Law Society
of British Columbia

Agenda

Bencher Meeting

Date:	Friday, November 1, 2024
Time:	**9:00 am – Call to Order**
Location:	The Bencher meeting is taking place as a virtual meeting. If you would like to attend the meeting as a virtual attendee, please email BencherRelations@lsbc.org
Recording:	***The public portion of the meeting will be recorded.***

CONSENT AGENDA

Any Bencher may request that a consent agenda item be moved to the regular agenda by notifying the President or the Manager, Governance & Board Relations prior to the meeting.

1	Minutes of September 20, 2024 meeting (regular session)
2	Minutes of September 20, 2024 meeting (*in camera* session)
3	2025 Fee Schedule Amendments
4	Omnibus Code Changes – Gender Inclusivity and General Updates
5	2025 Task Forces

REPORTS

6	President's Report	15 min	Jeevyn Dhaliwal, KC
7	CEO's Report	15 min	Don Avison, KC

DISCUSSION/DECISION

8	Demographic Data Collection and Use	30 min	Claire Marchant

FOR INFORMATION

9	2025 Bencher and Executive Committee Meeting Schedule

DM4478411

Law Society
of British Columbia

Agenda

10	Bencher Retreat 2024 – Discrimination, Harassment & Bullying in the Legal Profession
IN CAMERA	
11	Other Business

DM4478411

Bencher Meeting: Minutes (Draft)

To: Benchers

Purpose: Approval (Consent Agenda)

Date: Friday, September 20, 2024

Present:	Jeevyn Dhaliwal, KC, President	James A. S. Legh
	Brook Greenberg, KC, 1st Vice-President	Dr. Jan Lindsay
	Lindsay R. LeBlanc, KC, 2nd Vice-President	Jaspreet Singh Malik
	Paul Barnett	Georges Rivard
	Aleem Bharmal, KC	Michèle Ross
	Tanya Chamberlain	Thomas L. Spraggs
	Nikki L. Charlton	Barbara Stanley, KC
	Jennifer Chow, KC	James Struthers
	Tim Delaney	Natasha Tony
	Brian Dybwad	Michael F. Welsh, KC
	Cheryl D'Sa, KC	Kevin B. Westell
	Ravi R. Hira, KC	Gaynor C. Yeung
	Sasha Hobbs	Jonathan Yuen
Absent:	Simran Bains	Benjamin D. Levine
	Nikki L. Charlton	Jay Michi
	Christina J. Cook	Gurminder Sandhu, KC

Staff present:	Don Avison, KC Avalon Bourne Natasha Dookie Su Forbes, KC Vicki George Kerryn Holt Jeffrey Hoskins, KC Alison Kirby Jane Ladesma Michael Lucas, KC Alison Luke Claire Marchant Tara McPhail Jeanette McPhee
	Cary Ann Moore Doug Munro Rashmi Nair Maryanne Prohl Michelle Robertson Lesley Small Arrie Sturdivant Christine Tam Maddie Taylor Adam Whitcombe, KC Teo Wong Charlene Yan Vinnie Yuen

Guests:	Ian Burns	Digital Reporter, The Lawyer's Daily
	Alexandra Calbery	Guest of 2024 Indigenous Scholarship Winner
	Iyanuoluwa Christian	Guest of 2024 Scholarship for Graduate Legal Studies
	Onyinyechi Christian	Guest of 2024 Scholarship for Graduate Legal Studies
	Sopuruchi G. Christian	2024 Scholarship for Graduate Legal Studies
	Shirina Evans	2024 Indigenous Scholarship Winner
	Dr. Cristie Ford	Professor, Peter A. Allard School of Law
	Freya Kodar	Dean of Law, UVic
	Jamie Maclaren, KC	Executive Director, Access Pro Bono Society of BC
	Desmond MacMillan	Assistant Dean of Law, Thompson Rivers University
	Scott Morishita	Past President, Canadian Bar Association, BC Branch
	Lee Nevens	President, Canadian Bar Association, BC Branch
	Caroline Nevin	CEO, Courthouse Libraries BC
	Ngai Pindell	Dean of Law & Professor, Peter A. Allard School of Law
	Laura Selby	Director of Publications, Continuing Legal Education Society of BC
	Kerry Simmons, KC	Executive Director, Canadian Bar Association, BC Branch
	Trevor Tailfeathers	Executive Member, Aboriginal Lawyers Forum

Recognition

1. Presentation of the 2024 Law Society Scholarship for Graduate Legal Studies

President Jeevyn Dhaliwal, KC introduced and congratulated the recipient of the 2024 Law Society Scholarship for Graduate Legal Studies, Sopuruchi G. Christian.

2. Presentation of the 2024 Law Society Indigenous Scholarship

President Dhaliwal introduced and congratulated the recipient of the 2024 Law Society Indigenous Scholarship, Shirina Evans.

Consent Agenda

3. Minutes of July 5, 2024, meeting (regular session)

The minutes of the meeting held on July 5, 2024 were approved unanimously and by consent as circulated.

4. Minutes of July 5, 2024, meeting (*in camera* session)

The minutes of the *in camera* meeting held on July 5, 2024 were approved unanimously and by consent as circulated.

Reports

5. President's Report

President Dhaliwal indicated that Second Vice-President Lindsay R. LeBlanc, KC had declared a conflict in regard to item 10, which would be moved to the end of the regular portion of the agenda.

Ms. Dhaliwal began her report by thanking Benchers for arranging and attending call ceremonies which took place across the province since July, including an extraordinary one which took place in Nisg̲a'a, being the first of its kind in the province to welcome a new member to the bar in their home community. This ceremony attendance led her to being able to travel to Prince Rupert to meet the local bar. Ms. Dhaliwal gave thanks to all Benchers for their meaningful contributions in their communities.

Ms. Dhaliwal commented how each level of the court in BC has received a number of new appointments this year and she has had the pleasure of delivering remarks at many of the welcoming ceremonies. Ms. Dhaliwal gave her congratulations to the newly appointed judges throughout British Columbia, including Victoria, New Westminster, Vancouver, and Cranbrook, who have taken on these new appointments, or been elevated to the Court of Appeal.

Ms. Dhaliwal spoke of CBABC engagement and welcomed Kerry Simmons, KC, CEO and Lee LMG Nevens, President to the meeting, and gave thanks to the outgoing President, Scott Morishita for the work they had done in their presidential year.

Ms. Dhaliwal spoke about other events she had attended recently, including the welcoming at Allard Hall, a special sitting in Victoria to commemorate the passing of Life Bencher Ralston Alexander, KC, and the Life Bencher Dinner which took place in September.

President Dhaliwal concluded her report by speaking to the National Day of Truth and Reconciliation upcoming on September 30 and its importance as a day to formally recognize the history and legacy of residential schools. President Dhaliwal encouraged all non-Indigenous Benchers and guests to spend time on educating themselves about this important issue. President Dhaliwal concluded her remarks by giving special thanks to Bencher Georges Rivard for increasing awareness on this issue by facilitating a client's choice to provide an affirmation using an eagle feather, a practice more aligned with the client's culture.

6. CEO's Report

Don Avison, KC began his report noting that Bill 21 was before the courts a short while ago in relation to the injunction application, which was declined at the time. However, he said the door was left open to re-consider an injunction application at some later date. At this stage in the proceedings the focus was to work towards setting a date for the substantive constitutional matter to be heard. Mr. Avison indicated there were now a number of interested parties involved including the Trial Lawyers for BC, the Society of Notaries Public of BC, and the Law Society of Manitoba. Mr. Avison advised that the outcome of the Provincial election may have an impact on the future of Bill 21.

Mr. Avison observed that transition planning was underway and that the transitional board members were all confirmed. The transitional Indigenous Council was substantially complete, aside from one or two members to be appointed from the transitional board. Mr. Avison spoke about the work required to do the necessary planning throughout the transitional period and advised that Adam Whitcombe, KC, Senior Advisor, would provide a summary in the *in camera* portion of the meeting.

Mr. Avison then provided an update on the developments in Manitoba with the removal of a Member of the Legislative Assembly due to an alleged conflict. In his view, this was just one of the examples over the course of the last several years of politicians ignoring the fundamentals of the administration of justice and the rule of law. Mr. Avison advised that the Federation had also expressed some concerns regarding this matter, that he was expecting to see some communication from other law societies, and that he and President Dhaliwal would be sending a letter to the Winnipeg Free Press on this matter to show support for colleague jurisdictions.

Mr. Avison spoke of the upcoming 2024 Annual General Meeting and the number of resolutions that were coming forward, highlighting that the advance voting on the resolutions would close at 4:30pm on September 23, and that the meeting would take place the following day, September 24.

Mr. Avison referred to an event scheduled to take place that afternoon where Dr. Marie Wilson, the author of *North of Nowhere,* would be attending the Law Society of BC offices to speak to staff and Benchers about her book and experiences on Truth and Reconciliation Commission.

Mr. Avison advised of another event being organized by Vicki George, Senior Advisor, Indigenous Engagement, which would be coming up in October where Phyllis Webstad, the founder of the orange shirt movement, would be in attendance to speak with staff and Benchers.

Mr. Avison went on to speak of the exceptional outreach work being done by Ms. George and Jillian Currie, Indigenous Navigator, in Indigenous communities, and with the Law Society, and invited Ms. George to provide more information. Ms. George spoke of their recent trip to Vancouver Island and the outreach there to provide communities with information about Indigenous supports and systems that the Law Society can help them with, and what her role with the Law Society is. She expressed how they were welcomed into the communities and they were pleasantly surprised to see two Indigenous women carrying out that work at the Law Society. Ms. George shared some of the discussions and learnings from the experiences of travelling to different communities, including northern BC which included Indigenous and non-indigenous peoples expressing concerns that they wouldn't be believed, that they won't be taken seriously, they believed cultural awareness doesn't exist, and that they didn't feel safe sharing information including filing a complaint against a lawyer. Ms. George went on to discuss other work they are doing which includes working closely with the Professional Regulation department looking at our work through a trauma informed lens. Ms. George concluded her update by speaking about other community work including attending UVic and meeting with the Indigenous law research unit, and attending Duncan's First Nations court. Mr. Avison thanked Ms. George and Ms. Currie for the work they are doing.

Mr. Avison then invited Michael Lucas, KC to speak to the Supreme Court of Canada Decision in *Poonian v. British Columbia (Securities Commission)*. Mr. Lucas provided a summary of the decision and how it impacts the Law Society and other regulatory bodies. Mr. Avison concluded that he was of the view that a change to the *Bankruptcy and Insolvency Act* was needed and that the Federation ought to be engaging with other regulatory bodies on this matter.

Mr. Avison provided an update in relation to the security of the member portal and invited Kerryn Holt, Chief Operating Officer, to speak to this item. Ms. Holt presented on what is being proposed and how this work would be carried out, which will include the member portal being updated with two-factor authentication to improve security. Ms. Holt concluded that communication with the profession about the changes was crucial to the success of the project and that there would be various methods of communication, including notices in E-Brief, pop-up messaging within the member portal and Notices to the Profession.

Mr. Avison concluded his report by providing a staffing update. He advised that Natasha Dookie, Chief Legal Officer, would be moving on from the Law Society and spoke of their achievements during their tenure to include the positive impacts made with regards to discipline and the implementation of the Alternative Discipline Process and consent agreements, cutting the number of hearings by nearly half.

The Annual report for 2023 was distributed and thanks was given to Christine Tam, Director of Communications and Engagement, for the exceptional work on delivering the report, which provides a great resource for discussions.

Presentation

7. Presentation from CBABC President

Ms. Dhaliwal introduced Lee LMG Nevens and welcomed them to the meeting.

Mx. Nevens started their presentation by talking about being trans, queer and non-binary, and being the first transgender CBABC President and first non-binary Branch President in all of the CBA history.

Mx. Nevens spoke of marginalization in our communities, the rise of hate crimes and protests, increased risks violence at pride parades and at queer and trans events, and how these issues were still very much a problem and becoming more apparent. Mx. Nevens spoke of statistics and discussed barriers, and how this impacts access to justice, as well as how discrimination disproportionally affects the trans community, providing examples of recent survey results evidencing the current lack of knowledge and education within the profession around identities.

Mx. Nevens advised that they want to acknowledge who they are, and if not gendered correctly, persons can feel denied and there is no legal remedy that can fix this. Misgendering and misnaming is not always intentional; however, it still has a broader impact. Mx. Nevens spoke of how the Law Society is trying to improve this and that they continue to be a leader in this respect.

Mx. Nevens concluded their report by speaking to the work of CBABC on these matters, including its commitment to having a diverse board. They then provided some updates from

CBABC including how to work with the regulator, and highlighted some upcoming events, including the advancing reconciliation series and a conference being held on November 1 regarding Navigating the Court of Public Opinion. Mx. Nevens spoke about the constitutional challenge issued by Law Society and how the CBABC supports many of the Law Society's concerns, but also supports some of what is in Bill 21, and how the upcoming provincial election creates an opportunity for the CBABC to present their agenda for justice.

Discussion/Decision

8. Publication of Administrative Penalties

Ms. Dhaliwal introduced the item and provided some background information on the proposed Rule amendments, which would amend the Rule regarding publishing notices of administrative penalties, and instead provide for the publication of anonymous summaries of the circumstances and amount of the penalties, so as to align the Rules with those applicable to the publication of conduct reviews.

Mr. Avison provided some additional information regarding the success in the program generally in that there has been a reduction in the number of conduct reviews from 61 in 2022 down to 26 in 2023.

There was no discussion on this item.

The following resolution was passed unanimously:

BE IT RESOLVED to amend the Law Society Rules as follows:

1. In Rule 4-48 (1.2), by deleting "must" and replacing it with "may".

2. By inserting the following between Rules 4-49 (2) and 4-49 (3):

"(2.1) The publication of the circumstances of a rules breach deemed admitted under Rule 4-59 [Administrative Penalty] must not identify the respondent unless the respondent consents in writing."

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

9. 2025 Initiatives, Budgets and Fees

First Vice-President Brook Greenberg, KC introduced the item, followed by a presentation to Benchers on the proposed 2025 initiatives, budgets, and fees delivered by Jeanette McPhee and Don Avison, KC.

Mr. Avison started by thanking everyone for attending the recent budget session noting that it was very helpful to have the opportunity to have these discussions in advance and that the engagement from Benchers had been great.

Mr. Avison spoke about how development of the next strategic plan would need to begin and how things would look different with the Single Legal Regulator (SLR). Mr. Avison spoke about the five main objectives of the current strategic plan: leading as an innovative regulator of legal service providers; working toward reconciliation; taking action to improve access to justice; promoting a profession that reflects the diversity of the public it serves; and increasing confidence in the Law Society, the administration of justice, and the rule of law. Mr. Avison also spoke about some of the key operational priorities in line with the strategic plan contemplated by the 2025 budget and fees, including SLR, lawyer development and licensing, innovation sandbox, professional regulatory operations, professional development and practice support, AML, Indigenous engagement with regulatory matters, diversity action plan, and the information technology strategic plan.

Mr. Avison then spoke about some of the considerations in setting the 2025 budget, including focusing on strategic priorities and effective operations, interest rates and inflation, hybrid events and meetings (mix of hybrid and virtual), general fund net asset reserves, operating budget, deficit funding, and that there would be a modest increase to the practice fee in 2025 to fund external organizations, but no increase in the 2025 indemnity fee.

Jeanette McPhee, Chief Financial Officer and Senior Director, Trust Regulation then spoke about general fund revenues, which are projected to be $35.6 million, which will be 1.6% higher than the 2024 budget, primarily due to an increase in the number of practising numbers anticipated for next year. Ms. McPhee reviewed the number of practising lawyers over the last few years, as well as the breakdown between non-practising and retired lawyers. Ms. McPhee then reviewed 2025 budget revenue by type, with the majority coming from the practice fee. Ms. McPhee then reviewed the general fund operating expenses, which are expected to be 5% over the 2024 budget, due to salaries, modest addition of staff resources, technology and facilities upgrades, though there were some savings with external counsel fees. Ms. McPhee reviewed the 2025 budget expense summary by type and reviewed net assets and use of working capital reserves. Ms. McPhee spoke about use of reserves for one-time projects and reviewed the Trust Assurance program and TAF, and provided a summary of external funding included in the practice fee.

Su Forbes, KC, Chief Operating Officer of the Lawyers Indemnity Fund (LIF) provided an overview of LIF budget and fees. Ms. Forbes spoke about errors and omissions, reviewed net assets, minimum capital requirements, revenues, and expenses, as well as the recommendation regarding LIF's fee, which is to maintain the fee at $1,800 for full-time and $900 for part-time for 2025.

Ms. McPhee summarized the recommendations for the 2025 practice and indemnity fees.

There was no discussion on this item.

The following resolutions were passed unanimously:

BE IT RESOLVED that:

Effective January 1, 2025, the practice fee be set at $2,321, pursuant to section 23(1)(a) of the *Legal Profession Act*.

BE IT RESOLVED that:

Effective January 1, 2025, the trust administration fee be set at $20 for each client matter, pursuant to Rule 2-110 (1).

BE IT RESOLVED that:

The indemnity fee for 2025 pursuant to section 30(3) of the *Legal Profession Act* be set at $1,800;

The part-time indemnity fee for 2025 pursuant to Rule 3-40(2) be set at $900; and

The indemnity surcharge for 2025 pursuant to Rule 3-44(2) be set at $1,000.

10. Transition Cost Sharing

This item was removed from the regular agenda for discussion *in camera*.

11. External Appointments: Policy Revisions

Ms. Dhaliwal introduced the item and provided some background regarding the proposed revisions to the external appointments policy and guidebook.

Mr. Avison provided some additional information regarding the lack of consistency with the appointments process and the rationale for the revisions to address this, and that there would be a communication requirement initiated with each external party regarding the expectations of those appointed.

Discussion was had about whether geographic considerations should be noted in the policy and President Dhaliwal explained that these specific requirements were unique to each external body.

The following resolution was passed unanimously with one abstention:

BE IT RESOLVED the Benchers approve the redlined amendments to the Law Society External Appointments Policy and Guidebook.

For Information

12. External Appointments: BC Law Institute

There was no discussion on this item.

13. Timeline for 2024 By-Election in the County of Vancouver

There was no discussion on this item.

The Benchers then commenced the *in camera* portion of the meeting.

RN
2024-10-24

Law Society
of British Columbia

2025 Fee Schedule Amendments

To: Benchers

Purpose: Approval (Consent Agenda)

From: Staff

Date: November 1, 2024

Issue

1. Before the end of each calendar year, the Benchers must revise the fee schedules, which appear as schedules to the Law Society Rules, to reflect changes taking effect on the following January 1.

Background

2. Under section 23 (1) (a) of the *Legal Profession Act*, the Benchers have approved a practice fee of $2,321 for 2025, which includes an increase of $18 per lawyer to fund external organizations.

3. Pursuant to Rule 2-110 (1), the Trust Administration Fee for 2025 has been set at $20 for each client matter.

4. As a result of the $18 increase in the practice fee to fund external organizations, Schedule 2 (setting out prorated practice fees during the course of the year) requires updating. While the retired members' fee was not changed, staff in the Finance Department recommend some slight rounding adjustments to better reflect the prorating of the retired members' fee during the course of the year, which results in the need to update Schedule 3.

5. The indemnity fee was also approved at $1,800 for lawyers in full-time practice, $900 for those in part-time practice, and a liability indemnity surcharge of $1,000. These represent no change from the 2024 fees.

Decision

6. Redlined and clean versions of the Schedules are attached, together with a proposed resolution for the Benchers, which the Benchers are asked to approve.

LAW SOCIETY RULES

SCHEDULE 1 – ~~2024~~ 2025 LAW SOCIETY FEES AND ASSESSMENTS

	$
A. Annual fee	
1. Practice fee (Rule 2-105 *[Annual practising and indemnity fee instalments]*)	2,~~303~~321.00
2. Indemnity fee base assessment (which may be increased or decreased in individual cases in accordance with Rule 3-40 (1) *[Annual indemnity fee]*):	
(a) full-time practice	1,800.00
(b) part-time practice	900.00
3. Indemnity surcharge (Rule 3-44 (2) *[Deductible, surcharge and reimbursement]*)	1,000.00
4. Late payment fee for practising lawyers (Rule 2-108 (3) *[Late payment]*)	150.00
5. Retired member fee (Rule 2-105.1 (1) *[Annual non-practising and retired member fees]*)	125.00
6. Late payment fee for retired members (Rule 2-108 (4))	nil
7. Non-practising member fee (Rule 2-105.1 (1))	325.00
8. Late payment fee for non-practising members (Rule 2-108 (5))	40.00
9. Administration fee (R. 2-116 (3) *[Refund on exemption during practice year]*)	70.00
B. Trust administration fee	
1. Each client matter subject to fee (Rule 2-110 (1) *[Trust administration fee]*)	~~15~~20.00
C. Special assessments	
D. Articled student and training course fees	
1. Application fee for enrolment in admission program (Rules 2-54 (1) (e) *[Enrolment in the admission program]* and 2-62 (1) (b) *[Part-time articles]*)	275.00
2. Application fee for temporary articles (R. 2-70 (1) (c) *[Temporary articles]*)	150.00
3. Application fee for temporary articles (legal clinic) (Rule 2-70 (1) (c))	50.00
4. Training course registration (Rule 2-72 (4) (a) *[Training course]*)	2,600.00
5. Remedial work (Rule 2-74 (8) *[Review of failed standing]*):	
(a) for each piece of work	100.00
(b) for repeating the training course	4,000.00
E. Transfer fees	
1. Application fee for transfer from another Canadian province or territory – investigation fee (Rule 2-79 (1) (f) *[Transfer from another Canadian jurisdiction]*)	1,150.00
2. Transfer or qualification examination (Rules 2-79 (6) and 2-90 (5) *[Conditions on returning to practice]*)	325.00

LAW SOCIETY RULES

F. Call and admission fees	$
1. After enrolment in admission program (Rule 2-77 (1) (c) *[First call and admission]*)	250.00
1.1 Without enrolment in admission program (Rule 2-77 (1) (c))	525.00
2. After transfer from another Canadian province or territory (Rule 2-79 (1) (f) *[Transfer from another Canadian jurisdiction]*)	250.00
G. Reinstatement fees	
1. Application fee following disbarment, resignation or other cessation of membership as a result of disciplinary proceedings (Rule 2-85 (1)(b) *[Reinstatement of former lawyer]*)	700.00
2 Application fee following 3 years or more as a former member (Rule 2-85 (1) (b))	550.00
3. Application fee in all other cases (Rule 2-85 (1) (b))	450.00
H. Change of status fees	
1. Application fee to become retired member (Rule 2-4 (2) (b) *[Retired members]*)	35.00
2. Application fee to become non-practising member (Rule 2-3 (1) (b) *[Non-practising members]*)	70.00
3. Application fee for non-practising or retired member applying for practising certificate (Rule 2-5 (1) (b)) *[Release from undertaking]*	70.00
I. Inter-jurisdictional practice fees	
1. Application fee (Rule 2-19 (3) (b) *[Inter-jurisdictional practice permit]*)	500.00
2. Renewal of permit (Rule 2-19 (3) (b))	100.00
J. Corporation and limited liability partnership fees	
1. Permit fee for law corporation (Rule 9-4 (c) *[Law corporation permit]*)	400.00
2. New permit on change of name fee (Rule 9-6 (4) (c) *[Change of corporate name]*)	100.00
3. LLP registration fee (Rule 9-15 (1) *[Notice of application for registration]*	400.00
K. Practitioners of foreign law	
1. Application fee for practitioners of foreign law (Rule 2-29 (1) (b) *[Practitioners of foreign law]*)	700.00
2. Permit renewal fee for practitioners of foreign law (Rules 2-29 (1) (b) and 2-34 (2) (c) *[Renewal of permit]*)	150.00
3. Late payment fee (Rule 2-34 (6))	100.00

LAW SOCIETY RULES

L. Late fees	**$**
1. Trust report late filing fee (Rule 3-80 (2) (b) *[Late filing of trust report]*)	200.00
2. Professional development late completion fee (Rule 3-31 (1) (c) *[Late completion of professional development]*)	500.00
3. Professional development late reporting fee (Rule 3-31 (3) (b))	200.00
4. Late registration delivery fee (Rule 2-12.4)	200.00
5. Late self-assessment delivery fee (Rule 2-12.4)	500.00
6. Indigenous intercultural course late completion fee (Rule 3-28.11 (1) (c) *[Late completion of Indigenous intercultural course]*)	500.00
7. Indigenous intercultural course late reporting fee (Rule 3-28.11 (2) (b))	200.00
M. Multi-disciplinary practice fees	
1. Application fee (Rule 2-40 (1) (b) *[Application to practise law in MDP]*)........	300.00
2. Application fee per proposed non-lawyer member of MDP (Rules 2-40 (1) (c) and 2-42 (2) *[Changes in MDP]*)..	1,125.00

Note: The federal goods and services tax applies to Law Society fees and assessments.

SCHEDULE 2 – ~~2024~~ 2025 PRORATED FEES AND ASSESSMENTS FOR PRACTISING LAWYERS

[Rules 2-77 (1) *[First call and admission]*, 2-79 (1) *[Transfer from another Canadian jurisdiction]*, 2-85 (4) *[Reinstatement of former lawyer]*, and 3-45 (1) and (2) *[Application for indemnity coverage]*]

	Practice fee		**Indemnity fee assessment**	
	Payable prior to call	**Payable by May 31**	**Payable prior to call**	**Payable by May 31**
Full-time indemnification				
January	~~1,151.50~~1,160.50	~~1,151.50~~1,160.50	900.00	900.00
February	~~959.58~~967.08	~~1,151.50~~1,160.50	750.00	900.00
March	~~767.67~~773.67	~~1,151.50~~1,160.50	600.00	900.00
April	~~575.75~~580.25	~~1,151.50~~1,160,50	450.00	900.00
May	~~383.83~~386.83	~~1,151.50~~1,160.50	300.00	900.00
June	~~191.92~~193.42	~~1,151.50~~1,160.50	150.00	900.00
July	~~1,151.50~~1,160.50	0.00	900.00	0.00
August	~~959.58~~967.08	0.00	750.00	0.00
September	~~767.67~~773.67	0.00	600.00	0.00
October	~~575.75~~580.25	0.00	450.00	0.00
November	~~383.83~~386.83	0.00	300.00	0.00
December	~~191.92~~193.42	0.00	150.00	0.00
Part-time indemnification				
January	~~1,151.50~~1,160.50	~~1,151.50~~1,160.50	450.00	450.00
February	~~959.58~~967.08	~~1,151.50~~1,160.50	375.00	450.00
March	~~767.67~~773.67	~~1,151.50~~1,160.50	300.00	450.00
April	~~575.75~~580.25	~~1,151.50~~1,160.50	225.00	450.00
May	~~383.83~~386.83	~~1,151.50~~1,160.50	150.00	450.00
June	~~191.92~~1993.42	~~1,151.50~~1,160.50	100.00	450.00
July	~~1,151.50~~1,160.50	0.00	450.00	0.00
August	~~959.58~~967.08	0.00	375.00	0.00
September	~~767.67~~773.67	0.00	300.00	0.00
October	~~575.75~~580.25	0.00	225.00	0.00
November	~~383.83~~386.83	0.00	150.00	0.00
December	~~191.92~~193.42	0.00	100.00	0.00

Note: The federal goods and services tax applies to Law Society fees and assessments.

LAW SOCIETY RULES

SCHEDULE 3 – ~~2024~~ 2025 PRORATED FEES FOR NON-PRACTISING AND RETIRED MEMBERS

[Rules 2-3 (1) *[Non-practising members]*, 2-4 (2) *[Retired members]* and 2-85 (5) *[Reinstatement of former lawyer]*]

	Non-practising members fee	**Retired members fee**
January	325.00	125.00
February	297.92	~~114.59~~114.58
March	270.83	~~104.16~~104.17
April	243.75	93.75
May	216.67	~~83.34~~83.33
June	189.58	~~72.91~~72.92
July	162.50	62.50
August	135.42	~~52.09~~52.08
September	108.33	~~41.66~~41.67
October	81.25	31.25
November	54.17	~~20.84~~20.83
December	27.08	~~10.41~~10.42

Note: The federal goods and services tax applies to Law Society fees and assessments.

LAW SOCIETY RULES

SCHEDULE 1 – 2025 LAW SOCIETY FEES AND ASSESSMENTS

A. Annual fee	$
1. Practice fee (Rule 2-105 *[Annual practising and indemnity fee instalments]*)	2,321.00
2. Indemnity fee base assessment (which may be increased or decreased in individual cases in accordance with Rule 3-40 (1) *[Annual indemnity fee]*):	
(a) full-time practice	1,800.00
(b) part-time practice	900.00
3. Indemnity surcharge (Rule 3-44 (2) *[Deductible, surcharge and reimbursement]*)	1,000.00
4. Late payment fee for practising lawyers (Rule 2-108 (3) *[Late payment]*)	150.00
5. Retired member fee (Rule 2-105.1 (1) *[Annual non-practising and retired member fees]*)	125.00
6. Late payment fee for retired members (Rule 2-108 (4))	nil
7. Non-practising member fee (Rule 2-105.1 (1))	325.00
8. Late payment fee for non-practising members (Rule 2-108 (5))	40.00
9. Administration fee (R. 2-116 (3) *[Refund on exemption during practice year]*)	70.00

B. Trust administration fee

1. Each client matter subject to fee (Rule 2-110 (1) *[Trust administration fee]*)	20.00

C. Special assessments

D. Articled student and training course fees

1. Application fee for enrolment in admission program (Rules 2-54 (1) (e) *[Enrolment in the admission program]* and 2-62 (1) (b) *[Part-time articles]*)	275.00
2. Application fee for temporary articles (R. 2-70 (1) (c) *[Temporary articles]*)	150.00
3. Application fee for temporary articles (legal clinic) (Rule 2-70 (1) (c))	50.00
4. Training course registration (Rule 2-72 (4) (a) *[Training course]*)	2,600.00
5. Remedial work (Rule 2-74 (8) *[Review of failed standing]*):	
(a) for each piece of work	100.00
(b) for repeating the training course	4,000.00

E. Transfer fees

1. Application fee for transfer from another Canadian province or territory – investigation fee (Rule 2-79 (1) (f) *[Transfer from another Canadian jurisdiction]*)	1,150.00
2. Transfer or qualification examination (Rules 2-79 (6) and 2-90 (5) *[Conditions on returning to practice]*)	325.00

LAW SOCIETY RULES

F. Call and admission fees		**$**
1.	After enrolment in admission program (Rule 2-77 (1) (c) *[First call and admission]*)	250.00
1.1	Without enrolment in admission program (Rule 2-77 (1) (c))	525.00
2.	After transfer from another Canadian province or territory (Rule 2-79 (1) (f) *[Transfer from another Canadian jurisdiction]*)	250.00
G. Reinstatement fees		
1.	Application fee following disbarment, resignation or other cessation of membership as a result of disciplinary proceedings (Rule 2-85 (1)(b) *[Reinstatement of former lawyer]*)	700.00
2	Application fee following 3 years or more as a former member (Rule 2-85 (1) (b))	550.00
3.	Application fee in all other cases (Rule 2-85 (1) (b))	450.00
H. Change of status fees		
1.	Application fee to become retired member (Rule 2-4 (2) (b) *[Retired members]*)	35.00
2.	Application fee to become non-practising member (Rule 2-3 (1) (b) *[Non-practising members]*)	70.00
3.	Application fee for non-practising or retired member applying for practising certificate (Rule 2-5 (1) (b)) *[Release from undertaking]*	70.00
I. Inter-jurisdictional practice fees		
1.	Application fee (Rule 2-19 (3) (b) *[Inter-jurisdictional practice permit]*)	500.00
2.	Renewal of permit (Rule 2-19 (3) (b))	100.00
J. Corporation and limited liability partnership fees		
1.	Permit fee for law corporation (Rule 9-4 (c) *[Law corporation permit]*)	400.00
2.	New permit on change of name fee (Rule 9-6 (4) (c) *[Change of corporate name]*)	100.00
3.	LLP registration fee (Rule 9-15 (1) *[Notice of application for registration]*	400.00
K. Practitioners of foreign law		
1.	Application fee for practitioners of foreign law (Rule 2-29 (1) (b) *[Practitioners of foreign law]*)	700.00
2.	Permit renewal fee for practitioners of foreign law (Rules 2-29 (1) (b) and 2-34 (2) (c) *[Renewal of permit]*)	150.00
3.	Late payment fee (Rule 2-34 (6))	100.00

LAW SOCIETY RULES

L. Late fees	$
1. Trust report late filing fee (Rule 3-80 (2) (b) *[Late filing of trust report]*)	200.00
2. Professional development late completion fee (Rule 3-31 (1) (c) *[Late completion of professional development]*)	500.00
3. Professional development late reporting fee (Rule 3-31 (3) (b))	200.00
4. Late registration delivery fee (Rule 2-12.4)	200.00
5. Late self-assessment delivery fee (Rule 2-12.4)	500.00
6. Indigenous intercultural course late completion fee (Rule 3-28.11 (1) (c) *[Late completion of Indigenous intercultural course]*)	500.00
7. Indigenous intercultural course late reporting fee (Rule 3-28.11 (2) (b))	200.00

M. Multi-disciplinary practice fees	
1. Application fee (Rule 2-40 (1) (b) *[Application to practise law in MDP]*)........	300.00
2. Application fee per proposed non-lawyer member of MDP (Rules 2-40 (1) (c) and 2-42 (2) *[Changes in MDP]*)..	1,125.00

Note: The federal goods and services tax applies to Law Society fees and assessments.

