Law Society of Alberta

Code of Conduct

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Introduction

The Law Society of Alberta participated with the Federation of Law Societies of Canada in the development of a Model Code of Conduct from 2004 to 2010. The Professional Responsibility Committee and the Benchers then undertook a thorough review to ensure that the Model Code was current and complied with Alberta law and practice. Alberta lawyers will find the format and paragraph numbering new. At the same time, the content preserves much of the commentary, cross referencing and legal referencing characteristic of the former Code of Professional Conduct that served so well as a practical guide to lawyer conduct.

The practice of law continues to evolve. That is mainly why the Law Society has adopted the Code of Conduct set out in the following pages. Interprovincial lawyer mobility, anticipated in 1995, has arrived as a reality and allows lawyers to practice in every province and territory in the country. National and regional law firms are prevalent and international firms are emerging. The establishment of uniform national ethical standards is also important to the tradition of a strong independent bar. These factors all favor the establishment of national standards governing lawyer conduct.

The Alberta Code of Professional Conduct was introduced in 1995. The drafters intended to provide Alberta lawyers with practical guidance about the rules governing ethical conduct and clear direction when exercising professional judgment about them. They succeeded admirably. The following Preface is retained from the 1995 Alberta Code because it expresses the timeless nature of lawyers' professional obligations in the unambiguous language characteristic of the whole document.

Preface

Lawyers have traditionally played a vital role in the protection and advancement of individual rights and liberties in a democratic society. Fulfillment of this role requires an understanding and appreciation by lawyers of their relationship to society and the legal system. By defining and clarifying expectations and standards of behaviour that will be applied to lawyers, the Code of Conduct is intended to serve a practical as well as a motivational function.

Two fundamental principles underlie this Code and are implicit throughout its provisions. First, a lawyer is expected to establish and maintain a reputation for integrity, the most important attribute of a member of the legal profession. Second, a lawyer's conduct should be above reproach. While the Law Society is empowered by statute to declare any conduct deserving of sanction, whether or not it is related to a lawyer's practice, personal behaviour is unlikely to be disciplined unless it is dishonourable or otherwise indicates an unsuitability to practise law. However, regardless of the possibility of formal sanction, a lawyer should observe the highest standards of conduct on both a personal and professional level so as to retain the trust, respect and confidence of colleagues and members of the public.

The legal profession is largely self governing and is therefore impressed with special responsibilities. For example, its rules and regulations must be cast in the public interest, and its members have an obligation to seek observance of those rules on an individual and collective basis. However, the rules and regulations of the Law Society cannot exhaustively cover all situations that may confront a lawyer, who may find it necessary to also consider legislation relating to lawyers, other legislation, or general moral principles in determining an appropriate course of action.

Disciplinary assessment of a lawyer's conduct will be based on all facts and circumstances as they existed at the time of the conduct, including the willfulness and seriousness of the conduct, the existence of previous violations and any mitigating factors.

A member of the Law Society remains subject to this Code no matter where the member practises law. If a lawyer becomes a member of the bar of another jurisdiction in addition to that of Alberta, and there is an inconsistency or conflict between the rules of conduct of the two jurisdictions in a given instance, the rules of the jurisdiction in which the lawyer is practising in that matter will normally prevail. However, the Law Society continues to have jurisdiction over the lawyer. Disciplinary proceedings by another governing body may form the basis for proceedings in Alberta.

The willingness and determination of the profession to achieve widespread compliance with this Code is a more powerful and fundamental enforcement mechanism than the imposition of sanctions by the Law Society. A lawyer must therefore be vigilant with respect to the lawyer's own behaviour as well as that of colleagues. However, it is inconsistent with the spirit of this Code to use any of its provisions as an instrument of harassment or as a procedural weapon in the absence of a genuine concern respecting the interests of a client, the profession or the public.

Definitions

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-discipline practice providing services that support or supplement the practice of law;

"client" includes a client of a lawyer's firm, whether or not the lawyer handles the client's work, and may include a person who reasonably believes that a lawyer-client relationship exists, whether or not that is the case at law;

Commentary

A lawyer-client relationship is often established without formality. For example, an express retainer or remuneration is not required for a lawyer-client relationship to arise. Also, in some circumstances, a lawyer may have legal and ethical responsibilities similar to those arising from a lawyer-client relationship. For example, a lawyer may meet with a prospective client in circumstances that give rise to a duty of confidentiality, and, even though no lawyer-client relationship is ever actually established, the lawyer may have a disqualifying conflict of interest if he or she were later to act against the prospective client. It is, therefore, in a lawyer's own interest to carefully manage the establishment of a lawyer-client relationship.

"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 letter recording the consent;

"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;

"law firm" includes one or more lawyers practising:

(a) in a sole proprietorship;

(b) in a partnership;

(c) as a clinic operated by Legal Aid Alberta;

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

(e) in a corporation or other organization;

(f) from the same premises, while expressly or impliedly holding themselves out to be practising law together and indicating a commonality of practice through physical layout of office space, firm name, letterhead, signage and business cards, reception and telephone-answering services, or the sharing of office systems and support staff;

(g) from the same premises and indicating that their practices are independent.

"lawyer" means an active member of the Society, an inactive member of the Society, a suspended member of the Society, a student-at-law and a lawyer entitled to practise law in another jurisdiction who is entitled to practise law in Alberta. A reference to "lawyer" includes the lawyer's firm and each firm member except where expressly stated otherwise or excluded by the context;

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

"Society" means the Law Society of Alberta;

"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 1 – Standards of the Legal Profession

1.01 Integrity

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

Commentary

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

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

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.

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

Commentary

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

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

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

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

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

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

Chapter 2 – Relationships to Clients

2.01 Competence

Definitions

2.01 (1) In this rule

"competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client 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 with the client at all relevant stages of a matter in a timely and effective manner;**
- **(e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;**
- **(f) applying intellectual capacity, judgment and deliberation to all functions;**
- **(g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;**

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

(i) managing one's practice effectively;

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

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

Competence

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

Commentary

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.

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

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.

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.

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.

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) make reasonable efforts to assist the client to obtain competent legal representation from another lawyer;

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

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

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.

Lawyers owe clients a duty of competence, regardless of whether the retainer is a full service or a limited scope retainer. When a lawyer considers whether to provide legal services under a limited scope retainer, the lawyer must consider whether the limitation is reasonable in the circumstances. For example, some matters may be too complex to offer legal services pursuant to a limited scope retainer. (See Rule 2.02(1.1)).

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

A lawyer should 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.

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.

