result.[7]

Notice to Client

7. No hard and fast rules can be laid down as to what will constitute reasonable notice prior to withdrawal. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations the governing principle is that the lawyer should protect the client's interests so far as possible 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.[8]

Duty Following Withdrawal

8. Upon discharge or withdrawal the lawyer should:

(a) deliver in an orderly and expeditious manner to or to the order of the client all papers and property to which the client is entitled;
(b) give the client all information that may be required about the case or matter;
(c) account for all funds of the client on hand or previously dealt with and refund any remuneration not earned during the employment;
(d) promptly render an account for outstanding fees and disbursements;
(e) co-operate with the successor lawyer for the purposes outlined in paragraph 2.

The obligation in clause (a) to deliver papers and property is subject to the lawyer's right of lien referred to in paragraph 11. In the event of conflicting claims to such papers and property, the lawyer should make every effort to have the claimants settle the dispute.[9]

9. 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 express consent of the client.

10. The lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor lawyer or lawyers to the extent permitted by this Code, and should seek to avoid any unseemly rivalry, whether real or apparent.[10]

Lien for Unpaid Fees

11. Where upon the discharge or withdrawal of the lawyer the question of a right of lien for unpaid fees and disbursements arises, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, the lawyer should not enforce such a lien if the result would be to prejudice materially the client's position in any uncompleted matter.[11]

Duty of Successor Lawyer

12. Before accepting employment, the successor lawyer should be satisfied that the former lawyer approves, or has withdrawn or been discharged by the client. It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps toward settling or securing any account owed to 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 materially prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.[12]

Dissolution of Law Firm

13. When a law firm is dissolved, this will usually result in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients will prefer to retain the services of the lawyer whom they regarded as being in charge of their business prior to the dissolution. However, the final decision in each case rests with the client and there should be no contest for or unseemly action taken to obtain or maintain the client's retainer. The lawyers who are no longer retained by the clients should act in accordance with the principles here set out, and in particular, commentary 2.[13]

NOTES

1. Cf. CBA-COD 11; Que. 3.03.04, .05; B.C. G-5; IBA B-4; ABA-MR 1.16; ABA EC 2-32, DR 2-110(A), (C). For cases, see 4 Can. Abr. (2d) under "Barristers and Solicitors: Termination of Relationship", paras. 101-02 and supplements. See also *Orkin*, pp. 90-95.

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

3. Cf. ABA DR 2-110(A).
Provincial Rules of Court provide for the giving of notice of change of solicitors and for the making of applications for leave to withdraw.
For cases see 4 Can. Abr. (2d) under "Barristers and Solicitors: Change of Solicitors", paras. 342-58 and supplements.
In legal aid cases provincial regulations may also require notice to the plan administrators; see, e.g., in Ontario O. Reg. 59/86 as amended, s. 62(1)(a).
On an application under the Ontario rules for an order that the lawyer has ceased to act, the supporting material must show the particular facts warranting the lawyer's ceasing to act: *Ely* v. *Rosen* (1963), 1 O.R. 47 (Ont. H.C.).
"I have no doubt that the learned trial Judge seriously erred in law when he purported to direct counsel for the accused that he could not withdraw from the case, notwithstanding the fact that the accused, his client, apparently wished to discharge him.", per Jessup, J.A. in *Regina* v. *Spataro* (1971), 3 O.R. 419 at 422 (Ont. C.A.).

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

5. Cf. ABA DR 2-119(C).
"No solicitor...need put up with abuse and accusations such as were alleged to have been made here and would be fully entitled, after them, to withdraw from the case. An accusation of fraud, in fact, would make it improper for the solicitor to continue to act for the client, since it showed that the client had lost confidence in him., per Urquhart, J. in *Re Solicitors Act; Collison* v. *Hurst* (1946), O.W.N. 668 at 671 (Ont. H.C.).

6. Failure to instruct counsel constitutes repudiation which counsel could accept and terminate the employment.

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

8. "If the case is scheduled to be tried on a date which will afford the accused ample time to retain another counsel, a lawyer who has not been paid the fee agreed upon may withdraw.... But if he waits until the eve of the trial so that there is not time for another counsel to prepare adequately... it becomes too late for him to withdraw. He must continue on....", from panel discussion, note 4, *supra*, at pp. 295-96; and cf. Alta. 8: "If a member accepts a retainer to represent an accused at a preliminary hearing and not at the trial...[he] should have a clear and unambiguous understanding with his client to that effect and...should advise the Court at the beginning of the inquiry...".

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

10. "It is quite apparent...that the applicant dismissed the...solicitor without just cause.... The common law right of a solicitor to exercise a lien on documents in his possession where he has been discharged without cause by his client is well recognized, subject, however, to certain exceptions... where third parties are involved, the Court may interfere...always upon the basis that whereas a solicitor may assert a lien...he should not be entitled to embarrass other parties interested.", per McGillivray, J.A. in *Re Gladstone* (1972), 2 O.R. 127 at 128 (Ont. C.A.).