LAW SOCIETY RULES

SCHEDULE 2 – 2025 PRORATED FEES AND ASSESSMENTS FOR PRACTISING LAWYERS

[Rules 2-77 (1) *[First call and admission]*, 2-79 (1) *[Transfer from another Canadian jurisdiction]*, 2-85 (4) *[Reinstatement of former lawyer]*, and 3-45 (1) and (2) *[Application for indemnity coverage]*]

	Practice fee		**Indemnity fee assessment**	
	Payable prior to call	**Payable by May 31**	**Payable prior to call**	**Payable by May 31**
Full-time indemnification				
January	1,160.50	1,160.50	900.00	900.00
February	967.08	1,160.50	750.00	900.00
March	773.67	1,160.50	600.00	900.00
April	580.25	1,160,50	450.00	900.00
May	386.83	1,160.50	300.00	900.00
June	193.42	1,160.50	150.00	900.00
July	1,160.50	0.00	900.00	0.00
August	967.08	0.00	750.00	0.00
September	773.67	0.00	600.00	0.00
October	580.25	0.00	450.00	0.00
November	386.83	0.00	300.00	0.00
December	193.42	0.00	150.00	0.00
Part-time indemnification				
January	1,160.50	1,160.50	450.00	450.00
February	967.08	1,160.50	375.00	450.00
March	773.67	1,160.50	300.00	450.00
April	580.25	1,160.50	225.00	450.00
May	386.83	1,160.50	150.00	450.00
June	1993.42	1,160.50	100.00	450.00
July	1,160.50	0.00	450.00	0.00
August	967.08	0.00	375.00	0.00
September	773.67	0.00	300.00	0.00
October	580.25	0.00	225.00	0.00
November	386.83	0.00	150.00	0.00
December	193.42	0.00	100.00	0.00

Note: The federal goods and services tax applies to Law Society fees and assessments.

LAW SOCIETY RULES

SCHEDULE 3 – 2025 PRORATED FEES FOR NON-PRACTISING AND RETIRED MEMBERS

[Rules 2-3 (1) *[Non-practising members]*, 2-4 (2) *[Retired members]* and 2-85 (5) *[Reinstatement of former lawyer]*]

	Non-practising members fee	**Retired members fee**
January	325.00	125.00
February	297.92	114.58
March	270.83	104.17
April	243.75	93.75
May	216.67	83.33
June	189.58	72.92
July	162.50	62.50
August	135.42	52.08
September	108.33	41.67
October	81.25	31.25
November	54.17	20.83
December	27.08	10.42

Note: The federal goods and services tax applies to Law Society fees and assessments.

TITLE: 2025 FEE SCHEDULE

SUGGESTED RESOLUTION:

BE IT RESOLVED to amend the Law Society Rules*, effective January 1, 2025, *as follows:

1. By striking the year "2024" in each of the headings for Schedules 1, 2 and 3 and substituting the year "2025";

***2. In Schedule 1, by striking* "$2303.00" *at the end of item A 1 and substituting* "$2,321.00*"*;**

***3. In Schedule 1, by striking out* "$15.00" *at the end of item B 1 and substituting* "$20.00";**

4. By striking the table in Schedule 2 and replacing it with the following:

	Practice fee		Indemnity fee assessment	
	Payable prior to call	**Payable by May 31**	**Payable prior to call**	**Payable by May 31**
Full-time indemnification				
January	1,160.50	1,160.50	900.00	900.00
February	967.08	1,160.50	750.00	900.00
March	773.67	1,160.50	600.00	900.00
April	580.25	1,160,50	450.00	900.00
May	386.83	1,160.50	300.00	900.00
June	193.42	1,160.50	150.00	900.00
July	1,160.50	0.00	900.00	0.00
August	967.08	0.00	750.00	0.00
September	773.67	0.00	600.00	0.00
October	580.25	0.00	450.00	0.00
November	386.83	0.00	300.00	0.00
December	193.42	0.00	150.00	0.00
Part-time indemnification				
January	1,160.50	1,160.50	450.00	450.00
February	967.08	1,160.50	375.00	450.00
March	773.67	1,160.50	300.00	450.00
April	580.25	1,160.50	225.00	450.00
May	386.83	1,160.50	150.00	450.00
June	1993.42	1,160.50	100.00	450.00

July	1,160.50	0.00	450.00	0.00
August	967.08	0.00	375.00	0.00
September	773.67	0.00	300.00	0.00
October	580.25	0.00	225.00	0.00
November	386.83	0.00	150.00	0.00
December	193.42	0.00	100.00	0.00

5. By striking the table in Schedule 3 and replacing it with the following:

	Non-practising members fee	**Retired members fee**
January	325.00	125.00
February	297.92	114.58
March	270.83	104.17
April	243.75	93.75
May	216.67	83.33
June	189.58	72.92
July	162.50	62.50
August	135.42	52.08
September	108.33	41.67
October	81.25	31.25
November	54.17	20.83
December	27.08	10.42

REQUIRES 2/3 MAJORITY OF BENCHERS PRESENT

Law Society of British Columbia

Omnibus Code Changes – Gender Inclusivity and General Updates

To: Benchers

Purpose: Approval (Consent Agenda)

From: Staff

Date: November 1, 2024

DM4462872

Issue

1. The *Code of Professional Conduct for British Columbia* ("*BC Code*") was adopted by the Law Society in 2013, and is based on the Federation of Law Societies' of Canada's Model Code of Conduct ("Model Code"). Over the last decade, the Model Code and subsequently, the *BC Code*, were amended many times, which over time has led to inconsistencies in the use of defined phrases, references, gender-inclusive terminology, and punctuation.

Analysis & Recommendation

2. A review of the *BC Code* by staff identified a number of opportunities to improve consistency, readability, and clarity. Accordingly, staff recommend a large-volume package of minor amendments to address these issues.

3. An analysis of the factors to consider when amending the *BC Code* is provided in **Appendix A** of this report. The proposed red-lined amendments are provided in **Appendix B**, and the clean version in **Appendix C**.

4. The more administrative and editorial suggested amendments, largely focused on consistency and readability, include:

    a. Updating for gender-inclusive language in the *BC Code* rules for consistency with revisions that had been previously made to the commentaries;

    b. Clarifying that "Code rule" refers to the *BC Code* and "Rule" refers to the Law Society Rules;

    c. Updating for consistency in internal references to the *BC Code* rules;

    d. Including full citations for legislation;

    e. Incorporating different practice arrangements;

    f. Updating for consistency in the use of defined terms within the *BC Code*, including:

        i. "Articled student"

        ii. "Conflict of interest"

        iii. "Law firm"

        iv. "Lawyer"

        v. "Multi-disciplinary"

        vi. "Society"; and

    g. Amending mistakes in punctuation and grammar.

5. The more substantial suggested amendments, largely focused on clarity, include:

    a. Clarifying rules, including:

        i. Adding “fees” to the heading for *BC Code* rule 3.6-4;

        ii. Adding a reference to *BC Code* rule 3.6-6 to the definition of “another lawyer” provided in *BC Code* rule 3.6-6.1;

        iii. Removing repetitive reference in a definition provided in *BC Code* rule 4.2-4;

        iv. Removing “practice advisors” from the commentary in *BC Code* rule 5.1-2.1 to clarify that their role does not include providing substantive law advice; and

        v. Fixing the circular reference on *BC Code* rule 5.1-4 to “this rule”;

    b. Adding new headings for clarity to *BC Code* rules 7.2-2 to 7.2-10.

6. Staff recommend adopting the proposed changes as an omnibus amendment package. Although there are a considerable number of proposed amendments, the changes are straightforward, and improve the consistency, readability, and clarity of the *BC Code*.

Decision

7. The Benchers are asked to approve the following resolution:

    BE IT RESOLVED THAT the Law Society of British Columbia adopt amendments to the *BC Code* as set out in Appendix B to this document.

APPENDIX "A": Factor analysis for the omnibus of proposed *BC Code* amendments

POLICY IMPACT	Public Interest[1]	Legality[2]	Organizational Impact[3]	Reconciliation with Indigenous Peoples[4]	Equity, Diversity, & Inclusion[5]	Transparency & Disclosure[6]
No Action	Lawyers and the public use the *BC Code* as drafted.	Within the jurisdiction of the Law Society to determine the contents of the *BC Code*.	No impact.	N/A: The proposed amendments are minor changes for drafting consistency and clarity.	Uses of gendered language remain within the *BC Code*.	N/A: The proposed amendments are minor changes for drafting consistency and clarity.
Recommendation	Clarifies and maintains consistency across the *BC Code*.	Within the jurisdiction of the Law Society to determine the contents of the *BC Code*.	Amendments to the *BC Code* require minimal efforts by staff to implement.	N/A: The proposed amendments are minor changes for consistency.	All language updated for gender-inclusivity.	N/A: The proposed amendments are minor changes for consistency.

Continued on next page →

[1] **Public Interest:** How does the option address the provision of legal services and the administration of justice; what harm or risk to the public this intends to ameliorate or prevent, or how it intends to improve, innovate and/or modernize a specific process or situation?
[2] **Legality**: How will the option raise or affect any legal requirements placed on the Law Society, statutory or otherwise, or affect outstanding legal issues or litigation? Would the approval of the policy initiative or principle be expected to require rule changes? Will it require changes to the governing, or other, legislation?
[3] **Organizational Impact:** What are the implications on staff, resources, cost, etc.
[4] **Reconciliation with Indigenous Peoples:** Does this option to addressing reconciliation? If so, how?
[5] **Equity, Diversity & Inclusion:** How will the option affect the Law Society's equitable treatment of diverse individuals? How will it advance the Law Society's objectives in relation to equity, diversity and inclusion?
[6] **Transparency & Disclosure:** Is the option expected to enhance or detract from current levels of transparency and disclosure?

APPENDIX "A": Factor analysis for the omnibus of proposed *BC Code* amendments (continued)

STAKEHOLDER IMPACT	**Public Relations**[7]	**Government Relations**[8]	**Licensee Impact**[9]	**Privacy Impact**[10]
No Action	Lawyers and the public use the *BC Code* as drafted.	N/A: The proposed amendments are minor changes for consistency.	Lawyers use the *BC Code* as drafted.	N/A: No collection, use, disclosure or storage of information by Law Society.
Recommendation	Clarifies and maintains consistency across the *BC Code*.	N/A: The proposed amendments are minor changes for consistency.	Clarifies and maintains consistency across the *BC Code*.	N/A: No collection, use, disclosure or storage of information by Law Society.

[7] **Public Relations:** How will the option enhance or detract from the public perception of the Law Society or the legal profession generally?
[8] **Government Relations:** How will the option impact the government perception of the legal profession?
[9] **Licensee Impact:** How will the option enhance or detract from the perception of those who are licensed by the Law Society? How will it weaken or strengthen confidence in the regulator? Does it place an undue burden on licensees or on particular groups of licensees?
[10] **Privacy Impact:** Does the option contemplate the collection, use, storage, or disclosure of personal information?

APPENDIX "B": Red-lined *Code of Professional Conduct for British Columbia*

CHAPTER 1 – INTERPRETATION AND DEFINITIONS

1.1 Definitions

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

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-disciplin~~e~~ary practice providing services that support or supplement the practice of law;

"client" means a person who:

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on ~~his or her~~their behalf.

Commentary

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

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

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

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

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate written communication recording the consent as soon as practicable;

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

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

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the ~~[provincial or territorial Act governing legal aid]~~*Legal Services Society Act*, SBC 2002, c.30;

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

"lawyer" means a member of the Society and includes an ~~law~~articled student enrolled in the Law Society Admission Program;

"limited scope retainer" means the provision of legal services for part, but not all, of a client's legal matter by agreement with the client;

"Society" means the Law Society of British Columbia;

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

CHAPTER 2 – STANDARDS OF THE LEGAL PROFESSION

2.1 Canons of Legal Ethics

These Canons of Legal Ethics in Code rules 2.1-1 to 2.1-5 are a general guide and not a denial of the existence of other duties equally imperative and of other rights, though not specifically mentioned. A version of these Canons has formed part of the *Code of Professional Conduct* of the Law Society of British Columbia since 1921. They are included here both for their historical value and for their statement of general principles that underlie the remainder of the rules in this Code.

A lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession.

In these several capacities, it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.

2.1-3 To the client

(a) A lawyer should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client, and give an open and undisguised opinion of the merits and probable results of the client's cause. The lawyer should be wary of bold and confident assurances to the client, especially where the lawyer's employment may depend on such assurances. The lawyer should bear in mind that seldom are all the law and facts on the client's side, and that *audi alteram partem* (hear the other side) is a safe rule to follow.

(b) A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the controversy, if any, that might influence whether the client selects or continues to retain the lawyer. A lawyer must not act where there is a conflict of interests between the lawyer and a client or between clients.

(c) Whenever the dispute will admit of fair settlement the client should be advised to avoid or to end the litigation.

(d) A lawyer should treat adverse witnesses, litigants and counsel with fairness and courtesy, refraining from all offensive personalities. The lawyer must not allow a client's personal feelings and prejudices to detract from the lawyer's professional duties. At the same time, the lawyer should represent the client's interests resolutely and without fear of judicial disfavour or public unpopularity.

(e) A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.

(f) It is a lawyer's right to undertake the defence of a person accused of crime, regardless of the lawyer's own personal opinion as to the guilt of the accused. Having undertaken such defence, the lawyer is bound to present, by all fair and honourable means and in a manner consistent with the client's instructions, every defence that the law of the land permits, to the end that no person will be convicted except by due process of law.

(g) A lawyer should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject~~-~~ matter of the litigation being conducted by the lawyer. A lawyer should scrupulously guard, and not divulge or use for personal benefit, a client's secrets or confidences. Having once acted for a client in a matter, a lawyer must not act against the client in the same or any related matter.

(h) A lawyer must record, and should report promptly to a client the receipt of any moneys or other trust property. The lawyer must use the client's moneys and trust property only as authorized by the client, and not commingle it with that of the lawyer.

(i) A lawyer is entitled to reasonable compensation for services rendered, but should avoid charges that are unreasonably high or low. The client's ability to pay cannot justify a charge in excess of the value of the service, though it may require a reduction or waiver of the fee.

(j) A lawyer should try to avoid controversies with clients regarding compensation so far as is compatible with self-respect and with the right to receive reasonable recompense for services. A lawyer should always bear in mind that the profession is a branch of the administration of justice and not a mere money-making business.

(k) A lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a court or tribunal except as to purely formal or uncontroverted matters, such as the attestation or custody of a document, unless it is necessary in the interests of justice. If the lawyer is a necessary witness with respect to other matters, the conduct of the case should be entrusted to another ~~counsel~~lawyer.

CHAPTER 3 – RELATIONSHIP TO CLIENTS

3.1 Competence

Definitions

3.1-1 In this section

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

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

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

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

(i) legal research;

(ii) analysis;

(iii) application of the law to the relevant facts;

(iv) writing and drafting;

(v) negotiation;

(vi) alternative dispute resolution;

(vii) advocacy; and

(viii) problem solving;

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

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

(f) applying intellectual capacity, judgment and deliberation to all functions;

(g) complying in letter and spirit with all Code rules pertaining to the appropriate professional conduct of lawyers;

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

Competence

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

Commentary

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

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

[2.1] For a discussion of the correct procedure in swearing an affidavit or taking a solemn declaration, see Appendix A to this Code.

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

(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

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

[4.1] To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3 (Confidentiality).

[4.2] The required level of technological competence will depend upon whether the use or understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including:

(a) the lawyer's or law firm's practice areas;

(b) the geographic locations of the lawyer's or law firm's practice; and

(c) the requirements of clients.

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

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

(a) decline to act;

(b) obtain the client’s instructions to retain, consult or collaborate with a lawyer who is competent for that task; or

(c) obtain the client’s consent for the lawyer to become competent without undue delay, risk or expense to the client.

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

[7.1] When a lawyer considers whether to provide legal services under a limited scope retainer the lawyer must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement for such services does not exempt a lawyer from the duty to provide competent representation. The lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also Code rule 3.2-1.1 (Limited scope retainer).

[7.2] In providing short-term summary legal services under Code rules 3.4-11.1 to 3.4-11.4 (Short-term summary legal services), a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term summary legal services may be required or are advisable, and encourage the client to seek such further assistance.

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

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

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

[11] In a multi-disciplin~~e~~ary practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the law firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-disciplin~~e~~ary practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the Law Society Rules and Code rules governing multi-disciplin~~e~~ary practices.

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

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

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

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

3.2 Quality of service

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

Commentary

[1] This Code rule should be read and applied in conjunction with section 3.1 ~~regarding competence~~(Competence).

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

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

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

Examples of expected practices

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

(a) keeping a client reasonably informed;

(b) answering reasonable requests from a client for information;

(c) responding to a client’s telephone calls;

(d) keeping appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;

(e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;

(f) answering, within a reasonable time, any communication that requires a reply;

(g) ensuring that work is done in a timely manner so that its value to the client is maintained;

(h) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;

(i) maintaining office staff, facilities and equipment adequate to the lawyer's practice;

(j) informing a client of a proposal of settlement, and explaining the proposal properly;

(k) providing a client with complete and accurate relevant information about a matter;

(l) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report when one might reasonably be expected;

(m) avoidance of self-induced disability, for example from the use of intoxicants or drugs, that interferes with or prejudices the lawyer's services to the client;

(n) being civil.

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

Limited scope retainers

3.2-1.1 Before undertaking a limited scope retainer, the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.

Commentary

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

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

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

[4] A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed (see Code rule 7.2-6.1 (Communicating with a person represented on a limited scope retainer)).

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

Honesty and candour

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

Commentary

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

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

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

3.2-2.2 Where a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer must not undertake the matter unless the lawyer is competent to provide the required services in that language.

Commentary

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

[2] The choice of official language is that of the client not the lawyer. The lawyer should be aware of relevant statutory and Constitutional law relating to language rights including the *Canadian Charter of Rights and Freedoms*, s.19(1) and Part XVII of the *Criminal*

Code regarding language rights in courts under federal jurisdiction and in criminal proceedings. The lawyer should also be aware that provincial or territorial legislation may provide additional language rights, including in relation to aboriginal languages.

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

[4] Civil trials in British Columbia must be held in English: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42. Under section 530 of the *Criminal Code*, R~~.~~S~~.~~C 1985, c. C-46 an accused has the right to a criminal trial in either English or French.

When the client is an organization

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

Commentary

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

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

Inducement for withdrawal of criminal or regulatory proceedings

3.2-6 A lawyer must not:

(a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;

(b) accept or offer to accept, or advise a person to accept or offer to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or regulatory authority to enter such discussions; or

(c) wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

Commentary

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

[2] A lawyer for an accused or potential accused must never influence a complainant or potential complainant not to communicate or cooperate with the Crown. However, this Code rule does not prevent a lawyer for an accused or potential accused from communicating with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. When a proposed resolution involves valuable consideration being exchanged in return for influencing the Crown or regulatory authority not to proceed with a charge or to seek a reduced sentence or penalty, the lawyer for the accused must obtain the consent of the Crown or regulatory authority prior to discussing such proposal with the complainant or potential complainant. Similarly, lawyers advising a complainant or potential complainant with respect to any such negotiations can do so only with the consent of the Crown or regulatory authority.

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

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

Dishonesty, fraud by client

3.2-7 A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.

Commentary

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

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

[3] If lawyers have suspicions or doubts about whether they might be assisting a client in any dishonesty, crime or fraud, before accepting a retainer, or during the retainer, the lawyers should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature and purpose are not clear.

[3.1] The lawyer should also make inquiries of a client who:

(a) may be seeking, contrary to the prohibition in Rule 3-58.1(1) of the Law Society Rules, the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter, or

(b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.

[3.2] The lawyer should make a record of the results of these inquiries.

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

Dishonesty, fraud when client an organization

3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows or ought to know that the organization has acted, is acting or intends to act dishonestly, criminally or fraudulently, must do the following, in addition to ~~his or her~~their obligations under Code rule 3.2-7 (Dishonesty, fraud by client):

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, criminal or fraudulent and should be stopped;

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, criminal or fraudulent and should be stopped; and

(c) if the organization, despite the lawyer’s advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with section 3.7 (Withdrawal from representation).

Commentary

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

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

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

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

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

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

Clients with diminished capacity

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

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about the client's legal affairs and to provide the lawyer with 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 the client's ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from providing instructions or entering into binding legal relationships.

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

[3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the ~~Office of the~~ Public Guardian and Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

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

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

3.3 Confidentiality

Confidential information

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

(a) expressly or impliedly authorized by the client;

(b) required by law or a court to do so;

(c) required to deliver the information to the ~~Law~~ Society, or

(d) otherwise permitted by this Code rule.

Commentary

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

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

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

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

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

(a) retained by a person about a particular matter; or

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

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

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

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

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

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

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

Future harm / public safety exception

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

Commentary

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

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

[3] In assessing whether disclosure of confidential information is justified, a lawyer should consider a number of factors, including:

(a) the seriousness of the potential injury to others if the prospective harm occurs;

(b) the likelihood that it will occur and its imminence;

(c) the apparent absence of any other feasible way to prevent the potential injury; and

(d) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

[4] How and when disclosure should be made under this Code rule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should contact the ~~Law~~ Society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.

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

(a) the date and time of the communication in which the disclosure is made;

(b) the grounds in support of the lawyer's decision to communicate the information, including the harm the lawyer intended to prevent, the identity of the person who prompted the lawyer to communicate the information as well as the identity of the person or group of persons exposed to the harm; and

(c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

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

Commentary

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

[2] In these situations (see Code rules 3.4-17 to 3.4-23 ~~on~~ (Conflict~~s~~ from transfer between law firms)), this Code rule ~~3.3-7~~ permits lawyers and law firms to disclose limited information. This type of disclosure would only be made once substantive discussions regarding the new relationship have occurred.

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

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

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

(a) limit access to the disclosed information;

(b) not use the information for any purpose other than detecting and resolving a conflict~~s~~; and

(c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established.

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

3.4 Conflict~~s~~

Duty to avoid conflict~~s~~ of interest

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

Commentary

[0.1] In a real property transaction, a lawyer may act for more than one party with different interests only in the circumstances permitted by Appendix C.

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

[2] In cases where the bright line rule is inapplicable, the lawyer or law firm will still be prevented from acting if representation of the client would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

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

Representation

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

The fiduciary relationship, the duty of loyalty and conflicting interests

[5] The rule governing conflict~~s~~ of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty not to act in a conflict of interest.

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

Other duties arising from the duty of loyalty

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

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

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

Identifying a conflict~~s~~

[10] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest. Factors for the lawyer's consideration in determining whether a conflict of interest exists include:

(a) the immediacy of the legal interests;

(b) whether the legal interests are directly adverse;

(c) whether the issue is substantive or procedural;

(d) the temporal relationship between the matters;

(e) the significance of the issue to the immediate and long-term interests of the clients involved; and

(f) the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of areas where a conflict~~s~~ of interest may occur

[11] A ~~C~~conflict~~s~~ of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to a conflict~~s~~ of interest. The examples are not exhaustive.

(a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.

(b) A lawyer provides legal advice to a small business on a series of commercial transactions and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.

(c) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

(i) A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

(d) A lawyer has a sexual or close personal relationship with a client.

(i) Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning the client's affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by the lawyer. If the lawyer is at ~~a member of~~ a law firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's law firm, but ~~would~~could be cured if another lawyer in the law firm who is not involved in such a relationship with the client handled the client's work.

(e) A lawyer or a lawyer's law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

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

1. affect the lawyer's independent judgment and fiduciary obligations in either or both roles,

2. obscure legal advice from business and practical advice,

3. jeopardize the protection of lawyer and client privilege, and

4. disqualify the lawyer or the law firm from acting for the organization.

(f) Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute. See Code rules 3.4-42 and 3.4-43 ~~on~~ (~~s~~Space-sharing arrangements).

(i) The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

The role of the court and law societies

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

Consent

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

(a) Express consent must be fully informed and voluntary after disclosure.

(b) Consent may be inferred and need not be in writing where all of the following apply:

(i) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

(ii) the matters are unrelated;

(iii) the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

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

Commentary

Disclosure and consent

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

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

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

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

Consent in advance

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

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

Implied consent

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

Lawyer belief in reasonableness of representation

[7] The requirement that the lawyer reasonably believes that the lawyer is able to represent each client without having a material adverse effect on the representation of, or loyalty to, the other client precludes a lawyer from acting for parties to a transaction who have different interests, except where joint representation is permitted under this Code.

Dispute

3.4-3 Despite Code rule 3.4-2 (Consent), a lawyer must not represent opposing parties in a dispute.

Commentary

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

Concurrent representation with protection of confidential client information

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

(a) disclosure of the risks of the lawyers so acting has been made to each client;

(b) each client consents after having received independent legal advice, including on the risks of concurrent representation;

(c) the clients each determine that it is in their best interests that the lawyers so act;

(d) each client is represented by a different lawyer in the law firm;

(e) appropriate screening mechanisms are in place to protect confidential information; and

(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary

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

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

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

[4] In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in ~~the commentary to the rule on law firm disqualification (see~~Code rule 3.4-20 (Law firm disqualification), commentary [3]~~)~~.

Joint retainers

3.4-5 Before a lawyer is retained by more than one client in a matter or transaction, the lawyer must advise each of the clients that:

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

[1] Although this Code rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other. ~~The Law Society website contains two precedent letters that lawyers may use as the basis for compliance with rule 3.4-5.~~

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

(a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;

(b) in accordance with Code rule 3.3-1 (Confidential information), the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and

(c) the lawyer would have a duty to decline the new retainer, unless:

(i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;

(ii) the other spouse or partner had died; or

(iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

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

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

Commentary

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

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

(a) the lawyer must not advise them on the contentious issue and must:

(i) refer the clients to other lawyers; or

(ii) advise the clients of their option to settle the contentious issue by direct negotiation ~~-~~in which the lawyer does not participate, provided:

1. no legal advice is required; and

2. the clients are sophisticated;

(b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

Commentary

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

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

3.4-9 Subject to this section, if clients consent to a joint retainer and also agree that, if a contentious issue arises, the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary

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

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

Acting against former clients

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

(a) the same matter,

(b) any related matter, or

(c) any other matter, if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client.

Commentary

[1] This Code rule prohibits a lawyer from attacking legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper, however, for a lawyer to act against a former client in a matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter.

3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's law firm may act against the former client in the new matter, if the law firm establishes, in accordance with Code rule 3.4-20 (Law firm disqualification), that it is reasonable that it act in the new matter, having regard to all relevant circumstances, including:

(a) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;

(b) the extent of prejudice to any party; and

(c) the good faith of the parties.

Commentary

[1] The guidelines following commentary [3] to Code rule 3.4-20 (Law firm disqualification) regarding lawyer transfers between law firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for another lawyer in the law~~yer's partner or associate~~ firm to act against the former client.

Short-term summary legal services

3.4-11.1 In Code rules 3.4-11.2 to 3.4-11.4 **"short-term summary legal services"** means advice or representation to a client under the auspices of a pro bono or not-for-profit legal

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services provider with the expectation by the lawyer and the client that the lawyer will not provide continuing legal services in the matter.

3.4-11.3 Except with consent of the clients as provided in Code rule 3.4-2 (Consent), a lawyer must not provide, or must cease providing short-term summary legal services to a client where the lawyer knows or becomes aware that there is a conflict of interest.

3.4-11.4 A lawyer who provides short-term summary legal services must take reasonable measures to ensure that no disclosure of the client's confidential information is made to another lawyer in the lawyer's law firm.

Commentary

[1] Short-term summary legal service and duty counsel programs are usually offered in circumstances in which it may be difficult to systematically screen for a conflict~~s~~ of interest in a timely way, despite the best efforts and existing practices and procedures of the not-for-profit legal services provider and the lawyers and law firms who provide these services. Performing a full conflict~~s~~ screening in circumstances in which the short-term summary services described in these Code rules are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided.

[2] The limited nature of short-term summary legal services significantly reduces the risk of a conflict~~s~~ of interest with other matters being handled by the lawyer's law firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term summary legal services only if the lawyer has actual knowledge of a conflict of interest between the client receiving short-term summary legal services and an existing client of the lawyer or an existing client of the *pro bono* or not-for-profit legal services provider or between the lawyer and the client receiving short-term summary legal services.

[3] Confidential information obtained by a lawyer providing the services described in Code rules 3.4-11.1 to 3.4-11.4 will not be imputed to the lawyers in the lawyer's firm or to non-lawyer partners or associates in a multi-disciplin~~e~~ary partnership. As such, these individuals may continue to act for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services, and may act in future for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services.

[4] In the provision of short-term summary legal services, the lawyer's knowledge about a possible conflict~~s~~ of interest is based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of consulting with the pro bono or not-for-profit legal services provider to receive its services.

Conflict~~s~~ from transfer between law firms

Application of rule

3.4-17 In Code rules 3.4-17 to 3.4-23:

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

Commentary

[2] Code ~~R~~rules 3.4-17 to 3.4-23 apply to lawyers sharing space. Treating space-sharing lawyers as a law firm recognizes:

(a) the concern that opposing clients may have about the appearance of proximity of lawyers sharing space, and

(b) the risk that lawyers sharing space may be exposed inadvertently to confidential information of an opposing client.

3.4-18 Code ~~R~~rules 3.4-17 to 3.4-23 apply when a lawyer transfers from one law firm (“former law firm”) to another (“new law firm”), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) It is reasonable to believe the transferring lawyer has confidential information relevant to the new law firm’s matter for its client; or

(b) (i) the new law firm represents a client in a matter that is the same as or related to a matter in which a former law firm represents or represented its client (“former client”);

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

(iii) the transferring lawyer actually possesses relevant information respecting that matter.

Commentary

[1] The purpose of th~~e~~is Code rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in *MacDonald Estate* v. *Martin*, [1990] 3 SCR 1235, with respect to the ~~partners or associates~~other lawyers in the law firm of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the era of the mega-law firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same law firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in Code rule 3.4-20 (Law firm disqualification), have been taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the law firm who are engaged against a former client.

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

[3] Law firms with multiple offices — This Code rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments and an interjurisdictional law firm.

3.4-19 Code ~~R~~rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial government who, after transferring from one department, ministry or agency to another, continues to be employed by that government.

Commentary

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

Law firm disqualification

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

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

(b) the new law firm has:

(i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm; and

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

Commentary

[0.1] There are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm:

(a) if the transferring lawyer actually possesses confidential information respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, and

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

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

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

[3] The guidelines that follow are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

Guidelines: How to screen / measures to be taken

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

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

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

4. The law firm should take steps to preclude the screened lawyer from having access to any part of the file.

4.1 The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the law firm.

5. The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.

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

How to determine if a conflict exists before hiring a potential transferee

[4] When a law firm ("new law firm") considers hiring a lawyer, or an articled ~~law~~ student ("transferring lawyer/articled student") from another law firm ("former law firm"), the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflict~~s~~ of interest will be created. A ~~C~~conflict~~s~~ can arise with respect to clients of the law firm that the transferring lawyer is leaving and with respect to clients of a law firm in which the transferring lawyer worked at some earlier time.

[5] After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether any conflict~~s~~ of interest exists. In determining whether the transferring lawyer actually possesses relevant confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences. See Code rule 3.3-7 which provides that a lawyer may disclose confidential information to the extent the lawyer reasonably believes necessary to detect and resolve a conflict~~s~~ of interest where lawyers transfer between law firms.

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

[7] Issues arising as a result of a transfer between law firms should be dealt with promptly. A lawyer's failure to promptly raise any issues may prejudice clients and may be considered sharp practice.

Transferring lawyer disqualification

3.4-21 Unless the former client consents, a transferring lawyer referred to in Code rule 3.4-20 (Law firm disqualification) must not:

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

(b) disclose any confidential information respecting the former client except as permitted by Code rule 3.3-7.

3.4-22 Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in Code rule 3.4-20 (Law firm disqualification) except as permitted by Code rule 3.3-7.