In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services

unrelated to the legal services retainer will also be subject to the constraints outlined in the rules/by-laws/regulations governing multi-discipline practices.

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.

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

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.

Incompetence, Negligence and Mistakes

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

2.02 Quality of Service

Quality of Service

2.02 (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

This rule should be read and applied in conjunction with Rule 2.01 regarding competence.

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.

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. A lawyer must use reasonable efforts to ensure that the client comprehends the lawyer's advice and recommendations.

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

Examples of expected practices

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 and emails;

(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) avoiding 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.

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

2.02 (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

The scope of the service to be provided should be discussed with the client, and the client's acknowledgement and understanding of the risks and limitations of the retainer should be confirmed in writing. The lawyer should clearly identify the tasks for which the lawyer and the client are each responsible. The lawyer should advise the client about related legal issues which fall outside the scope of the limited scope retainer, and advise the client of the consequences of limiting the scope of the retainer, to allow the client to have enough information on which to base a decision to limit or expand the retainer.

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. Modifications to the scope of the limited scope retainer, or the obligations of the client and lawyer, should be confirmed in writing. The lawyer should also consider advising the client when the lawyer's retainer has ended.

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. Lawyers should consider whether disclosure of the limited nature of the retainer is required by the rules of practice governing a particular tribunal or other circumstances.

In Alberta, Rule 2.27 of the Rules of Court requires lawyers to inform the court if the lawyer is retained for a limited or particular purpose.

When one party is receiving legal services pursuant to a limited scope retainer, the lawyers representing all the parties in the matter should consider how communications from opposing counsel in a matter should be managed. (See Rule 6.02(8.1)).

This rule does not apply to situations in which a lawyer is providing summary advice or to initial consultations that may result in the client retaining the lawyer.

Summary advice may include advice received in a brief consultation on a telephone hotline or from duty counsel, for example, or may otherwise be advice which is received during the provision of short-term legal services, described in Rule 2.04(13).

Honesty and Candour

2.02 (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

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.

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.

Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client's perspective, or

may have concerns about the client's position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.

Client Instructions

2.02 (3) A lawyer must obtain instructions from the client on all matters not falling within the express or implied authority of the lawyer.

Commentary

Assuming that there are no practical exigencies requiring a lawyer to act for a client without prior consultation, the lawyer must consider before each decision in a matter whether and to what extent the client should be consulted or informed. Even an apparently routine step that clearly falls within the lawyer's authority may warrant prior consultation, depending on circumstances such as a particular client's desire to be involved in the day to day conduct of a matter.

A lawyer has an ethical obligation to put all settlement offers to the client and to obtain specific instructions with regard to making or accepting settlement offers on a client's behalf (see Rule 2.02(1)). In addition, certain decisions in litigation, such as how a criminal defendant will plead, whether a client will testify, whether to waive a jury trial and whether to appeal, require prior discussion with the client. As to other, less fundamental decisions, if there is any doubt in the lawyer's mind as to whether the client should be consulted, it is most prudent to do so.

If a client persistently refuses or fails to provide instructions, the lawyer is entitled to withdraw (see Rule 2.07(2)). If, however, the failure to provide instructions is due to the client's disappearance or incapacity, the lawyer has additional duties to attend to before withdrawal is justified (see Rules 2.02(4) and 2.02(12) and accompanying commentaries).

When acting for a corporation, on an in house basis or otherwise, a lawyer may encounter difficulty in identifying who within the corporation has authority to give instructions and receive advice on the client's behalf. In this regard, see Rule 2.02(6) and related commentary.

2.02 (4) When a lawyer is unable to obtain instructions from a client because the client cannot be located, the lawyer must make reasonable efforts to locate the client.

Commentary

Circumstances dictating the extent of a lawyer's efforts to locate a missing client include the facts giving rise to the inability to contact the client and importance of the issue on which instructions are sought. A wilful disappearance may mandate a less strenuous attempt at location, while the potential loss of a significant right or remedy will require greater efforts. In the latter case, the lawyer should take such steps as are reasonably necessary and in accordance with the lawyer's implied authority to preserve the right or remedy in the meantime. Once a matter moves beyond the implied authority of the lawyer and all attempts to locate the client have been unsuccessful, the lawyer may be

compelled to withdraw since a representation may not be continued in the absence of proper instructions.

2.02 (5) When receiving instructions from a third party on behalf of a client, a lawyer must ensure that the instructions accurately reflect the wishes of the client.

Commentary

It is not inherently improper for a lawyer to accept instructions on a client's behalf from someone other than the client. For example, a client may be indisposed or unavailable and therefore unable to provide instructions directly, or a lawyer may be retained at the suggestion of another advisor, such as an accountant, with the result that at least the initial contact is made by the advisor on the client's behalf.

In these circumstances a lawyer must verify that the instructions are accurate and were given freely and voluntarily by a client having the capacity to do so. The lawyer's freedom of access to the client must be unrestricted. In certain situations it may be appropriate for the lawyer to insist on meeting alone with the client (see also Rule 2.02(1) and related commentary).

From time to time a lawyer is retained and paid by one party but requested to prepare a document for execution by another party. While on a technical analysis the instructing party may be the client, the facts may indicate a relationship with the other party as well that carries with it certain duties on the part of the lawyer, such as the duty to make direct contact with the other party to confirm the instructions. If, for example, a lawyer has been asked to prepare a power of attorney or a will for a relative of the person providing instructions, the possibility of coercion or undue influence requires that steps be taken to protect the interests of the relative. If that person's wishes cannot be satisfactorily verified, it is improper for the lawyer to carry out the instructions.

Accepting payment from a third party – A lawyer may be paid by one person, such as an insurance company or union, while being retained to act for another person, such as an insured individual or union member, who has standing to provide instructions directly to the lawyer. In this situation, the lawyer must clarify through discussions with both parties at the outset of the representation whether the lawyer will be acting for both parties, or only for the person instructing the lawyer.

If both parties are to be represented by the lawyer in the relevant matter, then the conflict of interest rules will apply, regarding multiple representations. Briefly, the lawyer must make an independent judgment whether acting for both is in the parties' best interests; both parties must consent to the terms of the arrangement after full disclosure; and the lawyer will not be permitted to keep material information confidential from either party. In the event that a dispute develops, the lawyer will be compelled to cease acting altogether unless, at the time the dispute arises, both parties consent to the lawyer's continuing to represent one of them.