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

12. Cf. CBA 4(1).

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

CHAPTER XIII

THE LAWYER AND THE ADMINISTRATION OF JUSTICE

RULE

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

Commentary

Guiding Principles

1. The admission to and continuance in the practice of law imply a basic commitment by the lawyer 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. Because of changes in human affairs and the imperfection of human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.[2]

2. The lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. The lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be *bona fide* and reasoned.[3]

Scope of the Rule

3. The obligation outlined in the Rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. The lawyer's responsibilities are greater than those of a private citizen. The lawyer must not subvert the law by counselling or assisting in activities that are in defiance of it and must do nothing to lessen the respect and confidence of the public in the legal system of which the lawyer is a part. The lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by broad irresponsible allegations of corruption or partiality. The lawyer in public life must be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to any public statements.[4]

For the same reason, the lawyer should not hesitate to speak out against an injustice. (As to test cases, see commentary 8 of the Rule relating to advising clients.)

Criticism of the Tribunal

4. Although proceedings and decisions of tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. Firstly, the lawyer should avoid criticism that is petty, intemperate or unsupported by a *bona fide* belief in its real merit, bearing in mind that in the eyes of the public, professional knowledge lends weight to the lawyer's judgements or criticism. Secondly, if the lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Thirdly, where a tribunal is the object of unjust criticism, the lawyer, as a participant in the administration of justice, is uniquely able to and should support the tribunal, both because its members cannot defend themselves and because the lawyer is thereby contributing to greater public understanding of and therefore respect for the legal system.[5]

Improving the Administration of Justice

5. The lawyer who seeks legislative or administrative changes should disclose whose interest is being advanced, whether it be the lawyer's interest, that of a client, or the public interest. The lawyer may advocate such changes on behalf of a client without 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.[6]

NOTES

1. Cf. CBA-COD 12. IBA, "Duty to the Court": "In view of the vital part played by lawyers in the administration of justice, they are under an obligation to strive to maintain respect for that administration...".

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

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

4. Cf. CBA Preamble: "The lawyer is more than a mere citizen...". "[L]awyers, because of *what* they are as opposed to *who* they are...are required to assume responsibilities of citizenship well beyond [the basic requirements of good citizenship]... This...is necessary because we are the profession to which society has entrusted the administration of law and the dispensing of justice.", MacKimmie, "Presidential Address" 91963) 6 Can. B.J. 347 at 348. For lucid and divergent views as to the limits to which lawyers may properly go in "defying the law" see editorial "Civil Disobedience and the Lawyer" (1967) 1(3) Law Soc. U.C. Gaz. 5 and response thereto in (1968) 2 Law Soc. U.C. Gaz. 44.

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

6. Cf. ABA EC 8-4.

CHAPTER XIV

ADVERTISING, SOLICITATION AND MAKING LEGAL SERVICES AVAILABLE

RULE

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

Commentary

Guiding Principles

1. It is essential that a person requiring legal services to able to find a qualified lawyer with a minimum of difficulty or delay. In a relatively small community where lawyers are well known, the person will usually be able to make an informed choice and select a qualified lawyer in whom to have confidence. However, in larger centres these conditions will often not obtain. As the practice of law becomes increasingly complex and many individual lawyers restrict their activities to particular fields of law, the reputations of lawyers and their competence or qualification in particular fields may not be sufficiently well known to enable a person to make an informed choice. Thus one who has had little or no contact with lawyers or who is a stranger in the community may have difficulty finding a lawyer with the special skill required for a particular task. Telephone directories, legal directories, and referral services may help find a lawyer, but not necessarily the right one for the work involved.[2] Advertising of legal services by the lawyer may assist members of the public and thereby result in increased access to the legal system. Subject to the Rules of The Law Society of Saskatchewan, the lawyer may, therefore, advertise legal services to the general public.

2. Despite the lawyer's economic interest in earning a living, advertising, direct solicitation or any other means by which the lawyer seeks to make legal services more readily available to the public must comply with any rules prescribed by The Law Society of Saskatchewan, must be consistent with the public interest and must not detract from the integrity, independence or effectiveness of the legal profession. They must not mislead or arouse unattainable hopes and expectations, because this could

result in distrust of legal institutions and lawyers. They must not adversely affect the quality of legal services, nor must they be so undignified, in bad taste or otherwise offensive as to be prejudicial to the interests of the public or the legal profession.

Finding a Lawyer

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

4. The lawyer may also assist in making legal services available by participating in legal aid plans and referral services, by engaging in programs of public information, education or advice concerning legal matters, and by being considerate of those who seek advice but are inexperienced in legal matters or cannot readily explain their problems.

5. The lawyer has a general right to decline particular employment (except when assigned as counsel by a court) but it is a right the lawyer should be slow to exercise if the probable result would be to make it very difficult for a person to obtain legal advice or representation. Generally speaking, the lawyer should not exercise the right merely because the person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. As stated in commentary 4, the lawyer who declines employment should assist the person to obtain the services of another lawyer competent in the particular field and able to act.[5]

NOTES

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

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

3. Cf. ABA EC 2-8.

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

CHAPTER XV

RESPONSIBILITY TO THE PROFESSION GENERALLY

RULE

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

Commentary

Guiding Principles

1. Unless the lawyer who tends to depart from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the beginning of a course of conduct that would lead to serious breaches in the future. It is, therefore, proper (unless it be privileged or otherwise unlawful) for a lawyer to report to The Law Society of Saskatchewan any occurrences involving a breach of this Code. Where, however, there is a reasonable likelihood that someone will suffer serious damage as a consequence of an apparent breach, for example where a shortage of trust funds is involved, the lawyer has an obligation to the profession to report the matter unless it is privileged or otherwise unlawful to do so. In all cases, the report must be made *bona fide* without malice or ulterior motive.[2] Further, the lawyer must not act on a client's instructions to recover from another lawyer funds allegedly misappropriated by that other lawyer unless the client authorizes disclosure to The Law Society of Saskatchewan and the lawyer makes such disclosure. The lawyer has an obligation to advise the client in writing that failure to report the facts to The Law Society of Saskatchewan may negatively affect the amount recoverable by the client pursuant to a claim which the client may have against the Indemnity Fund. The lawyer has an obligation to inform the client of the provision of The Criminal Code of Canada dealing with the concealment of an indictable offence in return for an agreement to obtain valuable consideration.