Lawyer due diligence for non-lawyer staff

3.4-23 A lawyer or a law firm must exercise due diligence in ensuring that ~~each member and employee of~~all colleagues at the law firm, including administrative staff, and each other person whose services the lawyer or the law firm has retained:

(a) complies with Code rules 3.4-17 to 3.4-23; and

(b) does not disclose confidential information:

(i) of clients of the law firm; or

(ii) any other law firm in which the person has worked.

Commentary

[1] This Code rule is intended to regulate lawyers and articled ~~law~~ students who transfer between law firms. It also imposes a general duty on lawyers and law firms to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the Code rules and with the duty not to disclose confidences of clients of the lawyer's law firm and confidences of clients of other law firms in which the person has worked.

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

Conflict~~s~~ with clients

3.4-26.1 A lawyer must not perform any legal services if there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's

(a) relationship with the client, or

(b) interest in the client or the subject matter of the legal services.

Commentary

[1] Any relationship or interest that affects a lawyer's professional judgment is to be avoided under this Code rule, including ones involving a relative, partner, employer, employee, business associate or friend of the lawyer.

3.4-26.2 The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client is not a disqualifying interest under Code rule 3.4-26.1 (Conflict with clients).

Commentary

[1] Generally speaking, a lawyer may act as legal advisor or as business associate, but not both. These principles are not intended to preclude lawyers from performing legal services on their own behalf. Lawyers should be aware, however, that acting in certain circumstances may cause them to lose coverage as a result of Exclusion 6 in the B~~.~~C~~.~~ Lawyers Compulsory Professional Liability Indemnity Policy and similar provisions in other insurance policies.

[2] Whether or not coverage under the Compulsory Policy is lost is determined separate and apart from the ethical obligations addressed in this chapter. Review the current policy for the exact wording of Exclusion 6 or contact the Lawyers Indemnity Fund regarding the application of the Exclusion to a particular set of circumstances.

Doing business with a client

Independent legal advice

3.4-27 In Code rules 3.4-27 to 3.4-43, when a client is required or advised to obtain independent legal advice concerning a matter, that advice may only be obtained by retaining a lawyer who has no conflict~~ing~~ of interest in the matter.

3.4-27.1 A lawyer giving independent legal advice under this section must:

(a) advise the client that the client has the right to independent legal representation;

(b) explain the legal aspects of the matter to the client, who appears to understand the advice given; and

(c) inform the client of the availability of qualified advisers in other fields who would be in a position to advise the client on the matter from a business point of view.

Commentary

[0.1] A client is entitled to obtain independent legal representation by retaining a lawyer who has no conflict~~ing~~ of interest in the matter to act for the client in relation to the matter.

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

[2] Either independent legal representation or independent legal advice may be provided by a lawyer employed by the client as in-house counsel.

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

Commentary

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

(a) lending or borrowing money;

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift;

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

(e) recommending an investment; and

(f) entering into a common business venture.

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

Investment by client when lawyer has an interest

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

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

(b) recommend and require that the client receive independent legal advice; and

(c) if the client requests the lawyer to act, obtain the client's consent.

Commentary

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

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

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

[4] If the investment is by borrowing from the client, the transaction may fall within the requirements of Code rule 3.4-32 (Certificate of independent legal advice).

Borrowing from clients

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

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

(b) the client is a related person as defined by the *Income Tax Act* ~~(Canada)~~, RSC 1985, c.1 (5th Supp.) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary

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

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

Lawyers in loan or mortgage transactions

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

(a) disclose and explain the nature of the conflict~~ing~~ of interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

Guarantees by a lawyer

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

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

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:

(i) the lawyer has complied with this section (Conflict~~s~~), in particular, Code rules 3.4-27 (Independent legal advice) to 3.4-36 ~~(Doing Business with a Client)~~; and

(ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

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

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

Space-sharing arrangements

3.4-42 Code ~~R~~rule 3.4-43 applies to lawyers sharing office space with one or more other lawyers, but not practising or being held out to be practising in partnership or association with the other lawyer or lawyers.

3.4-43 Unless all lawyers sharing space together agree that they will not act for clients adverse in interest to the client of any of the others, each lawyer who is sharing space must disclose in writing to all of the lawyer's clients:

(a) that an arrangement for sharing space exists,

(b) the identity of the lawyers who make up the law firm acting for the client, and

(c) that lawyers sharing space with the law firm are free to act for other clients who are adverse in interest to the client.

Commentary

[1] Like other lawyers, those who share space must take all reasonable measures to ensure client confidentiality. Lawyers who do not wish to act for clients adverse in interest to clients of lawyers with whom they share space should establish an adequate conflict~~s~~ check system.

[2] In order both to ensure confidentiality and to avoid a conflicts~~s~~ of interest, a lawyer must have the consent of each client before disclosing any information about the client for the purpose of a conflicts~~s~~ checks~~s~~. Consent may be implied in some cases but, if there is any doubt, the best course is to obtain express consent.

3.5 Preservation of clients' property

3.5-1 In this section, **"property"** includes a client's money, securities as defined in the *Securities Act*, RSBC 1996, c.418, original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client's correspondence, files, reports, invoices and other such documents, as well as personal property including precious and semi-precious metals, jewellery and the like.

3.5-2 A lawyer must:

(a) care for a client's property as a careful and prudent owner would when dealing with like property; and

(b) observe all relevant Law Society Rules and Code rules and law about the preservation of a client's property entrusted to a lawyer.

Commentary

[1] The duties concerning safekeeping, preserving, and accounting for clients' monies and other property are set out in the Law Society Rules.

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

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

[4] If the lawyer withdraws from representing a client, the lawyer is required to comply with section 3.7 (Withdrawal from ~~R~~representation).

3.6 Fees and disbursements

Contingent fees and contingent fee agreements

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

Commentary

[1] In determining the appropriate percentage or other basis of a contingency fee, a lawyer and client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The test is whether the fee, in all of the circumstances, is fair and reasonable.

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

Statement of account

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

Commentary

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

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

Joint retainer fees

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

Division of fees and referral fees

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

3.6-6.1 In Code rules 3.6-6 and 3.6-7, **"another lawyer"** includes a person who is:

(a) a member of a recognized legal profession in any other jurisdiction; and

(b) acting in compliance with the law and any rules of the legal profession of the other jurisdiction.

3.6-7 A lawyer must not:

(a) directly or indirectly share, split or divide ~~his or her~~their fees with any person other than another lawyer; or

(b) give any financial or other reward for the referral of clients or client matters to any person other than another lawyer.

Commentary

[1] This Code rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. It does not prevent a lawyer from engaging in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients generally by a non-lawyer. Accordingly, this Code rule does not prohibit a lawyer from:

(a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;

(b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

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

(d) occasionally entertaining potential referral sources by purchasing meals, providing tickets to, or attending at, sporting or other activities or sponsoring client functions.

Exception for multi-disciplinary practices

3.6-8 Despite Code rule 3.6-7, a lawyer permitted to practise in a multi-disciplinary practice (MDP) under the Law Society Rules may share fees, profits or revenue from the practice of law in the MDP with a non-lawyer member of the MDP only if all the owners of the MDP are individuals or professional corporations actively involved in the MDP's delivery of legal services to clients or in the management of the MDP.

Commentary

[2] This Code rule also allows a lawyer to share fees or profits of an MDP with a non-lawyer for the purpose of paying out the ownership interest of the non-lawyer acquired by the non-lawyer's active participation in the MDP's delivery of services to clients or in the management of the MDP.

[3] See also the definitions of **"MDP"** and "**professional corporation**" in Rule 1 and Rules 2-38 to 2-49 of the Law Society Rules.

3. 6-10 A lawyer must not appropriate any client funds held in trust or otherwise under the lawyer's control for or on account of fees, except as permitted by the governing legislation.

Commentary

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

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

3.7 Withdrawal from representation

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

Commentary

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

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

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

[4] When a lawyer leaves a law firm to practise alone or to join another law firm, the departing lawyer and the law firm have a duty to inform all clients for whom the departing lawyer is the responsible lawyer in a legal matter that the clients have a right to choose who will continue to represent them. The same duty may arise when a law firm is winding up or dividing into smaller units.

[5] This duty does not arise if the lawyers affected by the changes, acting reasonably, conclude that the circumstances make it obvious that a client will continue as a client of a particular lawyer or law firm.

[6] When this Chapter requires a notification to clients, each client must receive a letter as soon as practicable after the effective date of the changes is determined, informing the client of the right to choose a lawyer.

[7] It is preferable that this letter be sent jointly by the law firm and any lawyers affected by the changes. However, in the absence of a joint announcement, the law firm or any lawyers affected by the changes may send letters in substantially the form set out in ~~a~~the precedents ~~letter on the Law Society website (see Practice Resources: Lawyer leaving law firm)~~provided by the Society.

[8] Lawyers whose clients are affected by changes in a law firm have a continuing obligation to protect client information and property, and must minimize any adverse effect on the interests of clients. This obligation generally includes an obligation to ensure that files transferred to a new lawyer or law firm are properly transitioned, including, when necessary, describing the status of the file and noting any unfulfilled undertakings and other outstanding commitments.

[9] The right of a client to be informed of changes to a law firm and to choose a lawyer cannot be curtailed by any contractual or other arrangement.

[10] With respect to communication other than that required by these Code rules, lawyers should be mindful of the common law restrictions upon uses of proprietary information, and interference with contractual and professional relations between the law firm and its clients.

Non-payment of fees

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

Commentary

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

[2] In criminal matters, if withdrawal is a result of non-payment of the lawyer's fees, the court may exercise its discretion to refuse counsel's withdrawal. The court's order refusing counsel's withdrawal may be enforced by the court's contempt power. See *R.* v. *Cunningham*, 2010 SCC 10.

[3] The relationship between a lawyer and client is contractual in nature, and the general rules respecting breach of contract and repudiation apply. Except in criminal matters involving non-payment of fees, if a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, and the decision to withdraw is not reviewable by the court, subject to its authority to cite a lawyer for contempt if there is evidence that the withdrawal was done for some improper purpose. Otherwise, the decision to withdraw is a matter of professional responsibility, and a lawyer who withdraws in contravention of this Chapter is subject to disciplinary action by the Benchers. See *Re Leask and Cronin* (1985), 66 BCLR 187 (SC). In civil proceedings the lawyer is not required to obtain the court's approval before withdrawing as counsel, but must comply with the ~~R~~rules of ~~C~~court before being relieved of the responsibilities that attach as "solicitor acting for the party." See *Luchka* v. *Zens* (1989), 37 BCLR (2d) 127 (CA).~~”~~

3.7-9 On discharge or withdrawal, a lawyer must, as soon as practicable:

(a) notify the client in writing, stating:

(i) the fact that the lawyer is no longer acting;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain a new ~~counsel~~lawyer promptly;

(a.1) notify in writing all other parties, including the Crown where appropriate, that the lawyer is no longer acting;

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

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

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and

(g) notify in writing the court registry where the lawyer's name appears as counsel for the client that the lawyer is no longer acting and comply with the applicable rules of court and any other requirements of the tribunal.

Commentary

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

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

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

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

[6] In the absence of a reasonable objection, a lawyer who is discharged or withdraws continues to have a duty to promptly sign appropriately drafted court orders that have been granted or agreed to while the lawyer was counsel. This duty continues, notwithstanding subsequent instructions of the client.

Confidentiality of reason for withdrawal

3.7-9.1 Subject to exceptions permitted by law, if the reason for withdrawal results from confidential communications between the lawyer and the client, the lawyer must not disclose the reason for the withdrawal unless the client consents.

Commentary

[1] One such exception is that in *R.* v. *Cunningham*, 2010 SCC 10, which establishes that, in a criminal case, if the disclosure of information related to the payment of the lawyer's fees is unrelated to the merits of the case and does not prejudice the accused, the lawyer may properly disclose such information to the court. See para~~.~~graph 31:

Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception to privilege, such as the innocence at stake or public safety exceptions (see generally *R.* v. *McClure*, 2001 SCC 14 and *Smith* v. *Jones*, [1999] 1 S.C.R. 455). Rather, non-payment of legal fees in this context does not attract the protection of solicitor-client privilege in the first place. However, nothing in these reasons, which address the application, or non-application, of solicitor-client privilege in disclosures to a court, should be taken as affecting counsel's ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts.

CHAPTER 4 – MARKETING OF LEGAL SERVICES

4.2 Marketing

Application of rule

4.2-3 This section applies to any marketing activity undertaken or authorized by a lawyer in which ~~he or she is~~they are identified as a lawyer, mediator or arbitrator.

Definitions

4.2-4 In this Chapter:

> **"marketing activity"** includes any publication or communication in the nature of an advertisement, promotional activity or material, letterhead, business card, listing in a directory, a public appearance or any other means by which professional legal services are promoted or clients are solicited~~;~~.

~~**“lawyer”** includes a member of the Law Society, and a person enrolled in the Law Society Admission Program.~~

Content and format of marketing activities

4.2-5 Any marketing activity undertaken or authorized by a lawyer must not be:

(a) false,

(b) inaccurate,

(c) unverifiable,

(d) reasonably capable of misleading the recipient or intended recipient, or

(e) contrary to the best interests of the public.

Commentary

[1] For example, a marketing activity violates this Code rule ~~-~~if it:

(a) is calculated or likely to take advantage of the vulnerability, either physical or emotional, of the recipient,

(b) is likely to create in the mind of the recipient or intended recipient an unjustified expectation about the results that the lawyer can achieve, or

(c) otherwise brings the administration of justice into disrepute.

Notary public

4.2-7 A lawyer who, on any letterhead, business card or sign, or in any other marketing activity:

(a) uses the term “~~N~~notary,” “~~N~~notary ~~P~~public” or any similar designation, or

(b) in any other way represents to the public that the lawyer is a notary public,

must also indicate in the same publication or marketing activity the lawyer’s status as a lawyer.

Designation

4.2-8 A lawyer must not list a person not entitled to practise law in British Columbia on any letterhead or in any other marketing activity without making it clear in the marketing activity that the person is not entitled to practise law in British Columbia.

In particular, a person who fits one or more of the following descriptions must not be listed without an appropriate indication of the person's status:

(a) a retired member,

(b) a non-practising member,

(c) a deceased member,

(d) an articled student,

(e) a legal assistant or paralegal,

(f) a patent agent, if registered as such under the *Patent Act*, RSC 1985, c. P-4,

(g) a trademark agent, if registered as such under the *Trade~~-~~marks Act*, ~~or~~RSC 1984, c. T-13,

(h) a practitioner of foreign law, if that person holds a valid permit issued under Law Society Rule 2-18~~.~~, or

(i) a qualified member of another profession, trade or occupation, provided that the lawyer and the other person are members of a ~~M~~multi-~~D~~disciplinary ~~P~~practice (MDP) permitted under the Law Society Rules.

4.3 Advertising nature of practice

Real estate sales

4.3-2 When engaged in marketing of real property for sale or lease, a lawyer must include in any marketing activity:

(a) the name of the lawyer or the lawyer's law firm, and

(b) if a telephone number is used, only the telephone number of the lawyer or the lawyer's law firm.

Multi-disciplinary practice

4.3-3 Unless permitted to practise law in an MDP under the Law Society Rules, a lawyer must not, in any marketing activity

(a) use the term ~~M~~multi-~~D~~disciplinary ~~P~~practice or MDP, or

(b) state or imply that the lawyer's practice or law firm is an MDP.

4.3-4 A lawyer practising law in an MDP must ensure that all marketing activity for the law firm indicates that the law firm is an MDP.

CHAPTER 5 – RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

5.1 The lawyer as advocate

Advocacy

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

(a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

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

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

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

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

(g) knowingly assert as fact that which cannot reasonably be supported by the evidence or taken on judicial notice by the tribunal;

(h) make suggestions to a witness recklessly or knowing them to be false;

(i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;

(j) improperly dissuade a witness from giving evidence or advise a witness to be absent;

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

(l) knowingly misrepresent the client's position in the litigation or the issues to be determined in the litigation

(m) abuse, hector or harass a witness;

(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge;

(o) needlessly inconvenience a witness; or

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

Commentary

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

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

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

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

[5] In the absence of a reasonable objection, lawyers have a duty to promptly sign appropriately drafted court orders that have been granted or agreed to. This duty continues, notwithstanding subsequent instructions of the client.

Incriminating physical evidence

5.1-2.1 A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence so as to obstruct or attempt to obstruct the course of justice.

Commentary

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

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

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its mere existence. A lawyer's possession of illegal things could constitute an offence and may require that the client obtain new counsel or disadvantage the client in other ways. It is imperative that a lawyer consider carefully the implications of accepting incriminating physical evidence. A lawyer should obtain the advice of a senior criminal ~~counsel~~lawyer ~~or a Law Society practice advisor~~ before agreeing to take possession. Where a lawyer already has possession, this advice should be promptly obtained with respect to how the evidence should be handled.

[3.1] Unless a lawyer's handling of incriminating physical evidence is otherwise prescribed by law, the options available to a lawyer who has taken possession of such evidence include, as soon as reasonably possible:

(a) delivering the evidence to law enforcement authorities or the prosecution, either directly or anonymously;

(b) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination;

(c) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it; or

(d) returning the evidence to its source, provided doing so will not cause the evidence to be concealed, destroyed or altered.

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

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

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

[7] A lawyer must never take possession of an item the mere possession of which is illegal, such as stolen property, unless specific dispensation is afforded by the law, such as under the "innocent possession" exception, which allows a person to take possession of such an item for the sole purpose of promptly turning it over to the police.

Ex parte proceedings

5.1-2.2 In an *ex parte* proceeding, a lawyer must act with utmost good faith and inform a tribunal of all material facts, including adverse facts, known to the lawyer that will enable the tribunal to make an informed decision.

Commentary

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

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

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

Single-party communications with a tribunal

5.1-2.3 Except where authorized by law, and subject to Code rule 5.1-2.2 (*Ex parte* proceedings), a lawyer must not communicate with a tribunal in the absence of the opposing party or their lawyer (when they are represented) concerning any matter of substance, unless the opposing party or their lawyer has been made aware of the content of the communication or has appropriate notice of the communication.

Commentary

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

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

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

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

Duty as prosecutor

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

Commentary

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

Disclosure of error or omission

5.1-4 A lawyer who has unknowingly done or failed to do something that, if done or omitted knowingly, would have been in breach of th~~is~~e Code rules in section 5.1 (The lawyer as advocate) and who discovers it, must, subject to section 3.3 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

Commentary

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

Undertakings

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

Commentary

[1] A lawyer should also be guided by the provisions of Code rule 7.2-11 (Undertakings and trust conditions).

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

(a) the lawyer advises ~~his or her~~their client about the prospects for an acquittal or finding of guilt;

(b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and

(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

Commentary

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

5.2 The ~~L~~lawyer as witness

Submission of evidence

5.2-1 A lawyer who appears as advocate must not testify or submit ~~his or her~~their own affidavit evidence before the tribunal unless

(a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal;

(b) the matter is purely formal or uncontroverted; or

(c) it is necessary in the interests of justice for the lawyer to give evidence.

Commentary

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

Appeals

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

5.3 Interviewing witnesses

5.3-1 Subject to the rules on communication with a represented party set out in Code rules 7.2-4 (Communications generally) to 7.2-8 (Communication with an officer or employee), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must 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.

5.4 Communication with witnesses giving evidence

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

(a) during examination-in-chief, the examining lawyer may discuss with the witness any matter;

(b) during cross-examination of the lawyer's own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(c) upon the conclusion of cross-examination and during any re-examination, with the leave of the court, the lawyer may discuss with the witness any matter;

(d) during examination for discovery, the lawyer may discuss the evidence given or to be given by the witness on the following basis:

(i) where a discovery is to last no longer than a day, ~~counsel~~the lawyer for the witness should refrain from having any discussion with the witness during this time.

(ii) where a discovery is scheduled for longer than one day, ~~counsel~~the lawyer is permitted to discuss with ~~his or her~~their witness all issues relating to the case, including evidence that is given or to be given, at the conclusion of the discovery each day. However, prior to any such discussion taking place, ~~counsel~~the lawyer should advise the other side of ~~his or her~~their intention to do so.

(iii) ~~counsel~~the lawyer for the witness should not seek an adjournment during the examination to specifically discuss the evidence that was given by the witness. Such discussion should either wait until the end of the day adjournment or until just before re-examination at the conclusion of the cross-examination.

Commentary

[1] The application of these Code rules may be determined by the practice and procedures of the tribunal and may be modified by agreement ~~of counsel~~between the parties' lawyers.

[2] The term "cross-examination" means the examination of a witness or party adverse in interest to the client of the lawyer conducting the examination. It therefore includes an examination for discovery, examination on affidavit or examination in aid of execution. Th~~e~~is Code rule prohibits obstruction or improper discussion by any lawyer involved in a proceeding and not just by the lawyer whose witness is under cross-examination.

[3] The opportunity to conduct a fully ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing ~~advocate's~~lawyer's ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer's witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objection to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing.

[~~6~~4] This Code rule is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has been retained by a witness under cross-examination, from consulting with the lawyer's new client.

[~~8~~5] For a discussion of issues relating to ~~counsel~~a lawyer speaking to ~~the~~a witness during examination for discovery see *Fraser River Pile & Dredge Ltd.* v. *Can-Dive Services Ltd.* (1992), 72 B.C.L.R. (2nd) 240 (B.C.S.C) and *Iroquois Falls Power Corp.* v. *Jacobs Canada Inc.* [2006] O.J. No. 4222 (Ont.Sup.Ct.). See also Shields and Shapray, "Woodshedding, Interruptions and Objections: How to Properly Conduct and Defend an Examination for Discovery", *the Advocate*, Vol. 68, Part 5, Sept. 2010.

5.5 Relations with jurors

Disclosure of information

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

(a) has or may have an interest, direct or indirect, in the outcome of the case;

(b) is acquainted with or connected in any manner with the presiding judge, any ~~counsel~~parties' lawyers or any litigant;

(c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness; or

(d) may be legally disqualified from serving as a juror.

5.6 The lawyer and the administration of justice

Encouraging respect for the administration of justice

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

Commentary

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

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

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

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

5.7 Lawyers and mediators

Role of mediator

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

(a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and

(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.

Commentary

[1] [rescinded 07/2014]

[1.1] Appendix B contains additional ~~rules~~guidance that govern the conduct of family law mediation.

[2] Generally, neither the lawyer-mediator nor a partner or associate of the ~~lawyer-~~same law firm as the mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of section 3.4 (Conflict~~s~~) and its commentaries and the common law authorities.

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

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

[5] A lawyer who has acted as a mediator in a family law matter may act for both spouses in a divorce action provided that all relief is sought by consent and both parties have received independent legal advice in relation to the matter.

CHAPTER 6 – RELATIONSHIP TO STUDENTS, EMPLOYEES, AND OTHERS

6.1 Supervision

Direct supervision required

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

Commentary

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

[~~3~~2] If a non-lawyer has received specialized training or education and is competent to do independent work under the general supervision of a lawyer, a lawyer may delegate work to the non-lawyer.

[~~4~~3] A lawyer in private practice may permit a non-lawyer to perform tasks delegated and supervised by a lawyer, so long as the lawyer maintains a direct relationship with the client. A lawyer in a community legal clinic funded by a provincial legal aid plan may do so, so long as the lawyer maintains direct supervision of the client's case in accordance with the supervision requirements of the legal aid plan and assumes full professional responsibility for the work.

[~~5~~4] Subject to the provisions of any statute, rule or court practice in that regard, the question of what the lawyer may delegate to a non-lawyer generally turns on the distinction between any special knowledge of the non-lawyer and the professional and legal judgment of the lawyer, which, in the public interest, must be exercised by the lawyer whenever it is required.

Definitions

6.1-2 In this section,

> **"designated paralegal"** means an individual permitted under Code rule 6.1-3.3 to give legal advice and represent clients before a court or tribunal;
>
> **"non-lawyer"** means an individual who is neither a lawyer nor an articled student;
>
> **"paralegal"** means a non-lawyer who is a trained professional working under the supervision of a lawyer.

6.1-3.1 The limitations imposed by Code rule 6.1-3 (Delegation) do not apply when a non-lawyer is:

> (a) a community advocate funded and designated by the Law Foundation;
>
> (b) a student engaged in a legal advice program or clinical law program run by, associated with or housed by a law school in British Columbia; ~~and~~or
>
> (c) with the approval of the Executive Committee, a person employed by or volunteering with a non-profit organization providing free legal services.

6.1-3.2 A lawyer may employ as a paralegal a person who

> (a) possesses adequate knowledge of substantive and procedural law relevant to the work delegated by the supervising lawyer;
>
> (b) possesses the practical and analytic skills necessary to carry out the work delegated by the supervising lawyer; and
>
> (c) carries out ~~his or her~~their work in a competent and ethical manner.

Commentary

[1] A lawyer must not delegate work to a paralegal, nor may a lawyer hold a person out as a paralegal, unless the lawyer is satisfied that the person has sufficient knowledge, skill, training and experience and is of sufficiently good character to perform the tasks delegated by the lawyer in a competent and ethical manner.

[2] In arriving at this determination, lawyers should be guided by Appendix ~~E~~D.

[3] Lawyers are professionally and legally responsible for all work delegated to paralegals. Lawyers must ensure that the paralegal is adequately trained and supervised to carry out each function the paralegal performs, with due regard to the complexity and importance of the matter.

6.1-3.3 Despite Code rule 6.1-3 (Delegation), where a designated paralegal has the necessary skill and experience, a lawyer may permit the designated paralegal

(a) to give legal advice;

(b) to represent clients before a court or tribunal, other than a family law arbitration, as permitted by the court or tribunal; or

(c) to represent clients at a family law mediation.

Commentary

[1] Law Society Rule 2-13 limits the number of designated paralegals performing the enhanced duties of giving legal advice, appearing in court or before a tribunal or appearing at a family law mediation.

[2] Where a designated paralegal performs the services in this Code rule ~~6.1-3.3~~, the supervising lawyer must be available by telephone or other electronic means, and any agreement arising from a family law mediation must be subject to final review by the supervising lawyer.

Suspended or disbarred lawyers

6.1-4 Without the express approval of the lawyer's governing body, a lawyer must not retain, occupy office space with, use the services of, partner or associate with or employ in any capacity having to do with the practice of law any person who, in any jurisdiction,

(a) has been disqualified or disbarred and struck off the Rolls,

(b) is suspended,

(c) has undertaken not to practise,

(d) has been involved in disciplinary action and been permitted to resign and has not been reinstated or readmitted,

(e) has failed to complete a Bar admission program for reasons relating to lack of good character and repute or fitness to be a member of the Bar,

(f) has been the subject of a hearing ordered, whether commenced or not, with respect to an application for enrolment as an articled student, call and admission, or reinstatement, unless the person was subsequently enrolled, called and admitted or reinstated in the same jurisdiction, or

(g) was required to withdraw or was expelled from a Bar admission program.

Electronic registration of documents

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

(a) permit others, including a non-lawyer employee, to use such access; or

(b) disclose ~~his or her~~their password or access phrase or number to others.

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

(a) permit others to use such access; or

(b) disclose ~~his or her~~their password or access phrase or number to others.

Commentary

[1] The implementation of systems for the electronic registration of documents imposes special responsibilities on lawyers and others using the system. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized access code, diskettes, etc., used to access the system and the personalized access pass phrase or number.

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

Real estate assistants

6.1-7 In Code rules 6.1-7 to 6.1-9,

"purchaser" includes a lessee or person otherwise acquiring an interest in a property;

"sale" includes lease and any other form of acquisition or disposition;

"show", in relation to marketing real property for sale, includes:

(a) attending at the property for the purpose of exhibiting it to members of the public;

(b) providing information about the property, other than preprinted information prepared or approved by the lawyer; and

(c) conducting an open house at the property.

6.2 Students

Duties of articled student

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

6.3 Harassment and discrimination

Discrimination

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

Commentary

[1] Lawyers are expected to respect the dignity and worth of all persons. A lawyer has a special responsibility to respect and uphold the principles and requirements of human rights and workplace health and safety laws, and to stay apprised of developments in the law pertaining to discrimination and harassment, applicable to them.

The principles of human rights, workplace health and safety laws, and related case law apply to the interpretation of this Code rule and to Code rules 6.3-2 (Harassment) to 6.3-4 (Reprisal). What constitutes discrimination, harassment, and protected grounds continues to evolve over time and may vary by jurisdiction.

[2] A lawyer engaging in discriminatory or harassing behaviour undermines confidence in the legal profession and our legal system. A lawyer should foster a professional environment that is respectful, accessible, and inclusive, and should strive to recognize their own biases and take particular care to avoid engaging in practices that would reinforce those biases, when offering services to the public and when organizing their workplace.

[3] As a result of the history of the colonization of Indigenous peoples in Canada, including ongoing repercussions of the colonial legacy, systemic factors, and biases, Indigenous peoples experience unique challenges in relation to discrimination and harassment. Lawyers should guard against engaging in, allowing, or being willfully blind to actions that constitute discrimination or any form of harassment against Indigenous peoples.

[4] Lawyers should be aware that discrimination includes adverse effects and systemic discrimination, that can arise from organizational policies, practices and cultures that create, perpetuate, or unintentionally result in unequal treatment of a person or persons. Lawyers should consider the distinct needs and circumstances of their colleagues, employees, and clients, and should be alert to biases that may inform these relationships and that serve to perpetuate systemic discrimination and harassment. Lawyers should guard against any express or implicit assumption that another person's views, skills, capabilities, and contributions are necessarily shaped or constrained by their gender, race, Indigeneity, disability or other personal characteristic.

[5] Discrimination can be defined as the distinction, intentional or not, based on grounds related to actual or perceived personal characteristics of an individual or group, that has the effect of imposing burdens, obligations or disadvantages on the individual or group that are not imposed on others, or which withhold or limit access to opportunities, benefits and advantages that are available to other members of society. Harassment may constitute or be linked to discrimination. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will typically constitute discrimination. Human rights laws recognize some actions based on grounds related to actual or perceived personal characteristics of an individual or group are not discriminatory, including for example, establishing or providing programs, services or activities that have the object of ameliorating conditions of those individuals or groups. It is important to recognize that people are multi-faceted, and the intersection of overlapping and interdependent systems of discrimination they may experience.

[6] Discrimination can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that are likely to constitute discrimination. The examples are not exhaustive.

(a) refusing to employ or to continue to employ any person on the basis of any personal characteristic protected by applicable law;

(b) refusing to provide legal services to any person on the basis of any personal characteristic protected by applicable law;

(c) charging higher fees on the basis of any personal characteristic protected by applicable law;

(d) assigning lesser work or paying an employee or staff member less on the basis of any personal characteristic protected by applicable law;

(e) using derogatory racial, gendered, or religious language to describe a person or group of persons;

(f) failing to provide reasonable accommodation to the point of undue hardship;

(g) applying policies regarding leave that are facially neutral (i.e. that apply to all employees equally), but which have the effect of penalizing individuals who take parental leave, in terms of seniority, promotion or partnership;

(h) providing training or mentoring opportunities in a manner that has the effect of excluding any person from such opportunities on the basis of any personal characteristic protected by applicable law;

(i) providing unequal opportunity for advancement by evaluating employees on facially neutral criteria that fail to take into account differential needs and needs requiring accommodation;

(j) comments, jokes or innuendos that cause humiliation, embarrassment or offence, or that by their nature, and in their context, are clearly embarrassing, humiliating or offensive; or

(k) instances when any of the above behaviour is directed toward someone because of their association with a group or individual with certain personal characteristics.

[7] Lawyers are expected to not condone or be willfully blind to conduct in their workplaces that constitutes discrimination.

[8] Lawyers are reminded that dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action. Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity (see Code rule 2.2-1 (Integrity), commentaries [3] and [4]).

Harassment

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

Commentary

[1] Harassment can be defined as an incident or a series of incidents involving physical, verbal or non-verbal conduct (including electronic communications) that might reasonably be expected to cause humiliation, offence or intimidation to the person who is subjected to the conduct. The intent of the lawyer engaging in the conduct is not determinative. Harassment may constitute or be linked to discrimination.

[2] Harassment can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that are likely to constitute harassment. The examples are not exhaustive.

(a) objectionable or offensive behaviour that is known or ought reasonably to be known to be unwelcome, including comments and displays that demean, belittle, intimidate or cause humiliation or embarrassment;

(b) behaviour that is degrading, threatening or abusive, whether physically, mentally or emotionally;

(c) bullying;

(d) verbal abuse;

(e) abuse of authority where a lawyer uses the power inherent in their position to endanger, undermine, intimidate, or threaten a person, or otherwise interfere with another person's career;

(f) comments, jokes or innuendos that are known or ought reasonably to be known to cause humiliation, embarrassment or offence, or that by their nature, and in their context, are clearly embarrassing, humiliating or offensive; or

(g) assigning work inequitably.