In some circumstances, the person responsible for payment may agree that the other person will be considered the sole client of the lawyer in that matter if (for example) the first party is paying the other's legal fees through courtesy or philanthropy or pursuant to a prepaid legal services plan. In this event, the lawyer should be satisfied that the financially responsible party understands the significance of the characterization of the other party as the sole client and, in particular, that the financially responsible party will have no right to request or receive confidential information regarding the matter.

Some prepaid legal services plans do not offer subscribers a choice of counsel. A lawyer participating in such a plan must explain to the client the implications of this lack of choice at the first available opportunity (See also Rule 2.06(11) regarding prepaid legal services plans).

When the Client is an Organization

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

Commentary

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

In addition to acting for the organization, a lawyer may also accept a joint retainer and act for a person associated with the organization. For example, a lawyer may advise an officer of an organization about liability insurance. In such cases the lawyer acting for an organization should be alert to the prospects of conflicts of interests and should comply with the rules about the avoidance of conflicts of interests (Rule 2.04).

Encouraging Compromise or Settlement

2.02 (7) A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

Commentary

Determining whether settlement or compromise is a realistic alternative requires objective evaluation and the application of a lawyer's professional judgment and experience to the circumstances of the case. The client must then be advised of the advantages and drawbacks of settlement versus litigation. Due to the uncertainty, delay and expense inherent in the litigation process, it is often in the client's interests that a matter be settled. On the other hand, because a lawyer's role is that of advocate rather than adjudicator, going to trial is justified if the client so instructs and the matter is meritorious (see Rule 4.01(2)(b)). A lawyer should not press settlement for personal reasons such as an overloaded calendar, lack of preparation, reluctance to face judge or opposing counsel in a courtroom setting, or possible financial benefit due to the terms of a fee agreement.

Threatening Criminal or Regulatory Proceedings

2.02 (8) A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:

(a) to initiate or proceed with a criminal or quasi-criminal charge; or

(b) to make a complaint to a regulatory authority.

Commentary

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

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

Inducement for Withdrawal of Criminal or Regulatory Proceedings

2.02 (9) 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 the 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

"Regulatory authority" includes professional and other regulatory bodies.

A lawyer for an accused or potential accused must never influence a complainant or potential complainant not to communicate or cooperate with the Crown. However, this rule does not prevent a lawyer for an accused or potential accused from communicating with a complainant or potential complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between the accused and the complainant. When a proposed resolution involves valuable consideration being exchanged in return for influencing the Crown or the 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 the 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 the regulatory authority.

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 the regulatory authority.

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

Fraud by Client

2.02 (10) When acting for a client, a lawyer must not advise or assist a client to commit a fraud, crime or illegal conduct, nor instruct the client on how to violate the law and avoid punishment.

Commentary

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.

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.

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

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

This rule is not intended to prevent a lawyer from fully explaining the options available to a client, including the consequences of various means of proceeding, or from representing after the fact a client accused of wrongful conduct. However, a lawyer may not act in furtherance of a client's improper objective. An example would be assisting a client to implement a transaction that is clearly a fraudulent preference. Nor may a lawyer purport to set forth alternatives without making a direct recommendation if the lawyer's silence would be construed as an indirect endorsement of an illegal action.

The mere provision of legal information must be distinguished from rendering legal advice or providing active assistance to a client. If a lawyer is reasonably satisfied on a balance of probabilities that the result of advice or assistance will be to involve the lawyer in a criminal or fraudulent act, then the advice or assistance should not be given. In contrast, merely providing legal information that

could be used to commit a crime or fraud is not improper since everyone has a right to know and understand the law. Indeed, a lawyer has a positive obligation to provide such information or ensure that alternative competent legal advice is available to the client. Only if there is reason to believe beyond a reasonable doubt, based on familiarity with the client or information received from other reliable sources, that a client intends to use legal information to commit a crime should a lawyer decline to provide the information sought.

Fraud when Client an Organization

2.02 (11) A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act fraudulently, criminally or illegally, must do the following, in addition to his or her obligations under Rule 2.02 (10):

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

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

(c) if the organization, despite the lawyer's advice, continues with or intends to pursue the unlawful conduct, withdraw from acting in the matter in accordance with Rule 2.07.

Commentary

The past, present, or proposed misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency, but also for the public who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences for the public at large. This rule addresses some of the professional responsibilities of a lawyer acting for an organization, including a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is fraudulent, criminal or illegal. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (Rule 2.03).

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

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

A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in an unlawful manner, may advise the chief executive officer and must advise the chief legal officer of the misconduct. If the unlawful 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 unlawful conduct, the lawyer must withdraw from acting in the particular matter in accordance with Rule 2.07. In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

This rule recognizes that lawyers as the legal advisors 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

2.02 (12) 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

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

impairs his or her ability to make decisions, the lawyer will have to assess whether the impairment is minor or whether it prevents the client from giving instructions or entering into binding legal relationships.

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

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

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

When a lawyer takes protective action on behalf of a person or client lacking in capacity, the authority to disclose necessary confidential information may be implied in some circumstances: See Commentary under Rule 2.03(1) (Confidentiality) for a discussion of the relevant factors. If the court or other counsel becomes involved, the lawyer should inform them of the nature of the lawyer's relationship with the person lacking capacity.

Language Rights

2.02 (13) (a) A lawyer should advise a client of the client's language rights, where applicable, including the right to proceed in the official language of the client's choice.

(b) Where a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer should not undertake the matter unless the lawyer is competent to provide the required services in that language or arranges for the assistance of an interpreter.

Commentary

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 established by Parliament and in criminal proceedings. This may not include provincial superior courts or courts of appeal. The lawyer should also be aware that provincial or territorial legislation may provide additional language rights, including in relation to aboriginal languages. In Alberta, for example, the Languages Act and Regulation provide guidance on the use of French and English. *The Rules of Court* also provide information on translation in court proceedings.

When a lawyer considers whether to provide the required services in the official language chosen by the client, the lawyer should carefully consider whether it is possible to render those services in a competent manner as required by Rule 2.01(2) and related commentary.

2.03 Confidentiality

Confidential Information

2.03 (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 rule.

Commentary

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.

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

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.

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 2.04 Conflicts).

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.

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. When acting for more than one party in the same matter, a lawyer must disclose to all such parties any material confidential information acquired by the lawyer in the course of the representation and relating to the matter in question. While multiple representation is generally discouraged, there are circumstances in which it is in the best interests of the parties involved (see Rule 2.04, Conflicts). A lawyer will be precluded, however, from receiving material information in connection with the matter from one client and treating it as confidential in respect of the others. This aspect of the representation must be disclosed to the clients in advance so that their consent is an informed one.