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

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

4. A lawyer in his or her professional capacity shall not discriminate on the grounds of race, creed, colour, national origin, disability, age, religion, sex, sexual orientation, marital or family status in the employment of lawyers, articled students or support staff or in any relations between the lawyer and members of the profession or any other person.[5]

Sexual harassment is a form of discrimination and may broadly be defined as "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job related consequences for the victims of the harassment".[6] The lack of an intent to produce feelings of harassment in the complainant is irrelevant.

[Chapter XV, Commentary 4 amended Dec. 9, 1993]

Participation in Professional Activities

5. In order that the profession may discharge its public responsibility of providing independent and competent legal services, lawyers should do their part to assist the profession to function properly and effectively. In this regard, participation in such activities as law reform, continuing legal education, tutorials, legal aid programs, community legal services, professional conduct and discipline, liaison with other professions and other activities of the governing body or local, provincial or national associations, although often time-consuming and without tangible reward, is essential to the maintenance of a strong, independent and useful profession.[7]

6. Often instances of improper conduct arise from emotional, mental or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Law Society of Saskatchewan supports Lawyers Concerned for Lawyers in its commitment to the provision of counselling on a confidential basis. Therefore, subject to the qualification below, it is not required that lawyers acting in the capacity of counsellors for Lawyers Concerned for Lawyers disclose information received in that capacity to the Discipline Committee of the Law Society, its agents, investigators or employees. Such lawyer/counsellor will not be called by the Law Society or by any investigation committee to testify at any discipline or competency hearing without the consent of the lawyer from whom the information was received. For similar reasons, and again subject to the qualifications below, the Law Society ombudsperson and designated practice advisor(s) are excused from disclosing to the Law Society information received in their capacities as ombudsperson or practice advisor.

Notwithstanding the above, a member of the Law Society acting in the capacity of counsellor for Lawyers Concerned for Lawyers, ombudsperson or practice advisor has an ethical obligation to report to the Law Society representations from a lawyer that indicate he/she may engage in future conduct which is unethical or criminal. Such conduct includes, without limitation, perjury, theft and fraud. The Law Society cannot countenance the continuation of such conduct regardless of a lawyer's attempts at rehabilitation".

[Chapter XV, Commentary 6, added Sept. 17, 1993]
[Chapter XV, Commentary 6 amended February, 2003]

NOTES

1. Cf. CBA-COD 14; CBA 5(1); ABA-MR 8; ABA Canon 1.
"The legal profession...has emerged over the centuries in order to fill a pressing public need for protection...under the law of the rights and liberties of the individual, however humble, if necessary against the state itself.", IBA introductory.
"Public confidence in the profession would be shaken if such conduct were tolerated...no solicitor could escape [striking off] simply by showing that there had been no dishonesty and no concealment, and that no client had suffered...", per Parker, L.C.J. in *re a Solicitor* (1959), 193 Sol. Jour. 875 (Q.B.D.).

2. Cf. CBA 5(1); Ont. 13; B.C. F-3; ABA DR 1-103, EC 1-4. Alta. 22: "It is conduct unbecoming...not to [report instances] when they clearly involve a shortage of trust funds or a breach of an undertaking."

3. Cf. Ont. 13(3); Alta. 18; N.B. D-1; Sask. 12. "The reprehensible thing about the solicitor's conduct is his indefensible ignoring of the communications of the Law Society...", per Walsh, J. in *In re X., a Solicitor* (1920), 16 Alta. L.R. 542 at 543.

4. Cf. IBA D-6.

5. This commentary does not preclude any program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups.

[Footnote 5 added Dec. 9, 1993]

6. Per the Supreme Court of Canada in *Janzen v. Platty Enterprises Ltd.*, [1989] 1 SCR 1252 at page 1284. The Chief Justice also said:

"Common to all of these descriptions of sexual harassment is the concept of using a position of power to import sexual requirements into the workplace thereby negatively altering the working conditions of employees who are forced to contend with sexual demands. (at p.1281).

Sexual harassment is not limited to demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands...Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour". (at p.1282)

See also: *Herman v. Rodin* [1989] 2 W.W.R. 769, 56 D.L.R. (4th) 109 (Sask. Q.B.).

"The proposition that sexual harassment is the product of individual attraction and it is not based on gender ignores the factual realities. A woman is sexually harassed not because of who she is, but because she has a woman's body and therefore is *identified* and treated differently because of her gender." Per McLellan J. at page 712.