[3] Bullying, including cyberbullying, is a form of harassment. It may involve physical, verbal or non-verbal conduct. It is characterized by conduct that might reasonably be expected to harm or damage the physical or psychological integrity of another person, their reputation or their property. Bullying can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that are likely to constitute bullying. The examples are not exhaustive.

(a) unfair or excessive criticism;

(b) ridicule;

(c) humiliation;

(d) exclusion or isolation;

(e) constantly changing or setting unrealistic work targets; or

(f) threats or intimidation.

[4] Lawyers are expected to not condone or be willfully blind to conduct in their workplaces that constitutes harassment.

[5] Lawyers are reminded that dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action. Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity (see Code rule 2.2-1 (Integrity), commentaries [3] and [4]).

Sexual harassment

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

Commentary

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

(a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the person who is subjected to the conduct;

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

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

(d) when submission to or rejection of such conduct is used as a basis for any employment decision, including;

(i) loss of opportunity;

(ii) the allocation of work;

(iii) promotion or demotion;

(iv) remuneration or loss of remuneration;

(v) job security; or

(vi) benefits affecting the employee;

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

(f) when a position of power is used to import sexual requirements into the workplace and negatively alter the working conditions of employees or colleagues; or

(g) when a sexual solicitation or advance is made by a lawyer who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the lawyer making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

[2] Sexual harassment can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that are likely to constitute sexual harassment. The examples are not exhaustive.

(a) displaying sexualized or other demeaning or derogatory images;

(b) sexually suggestive or intimidating comments, gestures or threats;

(c) comments, jokes that cause humiliation, embarrassment or offence, or which by their nature, and in their context, are clearly embarrassing, humiliating or offensive;

(d) innuendoes, leering or comments about a person’s dress or appearance;

(e) gender-based insults or sexist remarks;

(f) communications with sexual overtones;

(g) inquiries or comments about a person’s sex life;

(h) sexual flirtations, advances, propositions, invitations or requests;

(i) unsolicited or unwelcome physical contact or touching;

(j) sexual violence; or

(k) unwanted contact or attention, including after the end of a consensual relationship.

[3] Lawyers are expected to not condone or be willfully blind to conduct in their workplaces that constitutes sexual harassment.

[4] Lawyers are reminded that dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action. Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity (see Code rule 2.2-1 (Integrity), commentaries [3] and [4]).

CHAPTER 7 – RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

7.1 Responsibility to the Society and the profession generally

Regulatory compliance

7.1-1 A lawyer must

(a) reply promptly and completely to any communication from the Society;

(b) provide documents as required to the ~~Law~~ Society;

(c) not improperly obstruct or delay ~~Law~~ Society investigations, audits and inquiries;

(d) cooperate with ~~Law~~ Society investigations, audits and inquiries involving the lawyer or a member of the lawyer's law firm;

(e) comply with orders made under the *Legal Profession Act* or Law Society Rules; and

(f) otherwise comply with the ~~Law~~ Society's regulation of the lawyer's practice.

Meeting financial obligations

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

Commentary

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

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

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

Duty to report

7.1-3 Unless to do so would involve a breach of solicitor-client confidentiality or privilege, a lawyer must report to the Society, in respect of that lawyer or any other lawyer:

(a) a shortage of trust monies;

(a.1) a breach of undertaking or trust condition that has not been consented to or waived;

(b) the abandonment of a law practice;

(c) participation in criminal activity related to a lawyer's practice;

(d) [rescinded]

(e) conduct that raises a substantial question as to the honesty, trustworthiness, or competency of a lawyer; and

(f) any other situation in which a lawyer's clients are likely to be materially prejudiced.

Commentary

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

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

[3] A variety of stressors, physical, mental or emotional conditions, disorders or addictions may contribute to instances of conduct described in this Code rule. Lawyers who face such challenges should be encouraged by other lawyers to seek assistance as early as possible.

[4] The Society supports professional support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received in the course of such confidential counselling. A lawyer serving in the capacity of a peer support or counsellor in the Lawyers Assistance Program, or another ~~Law~~ Society approved peer assistance program, is not required to report any information concerning another lawyer acquired in the course of providing peer assistance. The potential disclosure of these communications is not subject to requirement by the ~~Law~~ Society. Such disclosure can only be required by law or a court but is permissible if the lawyer-counsellor believes on reasonable grounds that there is an imminent risk of death or serious harm and disclosure is necessary to prevent the death or harm.

7.2 Responsibility to lawyers and others

Courtesy and good faith

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

Commentary

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

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

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

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

[5] A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable notice.

Sharp practice and taking unfair advantage

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

Recording communications

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

Communications generally

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

Communicating with lawyer

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

Communicating with a represented person

7.2-6 Subject to Code rules 7.2-6.1 (Communicating with a person represented on a limited scope retainer) and 7.2-7 (Second opinions), if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:

(a) approach, communicate or deal with the person on the matter; or

(b) attempt to negotiate or compromise the matter directly with the person.

Communicating with a person represented on a limited scope retainer

7.2-6.1 Where a person is represented by a lawyer under a limited scope retainer on a matter, another lawyer may, without the consent of the lawyer providing the limited scope legal services, approach, communicate or deal with the person directly on the matter unless the lawyer has been given written notice of the nature of the legal services being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer.

Commentary

[1] Where notice as described in this Code rule ~~7.2-6.1~~ has been provided to a lawyer for an opposing party, the opposing lawyer is required to communicate with the person's lawyer, but only to the extent of the limited representation as identified by the lawyer. The opposing lawyer may communicate with the person on matters outside of the limited scope retainer.

Second opinions

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

Commentary

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

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

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

Communicating with an officer or employee

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

(a) who has the authority to bind the organization;

(b) who supervises, directs or regularly consults with the organization's lawyer; or

(c) whose own interests are directly at stake in the representation,

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

Commentary

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

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

Communicating with an unrepresented person

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

(a) urge the unrepresented person to obtain independent legal representation;

(b) take care to see that the unrepresented person is not proceeding under the impression that ~~his or her~~their interests will be protected by the lawyer; and

(c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

Commentary

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

~~Inadvertent communications~~Coming into possession of materials belonging to others

7.2-10 A lawyer who has access to or comes into possession of a document that the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, must:

(a) in the case of a paper document, return it unread and uncopied to the party to whom it belongs,

(b) in the case of an electronic document, delete it unread and uncopied and advise the party to whom it belongs that that was done, or

(c) if the lawyer reads part or all of the document before realizing that it was not intended for ~~him or her~~them, cease reading the document and promptly return it or delete it, uncopied, to the party to whom it belongs, advising that party:

(i) of the extent to which the lawyer is aware of the contents, and

(ii) what use the lawyer intends to make of the contents of the document.

Commentary

[~~3~~1] For purposes of this Code rule, **"electronic document"** includes email or other electronic modes of transmission subject to being read or put into readable form, such as computer hard drives and memory cards.

7.3 Outside interests and the practice of law

Maintaining professional integrity and judgment

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

Commentary

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

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

7.4 The lawyer in public office

Standard of conduct

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

Commentary

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

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

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

7.8 Errors and omissions

Informing client of errors or omissions

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

(a) promptly inform the client of the error or omission without admitting legal liability;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Commentary

[1] Under Condition 4.1 of the Lawyers Compulsory Professional Liability Indemnity Policy, a lawyer is contractually required to give written notice to the indemnitor immediately after the lawyer becomes aware of any actual or alleged error or any circumstances that could reasonably be expected to be the basis of a claim or suit covered under the policy. This obligation arises whether or not the lawyer considers the claim to have merit. Code ~~R~~rule 7.8-2 (Notice of claim) imposes an ethical duty to report to the indemnitor or insurer. This Code ~~R~~rule~~ 7.8-1~~ should not be construed as relieving a lawyer from the obligation to report to the indemnitor before attempting any rectification.

7.8-5 If liability is clear and the indemnitor or insurer is prepared to pay its portion of the claim, a lawyer has a duty to pay the balance. (See also Code ~~R~~rule 7.1-2~~]~~ (Meeting financial obligations).)

APPENDIX A – AFFIDAVITS, SOLEMN DECLARATIONS AND OFFICER CERTIFICATIONS

Affidavits and solemn declarations

1. A lawyer must not swear an affidavit or take a solemn declaration unless the deponent:

(a) appears personally before the lawyer,

(b) acknowledges that ~~he or she is~~they are the deponent,

(c) understands or appears to understand the statement contained in the document,

(d) in the case of an affidavit, swears, declares or affirms that the contents of the document are true,

(e) in the case of a solemn declaration, orally states that the deponent makes the solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath, and

(f) signs the document, or if permitted by statute, swears that the signature on the document is that of the deponent.

Commentary

Non-practising and retired members

[1] Non-practising and retired members are not permitted to act as notaries public or commissioners for the purpose of taking affidavits or solemn declarations. See Law Society Rules 2-3 and 2-4 for the definitions of non-practising and retired members.

Interjurisdictional practice

[2] A British Columbia lawyer, as a notary public, may administer oaths and take affidavits, declarations and affirmations only within British Columbia: See section 14 of the *Legal Profession Act* for a lawyer's right to act as a notary public, and section 18 of the *Notaries Act*, RSBC 1996, c. 334 for rights and powers of a notary public, including the right to draw affidavits, affirmations or statutory declarations for other jurisdictions.

[3] A British Columbia lawyer, as a commissioner for taking affidavits for British Columbia, has authority to administer oaths and take affidavits, declarations and affirmations outside of BC ~~*for use in BC*~~for use in BC: See sections 59 and 63, as well as sections 56 and 64 of the *Evidence Act*, RSBC 1996, c.124.

[4] Notwithstanding ~~L~~law ~~S~~society mobility provisions across Canada, a British Columbia lawyer cannot swear an affidavit in another province or territory for use in that jurisdiction unless the lawyer is a member of the bar in that jurisdiction or the jurisdiction's own legislation allows it. For example, because of Alberta legislation, a member of the ~~Law~~ Society ~~of British Columbia~~, while in Alberta acting under the mobility provisions on an Alberta matter, cannot swear an affidavit for use in Alberta.

[5] British Columbia lawyers should contact the law society of the other province or territory if they need to check whether they are entitled to swear an affidavit in that jurisdiction.

[6] Likewise, lawyers from other jurisdictions visiting British Columbia may not swear affidavits in BC for use in BC: See section 60 of the *Evidence Act*, RSBC 1996, c. 124 and the definition of "practising lawyer" in section 1(1) of the *Legal Profession Act.*

Deponent present before commissioner

[7] See *R.* v. *Schultz*, [1922] 2 WWR 582 (Sask. CA) in which the accused filled in and signed a declaration and left it on the desk of a commissioner for taking oaths, later meeting the commissioner outside and asking him to complete it. The court held that it was not a solemn declaration within the meaning of the *Canada Evidence Act*, RSC 1985, c. C-5, stating that: "The mere fact that it was signed by the accused does not make it a solemn declaration. The written statement by the commissioner that it was 'declared before him' is not true. The essential requirement of the *Act* is not the signature of the declarant but his solemn declaration made before the commissioner" (p. 584). Likewise, it has been held in the ~~U.S.~~United States that the taking of an affidavit over the telephone is grounds for a charge of negligence and professional misconduct: *Bar Association of New York City* v. *Napolis* (1915), 155 N.Y. Sup. 416 (N.Y. Sup. Ct. App. Div.). In ~~B.C.~~BC, the conduct of a lawyer who affixed the lawyer's name to the jurat of the signed affidavit without ever having seen the deponent constituted professional misconduct: Law Society *Discipline Case Digest* 83/14.

Identification

[8] The commissioner should be satisfied of the deponent's identity. Where the commissioner does not know the deponent personally, identification should be inspected~~,~~ ~~and/or~~ appropriate introductions should be obtained, or both.

Appearing to understand

[9] To be satisfied of this, the commissioner may read the document aloud to the deponent, have the deponent read it aloud or accept the deponent's statement that its contents are understood: *R.* v. *Whynot* (1954), 110 CCC 35 (NS CA) at 42~~ (NSCA)~~.

[10] It is also important that the deponent understands the significance of the oath or declaration to be taken. See *King* v. *Phillips* (1908), 14 CCC 239 (B.C. Co. Ct.); *R.* v. *Nichols*, [1975] 5 WWR 600 (Alta SC); and *Owen* v. *Yorke*, ~~(6 December, 1984), Vancouver A843177~~[1985] BCD Civ. 1231-03 (BCSC).

[11] If it appears that a deponent is unable to read the document, the commissioner must certify in the jurat that the document was read in ~~his or her~~their presence and the commissioner was satisfied that the deponent understood it: ~~B.C., *Rules of Court*~~Supreme Court Civil Rules, Rule 22-2(6). If it appears that the deponent does not understand English, the lawyer must arrange for a competent interpreter to interpret the document to the deponent and certify by endorsement in Form ~~60 [now Form~~ 109~~]~~ that ~~he or she has~~they have done so: ~~*Rules of Court*~~Supreme Court Civil Rules, Rule 22-2(7).

Remote commissioning of affidavits or solemn declarations

[12] While it is preferable for the deponent to appear physically before a lawyer for the purposes of commissioning an affidavit or solemn declaration, a lawyer may discharge the lawyer's ethical and professional obligations regarding commissioning an affidavit or solemn declaration where the lawyer and deponent are not physically together through the use of electronic and video technology in the manner set out below.

Lawyers should keep in mind however that what is accepted as evidence is ultimately for a trier of fact to determine, and that complying with the process set out in this commentary is not a guarantee that an affidavit or solemn declaration commissioned using electronic and video technology will be accepted as evidence by the trier of fact. Moreover, if concerns are identified about the particular manner in which an affidavit or solemn declaration is commissioned remotely or if a remote process raises any issues, in particular the serious concerns that would arise from issues regarding the identity or capacity of the deponent, or whether coercion of the deponent is a concern, those issues may result in the affidavit or solemn declaration not being accepted, or being given less weight. Lawyers are also reminded to be cautious regarding the heightened risks of fraud and undue influence presented by engaging in virtual processes, and of their obligations under Code rule 3.2-7 (Dishonesty, fraud by client).

Lawyers are also reminded to ensure that there are no prohibitions to the commissioning of an oath or solemn declaration through electronic or video technology for the purposes of any particular document for which such a process is contemplated.

Where the deponent is not physically present in British Columbia, the process for remote commissioning of an affidavit or solemn declaration should not be used unless the lawyer is satisfied there is no other practical way to undertake the commissioning of the document in accordance with the procedures of the jurisdiction in which the deponent is situated.

Process

The process for remote commissioning of an affidavit or solemn declaration by a lawyer must include the following elements.

1. Any affidavit or solemn declaration to be commissioned using electronic and video technology must contain a paragraph at the end of the body of the affidavit or solemn declaration describing that the deponent was not physically present before the lawyer as commissioner, but was in the lawyer's electronic presence linked with the lawyer utilizing video technology and that the process described below for remote commissioning of affidavits or solemn declarations was utilized.

2. The affidavit or solemn declaration must contain a paragraph acknowledging the solemnity of making the affidavit or solemn declaration and acknowledging the consequences of making an untrue statement.

3. While the lawyer and the deponent are in each other's electronic and video presence, the deponent must show the lawyer the front and back of the deponent's valid and current government-issued photo identification. The lawyer must compare the video image of the deponent and information in the deponent's government-issued photo identity document to be reasonably satisfied that the name and the photo are of the same person and that the document is authentic, valid and current. The lawyer must record that these steps have been taken. The lawyer should also consider recording the session through which the affidavit or solemn declaration is made.

4. The lawyer and the deponent must both have the text of the affidavit or solemn declaration, including all exhibits, before each of them while in each other's electronic presence.

5. The lawyer and the deponent must review the affidavit or solemn declaration and exhibits together to verify that the language is identical.

6. At the conclusion of the steps outlined above, while still in each other's electronic presence, the lawyer, as commissioner, must administer the oath, the deponent will swear or affirm the truth of the facts contained in the affidavit or solemn declaration, and the deponent will affix the deponent's signature to the affidavit or solemn declaration.

7. Where it is not permissible to commission an affidavit or solemn declaration using an electronic signature, the deponent's signature must be affixed in ink to the physical (paper) copy of the affidavit or solemn declaration above, and the deponent must immediately scan the document, save a copy immediately after scanning it, and immediately forward it, together with exhibits, electronically to the lawyer.

8. Where it is permissible to commission an affidavit or solemn declaration using an electronic signature, the deponent must immediately save the document and immediately forward it, together with the exhibits, electronically to the lawyer.

9. Upon receipt by the lawyer of the sworn affidavit or of a solemn declaration that has been attested to bearing the deponent's signature and all exhibits, the lawyer should, after having taken steps to ensure that the document received is the same as the document reviewed under the steps set out above, affix the lawyer's name and signature, as commissioner, to the jurat and exhibits.

10. If an electronic process is used that allows the lawyer, as commissioner, access to the document being signed by the deponent while in video contact with the deponent, the lawyer will then affix the lawyer's signature to the document, provided such process is permitted by the tribunal or court in which the affidavit or solemn declaration is to be used.

The version of the affidavit or solemn declaration that has been duly sworn or affirmed and contains the signatures of the deponent and the lawyer must then be saved by the lawyer, and may be filed with the ~~C~~court or tribunal as may be required.

Affirmation

[13] In cases where a deponent does not want to swear an affidavit by oath, an affidavit can be created by solemn affirmation. See section 20 of the *Evidence Act*, ~~R.S.B.C.~~RSBC 1996, c. 124.

Swear or affirm that the contents are true

[14] This can be accomplished by the commissioner asking the deponent: "Do you swear that the contents of this affidavit are true, so help you God?" or, if the affidavit is being affirmed, "Do you solemnly affirm [or words with the same effect] that the evidence given by you is the truth, the whole truth and nothing but the truth?," to which the deponent must answer in the affirmative. In taking an affirmation the lawyer should comply with section 20 of the *Evidence Act*, RSBC 1996, c. 124 and the *Affirmation Regulation*, ~~B.C. Reg.~~BC Reg 396/89.

[15] Section 29 of the *Interpretation Act*, RSBC 1996, c. 238, defines an affidavit or oath as follows:

> "affidavit" or "oath" includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act*, or under the *Canada Evidence Act*; and the word "swear" includes solemnly declare or affirm.

[16] If an affidavit is altered after it has been sworn, it cannot be used unless it is resworn. Reswearing can be done by the commissioner initialling the alterations, taking the oath again from the deponent and then signing the altered affidavit. A second jurat should be added, commencing with the word "resworn."

[17] Generally, an affidavit is sworn and filed in a proceeding that is already commenced. An affidavit may also be sworn before the proceeding is commenced: ~~*Rules of Court*~~Supreme Court Civil Rules, Rule 22-2(15). However, an affidavit may not be postdated: *Law Society of BC v. Foo*, [1997] LSDD No. 197.

[18] Swearing to an affidavit exhibits that are not in existence can amount to professional misconduct: *Law Society of BC v. Foo*, *supra*.

Solemn declaration

[19] A solemn declaration should be made in the words of the statute: *King* v. *Phillips*, *supra*; *R.* v. *Whynot*, *supra.*

[20] The proper form for a solemn declaration is set out in section 41 of the *Canada Evidence Act*, RSC 1985, c. C-5:

> **Solemn declaration**
>
> 41. Any judge, notary public, justice of the peace, provincial court judge, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or federal courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the declaration before him, in the following form, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:

> I, , solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.
>
> Declared before me at this . day of , 20

and in section 69 of the *Evidence Act*, RSBC 1996, c. 124:

> **Statutory declarations**
>
> 69. A gold commissioner, mayor or commissioner authorized to take affidavits, or any other person authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making it before him or her in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing, in the following words:
>
> > I, A.B., solemnly declare that [state the facts declared to], and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath.

Execution

[21] A deponent unable to sign an affidavit may place the deponent's mark on it: ~~*Rules of Court*~~Supreme Court Civil Rules, Rule 22-2(4)(b)(ii). An affidavit by a person who could not make any mark at all was accepted by the court in *R.* v. *Holloway* (1901), 65 JP 712 (Magistrates Ct.).

Witnessing the execution of an instrument

2. When a lawyer witnesses the execution of an instrument by an individual under the *Land Title Act*, RSBC 1996, c. 250, the lawyer's signature is a certification by the lawyer that:

> (a) the individual appeared before and acknowledged to the lawyer that ~~he or she is~~they are the person named in the instrument as transferor, and
>
> (b) the signature witnessed by the lawyer is the signature of the individual who made the acknowledgment. (See section 43 of the *Land Title Act*~~.~~, RSBC 1996, c. 250).

Commentary

[1] Non-practising and retired members are not permitted to act as officers for the purpose of witnessing the execution of instruments under the *Land Title Act*, RSBC 1996, c. 250.

APPENDIX B – FAMILY LAW, MEDIATION, ARBITRATION AND PARENTING COORDINATION

Obligations of family law mediator or arbitrator or parenting coordinator when participants unrepresented

3. A lawyer who acts as a family law mediator or arbitrator or parenting coordinator for participants who are unrepresented must:

(a) urge each unrepresented adult participant to obtain independent legal advice or representation, both before the commencement of the dispute resolution process and at any stage before an agreement between the participants is executed;

(b) take care to see that the unrepresented participant is not proceeding under the impression that the lawyer will protect ~~his or her~~their interests;

(c) make it clear to the unrepresented participant that the lawyer is acting exclusively in a neutral capacity, and not as ~~counsel~~the lawyer for either participant; and

(d) explain the lawyer's role in the dispute resolution process, including the scope and duration of the lawyer's powers.

Obligations of family law mediator or parenting coordinator

4. Unless otherwise ordered by the court, a lawyer who acts as a family law mediator or parenting coordinator and the participants must, before family law mediation or parenting coordination begins, enter into a written agreement that includes at least the following provisions:

(a) an agreement that the lawyer, throughout the family law mediation or parenting coordination, is not acting as ~~legal counsel~~the lawyer for any participant;

(b) an agreement that the lawyer may disclose fully to each participant all information provided by the other participant that is relevant to the issues;

(c) with respect to family law mediation, an agreement that, subject to Code rule 3.3-3 (Future harm / public safety exception), the family law mediation is part of an attempt to settle the differences between the participants and that all communications between participants or between any participant and the family law mediator will be "without prejudice" so that no participant will attempt:

(i) to introduce evidence of the communications in any legal proceedings, or

(ii) to call the family law mediator as a witness in any legal proceedings;

(c.1) with respect to parenting coordination, an agreement that no communications between the parenting coordinator and a participant, the child of a participant or a third party are confidential, except that the parenting coordinator may withhold any such information if, in the opinion of the parenting coordinator, the disclosure of the information may be harmful to a child's relationship with a participant, or compromise the child's relationship with a third party;

(d) an acknowledgment that the lawyer must report to ~~the~~a Director ~~of Family and Child Services~~under the *Child, Family and Community Services Act*, RSBC 1996, c. 46 any instance arising from the family law mediation or parenting coordination in which the lawyer has reasonable grounds to believe that a child is in need of protection;

(e) an agreement as to the lawyer's rate of remuneration and terms of payment;

(f) an agreement as to the circumstances in which family law mediation or parenting coordination will terminate.

Obligations of family law arbitrator

5. A lawyer who acts as a family law arbitrator and the participants must, before the lawyer begins ~~his or her~~their duties as family law arbitrator, enter into a written agreement that includes at least the following provisions:

(a) an agreement that the lawyer, throughout the family law arbitration, is not acting as ~~legal counsel~~the lawyer for any participant;

(b) an acknowledgment that the lawyer must report to ~~the~~a Director ~~of Family and Child Services~~under the *Child, Family and Community Services Act*, RSBC 1996, c. 46 any instance arising from the family law arbitration in which the lawyer has reasonable grounds to believe that a child is in need of protection;

(c) an agreement as to the lawyer's rate of remuneration and terms of payment.

7. A parenting coordinator who may act as a family law mediator as well as determine issues in a dispute resolution process must explain the dual role to the participants in writing and must advise the participants in writing when the lawyer's role changes from one to the other.

Commentary – designated paralegals and family law mediation

[1] The purpose of this commentary is to provide guidance to supervising lawyers who are considering sending a designated paralegal to represent a client at a family law mediation.

[2] Designated paralegals are permitted to represent a client at family law mediations in circumstances the supervising lawyer deems appropriate. However, family law mediations present unique challenges and before permitting a paralegal to represent a client in such processes the supervising lawyer must:

(a) determine whether the designated paralegal possesses the necessary skill and knowledge to act in the matter (consistent with the general obligation for determining whether to delegate work to the designated paralegal);

(b) ensure that there is no prohibition at law that prevents the designated paralegal from representing the client. For example, consider the restrictions in the ~~Notice to Mediate Regulations (Family)~~Notice to Mediate (Family) Regulation, BC Reg 227/2023 regarding who has the right to accompany a party to a mediation;

(c) obtain the client's informed consent to the use of the designated paralegal.

[3] It is prudent for the supervising lawyer to advise the mediator and the other party, through their counsel if they are represented, that the designated paralegal will be representing the client and provide the name and contact information for the supervising lawyer.

[4] In addition to considering the process in Appendix ~~E~~D (Supervision of paralegals) of the ~~BC~~ Code, lawyers should consider the following before permitting a designated paralegal to represent a client at a family law mediation:

- Mediation requires as much competency of the legal representative as is required before a court or tribunal. The supervising lawyer must bear this in mind when determining when it is appropriate to have a designated paralegal represent a client;

- Family law is a unique area of law in which many other areas of law intersect. In addition, clients are often dealing with considerable emotional stress and in some cases come from environments where family violence exists. It is an area of practice fraught with risks that both the lawyer and the designated paralegal need the skills and knowledge to identify and properly manage. Considerable skill is required to represent a client effectively at a family law mediation. A supervising lawyer should ensure the designated paralegal has received specific training in representing a client at a family law mediation. It is prudent to have the designated paralegal shadow the lawyer for several sessions and then have the lawyer shadow the designated paralegal for the next few sessions.

[5] Despite more family law matters being directed to consensual dispute resolution processes rather than to court, it remains essential that those processes and the settlements that arise in them be fair. It is important, therefore, for both the supervising lawyer and the designated paralegal to understand the case law surrounding circumstances in which settlement agreements have been set aside by the court on the grounds that the settlement was unfair.

[6] Lawyers must review any settlement agreement arising from a family law mediation where their designated paralegal represented the client, and such agreements are provisional until such time as the lawyer has signed off on them. This provides an opportunity for review and an additional safeguard for the client. The lawyer would also be prudent to advise the client about this process as a standard part of the retainer agreement.

APPENDIX C – REAL PROPERTY TRANSACTIONS

3. When a lawyer acts jointly for more than one client in a real property transaction, the lawyer must comply with the obligations set out in Code rules 3.4-5 (Joint retainers) to 3.4-9.

Simple conveyance

4. In determining whether or not a transaction is a simple conveyance, a lawyer should consider:

(a) the value of the property or the amount of money involved,

(b) the existence of non-financial charges, and

(c) the existence of liens, holdbacks for uncompleted construction and vendor's obligations to complete construction.

Commentary

[1] The following are examples of transactions that may be treated as simple conveyances when this commentary does not apply to exclude them:

(a) the payment of all cash for clear title,

(b) the discharge of one or more encumbrances and payment of the balance, if any, in cash,

(c) the assumption of one or more existing mortgages or agreements for sale and the payment of the balance, if any, in cash,

(d) a mortgage that does not contain any commercial element, given by a mortgagor to an institutional lender to be registered against the mortgagor's residence, including a mortgage that is

(i) a revolving mortgage that can be advanced and re-advanced,

(ii) to be advanced in stages, or

(iii) given to secure a line of credit,

(e) transfer of a leasehold interest if there are no changes to the terms of the lease,

(f) the sale by a developer of a completed residential building lot at any time after the statutory time period for filing claims of builders' liens has expired, or

(g) any combination of the foregoing.

[2] The following are examples of transactions that must not be treated as simple conveyances:

(~~h~~a) a transaction in which there is any commercial element, such as

(i) a conveyance included in a sale and purchase of a business,

(ii) a transaction involving a building containing more than three residential units, or

(iii) a transaction for a commercial purpose involving either a revolving mortgage that can be advanced and re-advanced or a mortgage given to secure a line of credit,

(~~i~~b) a lease or transfer of a lease, other than as set out in commentary [1], subparagraph (e),

(~~j~~c) a transaction in which there is a mortgage back from the purchaser to the vendor,

(~~k~~d) an agreement for sale,

(~~l~~e) a transaction in which the lawyer's client is a vendor who:

(i) advertises or holds out directly or by inference through representations of sales staff or otherwise as an inducement to purchasers that a registered transfer or other legal services are included in the purchase price of the property,

(ii) is or was the developer of property being sold, unless commentary [1], subparagraph (f) applies,

(~~m~~f) a conveyance of residential property with substantial improvements under construction at the time the agreement for purchase and sale was signed, unless the lawyer's clients are a purchaser and a mortgagee and construction is completed before funds are advanced under the mortgage, or

(~~n~~g) the drafting of a contract of purchase and sale.

[3] A transaction is not considered to have a commercial element merely because one of the parties is a corporation.

Advice and consent

5. If a lawyer acts for more than one party in the circumstances as set out in paragraph 2 (Acting for parties with different interests) of this Appendix, then the lawyer must, as soon as is practicable,

(a) advise each party in writing that no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned and that, if a conflict of interest arises, the lawyer cannot continue to act for any of them in the transaction,

(b) obtain the consent in writing of all such parties, and

(c) raise and explain the legal effect of issues relevant to the transaction that may be of importance to each such party.

Commentary

[1] If a written communication is not practicable at the beginning of the transaction, the advice may be given and the consent obtained orally, but the lawyer must confirm that advice to the parties in writing as soon as possible, and the lawyer must obtain consent in writing prior to completion.

[2] The consent in writing may be set out in the documentation of the transaction or may be a blanket consent covering an indefinite number of transactions.

Foreclosure proceedings

6. In this paragraph, "mortgagor" includes "purchaser," and "mortgagee" includes "vendor" under an agreement for sale, and "foreclosure proceeding" includes a proceeding for cancellation of an agreement for sale.

If a lawyer acts for both a mortgagor and a mortgagee in the circumstances set out in paragraph 2 (Acting for parties with different interests), the lawyer must not act in any foreclosure proceeding relating to that transaction for either the mortgagor or the mortgagee.

This prohibition does not apply if

(a) the lawyer acted for a mortgagee and attended on the mortgagor only for the purposes of executing the mortgage documentation,

(b) the mortgagor for whom the lawyer acted is not made a party to the foreclosure proceeding, or

(c) the mortgagor has no beneficial interest in the mortgaged property and no claim is being made against the mortgagor personally.

8. If the lawyer witnesses the execution of the necessary documents as set out in paragraph 7 (Unrepresented parties in real property transaction), it is not necessary for the lawyer to obtain the consent of the party or parties for whom the lawyer acts.

9. If one party to the real property transaction is otherwise unrepresented but wants the lawyer representing another party to the transaction to act for ~~him or her~~them to remove existing encumbrances, the lawyer may act for that party for those purposes only and may allow that party to execute the necessary documents in the lawyer's presence as witness if the lawyer advises the party in writing that:

(a) the lawyer's engagement is of a limited nature, and

(b) if a conflict arises between the parties, the lawyer will be unable to continue to act for that party.

~~APPENDIX D – CONFLICTS ARISING AS A RESULT OF TRANSFER BETWEEN LAW FIRMS~~

APPENDIX ~~E~~D – SUPERVISION OF PARALEGALS

Key concepts

Lawyers who use paralegals need to be aware of several key concepts:

1. The lawyer maintains ultimate responsibility for the supervision of the paralegal and oversight of the file;

2. Although a paralegal may be given operational carriage of a file, the retainer remains one between the lawyer and the client and the lawyer continues to be bound by ~~his or her~~their professional, contractual and fiduciary obligations to the client;

3. The Society will protect the public by regulating the lawyer who is responsible for supervising the paralegal in the event of misconduct or a breach of the ~~Legal Profession Act~~*Legal Profession Act* or Law Society Rules committed by the paralegal;

4. A lawyer must limit the number of persons that ~~he or she~~they supervise~~s~~ to ensure that there is sufficient time available for adequate supervision of each person.

5. A paralegal must be identified as such in correspondence and documents ~~he or she~~they signs~~s~~ and in any appearance before a court o~~f~~r tribunal.

6. ~~A l~~Lawyers must not delegate any matter to ~~a~~ paralegals that the lawyers would not be competent to conduct ~~himself or herself~~themselves.