When lawyers share space, the risk of advertent or inadvertent disclosure of confidential information is significant even if the lawyers involved exert efforts to insulate their respective practices. Consequently, the definition of “law firm” includes lawyers practising law from the same premises but otherwise practising law independently of one another. To comply with Rule 2.04 regarding Conflicts, lawyers in space-sharing arrangements must share certain confidential client information with each other. For example, it will be necessary to know the identities of clients of the other lawyers to determine when conflicts exist. When a conflict check shows that a person against whom one of the lawyers wishes to act was previously represented by another of the lawyers, those lawyers may need to discuss the nature of any confidential information possessed by the previous lawyer. Accordingly, the implied consent to disclosure of information referred to in Rule 2.03(1) extends to all lawyers practising in such an arrangement.

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

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

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 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.

A lawyer may have an obligation to disclose information under Rule 4.05 (2-3). If client information is involved in those situations, the lawyer should be guided by the provisions of this rule.

Use of Confidential Information

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

Commentary

See Rule 2.04, Conflicts. The fiduciary relationship between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer's use of a client's confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client's or former client's consent before disclosing confidential information.

There is generally an obligation to disclose to a client all information that must be disclosed to enable the lawyer to properly carry out the representation. A lawyer must decline to act in a matter, therefore, or must withdraw from an existing representation if all of the following circumstances are present:

(a) the lawyer is in possession of confidential information of a current or former client that is material to that matter or representation;

(b) the current or former client will not consent to disclosure of the information to the other client or potential client; and

(c) it is impossible to properly carry out the representation or prospective representation without making such disclosure or, alternatively, the client or potential client in that matter is unwilling to accept legal advice based on the information without actually being privy to the information and therefore insists on disclosure.

Under these circumstances, the lawyer is unable to act in the best interests of that client and cannot represent or continue to represent the client.

Future Harm / Public Safety Exception

2.03 (3) A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that an identifiable person or group is in imminent danger of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

Commentary

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. In some very exceptional situations identified in this rule, disclosure without the client's permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.

Serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

In assessing whether disclosure of confidential information is justified to prevent substantial harm, 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.

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

If confidential information is disclosed under Rule 2.03(3), the lawyer should prepare a written note as soon as possible, which should include:

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

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

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

Disclosure of Confidential Information by Lawyers

2.03 (4) If it is alleged that a lawyer or the lawyer's associates or employees:

(a) have committed a criminal offence involving a client's affairs;

(b) are civilly liable with respect to a matter involving a client's affairs;

(c) have committed acts of professional negligence; or

(d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer;

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

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

2.03 (6) A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct.

2.03 (7) A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from a lawyer's proposed transfer to a new law firm, or from a proposed law firm merger or acquisition, but only if disclosure does not otherwise prejudice the client.

Commentary

Lawyers in different firms may need to disclose limited client information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. (see Rules 2.04 (6) – (11).)

Disclosure of client information would only be made once substantive discussions regarding the new relationship have occurred. The exchange of information needs to be done in a manner consistent with the requirement to protect client confidentiality and privilege and to 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.

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

As the disclosure is made on the basis that it is solely for the use of checking conflicts where lawyers are transferring between firms and for establishing reasonable measures to protect confidential client information, the new law firm should agree with the transferring lawyer that it will:

(a) limit access to the disclosed information;

(b) not use the information for any purpose other than detecting and resolving conflicts; and

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

Lawyers must be sensitive to the disclosure of information which may prejudice the client. For example:

- a corporate client may be seeking advice on a corporate takeover that has not been publicly announced;
- a person may consult a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse;
- a person may consult a lawyer about a criminal investigation that has not led to charges being laid.

2.04 Conflicts

Duty to Avoid Conflicts of Interest

2.04 (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

A conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. A substantial risk is one that is significant and, while not certain or probable, is more than a mere possibility. A client's interests may be prejudiced unless the lawyer's advice, judgment and action on the client's behalf are free from conflicts of interest.

A lawyer must examine whether a conflict of interest exists not only from the inception of the retainer but throughout its duration, as new circumstances or information may establish or reveal a conflict of interest.

The disqualification of a lawyer may mean the disqualification of all lawyers in the law firm, due to the definition of "law firm" and "lawyer" in this Code. The definition of a law firm also includes practitioners who practise with other lawyers in space-sharing or other arrangements.

The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests

Lawyers' duties to former clients are primarily concerned with protecting confidential information. Duties to current clients are more extensive, and are based on a broad fiduciary duty, which prevails regardless of whether there is a risk of disclosure of confidential information.

The lawyer-client relationship is a fiduciary relationship. Lawyers accordingly owe a duty of loyalty to current clients, which includes the following:

- the duty not to disclose confidential information;
- the duty to avoid conflicting interests;
- the duty of commitment to the client's cause; and
- the duty of candour with a client on matters relevant to the retainer.

The Role of the Court and Law Societies

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

Consent and Disclosure

Except for representing opposing parties in a dispute (see Rule 2.04 (2)), these rules allow a lawyer to continue to act in a matter even when in a conflict of interest, if the clients consent. The lawyer must also be satisfied that the lawyer is able to proceed without a material and adverse effect on the client.

As defined in these rules, “consent” means fully informed and voluntary consent after disclosure. Disclosure may be made orally or in writing, and the consent should be confirmed in writing.

“Disclosure” means full and fair disclosure of all information relevant to a person’s decision, in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed. A lawyer therefore should inform the client of the relevant circumstances and the reasonably foreseeable ways that a conflict of interest could adversely affect the client interests. This would include the lawyer's relations to the parties and any interest in connection with the matter.

This rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest. In some cases, however, the lawyer should recommend such advice, especially if the client is vulnerable or not sophisticated.

Express Consent

Express consent is required in the case of conflicts involving multiple retainers, former clients, and transferring lawyers, and in the case of lawyers’ personal interests or relationships coming into conflict with the interests of clients. Disclosure is an essential requirement to obtaining a client’s consent. The lawyer must inform the client about all matters relevant to evaluating the conflict. Where it is not possible to provide the client with disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

Implied Consent

In cases involving the simultaneous representation of current clients, consent may either be express or implied. Implied consent is applicable in only exceptional cases. It may be appropriate to imply consent when acting for government agencies, chartered banks and other entities that might be considered sophisticated and frequent consumers of legal services from a variety of law firms. The matters must be unrelated, and the lawyer must not possess confidential information from one client that could affect the other client.