[Footnote 6 added Dec. 9, 1993]

7. Cf. ABA ECs 1-4, 2-25, 6-2, 8-1, 8-2, 8-3, 8-9, 9-6.

CHAPTER XVI

RESPONSIBILITY TO LAWYERS INDIVIDUALLY

RULE

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

Commentary

Guiding Principles

1. Public interest demands that matters entrusted to the lawyer be dealt with effectively and expeditiously. Fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the Rule will impair the ability of lawyers to perform their function properly.[2]

2. Any ill feeling 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 judgement to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or references between them should be avoided. Haranguing or offensive tactics interfere with the orderly administration of justice and have no place in our legal system.[3]

3. The lawyer should accede to reasonable requests for trial dates, adjournments, waivers or procedural formalities and similar matters that do not prejudice the rights of the client. The lawyer who knows that another lawyer has been consulted in a matter should not proceed by default in the matter without enquiry and warning.[4]

Avoidance of Sharp Practices

4. The lawyer should avoid sharp practice and 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 any sacrifice of the client's rights. The lawyer should not, unless required by the transaction, impose on other lawyers impossible,

impractical or manifestly unfair conditions of trust, including those with respect to time restraints and the payment of penalty interest. In addition, the lawyer shall not impose trust conditions which have the effect of altering the terms of the transaction.

5. The lawyer should not use a tape-recorder or other device to record a conversation, whether with a client, another lawyer or anyone else, even if lawful, without first informing the other person of the intention to do so.[5]

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

7. The lawyer should not communicate upon or attempt to negotiate or compromise a matter directly with any party who is represented by a lawyer except through or with the consent of that lawyer.[7] This commentary applies whether the client is an individual, a corporation, a municipal corporation, a minister, agency or department of the Crown or a Crown corporation. Upon becoming aware that a lawyer, including in house counsel, has been instructed on a matter, there must be no communication on any point of law or fact at issue except through that lawyer.

[Chapter XVI, Commentary 7 amended April 2, 1993]

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

9. The lawyer who is retained by another lawyer as counsel or adviser in a particular matter should act only as counsel or adviser and respect the relationship between the other lawyer and the client.

Undertakings

10. The lawyer shall give no undertaking that cannot be fulfilled, shall fulfil every undertaking given, and shall scrupulously honour any trust condition once accepted. Undertakings and trust conditions shall be written or confirmed in writing and shall be absolutely unambiguous in their terms. If the lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally.[8] If the lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition shall be immediately returned to the person imposing the trust condition unless its terms can be forthwith amended, preferably in writing, on a mutually agreeable basis.

10A. The lawyer shall not, when acting for the purchaser in a real estate transaction, undertake personal responsibility for a transaction by guaranteeing payment. Conversely the lawyer, when acting for the vendor in a real estate transaction, shall not impose upon the lawyer acting for the purchaser a trust condition which requires the lawyer for the purchaser to guarantee closure of the transaction by personally guaranteeing payment of the entire purchase price.

Nothing in this paragraph shall prevent a lawyer for the purchaser from accepting a trust condition nor a lawyer for the vendor from imposing a trust condition which imposes a guarantee of closure where the purchaser's lawyer has the full purchase price in his or her possession at the time of acceptance of the trust condition and the funds are fully releaseable upon closing.

[Commentary 10A added May, 2002]

Acting Against Another Lawyer

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

NOTES

1. Cf. CBA-COD 167; CBA 4(1), (2), (4); Ont. 14; ABA ECs 7-37 and 7-38, DR 7-101(A)(1).

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

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

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

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

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

7. Cf. CBA 4(3); B.C. D-1(a); Alta. 16; N.B. D-3; ABA EC 7-18; *Nelson v. Murphy et al.* (1957), 9 D.L.R. (2d) 195 (Man. C.A.) per Tritschler, J.A. at p. 213: "The principle was laid down long ago...that once it appears a person has an attorney there can be no effective dealing except through him...a lawyer 'should never in any way...attempt to negotiate or compromise the matter directly with any party represented by a lawyer except *through* such lawyer'."

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

8. Cf. paragraph 11 of the Rule relating to the lawyer as advocate; Ont. 14(6); Alta. 17: "...[T]he use of such words as 'on behalf of my client' or 'on behalf of the vendor' does not relieve the solicitor giving the undertaking of personal responsibility." B.C. D-2: "...[D]ifficulties may arise if [members] give undertakings on behalf of clients since clients may change instructions or solicitors. An undertaking given by one solicitor to another can be released or altered only by the latter and not by his client. The giving of an uncertified cheque is an undertaking, except in the most unusual and unforeseen circumstances the justification for which rests upon the member, that such cheque will be paid...".

9. Cf. CBA 5(1); IBA C-4; ABA EC 2-28; *Orkin* at pp. 97-98. See also paragraph 9 of the Rule relating to making legal services available.

CHAPTER XVII

PRACTICE BY UNAUTHORIZED PERSONS

RULE

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

Commentary

Guiding Principles

1. Statutory provisions against the practice of law by unauthorized persons are for the protection of the public. Unauthorized persons may have technical or personal ability, but they are immune from control, regulation and, in the case of misconduct, from discipline by any governing body. Their competence and integrity have not been vouched for by an independent body representative of the legal profession. Moreover, the client of a lawyer who is authorized to practise has the protection and benefit of the lawyer-client privilege, the lawyer's duty of secrecy, the professional standards of care that the law requires of lawyers, as well as the authority that the courts exercise over them. Other safeguards include group professional liability insurance, rights with respect to the taxation of bills, rules respecting trust monies, and requirements for the maintenance of compensation funds.[2]

Suspended or Disbarred Persons

2. The lawyer shall not, without the approval of The Law Society of Saskatchewan, employ in any capacity having to do with the practice of law (a) a lawyer who is under suspension as a result of disciplinary proceedings, or (b) a person who has been disbarred as a lawyer or has been permitted to resign while facing disciplinary proceedings and has not been reinstated.[3]