2. A lawyer must actively mentor and monitor the paralegal. A lawyer should consider the following:

(a) Train the paralegal as if ~~he or she~~they were training an articled student. A lawyer must be satisfied the paralegal is competent to engage in the work assigned;

(b) Ensuring the paralegal understands the importance of confidentiality and privilege and the professional duties of lawyers. Consider having the paralegal sign an oath to discharge ~~his or her~~their duties in a professional and ethical manner;

(c) Gradually increasing the paralegal's responsibilities;

(d) A lawyer should engage in file triage and debriefing to ensure that matters delegated are appropriate for the paralegal and to monitor competence. This may include:

(i) testing the paralegal's ability to identify relevant issues, risks and opportunities for the client;

(ii) engaging in periodic file review. File review should be a frequent practice until such time as the paralegal has demonstrated continued competence, and should remain a regular practice thereafter;

(iii) ensuring the paralegal follows best practices regarding client communication and file management.

5. Discuss paralegal supervision with a ~~Law~~ Society practice advisor if you have any concerns.

3. What work experience does the paralegal have, with particular importance being placed on legal work experience?:

(a) Preference~~/~~ or weight should be given to work experience with the supervising lawyer ~~and/~~or law firm;

(b) If the experience is with another law firm, consider contacting the prior supervising lawyer for an assessment;

(c) Does the paralegal have experience in the relevant area of law?

(d) What responsibilities has the paralegal undertaken in the past in dealing with legal matters?

4. What personal qualities does the paralegal possess that make ~~him or her~~them well-suited to take on enhanced roles:

(a) How responsible, trustworthy and mature is the paralegal?

(b) Does the paralegal have good interpersonal and language skills?

(c) Is the paralegal efficient and well organized?

(d) Does the paralegal possess good interviewing and diagnostic skills?

(e) Does the paralegal display a strong understanding of both the substantive and procedural law governing the matter to be delegated?

(f) Does the paralegal strive for continuous self-improvement, rise to challenges, etc.?

3. If a designated paralegal has reason to believe family violence may be present, it is essential the paralegal bring this to the supervising lawyer's attention so the lawyer can turn ~~his or her~~their mind to the issue and the potential risks associated with it.

2. Giving legal advice and independent legal advice involves consideration of process and of the content of the advice. As a matter of process the lawyer, or designated paralegal, must obtain the relevant factual information from the client. This requires the skill of focusing on necessary factual material, rather than an exhaustive and costly exploration of all potential facts no matter how tangential they may be. Once the lawyer, or designated paralegal, has the factual foundation, ~~he or she~~they advise~~s~~ the client of the legal rights, obligations and~~/or~~ remedies that are suggested by the facts. Finally, the lawyer should make a recommendation as to the preferred course of conduct and explain in clear terms why the suggested course is preferred.

APPENDIX "C": Clean *Code of Professional Conduct for British Columbia*

CHAPTER 1 – INTERPRETATION AND DEFINITIONS

1.1 Definitions

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

"associate" includes:

(a) a lawyer who practises law in a law firm through an employment or other contractual relationship; and

(b) a non-lawyer employee of a multi-disciplinary practice providing services that support or supplement the practice of law;

"client" means a person who:

(a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or

(b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on their behalf.

Commentary

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

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

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

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

"consent" means fully informed and voluntary consent after disclosure

(a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or

(b) orally, provided that each person consenting receives a separate written communication recording the consent as soon as practicable;

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

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

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic under the *Legal Services Society Act*, SBC 2002, c.30;

(d) in a government, a Crown corporation or any other public body; or

(e) in a corporation or other organization;

"lawyer" means a member of the Society and includes an articled student enrolled in the Law Society Admission Program;

"limited scope retainer" means the provision of legal services for part, but not all, of a client's legal matter by agreement with the client;

"Society" means the Law Society of British Columbia;

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

CHAPTER 2 – STANDARDS OF THE LEGAL PROFESSION

2.1 Canons of Legal Ethics

These Canons of Legal Ethics in Code rules 2.1-1 to 2.1-5 are a general guide and not a denial of the existence of other duties equally imperative and of other rights, though not specifically mentioned. A version of these Canons has formed part of the *Code of Professional Conduct* of the Law Society of British Columbia since 1921. They are included here both for their historical value and for their statement of general principles that underlie the remainder of the rules in this Code.

A lawyer is a minister of justice, an officer of the courts, a client's advocate and a member of an ancient, honourable and learned profession.

In these several capacities, it is a lawyer's duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.

2.1-3 To the client

(a) A lawyer should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client, and give an open and undisguised opinion of the merits and probable results of the client's cause. The lawyer should be wary of bold and confident assurances to the client, especially where the lawyer's employment may depend on such assurances. The lawyer should bear in mind that seldom are all the law and facts on the client's side, and that *audi alteram partem* (hear the other side) is a safe rule to follow.

(b) A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the controversy, if any, that might influence whether the client selects or continues to retain the lawyer. A lawyer must not act where there is a conflict of interest between the lawyer and a client or between clients.

(c) Whenever the dispute will admit of fair settlement the client should be advised to avoid or to end the litigation.

(d) A lawyer should treat adverse witnesses, litigants and counsel with fairness and courtesy, refraining from all offensive personalities. The lawyer must not allow a client's personal feelings and prejudices to detract from the lawyer's professional duties. At the same time, the lawyer should represent the client's interests resolutely and without fear of judicial disfavour or public unpopularity.

(e) A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer's own sense of honour and propriety.

(f) It is a lawyer's right to undertake the defence of a person accused of crime, regardless of the lawyer's own personal opinion as to the guilt of the accused. Having undertaken such defence, the lawyer is bound to present, by all fair and honourable means and in a manner consistent with the client's instructions, every defence that the law of the land permits, to the end that no person will be convicted except by due process of law.

(g) A lawyer should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject matter of the litigation being conducted by the lawyer. A lawyer should scrupulously guard, and not divulge or use for personal benefit, a client's secrets or confidences. Having once acted for a client in a matter, a lawyer must not act against the client in the same or any related matter.

(h) A lawyer must record, and should report promptly to a client the receipt of any moneys or other trust property. The lawyer must use the client's moneys and trust property only as authorized by the client, and not commingle it with that of the lawyer.

(i) A lawyer is entitled to reasonable compensation for services rendered, but should avoid charges that are unreasonably high or low. The client's ability to pay cannot justify a charge in excess of the value of the service, though it may require a reduction or waiver of the fee.

(j) A lawyer should try to avoid controversies with clients regarding compensation so far as is compatible with self-respect and with the right to receive reasonable recompense for services. A lawyer should always bear in mind that the profession is a branch of the administration of justice and not a mere money-making business.

(k) A lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a court or tribunal except as to purely formal or uncontroverted matters, such as the attestation or custody of a document, unless it is necessary in the interests of justice. If the lawyer is a necessary witness with respect to other matters, the conduct of the case should be entrusted to another lawyer.

CHAPTER 3 – RELATIONSHIP TO CLIENTS

3.1 Competence

Definitions

3.1-1 In this section

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

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

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

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

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

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

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

(f) applying intellectual capacity, judgment and deliberation to all functions;

(g) complying in letter and spirit with all Code rules pertaining to the appropriate professional conduct of lawyers;

(h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;

(i) managing one's practice effectively;

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and

(k) otherwise adapting to changing professional requirements, standards, techniques and practices.

Competence

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

Commentary

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

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

[2.1] For a discussion of the correct procedure in swearing an affidavit or taking a solemn declaration, see Appendix A to this Code.

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

(a) the complexity and specialized nature of the matter;

(b) the lawyer's general experience;

(c) the lawyer's training and experience in the field;

(d) the preparation and study the lawyer is able to give the matter; and

(e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

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

[4.1] To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3 (Confidentiality).

[4.2] The required level of technological competence will depend upon whether the use or understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including:

(a) the lawyer's or law firm's practice areas;

(b) the geographic locations of the lawyer's or law firm's practice; and

(c) the requirements of clients.

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

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

(a) decline to act;

(b) obtain the client’s instructions to retain, consult or collaborate with a lawyer who is competent for that task; or

(c) obtain the client’s consent for the lawyer to become competent without undue delay, risk or expense to the client.

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

[7.1] When a lawyer considers whether to provide legal services under a limited scope retainer the lawyer must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement for such services does not exempt a lawyer from the duty to provide competent representation. The lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also Code rule 3.2-1.1 (Limited scope retainer).

[7.2] In providing short-term summary legal services under Code rules 3.4-11.1 to 3.4-11.4 (Short-term summary legal services), a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term summary legal services may be required or are advisable, and encourage the client to seek such further assistance.

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

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

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

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

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

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

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

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

3.2 Quality of service

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

Commentary

[1] This Code rule should be read and applied in conjunction with section 3.1 (Competence).

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

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

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

Examples of expected practices

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

(a) keeping a client reasonably informed;

(b) answering reasonable requests from a client for information;

(c) responding to a client’s telephone calls;

(d) keeping appointments with a client, or providing a timely explanation or apology when unable to keep such an appointment;

(e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so; ensuring, where appropriate, that all instructions are in writing or confirmed in writing;

(f) answering, within a reasonable time, any communication that requires a reply;

(g) ensuring that work is done in a timely manner so that its value to the client is maintained;

(h) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;

(i) maintaining office staff, facilities and equipment adequate to the lawyer’s practice;

(j) informing a client of a proposal of settlement, and explaining the proposal properly;

(k) providing a client with complete and accurate relevant information about a matter;

(l) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report when one might reasonably be expected;

(m) avoidance of self-induced disability, for example from the use of intoxicants or drugs, that interferes with or prejudices the lawyer’s services to the client;

(n) being civil.

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

Limited scope retainers

3.2-1.1 Before undertaking a limited scope retainer, the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.

Commentary

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

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

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

[4] A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed (see Code rule 7.2-6.1 (Communicating with a person represented on a limited scope retainer)).

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

Honesty and candour

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

Commentary

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

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

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

3.2-2.2 Where a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer must not undertake the matter unless the lawyer is competent to provide the required services in that language.

Commentary

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

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

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

[4] Civil trials in British Columbia must be held in English: *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42. Under section 530 of the *Criminal Code*, RSC 1985, c. C-46 an accused has the right to a criminal trial in either English or French.

When the client is an organization

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

Commentary

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

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

Inducement for withdrawal of criminal or regulatory proceedings

3.2-6 A lawyer must not:

> (a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;
>
> (b) accept or offer to accept, or advise a person to accept or offer to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's

conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or regulatory authority to enter such discussions; or

(c) wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

Commentary

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

[2] A lawyer for an accused or potential accused must never influence a complainant or potential complainant not to communicate or cooperate with the Crown. However, this Code rule does not prevent a lawyer for an accused or potential accused from communicating with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. When a proposed resolution involves valuable consideration being exchanged in return for influencing the Crown or regulatory authority not to proceed with a charge or to seek a reduced sentence or penalty, the lawyer for the accused must obtain the consent of the Crown or regulatory authority prior to discussing such proposal with the complainant or potential complainant. Similarly, lawyers advising a complainant or potential complainant with respect to any such negotiations can do so only with the consent of the Crown or regulatory authority.

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

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

Dishonesty, fraud by client

3.2-7 A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud.

Commentary

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

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

[3] If lawyers have suspicions or doubts about whether they might be assisting a client in any dishonesty, crime or fraud, before accepting a retainer, or during the retainer, the lawyers should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include making reasonable attempts to verify the legal or beneficial ownership of property and business entities and who has the control of business entities, and to clarify the nature and purpose of a complex or unusual transaction where the nature and purpose are not clear.

[3.1] The lawyer should also make inquiries of a client who:

(a) may be seeking, contrary to the prohibition in Rule 3-58.1(1) of the Law Society Rules, the use of the lawyer's trust account without requiring any substantial legal services from the lawyer in connection with the trust matter, or

(b) promises unrealistic returns on their investment to third parties who have placed money in trust with the lawyer or have been invited to do so.

[3.2] The lawyer should make a record of the results of these inquiries.

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

Dishonesty, fraud when client an organization

3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows or ought to know that the organization has acted, is acting or intends to act dishonestly, criminally or fraudulently, must do the following, in addition to their obligations under Code rule 3.2-7 (Dishonesty, fraud by client):

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, criminal or fraudulent and should be stopped;

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, criminal or fraudulent and should be stopped; and

(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with section 3.7 (Withdrawal from representation).

Commentary

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

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

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

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

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

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

Clients with diminished capacity

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

Commentary

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about the client's legal affairs and to provide the lawyer with 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 the client's ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from providing instructions or entering into binding legal relationships.

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

[3] If a client's incapacity is discovered or arises after the solicitor-client relationship is established, the lawyer may need to take steps to have a lawfully authorized representative, such as a litigation guardian, appointed or to obtain the assistance of the Public Guardian and Trustee to protect the interests of the client. Whether that should be done depends on all relevant circumstances, including the importance and urgency of any matter requiring instruction. In any event, the lawyer has an ethical obligation to ensure that the client's interests are not abandoned. Until the appointment of a legal representative occurs, the lawyer should act to preserve and protect the client's interests.

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

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

3.3 Confidentiality

Confidential information

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

(a) expressly or impliedly authorized by the client;

(b) required by law or a court to do so;

(c) required to deliver the information to the Society, or

(d) otherwise permitted by this Code rule.

Commentary

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

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

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

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

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

(a) retained by a person about a particular matter; or

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

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

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

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

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

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

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

Future harm / public safety exception

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

Commentary

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

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

[3] In assessing whether disclosure of confidential information is justified, a lawyer should consider a number of factors, including:

(a) the seriousness of the potential injury to others if the prospective harm occurs;

(b) the likelihood that it will occur and its imminence;

(c) the apparent absence of any other feasible way to prevent the potential injury; and

(d) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.

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

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

(a) the date and time of the communication in which the disclosure is made;

(b) the grounds in support of the lawyer's decision to communicate the information, including the harm the lawyer intended to prevent, the identity of the person who prompted the lawyer to communicate the information as well as the identity of the person or group of persons exposed to the harm; and

(c) the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

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

Commentary

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

[2] In these situations (see Code rules 3.4-17 to 3.4-23 (Conflict from transfer between law firms)), this Code rule permits lawyers and law firms to disclose limited information. This type of disclosure would only be made once substantive discussions regarding the new relationship have occurred.

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

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

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

(a) limit access to the disclosed information;

(b) not use the information for any purpose other than detecting and resolving a conflict; and

(c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established.

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

3.4 Conflict

Duty to avoid conflict of interest

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

Commentary

[0.1] In a real property transaction, a lawyer may act for more than one party with different interests only in the circumstances permitted by Appendix C.

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

[2] In cases where the bright line rule is inapplicable, the lawyer or law firm will still be prevented from acting if representation of the client would create a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

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

Representation

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

The fiduciary relationship, the duty of loyalty and conflicting interests

[5] The rule governing conflict of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty not to act in a conflict of interest.

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

Other duties arising from the duty of loyalty

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

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

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

Identifying a conflict

[10] A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest. Factors for the lawyer's consideration in determining whether a conflict of interest exists include:

(a) the immediacy of the legal interests;

(b) whether the legal interests are directly adverse;

(c) whether the issue is substantive or procedural;

(d) the temporal relationship between the matters;

(e) the significance of the issue to the immediate and long-term interests of the clients involved; and

(f) the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

Examples of areas where a conflict of interest may occur

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

(a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.

(b) A lawyer provides legal advice to a small business on a series of commercial transactions and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.

(c) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.

> (i) A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.

(d) A lawyer has a sexual or close personal relationship with a client.

> (i) Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning the client's affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by the lawyer. If the lawyer is at a law firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's law firm, but could be cured if another lawyer in the law firm who is not involved in such a relationship with the client handled the client's work.

(e) A lawyer or a lawyer's law firm acts for a public or private corporation and the lawyer serves as a director of the corporation.

> (i) These two roles may result in a conflict of interest or other problems because they may
>
> > 1. affect the lawyer's independent judgment and fiduciary obligations in either or both roles,
> >
> > 2. obscure legal advice from business and practical advice,
> >
> > 3. jeopardize the protection of lawyer and client privilege, and
> >
> > 4. disqualify the lawyer or the law firm from acting for the organization.

(f) Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute. See Code rules 3.4-42 and 3.4-43 (Space-sharing arrangements).

(i) The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

The role of the court and law societies

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

Consent

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

(a) Express consent must be fully informed and voluntary after disclosure.

(b) Consent may be inferred and need not be in writing where all of the following apply:

(i) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

(ii) the matters are unrelated;

(iii) the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

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

Commentary

Disclosure and consent

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

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

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

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

Consent in advance

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

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

Implied consent

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

Lawyer belief in reasonableness of representation

[7] The requirement that the lawyer reasonably believes that the lawyer is able to represent each client without having a material adverse effect on the representation of, or loyalty to, the other client precludes a lawyer from acting for parties to a transaction who have different interests, except where joint representation is permitted under this Code.

Dispute

3.4-3 Despite Code rule 3.4-2 (Consent), a lawyer must not represent opposing parties in a dispute.

Commentary

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

Concurrent representation with protection of confidential client information

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

(a) disclosure of the risks of the lawyers so acting has been made to each client;

(b) each client consents after having received independent legal advice, including on the risks of concurrent representation;

(c) the clients each determine that it is in their best interests that the lawyers so act;

(d) each client is represented by a different lawyer in the law firm;

(e) appropriate screening mechanisms are in place to protect confidential information; and

(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary

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

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

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

[4] In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in Code rule 3.4-20 (Law firm disqualification), commentary [3].

Joint retainers

3.4-5 Before a lawyer is retained by more than one client in a matter or transaction, the lawyer must advise each of the clients that:

(a) the lawyer has been asked to act for both or all of them;

(b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and

(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

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

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

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

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

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

Commentary

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

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

(a) the lawyer must not advise them on the contentious issue and must:

(i) refer the clients to other lawyers; or

(ii) advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:

1. no legal advice is required; and

2. the clients are sophisticated;

(b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

Commentary

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

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

3.4-9 Subject to this section, if clients consent to a joint retainer and also agree that, if a contentious issue arises, the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

Commentary

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

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

Acting against former clients

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

(a) the same matter,

(b) any related matter, or

(c) any other matter, if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client.

Commentary

[1] This Code rule prohibits a lawyer from attacking legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper, however, for a lawyer to act against a former client in a matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter.

3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's law firm may act against the former client in the new matter, if the law firm establishes, in accordance with Code rule 3.4-20 (Law firm disqualification), that it is reasonable that it act in the new matter, having regard to all relevant circumstances, including:

(a) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;

(b) the extent of prejudice to any party; and

(c) the good faith of the parties.

Commentary

[1] The guidelines following commentary [3] to Code rule 3.4-20 (Law firm disqualification) regarding lawyer transfers between law firms provide valuable guidance for the protection of confidential information in the rare cases in which, having regard to all of the relevant circumstances, it is appropriate for another lawyer in the law firm to act against the former client.

Short-term summary legal services

3.4-11.1 In Code rules 3.4-11.2 to 3.4-11.4 **"short-term summary legal services"** means advice or representation to a client under the auspices of a pro bono or not-for-profit legal services provider with the expectation by the lawyer and the client that the lawyer will not provide continuing legal services in the matter.

3.4-11.3 Except with consent of the clients as provided in Code rule 3.4-2 (Consent), a lawyer must not provide, or must cease providing short-term summary legal services to a client where the lawyer knows or becomes aware that there is a conflict of interest.

3.4-11.4 A lawyer who provides short-term summary legal services must take reasonable measures to ensure that no disclosure of the client's confidential information is made to another lawyer in the lawyer's law firm.

Commentary

[1] Short-term summary legal service and duty counsel programs are usually offered in circumstances in which it may be difficult to systematically screen for a conflict of interest in a timely way, despite the best efforts and existing practices and procedures of the not-for-profit legal services provider and the lawyers and law firms who provide these services. Performing a full conflict screening in circumstances in which the short-term summary services described in these Code rules are being offered can be very challenging given the timelines, volume and logistics of the setting in which the services are provided.

[2] The limited nature of short-term summary legal services significantly reduces the risk of a conflict of interest with other matters being handled by the lawyer's law firm. Accordingly, the lawyer is disqualified from acting for a client receiving short-term summary legal services only if the lawyer has actual knowledge of a conflict of interest between the client receiving short-term summary legal services and an existing client of the lawyer or an existing client of the *pro bono* or not-for-profit legal services provider or between the lawyer and the client receiving short-term summary legal services.

[3] Confidential information obtained by a lawyer providing the services described in Code rules 3.4-11.1 to 3.4-11.4 will not be imputed to the lawyers in the lawyer's firm or to non-lawyer partners or associates in a multi-disciplinary partnership. As such, these individuals may continue to act for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services, and may act in future for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services.

[4] In the provision of short-term summary legal services, the lawyer's knowledge about a possible conflict of interest is based on the lawyer's reasonable recollection and information provided by the client in the ordinary course of consulting with the pro bono or not-for-profit legal services provider to receive its services.

Conflict from transfer between law firms

Application of rule

3.4-17 In Code rules 3.4-17 to 3.4-23:

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

Commentary

[2] Code rules 3.4-17 to 3.4-23 apply to lawyers sharing space. Treating space-sharing lawyers as a law firm recognizes:

(a) the concern that opposing clients may have about the appearance of proximity of lawyers sharing space, and

(b) the risk that lawyers sharing space may be exposed inadvertently to confidential information of an opposing client.

3.4-18 Code rules 3.4-17 to 3.4-23 apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

(a) It is reasonable to believe the transferring lawyer has confidential information relevant to the new law firm's matter for its client; or

(b) (i) the new law firm represents a client in a matter that is the same as or related to a matter in which a former law firm represents or represented its client ("former client");

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

(iii) the transferring lawyer actually possesses relevant information respecting that matter.

Commentary

[1] The purpose of this Code rule is to deal with actual knowledge. Imputed knowledge does not give rise to disqualification. As stated by the Supreme Court of Canada in *MacDonald Estate* v. *Martin*, [1990] 3 SCR 1235, with respect to the other lawyers in the law firm of a lawyer who has relevant confidential information, the concept of imputed knowledge is unrealistic in the era of the mega-law firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same law firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear and convincing evidence that shows that all reasonable measures, as discussed in Code rule 3.4-20 (Law firm disqualification), have been taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the law firm who are engaged against a former client.

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

[3] Law firms with multiple offices — This Code rule treats as one "law firm" such entities as the various legal services units of a government, a corporation with separate regional legal departments and an interjurisdictional law firm.

3.4-19 Code rules 3.4-20 to 3.4-22 do not apply to a lawyer employed by the federal, a provincial or a territorial government who, after transferring from one department, ministry or agency to another, continues to be employed by that government.

Commentary

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

Law firm disqualification

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

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

(b) the new law firm has:

(i) taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm; and

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

Commentary

[0.1] There are two circumstances in which the new law firm should consider the implementation of reasonable measures to ensure that there will be no disclosure of the former client's confidential information to any member of the new law firm:

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

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

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

[3] The guidelines that follow are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

> **Guidelines: How to screen / measures to be taken**
>
> 1. The screened lawyer should have no involvement in the new law firm's representation of its client in the matter.
>
> 2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
>
> 3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.

4. The law firm should take steps to preclude the screened lawyer from having access to any part of the file.

4.1 The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the law firm.

5. The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.

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

How to determine if a conflict exists before hiring a potential transferee

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

[5] After completing the interview process and before hiring the transferring lawyer, the new law firm should determine whether any conflict of interest exists. In determining whether the transferring lawyer actually possesses relevant confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose client confidences. See Code rule 3.3-7 which provides that a lawyer may disclose confidential information to the extent the lawyer reasonably believes necessary to detect and resolve a conflict of interest where lawyers transfer between law firms.

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

[7] Issues arising as a result of a transfer between law firms should be dealt with promptly. A lawyer's failure to promptly raise any issues may prejudice clients and may be considered sharp practice.

Transferring lawyer disqualification

3.4-21 Unless the former client consents, a transferring lawyer referred to in Code rule 3.4-20 (Law firm disqualification) must not:

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

(b) disclose any confidential information respecting the former client except as permitted by Code rule 3.3-7.

3.4-22 Unless the former client consents, members of the new law firm must not discuss the new law firm's representation of its client or the former law firm's representation of the former client in that matter with a transferring lawyer referred to in Code rule 3.4-20 (Law firm disqualification) except as permitted by Code rule 3.3-7.

Lawyer due diligence for non-lawyer staff

3.4-23 A lawyer or a law firm must exercise due diligence in ensuring that all colleagues at the law firm, including administrative staff, and each other person whose services the lawyer or the law firm has retained:

(a) complies with Code rules 3.4-17 to 3.4-23; and

(b) does not disclose confidential information:

(i) of clients of the law firm; or

(ii) any other law firm in which the person has worked.

Commentary

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

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

Conflict with clients

3.4-26.1 A lawyer must not perform any legal services if there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's

(a) relationship with the client, or

(b) interest in the client or the subject matter of the legal services.

Commentary

[1] Any relationship or interest that affects a lawyer's professional judgment is to be avoided under this Code rule, including ones involving a relative, partner, employer, employee, business associate or friend of the lawyer.

3.4-26.2 The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client is not a disqualifying interest under Code rule 3.4-26.1 (Conflict with clients).

Commentary

[1] Generally speaking, a lawyer may act as legal advisor or as business associate, but not both. These principles are not intended to preclude lawyers from performing legal services on their own behalf. Lawyers should be aware, however, that acting in certain circumstances may cause them to lose coverage as a result of Exclusion 6 in the BC Lawyers Compulsory Professional Liability Indemnity Policy and similar provisions in other insurance policies.

[2] Whether or not coverage under the Compulsory Policy is lost is determined separate and apart from the ethical obligations addressed in this chapter. Review the current policy for the exact wording of Exclusion 6 or contact the Lawyers Indemnity Fund regarding the application of the Exclusion to a particular set of circumstances.

Doing business with a client

Independent legal advice

3.4-27 In Code rules 3.4-27 to 3.4-43, when a client is required or advised to obtain independent legal advice concerning a matter, that advice may only be obtained by retaining a lawyer who has no conflict of interest in the matter.

3.4-27.1 A lawyer giving independent legal advice under this section must:

(a) advise the client that the client has the right to independent legal representation;

(b) explain the legal aspects of the matter to the client, who appears to understand the advice given; and

(c) inform the client of the availability of qualified advisers in other fields who would be in a position to advise the client on the matter from a business point of view.

Commentary

[0.1] A client is entitled to obtain independent legal representation by retaining a lawyer who has no conflict of interest in the matter to act for the client in relation to the matter.

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

[2] Either independent legal representation or independent legal advice may be provided by a lawyer employed by the client as in-house counsel.

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

Commentary

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

(a) lending or borrowing money;

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift;

(d) giving or acquiring ownership, security or other pecuniary interest in a company or other entity;

(e) recommending an investment; and

(f) entering into a common business venture.

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

Investment by client when lawyer has an interest

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

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

(b) recommend and require that the client receive independent legal advice; and

(c) if the client requests the lawyer to act, obtain the client's consent.

Commentary

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

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

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

[4] If the investment is by borrowing from the client, the transaction may fall within the requirements of Code rule 3.4-32 (Certificate of independent legal advice).

Borrowing from clients

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

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

(b) the client is a related person as defined by the *Income Tax Act*, RSC 1985, c.1 (5th Supp.) and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

Commentary

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

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

Lawyers in loan or mortgage transactions

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

(a) disclose and explain the nature of the conflict of interest to the client;

(b) require that the client receive independent legal representation; and

(c) obtain the client's consent.

Guarantees by a lawyer

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

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

(a) the lender is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

(b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or

(c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:

(i) the lawyer has complied with this section (Conflict), in particular, Code rules 3.4-27 (Independent legal advice) to 3.4-36; and

(ii) the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

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

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

Space-sharing arrangements

3.4-42 Code rule 3.4-43 applies to lawyers sharing office space with one or more other lawyers, but not practising or being held out to be practising in partnership or association with the other lawyer or lawyers.

3.4-43 Unless all lawyers sharing space together agree that they will not act for clients adverse in interest to the client of any of the others, each lawyer who is sharing space must disclose in writing to all of the lawyer's clients:

(a) that an arrangement for sharing space exists,

(b) the identity of the lawyers who make up the law firm acting for the client, and

(c) that lawyers sharing space with the law firm are free to act for other clients who are adverse in interest to the client.

Commentary

[1] Like other lawyers, those who share space must take all reasonable measures to ensure client confidentiality. Lawyers who do not wish to act for clients adverse in interest to clients of lawyers with whom they share space should establish an adequate conflict check system.

[2] In order both to ensure confidentiality and to avoid a conflict of interest, a lawyer must have the consent of each client before disclosing any information about the client for the purpose of a conflict check. Consent may be implied in some cases but, if there is any doubt, the best course is to obtain express consent.

3.5 Preservation of clients' property

3.5-1 In this section, **"property"** includes a client's money, securities as defined in the *Securities Act*, RSBC 1996, c.418, original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client's correspondence, files, reports, invoices and other such documents, as well as personal property including precious and semi-precious metals, jewellery and the like.

3.5-2 A lawyer must:

(a) care for a client's property as a careful and prudent owner would when dealing with like property; and

(b) observe all relevant Law Society Rules and Code rules and law about the preservation of a client's property entrusted to a lawyer.

Commentary

[1] The duties concerning safekeeping, preserving, and accounting for clients' monies and other property are set out in the Law Society Rules.

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

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

[4] If the lawyer withdraws from representing a client, the lawyer is required to comply with section 3.7 (Withdrawal from representation).

3.6 Fees and disbursements

Contingent fees and contingent fee agreements

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

Commentary

[1] In determining the appropriate percentage or other basis of a contingency fee, a lawyer and client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The test is whether the fee, in all of the circumstances, is fair and reasonable.

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

Statement of account

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

Commentary

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

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

Joint retainer fees

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

Division of fees and referral fees

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

3.6-6.1 In Code rules 3.6-6 and 3.6-7, **"another lawyer"** includes a person who is:

(a) a member of a recognized legal profession in any other jurisdiction; and

(b) acting in compliance with the law and any rules of the legal profession of the other jurisdiction.

3.6-7 A lawyer must not:

(a) directly or indirectly share, split or divide their fees with any person other than another lawyer; or

(b) give any financial or other reward for the referral of clients or client matters to any person other than another lawyer.

Commentary

[1] This Code rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. It does not prevent a lawyer from engaging in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients generally by a non-lawyer. Accordingly, this Code rule does not prohibit a lawyer from:

(a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;

(b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;

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

(d) occasionally entertaining potential referral sources by purchasing meals, providing tickets to, or attending at, sporting or other activities or sponsoring client functions.

Exception for multi-disciplinary practices

3.6-8 Despite Code rule 3.6-7, a lawyer permitted to practise in a multi-disciplinary practice (MDP) under the Law Society Rules may share fees, profits or revenue from the practice of law in the MDP with a non-lawyer member of the MDP only if all the owners of the MDP are individuals or professional corporations actively involved in the MDP's delivery of legal services to clients or in the management of the MDP.

Commentary

[2] This Code rule also allows a lawyer to share fees or profits of an MDP with a non-lawyer for the purpose of paying out the ownership interest of the non-lawyer acquired by the non-lawyer's active participation in the MDP's delivery of services to clients or in the management of the MDP.

[3] See also the definitions of **"MDP"** and "**professional corporation**" in Rule 1 and Rules 2-38 to 2-49 of the Law Society Rules.

3. 6-10 A lawyer must not appropriate any client funds held in trust or otherwise under the lawyer's control for or on account of fees, except as permitted by the governing legislation.

Commentary

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

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

3.7 Withdrawal from representation

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

Commentary

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

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

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

[4] When a lawyer leaves a law firm to practise alone or to join another law firm, the departing lawyer and the law firm have a duty to inform all clients for whom the departing lawyer is the responsible lawyer in a legal matter that the clients have a right to choose who will continue to represent them. The same duty may arise when a law firm is winding up or dividing into smaller units.

[5] This duty does not arise if the lawyers affected by the changes, acting reasonably, conclude that the circumstances make it obvious that a client will continue as a client of a particular lawyer or law firm.

[6] When this Chapter requires a notification to clients, each client must receive a letter as soon as practicable after the effective date of the changes is determined, informing the client of the right to choose a lawyer.

[7] It is preferable that this letter be sent jointly by the law firm and any lawyers affected by the changes. However, in the absence of a joint announcement, the law firm or any lawyers affected by the changes may send letters in substantially the form set out in the precedents provided by the Society.

[8] Lawyers whose clients are affected by changes in a law firm have a continuing obligation to protect client information and property, and must minimize any adverse effect on the interests of clients. This obligation generally includes an obligation to ensure that files transferred to a new lawyer or law firm are properly transitioned, including, when necessary, describing the status of the file and noting any unfulfilled undertakings and other outstanding commitments.

[9] The right of a client to be informed of changes to a law firm and to choose a lawyer cannot be curtailed by any contractual or other arrangement.

[10] With respect to communication other than that required by these Code rules, lawyers should be mindful of the common law restrictions upon uses of proprietary information, and interference with contractual and professional relations between the law firm and its clients.