The nature of the client is not a sufficient basis upon which to imply consent. The terms of the retainer, the relationship between the lawyer and client, and the unrelated matters involved must be considered. There must be a reasonable basis upon which a lawyer may objectively conclude that the client commonly accepts that its lawyers may act against it.

Where legal services are either highly specialized or are scarce, consent to act for another current client may be implied, depending on the circumstances.

Advance Consent

Consent may be obtained in advance of a conflict of interest arising, provided the consent is sufficiently comprehensive to contemplate the subsequent conflict, and there has been no change of circumstances that would render the initial consent invalid. The client must be able to understand the risks and consequences of providing the advance consent.

While not required, in some circumstances it may be advisable to recommend that the client obtain independent legal advice before deciding whether to provide advance consent. Advance consent must be recorded in writing or contained in the retainer agreement.

Disputes

2.04 (2) A lawyer must not represent opposing parties in a dispute.

Commentary

The existence of a dispute precludes joint representation, not only because it is impossible to properly advocate more than one side of a matter, but because the administration of justice would be brought into disrepute.

It is sometimes difficult to determine whether a dispute exists. While a litigation matter qualifies as a dispute from the outset, parties who appear to have differing interests or who disagree are not necessarily engaged in a dispute. The parties may wish to resolve the disagreement by consent, in which case a lawyer may be requested to act as a facilitator in providing information for their consideration. At some point, however, a conflict or potential conflict may develop into a dispute. At that time, the lawyer would be compelled by Rule 2.04(1) to cease acting for more than one party and perhaps to withdraw altogether.

In determining whether a dispute exists, a lawyer should have regard for the following factors:

- the degree of hostility, aggression and "posturing";
- the importance of the matters not yet resolved;
- the intransigence of one or more of the parties; and
- whether one or more of the parties wishes the lawyer to assume the role of advocate for that party's position.

If clients have consented to a joint retainer, a lawyer is not necessarily precluded from advising clients on non-contentious matters, even if a dispute has arisen between them. When in doubt, a lawyer should cease acting.

Mediation or Arbitration

This rule does not prevent a lawyer from mediating or arbitrating a dispute between clients or former clients where:

(a) the parties consent;

(b) it is in the parties' best interests that the lawyer act as mediator or arbitrator; and

(c) the parties acknowledge that the lawyer will not be representing either party and that no confidentiality will apply to material information in the lawyer's possession.

Current Clients

2.04 (3) A lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client, even if the matters are unrelated, unless both clients consent.

Commentary

This rule mirrors the bright line rule articulated by the Supreme Court of Canada.

The lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. For example, one client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer's representation of a client with adverse legal interests.

A client is a current client if the lawyer is currently acting for the client, and may be a current client despite there being no matters on which the lawyer is currently acting. In determining whether a client is a current client, notwithstanding that the lawyer has no current files, the lawyer must take into consideration all the circumstances of the lawyer-client relationship, including, where relevant:

- the duration of the relationship;
- the terms of the past retainer or retainers;
- the length of time since the last representation was completed or the last representation assigned; and
- whether the client uses other lawyers for the same type of work.

When determining if one client's legal interests are directly adverse to the immediate legal interests of another current client, a lawyer must consider the following factors:

- the immediacy of the legal interests;
- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;
- the temporal relationship between the matters;

- the significance of the issue to the immediate and long-term interests of the clients involved; and
- the clients' reasonable expectations in retaining the lawyer for the particular matter or representation.

The bright line rule cannot be used to support tactical abuses. For example, it is inappropriate for a lawyer to raise a conflict of interest in order to disqualify an opposing lawyer for an improper purpose, or to inconvenience an opposing client.

This rule will not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. In exceptional cases, a client's consent that a lawyer may act against it may be implied. (See commentary to Rule 2.04(1).)

A lawyer's duty of candour requires that a lawyer inform a client about any factors relevant to the lawyer's ability to provide effective representation. If the lawyer is accepting a retainer that requires the lawyer to act against an existing client, the lawyer should disclose this information to the client even if the lawyer believes there is no conflict of interest.

A lawyer's duty of commitment to the client's cause prevents the lawyer from summarily and unexpectedly dropping that client to circumvent conflict of interest rules. The client may legitimately feel betrayed if the lawyer ceases to act for the client in order to avoid a conflict of interest with another more lucrative or attractive client.

Concurrent Clients

2.04 (4) (a) An individual lawyer or a law firm may act for concurrent clients with competing business or economic interests, provided that the lawyer or law firm treats information received from each client as confidential and does not disclose it to other clients;

(b) Where concurrent clients wish to retain a law firm in respect of the same business opportunity, the law firm must:

(i) disclose that it is acting for other business competitors and the risks associated with concurrent representation;

(ii) provide the client with the opportunity to seek independent legal advice;

(iii) ensure that each client is represented by different lawyers in the law firm;

(iv) implement measures to protect confidential information;

(v) withdraw from the representation of all clients in the event a dispute arises that cannot be resolved, in relation to the subject matter of the concurrent representation.

Commentary

Concurrent retainers are distinct from joint retainers, which are the subject of Rule 2.04(5). For the purposes of these rules, concurrent retainers arise when a lawyer or firm simultaneously represents different clients in separate matters. There is no sharing of confidential information, and the concurrent clients are not associated. In contrast, joint representation involves simultaneous representation of multiple clients in the same matter, and involves sharing of confidential information and shared instructions from the clients.

Conflict of interest rules do not preclude law firms and individual lawyers from concurrently representing different clients who are economic or business competitors and whose legal interests are not directly adverse. Lawyers are obliged at all times to ensure that they maintain confidentiality regarding the information of each client. Competing commercial interests of clients will not present a conflict when they do not impair a lawyer's ability to properly represent the legal interests of each client. Whether or not a real risk of impairment exists will be a question of fact.

In a litigation practice, competing commercial interests become relevant when there is a legal dispute between clients, in which case Rules 2.04(2) and (3) will apply.

In corporate and commercial practice, a conflict of interest will arise when commercial competitors simultaneously seek to retain the same lawyer or law firm with regard to the same corporate or business opportunity. Where the subject matter of each independent retainer is the same, the same lawyer may not act for each concurrent client. A law firm may, however, represent concurrent clients in this situation if each client is represented by different lawyers and the existence of concurrent retainers is disclosed to the clients. Lawyers are not required to disclose the identities of other concurrent clients. Reasonable measures will be required to protect confidential client information and the details of the implementation of the measures should be disclosed to the clients (See commentary to Rule 2.04(10)).