Supervision of Employees

3. The lawyer must assume complete professional responsibility for all business entrusted to the lawyer, maintaining direct supervision over staff and assistants such as students, clerks and legal assistants to whom particular tasks and functions may be

delegated. The lawyer who practises alone or operates a branch or part-time office should ensure that all matters requiring a lawyer's professional skill and judgement are dealt with by a lawyer qualified to do the work and that legal advice is not given by unauthorized persons, whether in the lawyer's name or otherwise. Furthermore, the lawyer should approve the amount of any fee to be charged to a client.[4]

Legal Assistants

4. Subject to general and specific restrictions next following, a legal assistant may perform any task delegated and supervised by a lawyer so long as the lawyer maintains a direct relationship with the client and assumes full professional responsibility for the work. Legal assistants shall not perform any of the duties that lawyers only may perform or do things that lawyers themselves may not do. Generally speaking, the question of what a lawyer may delegate to a legal assistant turns on the distinction between the special knowledge of the legal assistant and the professional legal judgement of the lawyer which, in the public interest, must be exercised by him or her whenever it is required.

5. Except as permitted under Sections 5 to 7, 9, 10, 13 or 20 of *The Legal Aid Act*, SS 1983, c L-9.1, the lawyer should not permit the legal assistant to:

a) accept cases on behalf of the lawyer;

b) fix fees;

c) give legal advice;

d) give or receive undertakings;

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

f) be held out as a lawyer, or be identified other than as a legal assistant when communicating, whether orally or in writing, with clients, lawyers, public officials or with the public generally, whether within or outside the offices of the law firm of employment;

g) appear in Court or actively participate in legal proceedings on behalf of a client except in a support role to the lawyer appearing in the proceedings;

h) be named in any manner on the letterhead of a lawyer's stationery or in any sign, announcement or listing in any directory or advertisement used or published by the lawyer, or in association with the lawyer in any pleading, written agreement or other like document submitted to a court.

6. A legal assistant should be permitted to act only under the supervision of a member of The Law Society. Adequacy 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 legal assistant generally and with regard to the particular matter. The burden rests on the lawyer who employs a legal assistant to educate the latter with respect to the duties to which the legal assistant may be assigned, and then to supervise the manner in which the legal assistant carries out such work as it is performed to ensure that it is proceeding correctly and in a timely fashion for delivery to the client.

7. For the purposes of the following guidelines in specific areas of practice, it has in some instances been found easier to define the functions of the legal assistant affirmatively:

a) Real Estate

The lawyer may permit the legal assistant to attend to all matters of routine administration in a transaction relating to the sale, option, lease or mortgaging of land, and to conduct all routine correspondence and draft all documents and other correspondence including closing documents and statements of account, provided that the lawyer attends on the client to advise and take instructions on all substantive matters, review title search reports, conducts all negotiations with third parties or their lawyers, reviews documents before signing, attends on the client to review documents, reviews and signs title opinions and/or reporting letters to clients following registration.

b) Corporate and Commercial

The lawyer may permit the legal assistant to attend to all matters of routine administration and to draft all documentation and correspondence relating to corporate proceedings and corporate records, security instruments and contracts of all kinds, including closing documents and statements of account, provided that the lawyer attends on the client to advise and take instructions on all substantive matters, conducts all negotiations with third parties or their lawyers and reviews all written material prepared by the legal assistant before it leaves his or her office other than documents and correspondence relating to routine administration, and signs all correspondence except as aforesaid.

c) Wills, Trusts and Estate

The lawyer may permit the legal assistant to collect information, assist in drafting certain documents, prepare income tax, succession duty and estate tax returns, calculate such taxes and duties, draft executors' accounts and statements of account, attend to filings and conduct routine correspondence, provided that the lawyer attends on the client to advise and take instructions

on all substantive matters, conducts all negotiations with the third parties or their lawyers, attends at any hearing before the Court or Registrar, reviews all material prepared by the legal assistant before it leaves his or her office, other than documents and correspondence relating to routine administration, and signs all correspondence except as aforesaid.

d) Litigation

The lawyer may permit the legal assistant to collect information, prepare draft pleadings, correspondence and other documentation, research legal questions, prepare memoranda, organize documents, prepare briefs, draft statements of account and attend to filings and other matters of an administrative nature, provided that the lawyer shall attend on the client to advise and take instructions on all substantive issues, conduct all negotiations with third parties or their lawyers (except where the amount involved does not justify the cost of a lawyer's time, negotiations of claims other than in tort may be conducted by the legal assistant and communicated directly by him or her to the client if prior to settlement it is reviewed by the lawyer), and review all written material prepared by the legal assistant before it leaves his or her office, other than documents and correspondence relating to routine administration, and signs all correspondence except as aforesaid. The legal assistant shall not attend at any examination for discovery of the client or to examine another party in an action, or attend in Court or before a Registrar or before any Administrative Tribunal, except in support of a lawyer also in attendance.