Non-payment of fees

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

Commentary

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

[2] In criminal matters, if withdrawal is a result of non-payment of the lawyer's fees, the court may exercise its discretion to refuse counsel's withdrawal. The court's order refusing counsel's withdrawal may be enforced by the court's contempt power. See *R.* v. *Cunningham*, 2010 SCC 10.

[3] The relationship between a lawyer and client is contractual in nature, and the general rules respecting breach of contract and repudiation apply. Except in criminal matters involving non-payment of fees, if a lawyer decides to withdraw as counsel in a proceeding, the court has no jurisdiction to prevent the lawyer from doing so, and the decision to withdraw is not reviewable by the court, subject to its authority to cite a lawyer for contempt if there is evidence that the withdrawal was done for some improper purpose. Otherwise, the decision to withdraw is a matter of professional responsibility, and a lawyer who withdraws in contravention of this Chapter is subject to disciplinary action by the Benchers. See *Re Leask and Cronin* (1985), 66 BCLR 187 (SC). In civil proceedings the lawyer is not required to obtain the court's approval before withdrawing as counsel, but must comply with the rules of court before being relieved of the responsibilities that attach as "solicitor acting for the party." See *Luchka* v. *Zens* (1989), 37 BCLR (2d) 127 (CA).

3.7-9 On discharge or withdrawal, a lawyer must, as soon as practicable:

(a) notify the client in writing, stating:

(i) the fact that the lawyer is no longer acting;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain a new lawyer promptly;

(a.1) notify in writing all other parties, including the Crown where appropriate, that the lawyer is no longer acting;

(b) subject to the lawyer’s right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

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

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and

(g) notify in writing the court registry where the lawyer’s name appears as counsel for the client that the lawyer is no longer acting and comply with the applicable rules of court and any other requirements of the tribunal.

Commentary

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

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

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

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

[6] In the absence of a reasonable objection, a lawyer who is discharged or withdraws continues to have a duty to promptly sign appropriately drafted court orders that have been granted or agreed to while the lawyer was counsel. This duty continues, notwithstanding subsequent instructions of the client.

Confidentiality of reason for withdrawal

3.7-9.1 Subject to exceptions permitted by law, if the reason for withdrawal results from confidential communications between the lawyer and the client, the lawyer must not disclose the reason for the withdrawal unless the client consents.

Commentary

[1] One such exception is that in *R.* v. *Cunningham*, 2010 SCC 10, which establishes that, in a criminal case, if the disclosure of information related to the payment of the lawyer's fees is unrelated to the merits of the case and does not prejudice the accused, the lawyer may properly disclose such information to the court. See paragraph 31:

Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception to privilege, such as the innocence at stake or public safety exceptions (see generally *R.* v. *McClure*, 2001 SCC 14 and *Smith* v. *Jones*, [1999] 1 S.C.R. 455). Rather, non-payment of legal fees in this context does not attract the protection of solicitor-client privilege in the first place. However, nothing in these reasons, which address the application, or non-application, of solicitor-client privilege in disclosures to a court, should be taken as affecting counsel's ethical duty of confidentiality with respect to payment or non-payment of fees in other contexts.

CHAPTER 4 – MARKETING OF LEGAL SERVICES

4.2 Marketing

Application of rule

4.2-3 This section applies to any marketing activity undertaken or authorized by a lawyer in which they are identified as a lawyer, mediator or arbitrator.

Definitions

4.2-4 In this Chapter:

> **"marketing activity"** includes any publication or communication in the nature of an advertisement, promotional activity or material, letterhead, business card, listing in a directory, a public appearance or any other means by which professional legal services are promoted or clients are solicited.

Content and format of marketing activities

4.2-5 Any marketing activity undertaken or authorized by a lawyer must not be:

(a) false,

(b) inaccurate,

(c) unverifiable,

(d) reasonably capable of misleading the recipient or intended recipient, or

(e) contrary to the best interests of the public.

Commentary

[1] For example, a marketing activity violates this Code rule -if it:

(a) is calculated or likely to take advantage of the vulnerability, either physical or emotional, of the recipient,

(b) is likely to create in the mind of the recipient or intended recipient an unjustified expectation about the results that the lawyer can achieve, or

(c) otherwise brings the administration of justice into disrepute.

Notary public

4.2-7 A lawyer who, on any letterhead, business card or sign, or in any other marketing activity:

(a) uses the term "notary," "notary public" or any similar designation, or

(b) in any other way represents to the public that the lawyer is a notary public,

must also indicate in the same publication or marketing activity the lawyer's status as a lawyer.

Designation

4.2-8 A lawyer must not list a person not entitled to practise law in British Columbia on any letterhead or in any other marketing activity without making it clear in the marketing activity that the person is not entitled to practise law in British Columbia.

In particular, a person who fits one or more of the following descriptions must not be listed without an appropriate indication of the person's status:

(a) a retired member,

(b) a non-practising member,

(c) a deceased member,

(d) an articled student,

(e) a legal assistant or paralegal,

(f) a patent agent, if registered as such under the *Patent Act*, RSC 1985, c. P-4,

(g) a trademark agent, if registered as such under the *Trademarks Act*, RSC 1984, c. T-13,

(h) a practitioner of foreign law, if that person holds a valid permit issued under Law Society Rule 2-18, or

(i) a qualified member of another profession, trade or occupation, provided that the lawyer and the other person are members of a multi-disciplinary practice (MDP) permitted under the Law Society Rules.

4.3 Advertising nature of practice

Real estate sales

4.3-2 When engaged in marketing of real property for sale or lease, a lawyer must include in any marketing activity:

(a) the name of the lawyer or the lawyer's law firm, and

(b) if a telephone number is used, only the telephone number of the lawyer or the lawyer's law firm.

Multi-disciplinary practice

4.3-3 Unless permitted to practise law in an MDP under the Law Society Rules, a lawyer must not, in any marketing activity

(a) use the term multi-disciplinary practice or MDP, or

(b) state or imply that the lawyer's practice or law firm is an MDP.

4.3-4 A lawyer practising law in an MDP must ensure that all marketing activity for the law firm indicates that the law firm is an MDP.

CHAPTER 5 – RELATIONSHIP TO THE ADMINISTRATION OF JUSTICE

5.1 The lawyer as advocate

Advocacy

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

Commentary

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

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

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

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

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

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

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

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

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

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

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

(a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

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

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

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

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

(g) knowingly assert as fact that which cannot reasonably be supported by the evidence or taken on judicial notice by the tribunal;

(h) make suggestions to a witness recklessly or knowing them to be false;

(i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;

(j) improperly dissuade a witness from giving evidence or advise a witness to be absent;

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

(l) knowingly misrepresent the client’s position in the litigation or the issues to be determined in the litigation

(m) abuse, hector or harass a witness;

(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge;

(o) needlessly inconvenience a witness; or

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

Commentary

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

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

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

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

[5] In the absence of a reasonable objection, lawyers have a duty to promptly sign appropriately drafted court orders that have been granted or agreed to. This duty continues, notwithstanding subsequent instructions of the client.

Incriminating physical evidence

5.1-2.1 A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence so as to obstruct or attempt to obstruct the course of justice.

Commentary

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

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

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its mere existence. A lawyer's possession of illegal things could constitute an offence and may require that the client obtain new counsel or disadvantage the client in other ways. It is imperative that a lawyer consider carefully the implications of accepting incriminating physical evidence. A lawyer should obtain the advice of a senior criminal lawyer before agreeing to take possession. Where a lawyer already has possession, this advice should be promptly obtained with respect to how the evidence should be handled.

[3.1] Unless a lawyer's handling of incriminating physical evidence is otherwise prescribed by law, the options available to a lawyer who has taken possession of such evidence include, as soon as reasonably possible:

(a) delivering the evidence to law enforcement authorities or the prosecution, either directly or anonymously;

(b) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination;

(c) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it; or

(d) returning the evidence to its source, provided doing so will not cause the evidence to be concealed, destroyed or altered.

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

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

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

[7] A lawyer must never take possession of an item the mere possession of which is illegal, such as stolen property, unless specific dispensation is afforded by the law, such as under the "innocent possession" exception, which allows a person to take possession of such an item for the sole purpose of promptly turning it over to the police.

Ex parte proceedings

5.1-2.2 In an *ex parte* proceeding, a lawyer must act with utmost good faith and inform a tribunal of all material facts, including adverse facts, known to the lawyer that will enable the tribunal to make an informed decision.

Commentary

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

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

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

Single-party communications with a tribunal

5.1-2.3 Except where authorized by law, and subject to Code rule 5.1-2.2 (*Ex parte* proceedings), a lawyer must not communicate with a tribunal in the absence of the opposing party or their lawyer (when they are represented) concerning any matter of substance, unless the opposing party or their lawyer has been made aware of the content of the communication or has appropriate notice of the communication.

Commentary

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

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

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

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

Duty as prosecutor

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

Commentary

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

Disclosure of error or omission

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

Commentary

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

Undertakings

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

Commentary

[1] A lawyer should also be guided by the provisions of Code rule 7.2-11 (Undertakings and trust conditions).

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

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

Commentary

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

5.2 The lawyer as witness

Submission of evidence

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

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

(c) it is necessary in the interests of justice for the lawyer to give evidence.

Commentary

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

Appeals

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

5.3 Interviewing witnesses

5.3-1 Subject to the rules on communication with a represented party set out in Code rules 7.2-4 (Communications generally) to 7.2-8 (Communication with an officer or employee), a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must 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.

5.4 Communication with witnesses giving evidence

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

(a) during examination-in-chief, the examining lawyer may discuss with the witness any matter;

(b) during cross-examination of the lawyer's own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(c) upon the conclusion of cross-examination and during any re-examination, with the leave of the court, the lawyer may discuss with the witness any matter;

(d) during examination for discovery, the lawyer may discuss the evidence given or to be given by the witness on the following basis:

(i) where a discovery is to last no longer than a day, the lawyer for the witness should refrain from having any discussion with the witness during this time.

(ii) where a discovery is scheduled for longer than one day, the lawyer is permitted to discuss with their witness all issues relating to the case, including evidence that is given or to be given, at the conclusion of the discovery each day. However, prior to any such discussion taking place, the lawyer should advise the other side of their intention to do so.

(iii) the lawyer for the witness should not seek an adjournment during the examination to specifically discuss the evidence that was given by the witness. Such discussion should either wait until the end of the day adjournment or until just before re-examination at the conclusion of the cross-examination.

Commentary

[1] The application of these Code rules may be determined by the practice and procedures of the tribunal and may be modified by agreement between the parties' lawyers.

[2] The term "cross-examination" means the examination of a witness or party adverse in interest to the client of the lawyer conducting the examination. It therefore includes an examination for discovery, examination on affidavit or examination in aid of execution. This Code rule prohibits obstruction or improper discussion by any lawyer involved in a proceeding and not just by the lawyer whose witness is under cross-examination.

[3] The opportunity to conduct a fully ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing lawyer's ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer's witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objection to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing.

[4] This Code rule is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has been retained by a witness under cross-examination, from consulting with the lawyer's new client.

[5] For a discussion of issues relating to a lawyer speaking to a witness during examination for discovery see *Fraser River Pile & Dredge Ltd.* v. *Can-Dive Services Ltd*. (1992), 72 B.C.L.R. (2nd) 240 (B.C.S.C) and *Iroquois Falls Power Corp.* v. *Jacobs Canada Inc.* [2006] O.J. No. 4222 (Ont.Sup.Ct.). See also Shields and Shapray, "Woodshedding, Interruptions and Objections: How to Properly Conduct and Defend an Examination for Discovery", *the Advocate*, Vol. 68, Part 5, Sept. 2010.

5.5 Relations with jurors

Disclosure of information

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

(a) has or may have an interest, direct or indirect, in the outcome of the case;

(b) is acquainted with or connected in any manner with the presiding judge, any parties' lawyers or any litigant;

(c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness; or

(d) may be legally disqualified from serving as a juror.

5.6 The lawyer and the administration of justice

Encouraging respect for the administration of justice

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

Commentary

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

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

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

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

5.7 Lawyers and mediators

Role of mediator

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

(a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and

(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.

Commentary

[1] [rescinded 07/2014]

[1.1] Appendix B contains additional guidance that govern the conduct of family law mediation.

[2] Generally, neither the lawyer-mediator nor a partner or associate of the same law firm as the mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of section 3.4 (Conflict~~s~~) and its commentaries and the common law authorities.

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

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

[5] A lawyer who has acted as a mediator in a family law matter may act for both spouses in a divorce action provided that all relief is sought by consent and both parties have received independent legal advice in relation to the matter.

CHAPTER 6 – RELATIONSHIP TO STUDENTS, EMPLOYEES, AND OTHERS

6.1 Supervision

Direct supervision required

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

Commentary

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

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

[3] A lawyer in private practice may permit a non-lawyer to perform tasks delegated and supervised by a lawyer, so long as the lawyer maintains a direct relationship with the client. A lawyer in a community legal clinic funded by a provincial legal aid plan may do so, so long as the lawyer maintains direct supervision of the client's case in accordance with the supervision requirements of the legal aid plan and assumes full professional responsibility for the work.

[4] Subject to the provisions of any statute, rule or court practice in that regard, the question of what the lawyer may delegate to a non-lawyer generally turns on the distinction between any special knowledge of the non-lawyer and the professional and legal judgment of the lawyer, which, in the public interest, must be exercised by the lawyer whenever it is required.

Definitions

6.1-2 In this section,

"designated paralegal" means an individual permitted under Code rule 6.1-3.3 to give legal advice and represent clients before a court or tribunal;

"non-lawyer" means an individual who is neither a lawyer nor an articled student;

"paralegal" means a non-lawyer who is a trained professional working under the supervision of a lawyer.

6.1-3.1 The limitations imposed by Code rule 6.1-3 (Delegation) do not apply when a non-lawyer is:

(a) a community advocate funded and designated by the Law Foundation;

(b) a student engaged in a legal advice program or clinical law program run by, associated with or housed by a law school in British Columbia; or

(c) with the approval of the Executive Committee, a person employed by or volunteering with a non-profit organization providing free legal services.

6.1-3.2 A lawyer may employ as a paralegal a person who

(a) possesses adequate knowledge of substantive and procedural law relevant to the work delegated by the supervising lawyer;

(b) possesses the practical and analytic skills necessary to carry out the work delegated by the supervising lawyer; and

(c) carries out their work in a competent and ethical manner.

Commentary

[1] A lawyer must not delegate work to a paralegal, nor may a lawyer hold a person out as a paralegal, unless the lawyer is satisfied that the person has sufficient knowledge, skill, training and experience and is of sufficiently good character to perform the tasks delegated by the lawyer in a competent and ethical manner.

[2] In arriving at this determination, lawyers should be guided by Appendix D.

[3] Lawyers are professionally and legally responsible for all work delegated to paralegals. Lawyers must ensure that the paralegal is adequately trained and supervised to carry out each function the paralegal performs, with due regard to the complexity and importance of the matter.

6.1-3.3 Despite Code rule 6.1-3 (Delegation), where a designated paralegal has the necessary skill and experience, a lawyer may permit the designated paralegal

(a) to give legal advice;

(b) to represent clients before a court or tribunal, other than a family law arbitration, as permitted by the court or tribunal; or

(c) to represent clients at a family law mediation.

Commentary

[1] Law Society Rule 2-13 limits the number of designated paralegals performing the enhanced duties of giving legal advice, appearing in court or before a tribunal or appearing at a family law mediation.

[2] Where a designated paralegal performs the services in this Code rule, the supervising lawyer must be available by telephone or other electronic means, and any agreement arising from a family law mediation must be subject to final review by the supervising lawyer.

Suspended or disbarred lawyers

6.1-4 Without the express approval of the lawyer's governing body, a lawyer must not retain, occupy office space with, use the services of, partner or associate with or employ in any capacity having to do with the practice of law any person who, in any jurisdiction,

(a) has been disqualified or disbarred and struck off the Rolls,

(b) is suspended,

(c) has undertaken not to practise,

(d) has been involved in disciplinary action and been permitted to resign and has not been reinstated or readmitted,

(e) has failed to complete a Bar admission program for reasons relating to lack of good character and repute or fitness to be a member of the Bar,

(f) has been the subject of a hearing ordered, whether commenced or not, with respect to an application for enrolment as an articled student, call and admission, or reinstatement, unless the person was subsequently enrolled, called and admitted or reinstated in the same jurisdiction, or

(g) was required to withdraw or was expelled from a Bar admission program.

Electronic registration of documents

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

(a) permit others, including a non-lawyer employee, to use such access; or

(b) disclose their password or access phrase or number to others.

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

(a) permit others to use such access; or

(b) disclose their password or access phrase or number to others.

Commentary

[1] The implementation of systems for the electronic registration of documents imposes special responsibilities on lawyers and others using the system. The integrity and security of the system is achieved, in part, by its maintaining a record of those using the system for any transactions. Statements professing compliance with law without registration of supporting documents may be made only by lawyers in good standing. It is, therefore, important that lawyers should maintain and ensure the security and the exclusively personal use of the personalized access code, diskettes, etc., used to access the system and the personalized access pass phrase or number.

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

Real estate assistants

6.1-7 In Code rules 6.1-7 to 6.1-9,

"purchaser" includes a lessee or person otherwise acquiring an interest in a property;

"sale" includes lease and any other form of acquisition or disposition;

"show", in relation to marketing real property for sale, includes:

(a) attending at the property for the purpose of exhibiting it to members of the public;

(b) providing information about the property, other than preprinted information prepared or approved by the lawyer; and

(c) conducting an open house at the property.

6.2 Students

Duties of articled student

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

6.3 Harassment and discrimination

Discrimination

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

Commentary

[1] Lawyers are expected to respect the dignity and worth of all persons. A lawyer has a special responsibility to respect and uphold the principles and requirements of human rights and workplace health and safety laws, and to stay apprised of developments in the law pertaining to discrimination and harassment, applicable to them.

The principles of human rights, workplace health and safety laws, and related case law apply to the interpretation of this Code rule and to Code rules 6.3-2 (Harassment) to 6.3-4 (Reprisal). What constitutes discrimination, harassment, and protected grounds continues to evolve over time and may vary by jurisdiction.

[2] A lawyer engaging in discriminatory or harassing behaviour undermines confidence in the legal profession and our legal system. A lawyer should foster a professional environment that is respectful, accessible, and inclusive, and should strive to recognize their own biases and take particular care to avoid engaging in practices that would reinforce those biases, when offering services to the public and when organizing their workplace.

[3] As a result of the history of the colonization of Indigenous peoples in Canada, including ongoing repercussions of the colonial legacy, systemic factors, and biases, Indigenous peoples experience unique challenges in relation to discrimination and harassment. Lawyers should guard against engaging in, allowing, or being willfully blind to actions that constitute discrimination or any form of harassment against Indigenous peoples.

[4] Lawyers should be aware that discrimination includes adverse effects and systemic discrimination, that can arise from organizational policies, practices and cultures that create, perpetuate, or unintentionally result in unequal treatment of a person or persons. Lawyers should consider the distinct needs and circumstances of their colleagues, employees, and clients, and should be alert to biases that may inform these relationships and that serve to perpetuate systemic discrimination and harassment. Lawyers should guard against any express or implicit assumption that another person's views, skills, capabilities, and contributions are necessarily shaped or constrained by their gender, race, Indigeneity, disability or other personal characteristic.

[5] Discrimination can be defined as the distinction, intentional or not, based on grounds related to actual or perceived personal characteristics of an individual or group, that has the effect of imposing burdens, obligations or disadvantages on the individual or group that are not imposed on others, or which withhold or limit access to opportunities, benefits and advantages that are available to other members of society. Harassment may constitute or be linked to discrimination. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will typically constitute discrimination. Human rights laws recognize some actions based on grounds related to actual or perceived personal characteristics of an individual or group are not discriminatory, including for example, establishing or providing programs, services or activities that have the object of ameliorating conditions of those individuals or groups. It is important to recognize that people are multi-faceted, and the intersection of overlapping and interdependent systems of discrimination they may experience.

[6] Discrimination can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that are likely to constitute discrimination. The examples are not exhaustive.

(a) refusing to employ or to continue to employ any person on the basis of any personal characteristic protected by applicable law;

(b) refusing to provide legal services to any person on the basis of any personal characteristic protected by applicable law;

(c) charging higher fees on the basis of any personal characteristic protected by applicable law;

(d) assigning lesser work or paying an employee or staff member less on the basis of any personal characteristic protected by applicable law;

(e) using derogatory racial, gendered, or religious language to describe a person or group of persons;

(f) failing to provide reasonable accommodation to the point of undue hardship;

(g) applying policies regarding leave that are facially neutral (i.e. that apply to all employees equally), but which have the effect of penalizing individuals who take parental leave, in terms of seniority, promotion or partnership;

(h) providing training or mentoring opportunities in a manner that has the effect of excluding any person from such opportunities on the basis of any personal characteristic protected by applicable law;

(i) providing unequal opportunity for advancement by evaluating employees on facially neutral criteria that fail to take into account differential needs and needs requiring accommodation;

(j) comments, jokes or innuendos that cause humiliation, embarrassment or offence, or that by their nature, and in their context, are clearly embarrassing, humiliating or offensive; or

(k) instances when any of the above behaviour is directed toward someone because of their association with a group or individual with certain personal characteristics.

[7] Lawyers are expected to not condone or be willfully blind to conduct in their workplaces that constitutes discrimination.

[8] Lawyers are reminded that dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action. Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity (see Code rule 2.2-1 (Integrity), commentaries [3] and [4]).

Harassment

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

Commentary

[1] Harassment can be defined as an incident or a series of incidents involving physical, verbal or non-verbal conduct (including electronic communications) that might reasonably be expected to cause humiliation, offence or intimidation to the person who is subjected to the conduct. The intent of the lawyer engaging in the conduct is not determinative. Harassment may constitute or be linked to discrimination.

[2] Harassment can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that are likely to constitute harassment. The examples are not exhaustive.

(a) objectionable or offensive behaviour that is known or ought reasonably to be known to be unwelcome, including comments and displays that demean, belittle, intimidate or cause humiliation or embarrassment;

(b) behaviour that is degrading, threatening or abusive, whether physically, mentally or emotionally;

(c) bullying;

(d) verbal abuse;

(e) abuse of authority where a lawyer uses the power inherent in their position to endanger, undermine, intimidate, or threaten a person, or otherwise interfere with another person's career;

(f) comments, jokes or innuendos that are known or ought reasonably to be known to cause humiliation, embarrassment or offence, or that by their nature, and in their context, are clearly embarrassing, humiliating or offensive; or

(g) assigning work inequitably.

[3] Bullying, including cyberbullying, is a form of harassment. It may involve physical, verbal or non-verbal conduct. It is characterized by conduct that might reasonably be expected to harm or damage the physical or psychological integrity of another person, their reputation or their property. Bullying can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that are likely to constitute bullying. The examples are not exhaustive.

(a) unfair or excessive criticism;

(b) ridicule;

(c) humiliation;

(d) exclusion or isolation;

(e) constantly changing or setting unrealistic work targets; or

(f) threats or intimidation.

[4] Lawyers are expected to not condone or be willfully blind to conduct in their workplaces that constitutes harassment.

[5] Lawyers are reminded that dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action. Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer’s professional integrity (see Code rule 2.2-1 (Integrity), commentaries [3] and [4]).

Sexual harassment

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

Commentary

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

(a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the person who is subjected to the conduct;

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

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

(d) when submission to or rejection of such conduct is used as a basis for any employment decision, including;

(i) loss of opportunity;

(ii) the allocation of work;

(iii) promotion or demotion;

(iv) remuneration or loss of remuneration;

(v) job security; or

(vi) benefits affecting the employee;

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

(f) when a position of power is used to import sexual requirements into the workplace and negatively alter the working conditions of employees or colleagues; or

(g) when a sexual solicitation or advance is made by a lawyer who is in a position to confer any benefit on, or deny any benefit to, the recipient of the solicitation or advance, if the lawyer making the solicitation or advance knows or ought reasonably to know that it is unwelcome.

[2] Sexual harassment can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that are likely to constitute sexual harassment. The examples are not exhaustive.

(a) displaying sexualized or other demeaning or derogatory images;

(b) sexually suggestive or intimidating comments, gestures or threats;

(c) comments, jokes that cause humiliation, embarrassment or offence, or which by their nature, and in their context, are clearly embarrassing, humiliating or offensive;

(d) innuendoes, leering or comments about a person's dress or appearance;

(e) gender-based insults or sexist remarks;

(f) communications with sexual overtones;

(g) inquiries or comments about a person's sex life;

(h) sexual flirtations, advances, propositions, invitations or requests;

(i) unsolicited or unwelcome physical contact or touching;

(j) sexual violence; or

(k) unwanted contact or attention, including after the end of a consensual relationship.

[3] Lawyers are expected to not condone or be willfully blind to conduct in their workplaces that constitutes sexual harassment.

[4] Lawyers are reminded that dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action. Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity (see Code rule 2.2-1 (Integrity), commentaries [3] and [4]).

CHAPTER 7 – RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

7.1 Responsibility to the Society and the profession generally

Regulatory compliance

7.1-1 A lawyer must

(a) reply promptly and completely to any communication from the Society;

(b) provide documents as required to the Society;

(c) not improperly obstruct or delay Society investigations, audits and inquiries;

(d) cooperate with Society investigations, audits and inquiries involving the lawyer or a member of the lawyer's law firm;

(e) comply with orders made under the *Legal Profession Act* or Law Society Rules; and

(f) otherwise comply with the Society's regulation of the lawyer's practice.

Meeting financial obligations

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

Commentary

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

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

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

Duty to report

7.1-3 Unless to do so would involve a breach of solicitor-client confidentiality or privilege, a lawyer must report to the Society, in respect of that lawyer or any other lawyer:

(a) a shortage of trust monies;

(a.1) a breach of undertaking or trust condition that has not been consented to or waived;

(b) the abandonment of a law practice;

(c) participation in criminal activity related to a lawyer's practice;

(d) [rescinded]

(e) conduct that raises a substantial question as to the honesty, trustworthiness, or competency of a lawyer; and

(f) any other situation in which a lawyer's clients are likely to be materially prejudiced.

Commentary

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

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

[3] A variety of stressors, physical, mental or emotional conditions, disorders or addictions may contribute to instances of conduct described in this Code rule. Lawyers who face such challenges should be encouraged by other lawyers to seek assistance as early as possible.

[4] The Society supports professional support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received in the course of such confidential counselling. A lawyer serving in the capacity of a peer support or counsellor in the Lawyers Assistance Program, or another Society approved peer assistance program, is not required to report any information concerning another lawyer acquired in the course of providing peer assistance. The potential disclosure of these communications is not subject to requirement by the Society. Such disclosure can only be required by law or a court but is permissible if the lawyer-counsellor believes on reasonable grounds that there is an imminent risk of death or serious harm and disclosure is necessary to prevent the death or harm.

7.2 Responsibility to lawyers and others

Courtesy and good faith

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

Commentary

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

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

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

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

[5] A lawyer who knows that another lawyer has been consulted in a matter must not proceed by default in the matter without inquiry and reasonable notice.

Sharp practice and taking unfair advantage

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

Recording communications

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

Communications generally

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

Communicating with lawyer

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

Communicating with a represented person

7.2-6 Subject to Code rules 7.2-6.1 (Communicating with a person represented on a limited scope retainer) and 7.2-7 (Second opinions), if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:

(a) approach, communicate or deal with the person on the matter; or

(b) attempt to negotiate or compromise the matter directly with the person.

Communicating with a person represented on a limited scope retainer

7.2-6.1 Where a person is represented by a lawyer under a limited scope retainer on a matter, another lawyer may, without the consent of the lawyer providing the limited scope legal services, approach, communicate or deal with the person directly on the matter unless the lawyer has been given written notice of the nature of the legal services being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer.

Commentary

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

Second opinions

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

Commentary

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

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

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

Communicating with an officer or employee

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

(a) who has the authority to bind the organization;

(b) who supervises, directs or regularly consults with the organization’s lawyer; or

(c) whose own interests are directly at stake in the representation,

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

Commentary

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

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

Communicating with an unrepresented person

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

(a) urge the unrepresented person to obtain independent legal representation;

(b) take care to see that the unrepresented person is not proceeding under the impression that their interests will be protected by the lawyer; and

(c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

Commentary

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

Coming into possession of materials belonging to others

7.2-10 A lawyer who has access to or comes into possession of a document that the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, must:

(a) in the case of a paper document, return it unread and uncopied to the party to whom it belongs,

(b) in the case of an electronic document, delete it unread and uncopied and advise the party to whom it belongs that that was done, or

(c) if the lawyer reads part or all of the document before realizing that it was not intended for them, cease reading the document and promptly return it or delete it, uncopied, to the party to whom it belongs, advising that party:

(i) of the extent to which the lawyer is aware of the contents, and

(ii) what use the lawyer intends to make of the contents of the document.

Commentary

[1] For purposes of this Code rule, **"electronic document"** includes email or other electronic modes of transmission subject to being read or put into readable form, such as computer hard drives and memory cards.

7.3 Outside interests and the practice of law

Maintaining professional integrity and judgment

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

Commentary

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

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

7.4 The lawyer in public office

Standard of conduct

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

Commentary

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

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

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

7.8 Errors and omissions

Informing client of errors or omissions

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

(a) promptly inform the client of the error or omission without admitting legal liability;

(b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and

(c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Commentary

[1] Under Condition 4.1 of the Lawyers Compulsory Professional Liability Indemnity Policy, a lawyer is contractually required to give written notice to the indemnitor immediately after the lawyer becomes aware of any actual or alleged error or any circumstances that could reasonably be expected to be the basis of a claim or suit covered under the policy. This obligation arises whether or not the lawyer considers the claim to have merit. Code rule 7.8-2 (Notice of claim) imposes an ethical duty to report to the indemnitor or insurer. This Code rule should not be construed as relieving a lawyer from the obligation to report to the indemnitor before attempting any rectification.

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

APPENDIX A – AFFIDAVITS, SOLEMN DECLARATIONS AND OFFICER CERTIFICATIONS

Affidavits and solemn declarations

1. A lawyer must not swear an affidavit or take a solemn declaration unless the deponent:

(a) appears personally before the lawyer,

(b) acknowledges that they are the deponent,

(c) understands or appears to understand the statement contained in the document,

(d) in the case of an affidavit, swears, declares or affirms that the contents of the document are true,

(e) in the case of a solemn declaration, orally states that the deponent makes the solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath, and

(f) signs the document, or if permitted by statute, swears that the signature on the document is that of the deponent.

Commentary

Non-practising and retired members

[1] Non-practising and retired members are not permitted to act as notaries public or commissioners for the purpose of taking affidavits or solemn declarations. See Law Society Rules 2-3 and 2-4 for the definitions of non-practising and retired members.

Interjurisdictional practice

[2] A British Columbia lawyer, as a notary public, may administer oaths and take affidavits, declarations and affirmations only within British Columbia: See section 14 of the *Legal Profession Act* for a lawyer's right to act as a notary public, and section 18 of the *Notaries Act*, RSBC 1996, c. 334 for rights and powers of a notary public, including the right to draw affidavits, affirmations or statutory declarations for other jurisdictions.

[3] A British Columbia lawyer, as a commissioner for taking affidavits for British Columbia, has authority to administer oaths and take affidavits, declarations and affirmations outside of BC for use in BC: See sections 59 and 63, as well as sections 56 and 64 of the *Evidence Act*, RSBC 1996, c.124.

[4] Notwithstanding law society mobility provisions across Canada, a British Columbia lawyer cannot swear an affidavit in another province or territory for use in that jurisdiction unless the lawyer is a member of the bar in that jurisdiction or the jurisdiction's own legislation allows it. For example, because of Alberta legislation, a member of the Society, while in Alberta acting under the mobility provisions on an Alberta matter, cannot swear an affidavit for use in Alberta.

[5] British Columbia lawyers should contact the law society of the other province or territory if they need to check whether they are entitled to swear an affidavit in that jurisdiction.

[6] Likewise, lawyers from other jurisdictions visiting British Columbia may not swear affidavits in BC for use in BC: See section 60 of the *Evidence Act*, RSBC 1996, c. 124 and the definition of "practising lawyer" in section 1(1) of the *Legal Profession Act.*

Deponent present before commissioner

[7] See *R.* v. *Schultz*, [1922] 2 WWR 582 (Sask. CA) in which the accused filled in and signed a declaration and left it on the desk of a commissioner for taking oaths, later meeting the commissioner outside and asking him to complete it. The court held that it was not a solemn declaration within the meaning of the *Canada Evidence Act*, RSC 1985, c. C-5, stating that: "The mere fact that it was signed by the accused does not make it a solemn declaration. The written statement by the commissioner that it was 'declared before him' is not true. The essential requirement of the *Act* is not the signature of the declarant but his solemn declaration made before the commissioner" (p. 584). Likewise, it has been held in the United States that the taking of an affidavit over the telephone is grounds for a charge of negligence and professional misconduct: *Bar Association of New York City* v. *Napolis* (1915), 155 N.Y. Sup. 416 (N.Y. Sup. Ct. App. Div.). In BC, the conduct of a lawyer who affixed the lawyer's name to the jurat of the signed affidavit without ever having seen the deponent constituted professional misconduct: Law Society *Discipline Case Digest* 83/14.