Concurrent clients must be fully informed of the risks and understand that, if a dispute arises between them which cannot be resolved, the lawyers must withdraw, resulting in potential additional costs. Clients should be given the opportunity to seek independent legal advice regarding the advisability of the concurrent retainer, and whether the concurrent representation is in the best interests of the clients. The law firm should assess whether there is a real risk that the firm will not be able to properly represent the legal interests of each client.

Joint Retainers

2.04 (5) Before a lawyer acts for more than one client in the same matter, the lawyer must:

(a) obtain the consent of the clients following disclosure of the advantages and disadvantages of a joint retainer;

(b) ensure the joint retainer is in the best interests of each client;

(c) advise each client that 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

(d) advise each client that, 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

Identifying Conflicts

A joint retainer must be approached by a lawyer with caution, particularly in situations involving conflicting interests, rather than a potential conflict. It will generally be more difficult for a lawyer to justify acting in a situation involving actual conflicting interests. In each case, the lawyer must assess the likelihood of being able to demonstrate that each client received representation equal to that which would have been rendered by independent counsel.

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

In appropriate circumstances, lawyers may act for clients who have conflicting interests or have a potential conflict. Clients may have conflicting interests where they have differing interests but there is no actual dispute. Examples include vendor and purchaser, mortgagor and mortgagee (see special notes below), insured and insurer, estranged spouses, and lessor and lessee.

A potential conflict exists when clients are aligned in interest and there is no dispute among them in fact, but the relationship or circumstances are such that there is a possibility of differences developing. Examples are co-plaintiffs; co-defendants; co-insured; co-accused; shareholders entering into a unanimous shareholder agreement; spouses granting a mortgage to secure a loan; common guarantors; beneficiaries under a will; and a trustee in bankruptcy or court appointed receiver/manager and the secured creditor who had the trustee or receiver/manager appointed. This list is not exhaustive.

Assessing When the Joint Representation is in the Best Interests of the Parties

Many lawyers prefer not to act for more than one party in a transaction. From the client's perspective, however, this preference may interfere with the right to choose counsel and may appear to generate unwarranted costs, hostility and complexity. In addition, another lawyer having the requisite expertise or experience may not be readily available, especially in smaller communities. Situations will therefore arise in which it is clearly in the best interests of the parties that a lawyer represents more than one of them in the same matter.

In determining whether it is in the best interests of the parties that a lawyer act for more than one party where there is no dispute but where there is a conflict or potential conflict, the lawyer must consider all relevant factors, including but not limited to:

- the complexity of the matter;
- whether there are terms yet to be negotiated and the complexity and contentiousness of those terms;
- whether considerable extra cost, delay, hostility or inconvenience would result from using more than one lawyer;
- the availability of another lawyer of comparable skill;
- the degree to which the lawyer is familiar with the parties' affairs;
- the probability that the conflict or potential conflict will ripen into a dispute due to the respective positions or personalities of the parties, the history of their relationship or other factors;
- the likely effect of a dispute on the parties;
- whether it may be inferred from the relative positions or circumstances of the parties (such as a long-standing previous relationship of one party with the lawyer) that the lawyer would be motivated to favour the interests of one party over another; and
- the ability of the parties to make informed, independent decisions.

The requirement that the joint representation be in the clients' best interests will not be fulfilled unless the lawyer has made an independent evaluation and has concluded that this is the case. It is insufficient to rely on the clients' assessment in this regard.

Although the parties to a particular matter may expressly request joint representation, there are circumstances in which a lawyer may not agree. Even if all the parties consent, a lawyer should avoid acting for more than one client when it is likely that a dispute between them will arise or that their interests, rights or obligations will diverge as the matter progresses. For example, it is not advisable to represent opposing arm's-length parties in complex commercial transactions involving unique, heavily negotiated terms. In these situations, the risks of retaining a single lawyer outweigh the advantages.

If a lawyer proposes to act for a corporation and one or more of its shareholders, directors, managers, officers or employees, the lawyer must be satisfied that the dual representation is a true reflection of the will and desire of the corporation as a separate entity. Having met all preliminary

requirements, a lawyer acting in a conflict or potential conflict situation must represent each party's interests to the fullest extent. The fact of joint representation will not provide a justification for failing to fulfill the duties and responsibilities owed by the lawyer to each client.

Informed Consent to Joint Representation

If a lawyer determines that joint representation is permissible, then the consent of the parties must be obtained. Consent will be valid only if the lawyer has provided disclosure of the advantages and disadvantages of, first, retaining one lawyer and, second, retaining independent counsel for each party. Disclosure must include the fact that no material information received in connection with the matter from one party can be treated as confidential so far as any of the other parties is concerned. In addition, the lawyer must stipulate that, if a dispute develops, the lawyer will be compelled to cease acting altogether unless, at the time the dispute develops, all parties consent to the lawyer continuing to represent one of them. Advance consent may be ineffective since the party granting the consent may not at that time be in possession of all relevant information (see commentary to Rule 2.04(1)). Lawyers must disclose any relationships with the parties and any interest in or connection with the matter, if applicable.

While it is not mandatory that either disclosure or consent in connection with joint representation be in writing, the lawyer will have the onus of establishing that disclosure was provided and that consent was granted. Therefore, it is advisable to document the communication between the lawyer and client and to obtain written confirmation from the client.

Rule 2.04(5) does not require that a lawyer advise the client to obtain independent legal advice about a conflicting interest. In some cases, especially when the client is not sophisticated or is vulnerable, the lawyer should recommend independent legal advice. If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter, the lawyer should advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

Joint Representation of Lenders and Borrowers

In appropriate circumstances, a lawyer may act for or otherwise represent both lender and borrower in a mortgage or loan transaction. Consent must be obtained from both clients at the outset of the retainer.

When a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, before the advance or release of the mortgage or loan funds, all information that is material to the transaction. What is material is to be determined objectively. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

A lender’s acknowledgement of, and consent to, the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction, such as mortgage loan instructions, and the consent is generally acknowledged by a lender when the lawyer is requested by it to act.

Joint Retainer for Drafting Wills

A lawyer who receives instructions from spouses or domestic partners (including, in Alberta, adult interdependent partners) to prepare one or more wills for them based on their shared understanding of what is to be in each will should comply with this rule. It is important for the lawyer to ensure that the spouses or domestic partners understand the consequences of giving conflicting instructions during the course of the joint retainer for the preparation of the wills, and that any information or instructions provided to counsel by one client will be shared with the other spouse or domestic partner.