NOTES

1. Cf. CBA-COD 15; CBA 5(1), (2); IBA E-5 and E-6; ABA-MR 5.5; ABA Canon 3, DRs 3-101 (A), (B) and 3-103(2).

2. Cases and statutes provide that certain acts amount to "the practice of law"; see, for example:
B.C.: *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, ss. 1, 80.
Man.: *Law Society Act*, R.S.M. 1970, c. L-100, s. 48(1), (2).
N.B.: *Barristers Society Act*, S.N.B. 1931, c. 50, s. 14A as amended by S.N.B. 1937, c. 30.
Nfld.: *Law Society Act*, R.S.N. 1970, c. 201, s. 76(2).
N.S.: *Barristers and Solicitors Act*, R.S.N.S. c. B-2, s. 4(2).
P.E.I.: *Law Society and Legal Profession Act*, R.S.P.E.I. 1974, c. L-9, s. 21.
Que.: *Bar Act*, R.S.Q. 1977, c. B-1, s. 128.
The statutes of all provinces prohibit the practice of law by unauthorized persons:
Alta.: *Legal Profession Act*, R.S.A. c. L-9, s. 93.
B.C.: *supra*, s. 77.
Man.: *supra*, s. 48(1).

N.B.: *supra*, s. 143(3).
Nfld.: *supra*, s. 76(1).
N.S.: *supra*, s. 4(1).
Ont.: *Law Society Act*, R.S.O. 1980, c. 233, s. 50(1), (2).
P.E.I.: *supra*, s. 19.
Que.: *supra*, ss. 132 et seq.
Sask.: *The Legal Profession Act, 1990*, ss. c. L-10.1, s. 30
"To protect the public against persons who...set themselves up as competent to perform services that imperatively require the training and learning of a solicitor, although such persons are without either learning or experience to qualify them, is an urgent public service.", per Robertson, C.J.O. in *Rex ex rel. Smith* v. *Ott* (1950) O.R. 493 at 496 (Ont. C.A.)
"When a man says in effect, I am not a lawyer but I will do the work of a lawyer for you he is offering his services as a lawyer. In offering his services as a lawyer he is holding himself out as a lawyer even though he makes it clear he is not a properly qualified lawyer.", per Miller, C.C.J. in *Regina* v. *Woods* (1962), O.W.N. 27 at 30. See, generally, *Orkin* at pp. 350-53, *Bennion* at p. 54.

3. Cf. Ont. 19, 20; B.C. F-4. In cases of hardship or illness and for other good cause governing bodies may well permit regulated and limited employment, for example to help rehabilitate an offender or one recovering from a disability. Their concern is to protect the public, not necessarily to inhibit individuals.

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

CHAPTER XVIII

PUBLIC APPEARANCES AND PUBLIC STATEMENTS BY LAWYERS

RULE

The lawyer who makes public appearances and public statements should do so in conformity with the principles of this Code and the Rules of The Law Society of Saskatchewan.

Commentary

Guiding Principles

1. The lawyer who makes public appearances and public statements should behave in the same way as when dealing with clients, fellow practitioners and the courts. Dealings with the media are simply an extension of the lawyer's conduct in a professional capacity. The fact that an appearance is outside a courtroom or law office does not excuse conduct that would be considered improper in those contexts.

Public Statements Concerning Clients

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

3. When acting as an advocate, the lawyer should refrain from expressing personal opinions about the merits of the client's case.

Standard of Conduct

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

5. The lawyer who makes public appearances and public statements must comply with the requirements of commentary 2 of Chapter XIV and the Rules of The Law Society of Saskatchewan.

[Chapter XVIII Commentary 5 Amended December 11, 1992]

Contacts with the Media[1,2]

6. Where the lawyer, by reason of professional involvement or otherwise, is able to assist the media in conveying accurate information to the public, it is proper for the lawyer to do so, provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts or the administration of justice, and provided also that the lawyer's comments are made *bona fide* and without malice or ulterior motive.

7. The lawyer may make contact with the media in a non-legal setting to publicize such things as fund-raising, expansion of hospitals or universities, promoting public institutions or political organizations, or speaking on behalf of organizations that represent various racial, religious or other special interest groups.

8. The lawyer is often called upon to comment publicly on the effectiveness of existing statutory or legal remedies, on the effect of particular legislation or decided cases, or to offer an opinion on causes that have been or are about to be instituted. It is permissible to do this in order to assist the public to understand the legal issues involved.

9. The lawyer may also be involved as an advocate for special interest groups whose objective is to bring about changes in legislation, government policy or even a heightened public awareness about certain issues, and the lawyer may properly comment publicly about such changes.

10. In some circumstances, the lawyer should have no contact at all with the media; in others it may be proper to contact the media in order to serve the client properly. The latter situation will arise more often when dealing with administrative boards and tribunals that are instruments of government policy and hence susceptible to public opinion. Given the variety of cases that can arise in the legal system, whether in civil, criminal or administrative matters, it is not feasible to set down guidelines that would anticipate every possible situation.

11. This Rule should not be construed in such a way as to discourage constructive comment or criticism.

NOTES

1. The media have recently shown greater interest in legal matters than they did formerly. This is reflected in more coverage of the passage of legislation at national and provincial levels, as well as of cases before the courts that may have social, economic or political significance. This interest has been heightened by the enactment of the *Canadian Charter of Rights and Freedoms*. As a result, media reporters regularly seek out the views not only of lawyers directly involved in particular court proceedings but also of lawyers who represent special interest groups or have recognized expertise in a given field in order to obtain information or provide commentary.

2. The lawyer should bear in mind when making a public appearance or giving a statement that ordinarily the lawyer will have no control over any editing that may follow, or the context in which the appearance or statement may be used.