Identification

[8] The commissioner should be satisfied of the deponent's identity. Where the commissioner does not know the deponent personally, identification should be inspected, appropriate introductions should be obtained, or both.

Appearing to understand

[9] To be satisfied of this, the commissioner may read the document aloud to the deponent, have the deponent read it aloud or accept the deponent's statement that its contents are understood: *R.* v. *Whynot* (1954), 110 CCC 35 (NS CA) at 42.

[10] It is also important that the deponent understands the significance of the oath or declaration to be taken. See *King* v. *Phillips* (1908), 14 CCC 239 (B.C. Co. Ct.); *R.* v. *Nichols*, [1975] 5 WWR 600 (Alta SC); and *Owen* v. *Yorke*, [1985] BCD Civ. 1231-03 (BCSC).

[11] If it appears that a deponent is unable to read the document, the commissioner must certify in the jurat that the document was read in their presence and the commissioner was satisfied that the deponent understood it: Supreme Court Civil Rules, Rule 22-2(6). If it appears that the deponent does not understand English, the lawyer must arrange for a competent interpreter to interpret the document to the deponent and certify by endorsement in Form 109 that they have done so: Supreme Court Civil Rules, Rule 22-2(7).

Remote commissioning of affidavits or solemn declarations

[12] While it is preferable for the deponent to appear physically before a lawyer for the purposes of commissioning an affidavit or solemn declaration, a lawyer may discharge the lawyer's ethical and professional obligations regarding commissioning an affidavit or solemn declaration where the lawyer and deponent are not physically together through the use of electronic and video technology in the manner set out below.

Lawyers should keep in mind however that what is accepted as evidence is ultimately for a trier of fact to determine, and that complying with the process set out in this commentary is not a guarantee that an affidavit or solemn declaration commissioned using electronic and video technology will be accepted as evidence by the trier of fact. Moreover, if concerns are identified about the particular manner in which an affidavit or solemn declaration is commissioned remotely or if a remote process raises any issues, in particular the serious concerns that would arise from issues regarding the identity or capacity of the deponent, or whether coercion of the deponent is a concern, those issues may result in the affidavit or solemn declaration not being accepted, or being given less weight. Lawyers are also reminded to be cautious regarding the heightened risks of fraud and undue influence presented by engaging in virtual processes, and of their obligations under Code rule 3.2-7 (Dishonesty, fraud by client).

Lawyers are also reminded to ensure that there are no prohibitions to the commissioning of an oath or solemn declaration through electronic or video technology for the purposes of any particular document for which such a process is contemplated.

Where the deponent is not physically present in British Columbia, the process for remote commissioning of an affidavit or solemn declaration should not be used unless the lawyer is satisfied there is no other practical way to undertake the commissioning of the document in accordance with the procedures of the jurisdiction in which the deponent is situated.

Process

The process for remote commissioning of an affidavit or solemn declaration by a lawyer must include the following elements.

1. Any affidavit or solemn declaration to be commissioned using electronic and video technology must contain a paragraph at the end of the body of the affidavit or solemn declaration describing that the deponent was not physically present before the lawyer as commissioner, but was in the lawyer's electronic presence linked with the lawyer utilizing video technology and that the process described below for remote commissioning of affidavits or solemn declarations was utilized.

2. The affidavit or solemn declaration must contain a paragraph acknowledging the solemnity of making the affidavit or solemn declaration and acknowledging the consequences of making an untrue statement.

3. While the lawyer and the deponent are in each other's electronic and video presence, the deponent must show the lawyer the front and back of the deponent's valid and current government-issued photo identification. The lawyer must compare the video image of the deponent and information in the deponent's government-issued photo identity document to be reasonably satisfied that the name and the photo are of the same person and that the document is authentic, valid and current. The lawyer must record that these steps have been taken. The lawyer should also consider recording the session through which the affidavit or solemn declaration is made.

4. The lawyer and the deponent must both have the text of the affidavit or solemn declaration, including all exhibits, before each of them while in each other's electronic presence.

5. The lawyer and the deponent must review the affidavit or solemn declaration and exhibits together to verify that the language is identical.

6. At the conclusion of the steps outlined above, while still in each other's electronic presence, the lawyer, as commissioner, must administer the oath, the deponent will swear or affirm the truth of the facts contained in the affidavit or solemn declaration, and the deponent will affix the deponent's signature to the affidavit or solemn declaration.

7. Where it is not permissible to commission an affidavit or solemn declaration using an electronic signature, the deponent's signature must be affixed in ink to the physical (paper) copy of the affidavit or solemn declaration above, and the deponent must immediately scan the document, save a copy immediately after scanning it, and immediately forward it, together with exhibits, electronically to the lawyer.

8. Where it is permissible to commission an affidavit or solemn declaration using an electronic signature, the deponent must immediately save the

document and immediately forward it, together with the exhibits, electronically to the lawyer.

9. Upon receipt by the lawyer of the sworn affidavit or of a solemn declaration that has been attested to bearing the deponent's signature and all exhibits, the lawyer should, after having taken steps to ensure that the document received is the same as the document reviewed under the steps set out above, affix the lawyer's name and signature, as commissioner, to the jurat and exhibits.

10. If an electronic process is used that allows the lawyer, as commissioner, access to the document being signed by the deponent while in video contact with the deponent, the lawyer will then affix the lawyer's signature to the document, provided such process is permitted by the tribunal or court in which the affidavit or solemn declaration is to be used.

The version of the affidavit or solemn declaration that has been duly sworn or affirmed and contains the signatures of the deponent and the lawyer must then be saved by the lawyer, and may be filed with the court or tribunal as may be required.

Affirmation

[13] In cases where a deponent does not want to swear an affidavit by oath, an affidavit can be created by solemn affirmation. See section 20 of the *Evidence Act*, RSBC 1996, c. 124.

Swear or affirm that the contents are true

[14] This can be accomplished by the commissioner asking the deponent: "Do you swear that the contents of this affidavit are true, so help you God?" or, if the affidavit is being affirmed, "Do you solemnly affirm [or words with the same effect] that the evidence given by you is the truth, the whole truth and nothing but the truth?," to which the deponent must answer in the affirmative. In taking an affirmation the lawyer should comply with section 20 of the *Evidence Act*, RSBC 1996, c. 124 and the *Affirmation Regulation*, BC Reg 396/89.

[15] Section 29 of the *Interpretation Act*, RSBC 1996, c. 238, defines an affidavit or oath as follows:

> "affidavit" or "oath" includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act*, or under the *Canada Evidence Act*; and the word "swear" includes solemnly declare or affirm.

[16] If an affidavit is altered after it has been sworn, it cannot be used unless it is resworn. Reswearing can be done by the commissioner initialling the alterations, taking the oath again from the deponent and then signing the altered affidavit. A second jurat should be added, commencing with the word "resworn."

[17] Generally, an affidavit is sworn and filed in a proceeding that is already commenced. An affidavit may also be sworn before the proceeding is commenced: Supreme Court Civil Rules, Rule 22-2(15). However, an affidavit may not be postdated: *Law Society of BC v. Foo*, [1997] LSDD No. 197.

[18] Swearing to an affidavit exhibits that are not in existence can amount to professional misconduct: *Law Society of BC v. Foo*, *supra*.

Solemn declaration

[19] A solemn declaration should be made in the words of the statute: *King* v. *Phillips*, *supra*; *R.* v. *Whynot*, *supra.*

[20] The proper form for a solemn declaration is set out in section 41 of the *Canada Evidence Act*, RSC 1985, c. C-5:

> **Solemn declaration**
>
> 41. Any judge, notary public, justice of the peace, provincial court judge, recorder, mayor or commissioner authorized to take affidavits to be used either in the provincial or federal courts, or any other functionary authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making the declaration before him, in the following form, in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing:
>
>> I, , solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath.
>>
>> Declared before me at this . day of , 20

and in section 69 of the *Evidence Act*, RSBC 1996, c. 124:

> **Statutory declarations**
>
> 69. A gold commissioner, mayor or commissioner authorized to take affidavits, or any other person authorized by law to administer an oath in any matter, may receive the solemn declaration of any person voluntarily making it before him or her in attestation of the execution of any writing, deed or instrument, or of the truth of any fact, or of any account rendered in writing, in the following words:
>
>> I, A.B., solemnly declare that [state the facts declared to], and I make this solemn declaration conscientiously believing it to be true and knowing that it is of the same legal force and effect as if made under oath.

Execution

[21] A deponent unable to sign an affidavit may place the deponent's mark on it: Supreme Court Civil Rules, Rule 22-2(4)(b)(ii). An affidavit by a person who could not make any mark at all was accepted by the court in *R.* v. *Holloway* (1901), 65 JP 712 (Magistrates Ct.).

Witnessing the execution of an instrument

2. When a lawyer witnesses the execution of an instrument by an individual under the *Land Title Act*, RSBC 1996, c. 250, the lawyer's signature is a certification by the lawyer that:

(a) the individual appeared before and acknowledged to the lawyer that they are the person named in the instrument as transferor, and

(b) the signature witnessed by the lawyer is the signature of the individual who made the acknowledgment. (See section 43 of the *Land Title Act*, RSBC 1996, c. 250).

Commentary

[1] Non-practising and retired members are not permitted to act as officers for the purpose of witnessing the execution of instruments under the *Land Title Act*, RSBC 1996, c. 250.

APPENDIX B – FAMILY LAW, MEDIATION, ARBITRATION AND PARENTING COORDINATION

Obligations of family law mediator or arbitrator or parenting coordinator when participants unrepresented

3. A lawyer who acts as a family law mediator or arbitrator or parenting coordinator for participants who are unrepresented must:

(a) urge each unrepresented adult participant to obtain independent legal advice or representation, both before the commencement of the dispute resolution process and at any stage before an agreement between the participants is executed;

(b) take care to see that the unrepresented participant is not proceeding under the impression that the lawyer will protect their interests;

(c) make it clear to the unrepresented participant that the lawyer is acting exclusively in a neutral capacity, and not as the lawyer for either participant; and

(d) explain the lawyer's role in the dispute resolution process, including the scope and duration of the lawyer's powers.

Obligations of family law mediator or parenting coordinator

4. Unless otherwise ordered by the court, a lawyer who acts as a family law mediator or parenting coordinator and the participants must, before family law mediation or parenting coordination begins, enter into a written agreement that includes at least the following provisions:

(a) an agreement that the lawyer, throughout the family law mediation or parenting coordination, is not acting as the lawyer for any participant;

(b) an agreement that the lawyer may disclose fully to each participant all information provided by the other participant that is relevant to the issues;

(c) with respect to family law mediation, an agreement that, subject to Code rule 3.3-3 (Future harm / public safety exception), the family law mediation is part of an attempt to settle the differences between the participants and that all communications between participants or between any participant and the family law mediator will be "without prejudice" so that no participant will attempt:

(i) to introduce evidence of the communications in any legal proceedings, or

(ii) to call the family law mediator as a witness in any legal proceedings;

(c.1) with respect to parenting coordination, an agreement that no communications between the parenting coordinator and a participant, the child of a participant or a third party are confidential, except that the parenting coordinator may withhold any such information if, in the opinion of the parenting coordinator, the disclosure of the information may be harmful to a child's relationship with a participant, or compromise the child's relationship with a third party;

(d) an acknowledgment that the lawyer must report to a Director under the *Child, Family and Community Services Act*, RSBC 1996, c. 46 any instance arising from the family law mediation or parenting coordination in which the lawyer has reasonable grounds to believe that a child is in need of protection;

(e) an agreement as to the lawyer's rate of remuneration and terms of payment;

(f) an agreement as to the circumstances in which family law mediation or parenting coordination will terminate.

Obligations of family law arbitrator

5. A lawyer who acts as a family law arbitrator and the participants must, before the lawyer begins their duties as family law arbitrator, enter into a written agreement that includes at least the following provisions:

(a) an agreement that the lawyer, throughout the family law arbitration, is not acting as the lawyer for any participant;

(b) an acknowledgment that the lawyer must report to a Director under the *Child, Family and Community Services Act*, RSBC 1996, c. 46 any instance arising from the family law arbitration in which the lawyer has reasonable grounds to believe that a child is in need of protection;

(c) an agreement as to the lawyer's rate of remuneration and terms of payment.

7. A parenting coordinator who may act as a family law mediator as well as determine issues in a dispute resolution process must explain the dual role to the participants in writing and must advise the participants in writing when the lawyer's role changes from one to the other.

Commentary – designated paralegals and family law mediation

[1] The purpose of this commentary is to provide guidance to supervising lawyers who are considering sending a designated paralegal to represent a client at a family law mediation.

[2] Designated paralegals are permitted to represent a client at family law mediations in circumstances the supervising lawyer deems appropriate. However, family law mediations present unique challenges and before permitting a paralegal to represent a client in such processes the supervising lawyer must:

(a) determine whether the designated paralegal possesses the necessary skill and knowledge to act in the matter (consistent with the general obligation for determining whether to delegate work to the designated paralegal);

(b) ensure that there is no prohibition at law that prevents the designated paralegal from representing the client. For example, consider the restrictions in the Notice to Mediate (Family) Regulation, BC Reg 227/2023 regarding who has the right to accompany a party to a mediation;

(c) obtain the client's informed consent to the use of the designated paralegal.

[3] It is prudent for the supervising lawyer to advise the mediator and the other party, through their counsel if they are represented, that the designated paralegal will be representing the client and provide the name and contact information for the supervising lawyer.

[4] In addition to considering the process in Appendix D (Supervision of paralegals) of the Code, lawyers should consider the following before permitting a designated paralegal to represent a client at a family law mediation:

- Mediation requires as much competency of the legal representative as is required before a court or tribunal. The supervising lawyer must bear this in mind when determining when it is appropriate to have a designated paralegal represent a client;

- Family law is a unique area of law in which many other areas of law intersect. In addition, clients are often dealing with considerable emotional stress and in some cases come from environments where family violence exists. It is an area of practice fraught with risks that both the lawyer and the designated paralegal need the skills and knowledge to identify and properly manage. Considerable skill is required to represent a client effectively at a family law mediation. A supervising lawyer should ensure the designated paralegal has received specific training in representing a client at a family law mediation. It is prudent to have the designated paralegal shadow the lawyer for several sessions and then have the lawyer shadow the designated paralegal for the next few sessions.

[5] Despite more family law matters being directed to consensual dispute resolution processes rather than to court, it remains essential that those processes and the settlements that arise in them be fair. It is important, therefore, for both the supervising lawyer and the designated paralegal to understand the case law surrounding circumstances in which settlement agreements have been set aside by the court on the grounds that the settlement was unfair.

[6] Lawyers must review any settlement agreement arising from a family law mediation where their designated paralegal represented the client, and such agreements are provisional until such time as the lawyer has signed off on them. This provides an opportunity for review and an additional safeguard for the client. The lawyer would also be prudent to advise the client about this process as a standard part of the retainer agreement.

APPENDIX C – REAL PROPERTY TRANSACTIONS

3. When a lawyer acts jointly for more than one client in a real property transaction, the lawyer must comply with the obligations set out in Code rules 3.4-5 (Joint retainers) to 3.4-9.

Simple conveyance

4. In determining whether or not a transaction is a simple conveyance, a lawyer should consider:

(a) the value of the property or the amount of money involved,

(b) the existence of non-financial charges, and

(c) the existence of liens, holdbacks for uncompleted construction and vendor's obligations to complete construction.

Commentary

[1] The following are examples of transactions that may be treated as simple conveyances when this commentary does not apply to exclude them:

(a) the payment of all cash for clear title,

(b) the discharge of one or more encumbrances and payment of the balance, if any, in cash,

(c) the assumption of one or more existing mortgages or agreements for sale and the payment of the balance, if any, in cash,

(d) a mortgage that does not contain any commercial element, given by a mortgagor to an institutional lender to be registered against the mortgagor's residence, including a mortgage that is

(i) a revolving mortgage that can be advanced and re-advanced,

(ii) to be advanced in stages, or

(iii) given to secure a line of credit,

(e) transfer of a leasehold interest if there are no changes to the terms of the lease,

(f) the sale by a developer of a completed residential building lot at any time after the statutory time period for filing claims of builders' liens has expired, or

(g) any combination of the foregoing.

[2] The following are examples of transactions that must not be treated as simple conveyances:

(a) a transaction in which there is any commercial element, such as

(i) a conveyance included in a sale and purchase of a business,

(ii) a transaction involving a building containing more than three residential units, or

(iii) a transaction for a commercial purpose involving either a revolving mortgage that can be advanced and re-advanced or a mortgage given to secure a line of credit,

(b) a lease or transfer of a lease, other than as set out in commentary [1], subparagraph (e),

(c) a transaction in which there is a mortgage back from the purchaser to the vendor,

(d) an agreement for sale,

(e) a transaction in which the lawyer's client is a vendor who:

(i) advertises or holds out directly or by inference through representations of sales staff or otherwise as an inducement to purchasers that a registered transfer or other legal services are included in the purchase price of the property,

(ii) is or was the developer of property being sold, unless commentary [1], subparagraph (f) applies,

(f) a conveyance of residential property with substantial improvements under construction at the time the agreement for purchase and sale was signed, unless the lawyer's clients are a purchaser and a mortgagee and construction is completed before funds are advanced under the mortgage, or

(g) the drafting of a contract of purchase and sale.

[3] A transaction is not considered to have a commercial element merely because one of the parties is a corporation.

Advice and consent

5. If a lawyer acts for more than one party in the circumstances as set out in paragraph 2 (Acting for parties with different interests) of this Appendix, then the lawyer must, as soon as is practicable,

(a) advise each party in writing that no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned and that, if a conflict of interest arises, the lawyer cannot continue to act for any of them in the transaction,

(b) obtain the consent in writing of all such parties, and

(c) raise and explain the legal effect of issues relevant to the transaction that may be of importance to each such party.

Commentary

[1] If a written communication is not practicable at the beginning of the transaction, the advice may be given and the consent obtained orally, but the lawyer must confirm that advice to the parties in writing as soon as possible, and the lawyer must obtain consent in writing prior to completion.

[2] The consent in writing may be set out in the documentation of the transaction or may be a blanket consent covering an indefinite number of transactions.

Foreclosure proceedings

6. In this paragraph, "mortgagor" includes "purchaser," and "mortgagee" includes "vendor" under an agreement for sale, and "foreclosure proceeding" includes a proceeding for cancellation of an agreement for sale.

If a lawyer acts for both a mortgagor and a mortgagee in the circumstances set out in paragraph 2 (Acting for parties with different interests), the lawyer must not act in any foreclosure proceeding relating to that transaction for either the mortgagor or the mortgagee.

This prohibition does not apply if

(a) the lawyer acted for a mortgagee and attended on the mortgagor only for the purposes of executing the mortgage documentation,

(b) the mortgagor for whom the lawyer acted is not made a party to the foreclosure proceeding, or

(c) the mortgagor has no beneficial interest in the mortgaged property and no claim is being made against the mortgagor personally.

8. If the lawyer witnesses the execution of the necessary documents as set out in paragraph 7 (Unrepresented parties in real property transaction), it is not necessary for the lawyer to obtain the consent of the party or parties for whom the lawyer acts.

9. If one party to the real property transaction is otherwise unrepresented but wants the lawyer representing another party to the transaction to act for them to remove existing encumbrances, the lawyer may act for that party for those purposes only and may allow that party to execute the necessary documents in the lawyer's presence as witness if the lawyer advises the party in writing that:

(a) the lawyer's engagement is of a limited nature, and

(b) if a conflict arises between the parties, the lawyer will be unable to continue to act for that party.

APPENDIX D – SUPERVISION OF PARALEGALS

Key concepts

Lawyers who use paralegals need to be aware of several key concepts:

1. The lawyer maintains ultimate responsibility for the supervision of the paralegal and oversight of the file;

2. Although a paralegal may be given operational carriage of a file, the retainer remains one between the lawyer and the client and the lawyer continues to be bound by their professional, contractual and fiduciary obligations to the client;

3. The Society will protect the public by regulating the lawyer who is responsible for supervising the paralegal in the event of misconduct or a breach of the *Legal Profession Act* or Law Society Rules committed by the paralegal;

4. A lawyer must limit the number of persons that they supervise to ensure that there is sufficient time available for adequate supervision of each person.

5. A paralegal must be identified as such in correspondence and documents they sign and in any appearance before a court or tribunal.

6. Lawyers must not delegate any matter to paralegals that the lawyers would not be competent to conduct themselves.

2. A lawyer must actively mentor and monitor the paralegal. A lawyer should consider the following:

(a) Train the paralegal as if they were training an articled student. A lawyer must be satisfied the paralegal is competent to engage in the work assigned;

(b) Ensuring the paralegal understands the importance of confidentiality and privilege and the professional duties of lawyers. Consider having the paralegal sign an oath to discharge their duties in a professional and ethical manner;

(c) Gradually increasing the paralegal's responsibilities;

(d) A lawyer should engage in file triage and debriefing to ensure that matters delegated are appropriate for the paralegal and to monitor competence. This may include:

(i) testing the paralegal's ability to identify relevant issues, risks and opportunities for the client;

(ii) engaging in periodic file review. File review should be a frequent practice until such time as the paralegal has demonstrated continued competence, and should remain a regular practice thereafter;

(iii) ensuring the paralegal follows best practices regarding client communication and file management.

5. Discuss paralegal supervision with a Society practice advisor if you have any concerns.

3. What work experience does the paralegal have, with particular importance being placed on legal work experience?:

(a) Preference or weight should be given to work experience with the supervising lawyer or law firm;

(b) If the experience is with another law firm, consider contacting the prior supervising lawyer for an assessment;

(c) Does the paralegal have experience in the relevant area of law?

(d) What responsibilities has the paralegal undertaken in the past in dealing with legal matters?

4. What personal qualities does the paralegal possess that make them well-suited to take on enhanced roles:

(a) How responsible, trustworthy and mature is the paralegal?

(b) Does the paralegal have good interpersonal and language skills?

(c) Is the paralegal efficient and well organized?

(d) Does the paralegal possess good interviewing and diagnostic skills?

(e) Does the paralegal display a strong understanding of both the substantive and procedural law governing the matter to be delegated?

(f) Does the paralegal strive for continuous self-improvement, rise to challenges, etc.?

3. If a designated paralegal has reason to believe family violence may be present, it is essential the paralegal bring this to the supervising lawyer's attention so the lawyer can turn their mind to the issue and the potential risks associated with it.

2. Giving legal advice and independent legal advice involves consideration of process and of the content of the advice. As a matter of process the lawyer, or designated paralegal, must obtain the relevant factual information from the client. This requires the skill of focusing on necessary factual material, rather than an exhaustive and costly exploration of all potential facts no matter how tangential they may be. Once the lawyer, or designated paralegal, has the factual foundation, they advise the client of the legal rights, obligations and remedies that are suggested by the facts. Finally, the lawyer should make a recommendation as to the preferred course of conduct and explain in clear terms why the suggested course is preferred.

2025 Task Forces

To: Benchers

Purpose: Approval (Consent Agenda)

From: Brook Greenberg, KC
First Vice-President

Date: November 1, 2024

Background and Discussion

1. Following a review of the current Law Society Task Forces and looking ahead to 2025, I propose that the Benchers approve the winding up of two of our current Task Forces and the creation of two new Task Forces.

2. Task Forces are groups that exist for a period of time in order to accomplish a specific objective, with the expectation that the Task Force will be terminated on completion of their work. This then frees up resources for other work to be done.

3. The Lawyer Development Task Force (LDTF) was created in 2020 with a mandate to undertake an evaluation of what will be required in the future to ensure the development and maintenance of a well-educated and qualified bar to serve the public of British Columbia. I am of the view that the LDTF has completed the work asked of it, including with respect to the Competencies Framework, and that the LTDF should be wound up at the end of this year.

4. The Trust Review Task Force (TRTF) was established in 2022 with a mandate to consider recommendations from the Cullen Commission and also assess the current trust accounting rules against the objectives of those rules, including consideration of their enforcement. I intend for the Trust Review Task Force (TRTF) to present its final report to the Benchers at the February 7, 2025 meeting, which will conclude its work, and at that point the TRTF should then be wound up.

5. To continue moving forward with the work commenced at our Bencher Retreat this year, I propose that the Benchers establish a new Task Force on Bullying, Harassment, and Discrimination in the Legal Profession, with a 2-year mandate, to make recommendations for appropriate regulatory responses, including alternative processes, to address these issues.

6. Finally, I propose that the Benchers establish a new Task Force on Law Society Discipline Processes, with a 2-year mandate, to consider and provide advice on how to coordinate and integrate the newer aspects of our discipline processes with the traditional discipline framework, including consideration of the best practices and approaches to attain the goal of a principled and effective discipline system.

7. Proposed terms of reference for these two new task forces will be developed and brought back to Benchers for approval at a subsequent meeting.

Decision

8. In keeping with the above, I would ask the Benchers to approve the following resolution:

BE IT RESOLVED that the Benchers approve:

a. **The dissolution of the Lawyer Development Task Force, effective as of December 31, 2024;**

b. **The dissolution of the Trust Review Task Force on presentation of its final report to the Benchers on February 7, 2025;**

c. **The establishment of a Task Force on Bullying, Harassment, and Discrimination in the Legal Profession with a 2-year mandate; and.**

d. **The establishment of a Task Force on Law Society Discipline Processes with a 2-year mandate.**

CEO Report

November 1, 2024

Prepared for: **Benchers**

Prepared by: **Don Avison, KC**

1. Provincial Election – Outcomes/Implications

BC's Provincial Election took place on October 19, 2024.

While the election writs had not yet been returned at the time of this writing, the outcome stands at:

46 NDP
45 Conservative
0 Independent
2 Green
2 seats remain undetermined and subject to recounts

As noted above, after almost a week from the election date, the final result has not been confirmed and recounts are underway in two ridings where the NDP currently lead (by only 23 votes in Juan de Fuca-Malahat).

In many respects, the situation is similar to what happened with the 2017 election which ultimately resulted in the NDP forming government after concluding a Confidence and Supply Agreement with the Green Party which, at that time was led by Andrew Weaver. In that situation the Greens had had three seats which made appointing a Speaker somewhat easier than what may be the case this time around. The situation is further complicated by the fact that Green Party leader Sonia Fursteneau was unsuccessful in Victoria-Beacon Hill (although she plans to remain as party leader during the transition).

It will be some time yet before the return of the election writs and some time after that before the Lieutenant-Governor invites one of the party leaders to endeavour to form a government.

I expect Mr. Eby will explore the opportunity for another Confidence-style agreement with the Greens but, based on the previous experience, that may be more challenging.

No matter what happens, I don't expect to see any Cabinet appointments for several weeks yet.

The outcome of the election clearly has implications for Bill-21 and this will be discussed in greater detail during the *in camera* portion of both the November 1st and 29th Bencher meetings.

2. Vancouver County By-election

The call for nominations came to a close on October 15 with three candidates putting their names forward for consideration. Candidate biographies and election statements can be found on the Law Society website. Voting in the by-election will take place electronically through Simply Voting from November 7 to 4:30pm on November 14, and votes will be counted on November 15, 2024.

3. Bill 21 – Transition Work

As Benchers know, the composition of the Transitional Board was confirmed some time ago and a meeting of the group took place on October 21, 2024.

Government has also now convened the first meeting of the "Regulated Paralegal Working Group". That took place virtually on October 10th and a full-day in-person meeting is to take place in November.

The Working Group is chaired by Assistant Professor, Lisa Trabucco, of the Faculty of Law at the University of Windsor. Bencher Michèle Ross and LSBC Senior Director Lesley Small are on the Working Group along with 12 others who come from a variety of backgrounds. The timeline for this process contemplates a final report being provided in November of 2025.

4. "Interesting Times" – Professional Regulation in Alberta

In recent days the Premier of Alberta, together with the Justice Minister, has announced plans to review and then develop legislation regarding the scope of professional regulation in that jurisdiction. A video of the announcement can be found here and I would urge all Benchers to view the video prior to the November 1st meeting.

5. Annual General Meeting Resolution Follow-Up

Benchers will want to have a discussion at some future point regarding member resolutions passed at the 2024 AGM.

Staff are developing background materials on several aspects of the resolutions to assist with future consideration of the resolutions. This will include assessment of what kind of legislative changes might be required in establishing a membership category for articled students. Work is also being done to examine the costs, and other implications, of a differential fee that would reduce the practice fee for those in their first three years of practice. That analysis will also provide Benchers with information on a more targeted approach – similar to the needs-based application model that the LSBC deployed during the early stages of the COVID pandemic.

While resolution three was not successful, we have always taken the position that periodic amendments, corrections and additions will be made to the Indigenous Cultural Awareness Program. Work on the development of the next iteration of the program, which is likely to include additional information on the residential school experience, is now underway with a view towards having those changes completed by the first quarter of 2025.

Benchers may also wish to consider whether any action is required regarding the proposed reinstatement of mandatory call ceremonies.

6. November 29 Bencher Meeting

The last Bencher meeting of the year will now take place on November 29.

The original plan was for that meeting to take place on the morning followed by a call ceremony at the Great Hall of the Vancouver Law Courts in the afternoon.

That plan is now reversed with the call ceremony to take place in the morning, a lunch in the Bencher Room at noon and with the Bencher meeting commencing at 1:00 pm that afternoon.

7. Staffing Update

With the departure of Natasha Dookie as the Law Society's Chief Legal Officer, Gurprit Bains has stepped in as the Acting Chief Legal Officer.

Thanks again to Natasha for everything she has accomplished here at the LSBC and our very best wishes for success in her new role.

Don Avison, KC
Chief Executive Officer

Law Society
of British Columbia

Demographic Data Collection and Use – A Proposed New Approach

To: Benchers

Purpose: Discussion and Decision (In Principle)

From: Staff

Date: November 1, 2024

Issue

1. Ensuring equal access to the legal profession is recognized by the Supreme Court of Canada as part of the Law Society's duty to uphold the public interest.[1] To equip the Law Society with a key tool to identify, learn about, and address systemic inequities in its regulatory requirements and within the profession, the Law Society has committed, through the priorities identified in the Strategic Plan and the Diversity Action Plan, and through the work of its Advisory Committees, to re-evaluate its approach to demographic data collection.

2. In undertaking work to address issues associated with the Law Society's current approach, three key challenges were identified. First, almost all demographic data collected only comes from a subset of the profession (practising lawyers) and excludes other categories of lawyers, such as retired lawyers, non-practising lawyers, and articled students. Secondly, demographic data is primarily collected anonymously, which limits the Law Society's ability to connect different data sets and to perform advanced statistical and intersectional analysis, which is necessary to develop a nuanced understanding of existing systemic inequalities and to track changes in the profession over time. Finally, the current wording and format of the demographic self-identification questions that appear following the completion of the Annual Practice Declaration (APD) do not align with best practices and the quality of data being collected through this process could be improved.

3. As such, a new approach to demographic data collection is required. This report makes a recommendation to Benchers proposing the key principles to govern the collection of demographic data in the future, based on the fundamental premise that demographic data will be used solely at an aggregate level, and will not be used for individual regulatory decisions.

Background

Demographic data is an organizational priority

4. Demographic data refers to information related to populations and the groups within it. For instance, Statistics Canada[2] collects demographic details such as age, indigeneity, ethnicity, language, gender, and sex. These demographics can serve as fundamental categories through which individuals self-identify within society while also encompassing social identities that

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[1] See *Trinity Western University v. Law Society of Upper Canada,* 2018 SCC 33 at para 23 ("Access to justice is facilitated where clients seeking legal services are able to access a legal profession that is reflective of a diverse population and responsive to its diverse needs. Accordingly, ensuring a diverse legal profession, which is facilitated when there are no inequitable barriers to those seeking to access legal education, furthers access to justice and promotes the public interest").

[2] Statistics Canada. "Population and Demography." *Statistics Canada*, Government of Canada, https://www.statcan.gc.ca/en/subjects-start/population_and_demography.

may be imposed by others[3]. Importantly, these social identities underpin various social hierarchies or systems of oppression, such as ageism, racism, sexism, colonialism, ableism, linguicism, and heteronormativity, which significantly shape people's experiences and outcomes.[4, 5] Using demographic data to capture these social identities is therefore crucial for addressing systemic inequalities.

5. In this regard, improved demographic data can help the Law Society better understand diversity and inclusion in the legal profession, explore the extent to which it reflects the population of British Columbia, identify systemic inequalities, and promote equitable treatment. Furthermore, this data will help the Law Society survey developments in the demographic composition of lawyers in British Columbia over time.