If subsequently only one spouse or domestic partner communicates new instructions, such as instructions to change or revoke a will:

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

b) in accordance with Rule 2.03, the lawyer is obliged to hold all information related to the subsequent communication in strict confidence and not disclose it to the other spouse or domestic partner;

c) the lawyer has a duty to decline the new retainer, unless:

(i) the spouses or domestic partners have 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 domestic partner has died; or

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

Single Client in Multiple Roles

Special considerations apply when a lawyer is representing one client acting in two possibly conflicting roles. For example, a lawyer acting for an estate when the executor is also a beneficiary must be sensitive to divergence of the obligations and interests of the executor in those two capacities. Such divergence could occur if the executor is a surviving spouse who is the beneficiary of only part of the estate. The individual may wish to apply to the court to receive a greater share of the estate. This course of action is, however, contrary to the interests of other beneficiaries and inconsistent with the neutral role of executor. The lawyer would accordingly be obliged to refer the executor elsewhere with respect to the application for relief which the individual is pursuing in a personal capacity.

Acting Against Former Clients

2.04 (6) Unless the former client consents, a lawyer must not act against a former client:

(a) in the same matter,

(b) in any related matter, or

(c) except as provided by Rule 2.04(7), in any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary

This rule protects clients from the misuse of confidential information and prohibits a lawyer from attacking the legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client. A new matter is wholly unrelated if no confidential information from the prior retainer is relevant to the new matter and the new matter will not undermine the work done by the lawyer for the client in the prior retainer.

A person who has consulted a lawyer in the lawyer's professional capacity may be considered a former client for the purposes of this rule even though the lawyer did not agree to represent that person or did not render an account to that person (see commentary below regarding "Prospective Client").

Confidential Information

"Confidential information" means all information concerning a client's business, interests and affairs acquired in the course of the lawyer-client relationship. A lawyer's knowledge of personal characteristics or corporate policies that are notably unusual or unique to a client may bar an adverse representation if such knowledge could potentially be used to the client's disadvantage. For example, a lawyer might know that a former client will not under any circumstances proceed to trial or appear as a witness. However, a lawyer's awareness that a client has a characteristic common to many people (such as a general aversion to testifying) or a fairly typical corporate policy (such as a propensity to settle rather than proceed to litigation) will not generally preclude the lawyer from acting against that client.

A lawyer's duty not to use confidential information to the disadvantage of a former client continues indefinitely. However, the passage of time may mitigate the effect of a lawyer's possession of particular confidential information, and may permit the lawyer to act against a former client when the information no longer has the potential to prejudice the former client.

Prospective Client

A prospective client is a person who discloses confidential information to a lawyer for the purpose of retaining the lawyer. A lawyer must maintain the confidentiality of information received from a prospective client.

Before performing a conflict check, a lawyer should endeavour not to receive more information than is necessary to carry out the conflict check. As soon as a conflict becomes evident the lawyer must decline the representation and refuse to receive further information, unless the conflict is resolved by the consent of the existing client and the prospective client or the approval of a tribunal. If the lawyer declines the representation, the information disclosed by the prospective client, including the fact that the client approached the firm, must not be disclosed to those who may act against the prospective client. The firm may act or continue to act contrary to the interests of the prospective client in relation to the proposed retainer if the lawyer takes adequate steps to ensure that:

(a) the confidential information is not disclosed to other firm members representing clients adverse to the prospective client, and

(b) firm members who have the confidential information will not be involved in any retainer that is related to the matter for which the prospective client sought to retain the firm.

The adequacy of the measures taken to prevent disclosure of the information will depend on the circumstances of the case, and may include destroying, sealing or returning to the prospective client notes and correspondence and deleting or password protecting computer files on which any such information may be recorded.

2.04 (7) 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 ("the other lawyer") may act in the new matter against the former client if:

(a) the former client consents to the other lawyer acting; or

(b) the law firm establishes that it is in the interests of justice that the other lawyer act in the new matter, having regard to all relevant circumstances, including:

(i) the adequacy and timing of the measures taken to ensure that there has been, and will be, no disclosure of the former client's confidential information to any other member or employee of the law firm, or any person whose services the lawyer or law firm has retained in the new matter;

(ii) the extent of prejudice to any party;

(iii) the good faith of the parties; and

(iv) the availability of suitable alternative counsel.

Commentary

The guidelines at the end of the commentary in Rule 2.04(10) regarding lawyer transfers between firms provide valuable guidance for the protection of confidential information in the cases where, having regard to all of the relevant circumstances, it is appropriate for the lawyer's partner or associate to act against the former client.

Conflicts from Transfer Between Law Firms

2.04 (8) Rules 2.04(9) and (10) apply when a lawyer transfers from one law firm ("former law firm") to another ("new law firm"), and either the transferring lawyer or the new law firm is aware at the time of the transfer or later discovers that:

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

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

2.04 (9) If the transferring lawyer possesses relevant confidential information 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 representation of its client in that matter unless:

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

(b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including:

(i) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to any member of the new law firm will occur;

(ii) the extent of prejudice to any party;

(iii) the good faith of the parties; and

(iv) the availability of suitable alternative counsel.

2.04 (10) If the transferring lawyer does not possess relevant confidential information that could prejudice the former client, the transferring lawyer must not, unless the former client consents:

(i) participate in the new law firm's representation of its client in the relevant matter or disclose any confidential information respecting the former client; or

(ii) discuss with any member of the new law firm the new law firm's representation of its client or the former law firm's representation of the former client, except as permitted by Rule 2.03 (7).

Commentary

The purpose of the rules regarding transferring lawyers is to deal with actual knowledge. Imputed knowledge may not give rise to disqualification if the law firm can demonstrate compliance with these rules and the implementation of effective ethical screens.

In these rules, “client” bears the same meaning as in the Definitions chapter, and includes anyone to whom a lawyer owes a duty of confidentiality, even if no lawyer-client relationship exists between them.

“Confidential information” means information concerning a client’s business, interests and affairs which is not generally known to the public and which has been acquired in the course of the lawyer-client relationship.

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

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

Lawyers and Support Staff

This rule is intended to regulate lawyers and students-at-law who transfer between law firms. There is also a general duty on lawyers to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidential information of clients of the lawyer’s firm and confidential information of clients of other law firms in which the person has worked.

Government Employees and In-house Counsel

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

Law Firms with Multiple Offices

This rule treats as one “law firm” such entities as the various legal services units of a government, a corporation with separate regional legal departments, an interjurisdictional law firm and a legal aid program with many community law offices. It is easier to create more effective ethical screens when the law firm’s offices are remote from one another or are managed independently. The law firm should disclose the reasonable measures taken to ensure protection of confidential information when seeking the former client’s consent.