CHAPTER XIX

AVOIDING QUESTIONABLE CONDUCT

RULE

The lawyer should observe the rules of professional conduct set out in the Code in the spirit as well as in the letter.[1]

Commentary

Guiding Principles

1. Public confidence in the administration of justice and the legal profession may be eroded by irresponsible conduct on the part of the individual lawyer. For that reason, even the appearance of impropriety should be avoided.[2]

2. Our justice system is designed to try issues in an impartial manner and decide them upon the merits. Statements or suggestions that the lawyer could or would try to circumvent the system should be avoided because they might bring the lawyer, the legal profession and the administration of justice into disrepute.[3]

Duty after Leaving Public Employment

3. After leaving public employment, the lawyer should not accept employment in connection with any matter in which the lawyer had substantial responsibility or confidential information prior to leaving, because to do so would give the appearance of impropriety even if none existed. However, it would not be improper for the lawyer to act professionally in such a matter on behalf of the particular public body or authority by which the lawyer had formerly been employed.[4] As to confidential government information acquired when the lawyer was a public officer or employee, see commentary 14 of the Rule relating to confidential information.

Retired Judges

4. A judge who returns to practice after retiring or resigning from the bench should not, subject to the Rules of The Law Society of Saskatchewan, appear as a lawyer before the court of which the former judge was a member or before courts of inferior jurisdiction thereto. If in a given case the former judge should be in a preferred position by reason of having held judicial office, the administration of justice would suffer; if the reverse were true, the client might suffer. There may, however, be cases where a governing body would consider that no preference or appearance of preference would result, for example, where the judge resigned for good reason after only a very short time on the bench. In this paragraph "judge" refers to one who was appointed as such under provincial legislation or section 96 of the *Constitution Act*, 1982 and "courts" include chambers and administrative boards and tribunals.[5]

5. Conversely, although it may be unavoidable in some circumstances or areas, generally speaking the lawyer should not appear before a judge if by reason of relationship or past association, the lawyer would appear to be in a preferred position.[6]

Inserting Retainer in Client's Will

6. Without express instructions from the client, it is improper for the lawyer to insert in the client's will a clause directing the executor to retain the lawyer's services in the administration of the estate.[7]

Duty to Meet Financial Obligations

7. The lawyer has a professional duty, apart from any legal liability, to meet financial obligations incurred or assumed in the course of practice when called upon to do so. Examples are agency accounts, obligations to members of the profession, trade accounts directly related to the lawyer's practice, fees or charges of witnesses, sheriffs, special examiners, registrars, reporters and public officials as well as the deductible under a governing body's errors and omissions insurance policy.[8]

Dealings with Unrepresented Persons

8. The lawyer should not undertake to advise an unrepresented person, but should urge such a person to obtain independent legal advice and, if the unrepresented person does not do so, the lawyer must take care to see that such person is not proceeding under the impression that the lawyer is protecting such person's interests. If the unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in the Rule relating to impartiality and conflict of interest between clients.[9] The lawyer may have an obligation to a person whom the lawyer does not represent, whether or not such person is represented by a lawyer.

Bail

9. The lawyer shall not stand bail for an accused person for whom the lawyer or a partner or associate is acting, except where there is a family relationship with the accused in which case the person should not be represented by the lawyer but may be represented by a partner or associate.

[Commentary 9 Amended April 15, 1994]

Standard of Conduct

10. The lawyer should try at all times to observe a standard of conduct that reflects credit on the legal profession and the administration of justice generally and inspires the confidence, respect and trust of both clients and the community.

NOTES

1. Cf. CBA-COD 17; CBA 5(6): "...[T]he oath of office...is not a mere form, but is a solemn undertaking." ABA Canon 9: "A lawyer should avoid even the appearance of professional impropriety."
Cf. dictum of Hewart, L.C.J. in *The King* v. *Sussex Justices* (1924), 1 K.B. 256 at 259 (K.B.D.): "...[It] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

2. Cf. ABA EC 9-1. In *Re Novak and Law Society* (1973) 31 D.L.R. (3d) 89 (B.C.S.C.) (sustaining the disbarment of a lawyer who had negotiated a reward through the police for the return of stolen securities) the Discipline Committee said (at p. 95): "In exposing himself to these situations the Respondent divested himself of the dignity and forthright dealing that one may expect of a lawyer, gave rise to the reasonable conclusion that he was associated with the possessors of the goods, and that he was participating in some way in the reward.... Whether in fact he was doing so is perhaps not important."

3. Cf. ABA EC 9-4: "There should be the very contrary to the secrecy and subterfuge which marks every step of this transaction, dishonourable alike to counsel and the magistrate.", per Baxter, C.J. in *The King* v. *LeBlanc and Long* (1938-39) 13 M.P.R. 343 at 357 (N.B. App. Div.).

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

5. Cf. Ont. 15: "...[I]f a man should step down [from the Bench] and... perhaps challenge the decisions which he pronounced, or even fail to support them in argument, he will shake the authority of the judicial limb of government, and mar the prestige and dignity of the Courts of Justice...", per Kennedy, C.J. in *Re Solicitors Act and O'Connor* (1930) I.R. 623 at 631 (Irish H.C.).

6. Cf paragraph 1(c) of the Rule relating to the lawyer as advocate; *Orkin* at p. 43.

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

8. Art. 19 of the International Code of Ethics provides: "A lawyer who engages a foreign colleague to advise on a case or to cooperate in handling it, is responsible for the payment of the latter's charges except express agreement to the contrary. When a lawyer directs a client to a foreign colleague he is not responsible...".
Cf. also IBA D-10.