6. The Law Society has for some time recognized the need for direct demographic data from lawyers, rather than deducing it from census data of the general population in British Columbia. However, the Law Society's approach to the collection and use of demographic data has remained fragmented and requires updating since the self-identification survey was first introduced in 2013.[6] In recent years, updating the demographic data of BC legal professionals has been included as a strategic priority[7], and is part of the Law Society's broader efforts to advance a profession that reflects the diversity of the public it serves. The Diversity Action Plan[8] also includes several action items related to demographic data, such as updating the survey for more detailed responses, encouraging lawyers to respond to demographic self-identification questions, exploring additional data collection methods, and monitoring diversity statistics over time.

7. The Law Society prioritized a review of its demographic data practices early this year, forming part of the work plans of the Equity, Diversity & Inclusion Advisory Committee (EDIAC) and the Truth & Reconciliation Advisory Committee (TRAC). These consultations and discussions have played an important role in the development of this report.

8. EDIAC and TRAC considered a range of issues including challenges with the existing demographic data and provided valuable feedback to staff. It was clear based on these discussions that EDIAC, TRAC, and staff shared a commitment to reform the Law Society's current approach to demographic data. Based on this consensus, staff undertook an

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[3] Hogg, Michael A., and Dominic Abrams. *Social Identifications: A Social Psychology of Intergroup Relations and Group Processes*. Routledge, 1988.
[4] Collins, Patricia Hill. *Intersectionality as Critical Social Theory.* Duke University Press, 2020.
[5] Purdie-Vaughns, Valerie. "Intersectional Invisibility: The Distinctive Advantages and Disadvantages of Multiple Subordinate-Group Identities." Columbia University, 2008.
[6]The 2012 Law Society report titled "Towards a More Representative Legal Profession" highlighted the need for direct demographic data from lawyers, rather than relying on secondary census data from the general population in British Columbia.
[7] Law Society's Strategic Plan (2021-2025)
[8] Law Society of BC, Diversity Action Plan (2020)

environmental scan to gather information about other law societies' approaches to demographic data collection and to catalog current best practices. Best practices for revising the Law Society's approach to collecting demographic data from BC lawyers were discussed with both EDIAC and TRAC in July 2024. EDIAC and TRAC were both subsequently consulted on the contents of this report at their respective meetings in September and October 2024.

Current Demographic Data Collection and Use

9. The Law Society's demographic data on lawyers in BC is currently collected and stored in two different ways.[9] First, limited demographic information about a lawyer is collected through the application for admission process and is linked to each lawyer's individual "member profile" in the Law Society's Information System (LSIS).[10] This information is therefore identifiable. Because this data is linked to a specific individual, the information can be used as variables in statistical and intersectional analysis to examine how these factors relate to various aspects of lawyers' profiles. For example, the data can be used to determine the number of lawyers practising part-time by age or to analyze the distribution of age across firms of different sizes, practice areas, geographic locations etc.

10. A second set of demographic information is collected separately and anonymously through a single, omnibus demographic question that appears following the completion of the APD, the following paragraphs discuss the history of the single, omnibus demographic question and the limitations of this approach.

11. The APD, which has evolved over the years, was originally designed to collect information that was considered essential to direct regulation of lawyers. Various questions have been added to the APD to provide statistical information for regulating the profession as a whole.

12. In 2013, the single "demographic self-identification" question was added to the end of the APD process, so that it appeared after the regulatory questions had been completed and could be completed anonymously rather than as part of the identifiable APD process. This was a means of gathering data to compare the composition of the profession to baseline census data.[11] The decision to collect this type of demographic data on an anonymous basis was informed by two concerns. First, as some individuals consider diversity characteristics to be highly personal and may have concerns about the Law Society's use of this data, it was

[9] This year, the Law Society of British Columbia also collected demographic data for the first time from 88 articling students, 13 individuals who had completed articling but had not yet been called to the bar, 33 individuals who had been called to the bar but were not currently practising lawyers, and 380 new lawyers as part of a survey on articling experiences.
[10] LSIS is internal to the Law Society, cannot be accessed by the public, and is subject to a number of security protocols.
[11] It was anticipated that directly obtaining demographic information from lawyers through self-identification questions would be a more effective method of data collection than relying on indirect information from the census.

anticipated that anonymity would increase the number of lawyers responding to the demographic questions. Second, as the Law Society is bound by the *Freedom of Information and Protection of Privacy Act* (*FIPPA*), if demographic data were connected to lawyers' profiles, aggregate data about whether certain demographics of lawyers were over-represented in credentials, complaints, investigations, and disciplinary processes could be subject to disclosure, which may lead to negative perceptions about diverse lawyers if the data is not interpreted or reported in a thoughtful manner.

13. As the current demographic data collection following the APD process is limited to practising lawyers, it therefore excludes other key sections of the legal profession, such as non-practising lawyers, retired lawyers, and articled students. This exclusion reduces the representativeness of the dataset. As of 2023, the excluded population comprised 1,567 non-practising lawyers, 1,086 retired lawyers, and 655 articled students, whose demographic information is not captured by the APD process.

14. The anonymity of the demographic data collected through the single, omnibus demographic question results in significant limitations, hindering the Law Society's ability to conduct advanced statistical analyses such as assessing the role of multiple factors in predicting different variables of interest. To exemplify, multiple regression is a statistical analysis that uses demographic variables like age, gender, and racial identity as control variables. This allows researchers to control or account for other covariates while studying the association between two variables.[12] For example, one can determine whether gender predicts the number of complaints, after controlling for factors like age and racial identity. Furthermore, because one is unable to connect lawyers' demographic information collected through the single omnibus question with other variables stored on LSIS, it is not possible to examine how multiple intersecting social locations can shape a lawyer's outcomes and experiences.

15. Several limitations arise from collecting demographic data through the single, omnibus question following the completion of the APD process. The question asks respondents to select all applicable characteristics from the following options: 1) Aboriginal/Indigenous – First Nations, Métis, Inuit, 2) Visible Minority/Racialized/Person of Colour, 3) Person with a Disability, 4) Lesbian/Gay/Bisexual/Transgender, 5) I do not identify with any of these characteristics, and 6) I choose not to answer this question. Critically, the structure of the question does not allow for identification with subcategories within the provided options, limiting the granularity of the data collected. Moreover, the terminology of the existing social categories is outdated and does not capture other relevant identities that underlie systemic inequality.

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[12] Darlington, Richard B., and Andrew F. Hayes. *Regression Analysis and Linear Models: Concepts, Applications, and Implementation.* The Guilford Press, 2017.

Internal Consultation and Interjurisdictional Review

16. At any time when personal information is collected, best practices require that there is a clear and well-considered reason for doing so, particularly when collecting sensitive personal information. Accordingly, a cross-department consultation was conducted to evaluate staff's current and potential uses of demographic data. This consultation was a critical part of defining the various reasons for collecting demographic data, and provided key insights that better positioned the Law Society to be able to clearly communicate why it is doing so.

17. To better understand how other legal regulators approach demographic data collection, the practices of eight other law societies (Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, and Newfoundland and Labrador) were reviewed. Information was sought on a range of topics, including how this data was collected, whether their demographic data was collected anonymously, whether it was collected from all lawyers, and what kind of demographic questions were used. The key findings were as follows:

    a. The most common approach for collecting demographic data is through an annual filing process;

    b. All contacted law societies collect demographic data in a non-anonymous manner (i.e., linking the data to individual lawyer's names or ID numbers to different degrees);

    c. Some law societies collected demographic data from all licensees, not just practising lawyers; and

    d. The majority of law societies collect demographic data by asking multiple questions.

18. In comparison, although the Law Society of British Columbia also collects a limited amount of demographic data on an annual basis, unlike most other law societies, BC's data is collected anonymously, it is only sought from practising lawyers and consists of a single, omnibus question rather than multiple questions.

Best Practices for Data Collection, Use, and Publication

19. In order to revise the Law Society's current approach, staff reviewed best practices for data collection, use, and publication from multiple sources.[13] Key sources included the BC Office of the Human Rights Commissioner's report on *Disaggregated Demographic Data Collection in British Columbia: The Grandmother Perspective* (Grandmother Perspective

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[13] The work will also be guided by the Indigenous Framework, the Truth and Reconciliation Action Plan, and the Indigenous Engagement in Regulatory Matters Task Force Report.

Report)[14] that informed the *Anti-Racism Data Act*,[15] the UN Office of the High Commissioner for Human Rights report titled *Human Rights-Based Approach to Data* (UN Report),[16] the BC Government's *What They Heard* reports (What They Heard Reports),[17] and the American Psychological Association's (APA) Publication Manual.[18]

20. The following best practices, distilled from these sources, ought to guide any actions by the Law Society with respect to demographic data:

   a. **Define Purpose and Objectives:** Clearly articulate the purpose and objectives for collecting demographic data, ensuring they align with structural change or equity-seeking goals. (Grandmother Perspective Report)

   b. **Consider Benefits and Risks:** Demographic data can be a powerful tool for advancing human rights by revealing systemic inequalities and supporting policy and structural changes. However, it is crucial to manage the associated risks to fully realize these benefits. (Grandmother Perspective Report) A supplementary document[19] to the Grandmother Perspective Report outlines some potential harms of disaggregated data and proposes mitigation strategies. **Appendix A** sets out these harms and explains how the Law Society would implement these strategies in any future actions regarding demographic data.

   c. **Engage in Reflexive Practices:** Incorporate continual reflection on individual, social, and institutional biases throughout data collection, analysis, and use. (Grandmother Perspective Report)

   d. **Respect Indigenous Data Sovereignty:** Adhere to Indigenous data sovereignty principles (OCAP[20]: ownership, control, access, possession), include diverse Indigenous voices, and prevent the misuse of data to maintain community trust. (Grandmother Perspective Report; What They Heard Reports)

   e. **Engage Marginalized Communities:** Involve marginalized communities meaningfully. Develop respectful relationships, grounded in community data governance, and address risks and benefits through consultation processes.

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[14] Disaggregated Demographic Data Collection in BC: The Grandmother Perspective
[15] *Anti-Racism Data Act* (gov.bc.ca)
[16] UN Human Rights Commission's Report on Human Rights-Based Approach to Data
[17] What They Heard Reports
[18] *Publication Manual of the American Psychological Association*. 7th ed., American Psychological Association, 2020.
[19] British Columbia Human Rights Commission. *Disaggregated Data Recommendation Summary*. June 2021, BC Human Rights Commission, https://bchumanrights.ca/wp-content/uploads/BCOHRC_June2021_Disaggregated-Data-Recommendation-Summary_FINAL.pdf.
[20] First Nations Information Governance Centre. "The First Nations Principles of OCAP." Accessed June, 2024. https://fnigc.ca/ocap-training/.

(Grandmother Perspective Report; UN Report)

f. **Define Categories Clearly:** Clearly define demographic categories and variables used in the report, ensuring definitions are precise and understandable to avoid ambiguity. (Grandmother Perspective Report; APA Publication Manual)

g. **Ensure Data Security:** Establish clear criteria for data collection with secure platforms, independent oversight, transparency, and culturally trained staff to address concerns about data misuse. (What They Heard Reports) For example, the staff working on this project will be trained in relevant courses such as the First Nations Principles of OCAP (Ownership, Control, Access, and Possession) by the First Nations Information Governance Centre to ensure that the Law Society's data handling processes align with best practices.

h. **Respect Self-Identification:** Avoid imposing social identities on individuals and ensure their self-identification is respected. (Grandmother Perspective Report; UN Report)

i. **Update Nomenclature:** Carefully consider the naming of categories to move beyond outdated notions of diverse social categories, including race, gender, and indigeneity. (Grandmother Perspective Report)

j. **Avoid Stereotypes:** Be mindful of cultural considerations when discussing demographic data. Avoid stereotypes or insensitive language that could misrepresent or harm communities. (Grandmother Perspective Report; APA Publication Manual)

k. **Examine Multiple Social Identities using Intersectionality:** Apply the intersectionality framework to account for the impact of multiple intersecting social identities. This framework suggests that individuals often belong to multiple social groups—such as race, class, and gender—that are interconnected and mutually reinforcing.[21] Intersectionality emphasizes examining the unique experiences of disadvantage and privilege that arise from these intersections, rather than focusing on single identity groups. [22] (Grandmother Perspective, UN Report)

l. **Obtain Informed Consent:** Ensure that participants understand the study's purpose, methods, potential risks, and benefits before agreeing to participate. This practice respects participants' autonomy, promotes transparency, and maintains

[21] Crenshaw, Kimberlé. "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color." Stanford Law Review, vol. 43, no. 6, 1991, pp. 1241-1299.
[22] Collins, Patricia Hill, and Sirma Bilge. *Intersectionality.* Polity Press, 2016.

the ethical integrity of the research. Consent must be obtained freely and without coercion using consent forms/participant information sheets that elaborate on the above-mentioned aspects. (APA Publication Manual)

m. **Ensure Confidentiality:** Implement robust confidentiality measures and data privacy mechanisms to uphold human rights standards. In line with *FIPPA*, ensure identifiable data is anonymized for statistical purposes. (Grandmother Perspective Report; APA Publication Manual)

n. **Permit Voluntary Disclosure:** Allow participants to voluntarily disclose demographic characteristics with relevant, optional questions that they are free to skip. Voluntary disclosure respects individuals' autonomy and privacy. (*Anti-Racism Data Act*, Grandmother Perspective Report; UN Report)

o. **Share Methodology and Findings Accurately:** Publicly disclose research methodology details, procedures, and findings promptly to ensure transparency and enable communities to hold stakeholders accountable. Present data accurately and avoid making broad generalizations or assumptions based on demographic characteristics. Provide context and acknowledge nuances where applicable. (Grandmother Perspective Report; UN Report; APA Publication Manual)

Analysis & Recommendation

21. Informed by the cross-departmental scan, the review of other law societies' approaches to demographic data collection, best practices in demographic data research, and feedback from EDIAC and TRAC, staff propose the following principles form the basis of a new approach to the collection and use of demographic data:

    a. continue collecting demographic data on a voluntary basis, but in an identifiable rather than anonymous manner;

    b. collect demographic data from all categories of licensees (practising, non-practising, and retired), as well as other individuals governed by the Law Society; and

    c. review and revise the demographic data questions asked currently in the APD to ensure alignment with best practices and improve the quality of data being collected.

22. This approach is based on the fundamental premise that demographic data will be used solely at an aggregate level, and will not be used for individual regulatory decisions. In that regard,

demographic data collected through this approach would be distinct from any information required from anyone engaging with a Law Society admission process.

23. Collecting data in an identifiable manner would provide the Law Society with information with which it could undertake advanced statistical and intersectional analysis which is a key tool to identify, learn about, and address systemic inequalities in the Law Society's regulatory processes. Specifically, collecting attributable data facilitates the connection of variables from different data sets. For instance, this will help the Law Society identify how various social categories may be linked with systemic/structural inequality, understand how this can influence a lawyer's experiences and regulatory outcomes, track demographic changes over time, and promote a profession that better reflects the diversity of the public it serves.

24. Revising the current approach to demographic data collection would also enable the exploration of critical questions such as how demographic identities, including race, gender, and disability, influence the experiences and outcomes of lawyers in British Columbia, for instance in relation to issues like bullying, harassment, and discrimination. It would also allow for assessing whether the demographic composition of lawyers reflects the broader population of the province and provide an intersectional analysis of lawyers from diverse communities. This enhanced data would offer deeper insights to assist us in advancing reconciliation as well as diversity, equity, and inclusion within the profession.

25. It is important to explicitly acknowledge and recognize in this report the systemic challenges and barriers faced by lawyers from equity-deserving groups,[23] including those rooted in ageism, colonialism, heteronormativity, and sexism. The goal of improving demographic data collection is to provide the Law Society with insights into these barriers and to capture relevant social identities in a way that enables it to address the issues most effectively within the current context.

26. Critical to moving away from collecting data in an anonymous manner will be commitments to confidentiality and privacy. Access to the data, once collected, would be highly restricted, and the data will be de-identified before being analyzed. Any public reporting of the data, for example in Law Society reports or in any response to an *FIPPA* request, would require that

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[23] For instance, a 2018 survey on bullying and sexual harassment in the legal profession by the International Bar Association, covering 135 countries, revealed widespread issues. Approximately 1 in 3 female respondents and 1 in 14 male respondents reported experiencing sexual harassment at work, while bullying was reported by about 1 in 2 female respondents and 1 in 3 male respondents. Similarly, a national study on the psychological health of Canadian legal professionals conducted by the University of Sherbrooke between 2020 and 2022 found that 8% of lawyers experienced unwanted sexual advances in the past year, with higher rates among disadvantaged groups: 13% of women compared to 3.5% of men, 14.6% of LGBTQ2S+ individuals, 11.2% of Indigenous lawyers, 10.4% of racialized lawyers, and 11.6% of those with disabilities. Additionally, an assessment of articling programs by the Law Societies of Alberta, Saskatchewan, and Manitoba in 2019 found that 32% of students and new lawyers reported experiencing discrimination or harassment during recruitment or articling. Notably, 54% of those affected were women, compared to 22% men.

the data be de-identified and disclosed only in aggregate format, to ensure that the answers cannot be traced back to a specific respondent.

27. Relatedly, it will be important for the Law Society to be proactive in making the anonymized aggregate data publicly available, to demonstrate its commitment to transparency and accountability. Moreover, demographic data can play a critical role in furthering diversity and promoting equity in the legal profession. Publicly available demographic data can encourage law firms, bar associations, courts, and law schools to promote inclusiveness. Researchers can use this data to study diversity trends, career progression, and challenges faced by equity-deserving groups. Further, communities can leverage this data to advocate for fairer representation in legal institutions. Additionally, it can help build trust with licensees, especially those from diverse backgrounds, by demonstrating that we recognize the barriers they face and are actively supporting the work of various stakeholders to address these inequities. In this way, publicly available demographic data can help underscore the need to address systemic barriers, drive policy reforms, and ensure that the legal profession reflects and serves society more effectively. Risk remains that data could be interpreted by third parties not in a thoughtful manner, or in a manner in which systemic issues including colonialism are not appropriately considered. This can be mitigated at least in part by the Law Society providing appropriate context in any reporting of the results, including information about the collection methodology to demonstrate the limits of what conclusions can reasonably be drawn from the data.

28. It is important to acknowledge that the success of this new approach is predicated on trust, which is the Law Society's responsibility to build and maintain. It is anticipated that these changes, in particular the collection of non-anonymous data, may cause skepticism about the Law Society's goals and hesitation or fear about the potential misuse of data. Staff is committed to engaging in extensive consultation throughout the process including transparent communication in regards to the Law Society's goals and data security practices when collecting and using demographic data in an effort to build the trust required for this new approach to succeed.

29. The experiences of other Canadian law societies that do not collect demographic data anonymously suggest that eliminating anonymity while maintaining the confidentiality of the data is unlikely to decrease response rates to demographic questions. Indeed, in general, the Law Society of British Columbia does not have a lower response rate than other Law Societies, and while an initial decrease in response rates[24] is anticipated given the changes,

[24] A survey's response rate is the percentage of eligible participants who completed the survey, while the nonresponse rate represents those who did not, with nonresponse potentially affecting the quality of the survey estimates. The current response rate to the omnibus demographic question included in the APD stands around 80%. According to Babbie (2004), while there are not strict statistical standards regarding response rates, the literature on social research indicates that a response rate of 50 percent is generally seen as sufficient for analysis and reporting, 60 percent is considered good and 70 percent is very good. See Babbie, E. (2004). *The practice of social research*

improvements are expected over time. Ensuring clear, consistent, and repeated communications with the profession regarding the rationale for the shift in approach, the purpose of collecting demographic data (i.e., addressing systemic inequalities), what the data will *not* be used for (i.e., individual-level analysis), how the confidentiality of this information will be maintained (i.e., restricted access), and how the data will be published (i.e., in de-identified, aggregate form only) is likely to have the greatest impact on encouraging lawyers to respond to these types of questions.

30. Collecting information from lawyers of all practice statuses in addition to other individuals governed by the Law Society would enable it to identify and address issues related to the experience of all regulated professionals. The data could be used to look for trends in individuals who move between statuses, which would help identify and address systemic issues in that regard. Moreover, collecting demographic data from articled students could put the Law Society in the position to analyze data over the life-cycle of a legal career and barriers to entering the profession.

31. The omnibus demographic data question does not align with best practices and needs to be revised to align with these principles. Revising these questions will improve the quality of the data that will be collected, and will demonstrate the Law Society's commitment to responsible data collection. In addition to these reforms, supplemental (also voluntary) questions could be added to address the evolving challenges and experiences of lawyers (e.g., questions about bullying, harassment, and discrimination, questions about succession planning, questions about access to justice, pro bono work, community involvement, etc.), and look for similarities and differences in how individuals with different demographic attributes experience these challenges to further assist identifying and addressing systemic inequalities.

32. A revised approach to collecting demographic data following the completion of the APD will enable the Law Society to use more current and inclusive terminology and allow for greater nuance. Including additional subcategories will enhance accuracy and relevance. Likewise, adding more social identities, after consulting with different stakeholders, will provide a more comprehensive understanding of systemic inequalities and barriers.

33. Instituting this new approach to demographic data collection represents change, challenge, and opportunity. Staff are committed to doing the work required to not only improve the quality of the data collected, but also the usability of the data to assist the Law Society in ensuring equal access to the legal profession as part of the Law Society's duty to uphold the public interest.

(10th ed.). Wadsworth Publishing. For a deeper exploration of response rate variability, see Miller, Delbert C., and Neil J. Salkind. *Handbook of Research Design and Social Measurement.* 6th ed., Sage Publications, 2002.

Next Steps

34. If the Benchers are supportive of the new approach and principles proposed to guide demographic data collection and use as described in this report, staff will continue to seek advice from EDIAC, TRAC, and the Senior Advisor, Indigenous Engagement throughout the process and engage in extensive planning and consultation. Staff will also undertake a Privacy Impact Assessment, engage in consultations with individuals in the legal community from diverse backgrounds, conduct focus groups to gather input, and engage in internal review and consultation.

35. Based on these discussions, staff will develop operational changes to the collection and use of demographic data to be presented for review and approval by Benchers and any relevant Committees, as required.

Decision

36. The following resolution is presented for Bencher consideration and decision:

BE IT RESOLVED THAT the Benchers approve, in principle, that the Law Society adopt a new approach to the collection and use of demographic data based on the following principles:

a. continue collecting demographic data on a voluntary basis, but in an identifiable rather than anonymous manner;

b. collect demographic data from all categories of licensees (practising, non-practising, and retired), as well as other individuals governed by the Law Society; and

c. review and revise the demographic data questions currently asked following completion of the Annual Practice Declaration to ensure alignment with best practices and improve the quality of data being collected.

Appendix A – Disaggregated Data[1]: Harms & Proposed Mitigation Strategies

A supplementary document[2] to the Grandmother Perspective Report outlined various harms associated with disaggregated data collection and offered several recommendations to ensure this data furthers the aims of equity and justice. Building on these suggestions, the following sets out the identified harms and the proposed actions that the Law Society can take to mitigate them.

Identified Harm	Proposed Action for the Law Society
Data collection concerning Indigenous peoples has frequently disregarded Indigenous sovereignty, violating their rights to own and control their data.	Ensure that the development of demographic data collection and use, and regularly includes consultations with the Senior Advisor, Indigenous Engagement, TRAC, and others directly connected to this work. Ensure that staff working on demographic data are trained in and adhere to principles from relevant courses, such as the First Nations Principles of OCAP (Ownership, Control, Access, and Possession) by the First Nations Information Governance Centre (FNIGC). Share the results and interpretations of the data with the Indigenous communities involved, allowing them to influence how the data is used.
Disaggregated data can reinforce stigma and systemic oppression against marginalized people and communities.	Implement clear purpose statements defining the equity goal(s) for data collection, emphasizing systemic change. Provide context when presenting disaggregated data to avoid misinterpretation and to highlight systemic factors rather than individual or community deficits. Monitor how the data is being used and be open to feedback from the affected communities to make necessary adjustments.

[1] According to the grandmother perspective report disaggregated data refers to data that provides sub-categories of information, for example by ethnic group, gender, or occupation. They are sometimes called demographic data.

[2] Disaggregated Data: Summary of Recommendations to Prevent Harm to Communities. BC Human Rights Commission, June 2021, (https://bchumanrights.ca/wp-content/uploads/BCOHRC_June2021_Disaggregated-Data-Recommendation-Summary_FINAL.pdf).

Disaggregated data has historically served as a tool for oppression and surveillance over marginalized communities.	Include members of marginalized communities in the research process. Develop a research design that allows the Law Society to account for the perspective of lawyers from diverse backgrounds using qualitative methods before the survey. For example, conducting focus groups can enable the Law Society to unpack common challenges facing lawyers from diverse backgrounds and assess the wording of demographic questions. This data will inform quantitative data collection, which will be reported in a way that challenges, rather than perpetuates systemic oppression and stigma against marginalized communities.
Disaggregated data can perpetuate the notion that individuals and groups are responsible for their own marginalization by portraying them as deficient or implying identities are rooted in innate biological differences rather than recognizing them as socially constructed[3]. This perspective overlooks that these identities and perceived deficiencies are not objectively defined; rather, they are subjectively constructed through social interactions and the language that shapes our understanding of reality.	When presenting the findings, actively challenge and deconstruct deficit narratives by presenting alternative explanations or interpretations of the data that highlight systemic factors rather than individual or group shortcomings. Ensure that staff working with the data remain open-minded about both quantitative and qualitative methods of data collection. Encourage reflexivity among researchers and data analysts to critically examine their assumptions and biases when working with demographic data. Frame demographic data collection within broader social, historical, and systemic contexts that shape marginalization, acknowledging the multiple social hierarchies influencing our experiences and outcomes.
Disaggregated data, though typically de-identified, faces an increasing risk of re-identification due to rapid technological advancements.	Ensure data collection adheres to *FIPPA*, refrain from publishing any information that could identify individuals, and implement robust confidentiality measures consistent with the Five Safes model to the fullest extent possible. The Five Safes model ensures data

[3] Gergen, Kenneth J. An Invitation to Social Construction. SAGE Publications, 1999.

	protection through measures including restricting access to authorized individuals directly connected to the project, and de-identification for protection of privacy. As part of the informed consent process, LSBC would use a Participant Information Form. This form informs participants about the purpose of data collection, their rights, how their data will be protected, used, and reported at an aggregate level in an untraceable manner before they consent to answer the demographic questions. Moreover, even though the data collected will be analyzed and reported only at the aggregate level, staff will ensure that the data is de-identified before analysis, further preventing any possibility of tracing it back to individual respondents.

Law Society
of British Columbia

2025 Bencher & Executive Committee Meetings

Executive Committee	Bencher	Other Dates
Thursday, January 23 **Hybrid**	Friday, February 7 **Hybrid**	Jan 1: New Year's Day Jan 29: Lunar New Year Feb 5: New Bencher Orientation Feb 7: Welcome/Farewell Dinner TBA: CBABC Provincial Council Meeting TBA: CBA Annual General Meeting Feb 17: Family Day
Thursday, March 27 **Virtual**	Friday, April 11 **Hybrid**	Feb 28 (sundown)-Mar 29 (sundown): Ramadan March 17-28: Spring Break March 30 (sundown)-April 1 (sundown) Eid April 13: Vaisakhi April 18: Good Friday April 21: Easter Monday TBA: IILACE Conference
Thursday, May 15 **Hybrid**	Saturday, May 31 **Hybrid**	May 19: Victoria Day May 29 to 31: LSBC Bencher Retreat (TBC) TBD: LSA Retreat
Thursday, June 19 **Virtual**	Friday, July 4 **Virtual**	June 21: National Indigenous Peoples Day July 1: Canada Day TBA: Federation Council Meeting Aug 4: BC Day Sept 1: Labour Day
Thursday, September 4 **Hybrid**	Friday, September 19 **Hybrid**	Sept 23 (sundown)-24 (sundown): Rosh Hashanah Sept 30: Truth and Reconciliation Day Oct 1 (sundown)-2 (sundown): Yom Kippur **Oct 7: AGM** Oct 13: Thanksgiving Day
Wednesday, October 8 **Virtual**	Friday, October 24 **Virtual**	Nov 1: Diwali TBA: IBA Annual Conference Nov 11: Remembrance Day TBA: Federation Fall Meetings
Thursday, November 20 **Hybrid**	Friday, December 5 **Hybrid**	Nov 14: Bencher General Elections Dec 25: Christmas Day Dec 26: Boxing Day Dec 14(sundown)-Dec 22 (sundown): Hanukkah Dec 26-Jan 1: Kwanzaa

DM4293903

Approved by Executive Committee at January 18, 2024 meeting, revisions approved by Executive Committee on October 9, 2024.

Law Society
of British Columbia

Bencher Retreat 2024 – Discrimination, Harassment & Bullying in the Legal Profession

To: Benchers

Purpose: For Information

From: Staff

Date: November 1, 2024

Bencher Retreat Conference 2024

1. The Law Society Bencher Retreat was held in Whistler, BC from Thursday, May 30, 2024 to Saturday June 1, 2024. Attendees included Benchers, representatives of the Federation of Law Societies of Canada, representatives from the Law Societies of Alberta, Saskatchewan, and Manitoba, and staff.

2. On Friday May 31, 2024, Bencher Retreat attendees participated in a one-day conference program dedicated to addressing discrimination, harassment, and bullying in the legal profession.[1] The conference was chaired by First Vice-President Brook Greenberg, KC, who selected the topics for discussion and the presenters.

Conference Presentations

3. The conference program consisted of four presentations:

   a. **Discrimination, Harassment & Bullying in the Legal Profession:** Bencher Natasha Tony and Law Society staff member Claire Marchant provided guidance on creating space for inclusive dialogue on these difficult topics, gave an overview of the state of harassment, discrimination, and bullying in the legal profession, and provided a summary of current actions being undertaken by the Law Society to address these issues.

   b. **Role of the Regulator, the Model Code & the Duty to Report:** Professor Amy Salyzyn provided her views on the appropriate role of a regulator in addressing these issues, the changes to the Federation Model Code of Professional Conduct in regard to discrimination, harassment, and bullying, and corresponding amendments to the *Code of Professional Conduct for British Columbia*. Professor Salyzyn also explored the issue of the potential creation of a mandatory duty to report in regard to these issues in the Model Code and provided her views in regard to the implications of that course of action.[2]

   c. **Lessons from the Labour, Employment & Investigation Practice:** Sara Forte and Jessica Forman from Forte Law presented on these issues from their vantage point as lawyers in private practice with labour, employment, and workplace investigation practices. The presentation also included information about bystander training, and provided an overview of what would be covered in a typical bystander training session.

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[1] Given the challenging nature of the material, registered therapeutic counsellor Erin Peters was present at the retreat to provide counselling services to conference participants should they be required.

[2] For more information, see: Reporting Sexual Harassment: A New Professional Duty for Lawyers? - Slaw

d. **Regulatory Response of the NZLS to Discrimination, Harassment & Bullying:** Gareth Smith, General Manager, Professional Standards from the Law Society of New Zealand provided an overview of actions taken by the Law Society of New Zealand to addresses these issues, including the introduction of a mandatory duty to report.

Conference Discussions

4. The retreat conference provided the opportunity for discussion and reflection on a number of important points. The discussion around a potential mandatory duty to report was particularly timely, as that is an issue currently being considered by the Federation Model Code Standing Committee. Generally conference participants shared the concerns in regard to unintended consequences of a mandatory duty to report for people who have experienced discrimination, harassment, or bullying along the lines of those expressed by Professor Salyzyn, and that feedback has been shared with the Standing Committee.

5. Discussion also explored the key challenges of what actions the Law Society can take to remove barriers to reporting and facilitate alternative processes. These discussions focused around the challenges presented by firm culture and power imbalances, and opportunities for the Law Society to explore alternative processes and increase education, training, and awareness.

Going Forward

6. Discrimination, harassment and bullying in the legal profession has and will continue to be an area of focus for the Law Society. Recent years have seen significant progress on these issues,[3] but there is still much more to do. The Articled Student Placement program, the pilot for which was approved by Benchers on June 1, 2024, presents a key opportunity to assist students exit untenable articling environments and complete their articles in better circumstances. The results of the recent survey of articled students, new lawyers, principals, recruiters and mentors will provide meaningful sources of guidance on what else the Law Society can do to address these issues in the profession.

7. Benchers and staff share a commitment to addressing discrimination, harassment, and bullying in the legal profession, and this work will continue in earnest.

[3] The revisions to *Code of Professional Conduct for BC* Section 6.3 (Harassment and discrimination), the Equity Advisor program, witness accommodations, commitment to trauma-informed practices, published decisions, and improved website materials, amongst other initiatives.