9. Cf. *Orkin* at pp. 127-28.
"In every case where there is the least doubt...as to whether the other party is capable of protecting himself, it is the duty of [the] solicitor...to see, if possible, that the other party is adequately represented; and, in the absence of such independent representation, it is the duty of the Court to scrutinize...to see whether...there has been any overreaching or unconscionable dealing.", per Orde, J. in *Chait & Leon* v. *Harding* (1920-21) 19 O.W.N. 20 at 21 (Ont. H.C.). "It was [the solicitor's] duty to see that the infirm person was adequately protected or had independent advice. If [he] regarded himself as the adviser of the aged plaintiff, he should have insisted that proper arrangements protecting [him] were entered into...", per Middleton, J. in *Finney* v. *Tripp* (1922) 22 O.W.N. 429 at 430 (Ont. H.C.).

ABBREVIATIONS

Short-form references to Canons, Codes, Rulings and other particular writings are as follows:

Alta	Rulings of the Benchers of the Law Society of Alberta, contained in the *Professional Conduct Handbook* published by that Society at Calgary in 1968, as amended.
ABA	*Code of Professional Responsibility* of the American Bar Association (Chicago), adopted with effect from January 1, 1970. The ABA is divided into Canons, Ethical Considerations (ECs) and Disciplinary Rules (DRs).
ABA-MR	*Model Rules of Professional Conduct* of the American Bar Association, adopted August 2, 1983.
Bennion	F.A.R., *Professional Ethics, The Consultation Professions and Their Code* (London: Charles Knight, 1969).
B.C.	Rulings of the Benchers of the Law Society of British Columbia contained in the *Professional Conduct Handbook* published by that Society at Vancouver in 1970, as amended.
CBA	*Canons of Legal Ethics* of the Canadian Bar Association adopted in 1920.
CBA-COD	*Code of Professional Conduct* of the Canadian Bar Association adopted in 1974.
IBA	*Professional Ethics*, by Sir Thomas Lund, being Book II of the International Bar Association published in 1970 by that Association (London: Sweet & Maxwell). IBA includes as an Appendix the "International Code of Ethics" of the International Bar Association adopted in 1956, as amended.
N.B.	Rules of the Barristers' Society of New Brunswick contained in the *Professional Conduct Handbook* published by that Society at Fredericton in 1971, as amended.
Ont.	Rules of Professional Conduct of the Law Society of Upper Canada contained in the *Professional Conduct Handbook* published by that Society at Toronto in 1987, as amended.
Orkin	M.M., *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Jane, 1957).
Que.	*Code of Advocates*, An Act respecting the Barreau du Québec, R.S.Q. c. B-1, s. 15.
Sask.	*Canons of Legal Ethics and Etiquette* of The Law Society of Saskatchewan, published by the Benchers of that Society at Regina in 1962, as amended.

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Guidelines on Ethics and the New Technology

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Part I Technology and the Duty of Competence

A lawyer must maintain a state of competence on a continuing basis in all areas which the lawyer practices. 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 Practicing 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 practices 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 e-mail.

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 e-mail, 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.

The provisions of Chapter IV of *The Code of Professional Conduct* apply with equal force to electronic communication.

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 e-mail, whether via the Internet, internal e-mail 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 although where the lawyer has reason to believe that such use is inappropriate, he/she should so advise the client.

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 e-mail 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 e-mail 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 discovery or 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 should not be left entirely in the hands of an office manager or support staff. The lawyer is ethically responsible to ensure proper compliance.

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.[1]

Part 5 Advertising

1. Applicability of Policy Directive No. 2 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 e-mail, and is governed by Part 19 of the Rules.

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 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

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1 Copying software is illegal. SPA Education: Administrator Advice, p.1.

e-mail 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 practice 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

The Ethics Committee considers that 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, such as SPAM or the automatic opening of new windows.

A lawyer's advertising activity is further governed by the provisions of these guidelines which directs 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 and the Rules. Like the Code and Rules, 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, Rules and these guidelines apply will change as technology changes, but the principles of ethical professional conduct will not.

Appendix 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.[2]

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?

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.[3] Software rental occurs when

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2 Microsoft Licensing Policies: Answers to Frequently Asked Questions. p.1.

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.

software is rented or borrowed (like a videotape) for temporary use, contrary to the terms of the licensing agreement.[4]

Pirating can occur whenever copying occurs. A person who receives e-mail 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;
>
> *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.[5] While there is some controversy over the

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

5 QL Systems Limited's licencing agreement, for instance, places restrictions on the user's ability to store information downloaded from its databases. 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 any 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

"shrinkwrap licence", it is certainly far from clear that this form of licensing agreement is always unenforceable.[6]

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.[7] The copyright also exists automatically upon creation. That is to say, it is not necessary for the creator to place the 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)[8]. Software piracy is also an indictable offence punishable by up to 5 years imprisonment and/or a fine of up to $1 million.[9]

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.[10] 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,

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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 has 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 competitors' actions.

7 The *Copy Right 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.

8 *Copy Right Act*, s.35.

9 *Copy Right Act*, s.42.

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

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.[11] Enforcement actions have not been limited to the United States.[12]

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

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

12 *The SPA reports that, as of July 16th, 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.