Other Matters

When a new law firm considers hiring a lawyer from another law firm, the transferring lawyer and the new law firm need to determine, before the transfer, whether any conflicts of interest will be created. In determining whether the transferring lawyer possesses confidential information, both the transferring lawyer and the new law firm must be very careful, during any interview of a potential transferring lawyer, or other recruitment process, to ensure that they do not disclose confidential information.

If the new law firm applies to a tribunal under Rule 2.04(9) for a determination that it may continue to act, it bears the onus of establishing that it has met the requirements of Rule 2.04(9)(b).

Reasonable Measures to Ensure Non-disclosure of Confidential Information

The new law firm should implement reasonable measures to ensure that no disclosure of the former client's confidential information will be made to any member of the new law firm:

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

(b) when the new law firm is not certain whether the transferring lawyer actually possesses such confidential information.

It is not possible to offer a set of "reasonable measures" that will suffice 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.

In the case of law firms with multiple offices, the degree of autonomy possessed by each office will be a factor in determining what constitutes "reasonable measures." For example, the various legal services units of a government, a corporation with separate regional legal departments, an 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 prevent the disclosure of confidential information. 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."

The following guidelines 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.

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

4. The current matter should be discussed only within the limited group that is working on the matter.
5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.
6. No member of the new law firm should show the transferring lawyer any documents relating to the current representation.
7. The measures taken by the new law firm to prevent the disclosure of confidential information should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
8. Appropriate law firm members should provide undertakings setting out that they have adhered to and will continue to adhere to all elements of the firm's policy.
9. If the former client, or a lawyer representing the former client, requests further information regarding the protection of confidential information, the former client should be advised of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information. An appropriate response may include the provision of an affidavit or statutory declaration, confirming that the transferring lawyer possesses no confidential information or, alternatively, that a transferring lawyer possessing actual confidential information has not disclosed the former client's confidential information to other members of the new firm.
10. The transferring lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.
11. The transferring lawyer should use associates and support staff different from those working on the current matter.
12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office.

Merged Firms

2.04 (11) When two or more firms have been representing different parties in a matter and the firms merge during the course of the matter, the following rules apply:

(a) If the matter constitutes a dispute, the merged firm must not continue acting for opposing parties to the dispute.

(b) If the matter constitutes a potential or actual conflicting interest, the merged firm may continue acting for more than one party only in compliance with Rule 2.04(5).

(c) Whether the matter constitutes a dispute or a potential or actual conflicting interest, the merged firm may continue acting for one of the parties only if all parties consent.

Commentary

A merger is distinguishable from lawyer movement between firms because knowledge of confidential information will be imputed to the merged firm when two or more firms merge. It may be impossible for the merged firm to represent more than one client in a matter. In evaluating the best interests of the clients, the firm should consider additional factors such as the stage of the matter at the time of merger. If the matter has not progressed very far and it would not be unduly prejudicial or costly for the clients to obtain other counsel, the merged firm may be wise to refer all parties to other firms.

If, however, the firm wishes to send one or more clients elsewhere while continuing to act for another of the clients (whether the matter constitutes a dispute, or a potential or actual conflict), all parties must consent.

Conflict with Lawyer's Own Interests

2.04 (12) A lawyer must not act when there is a conflict of interest between lawyer and client, unless the client consents and it is in the client's best interests that the lawyer act.

Commentary

If a lawyer's own loyalty, interest, or belief would impair the lawyer's ability to carry out a representation, the lawyer may not act. If the conflicting interest of the lawyer does not impair the lawyer's objectivity, the lawyer should nonetheless decline to act unless the representation is in the client's best interests. In making this judgment, the lawyer must evaluate all relevant factors. It is insufficient to rely on the client's assessment. The client must consent to the representation after disclosure by the lawyer of the nature of the conflicting interest and the advantages of independent representation. The lawyer has the onus to establish disclosure to and consent from the client. It is therefore advisable that these matters be confirmed in writing.

In addition, a lawyer's professional objectivity in a matter may be threatened or destroyed by circumstances personal to the lawyer. A conflict may arise due to a family or other close relationship, an outside activity, or a strong belief or viewpoint. Another example is a mental state created or

exacerbated by a particular representation, such as feelings of enmity towards a colleague acting for an opposing party. A lawyer's objectivity may also be affected when the lawyer unduly favours the client's position, since the result may be overly optimistic advice or an unrealistic recommendation.

In all of these circumstances, a lawyer must recognize when it is not in the client's best interests to be represented by the lawyer.

Doing Business with a Client

2.04 (13) A lawyer must not enter into a transaction with a client who does not have independent legal representation unless the transaction is fair and reasonable to the client and the client consents to the transaction.

Commentary

This rule applies to any transaction with a client, including:

(a) lending or borrowing money (see related commentary below);

(b) buying or selling property;

(c) accepting a gift, including a testamentary gift (see related commentary below);

(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.

General Principles

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 is permitted. When entering a transaction with a client who does not otherwise have independent legal representation, the lawyer faces a potential conflict whether acting only on his own behalf or on behalf of both himself and the client in relation to the transaction.

Independent legal representation is distinguishable from independent legal advice. Independent legal representation is a retainer in which the client has a separate lawyer acting for the client in the transaction. Independent legal advice is a retainer in which the client does not wish to have full independent legal representation but receives advice about the legal aspects of the transaction and its advisability.

When the client does not have separate independent legal representation in the transaction, the lawyer has the onus of demonstrating that:

- the transaction was fair and reasonable to the client;

- the transaction was not disadvantageous to the client;
- the client was fully informed;
- the client consented to the transaction; and
- the client had independent legal advice, or was not disadvantaged by its absence.

For the purposes of this rule and commentary, the reference to a “lawyer” includes an associate or partner of the lawyer, related persons (as defined below), and a trust or estate in which the lawyer has a beneficial interest or for which the lawyer acts as a trustee or in a similar capacity.

In this rule, “related persons” means individuals connected to the lawyer by a blood relationship, marriage or common-law partnership or adoption, and includes a corporation owned or controlled directly or indirectly by the lawyer, or other related persons as described, either individually or in combination with one another.

A conflict may also arise if a related person transacts business with the lawyer’s client. There is no conflict, however, if the client is entering a transaction with a publicly traded corporation or entity in which the lawyer has an interest.

The lawyer must act in good faith and make full disclosure to the client of material facts relevant to the transaction. The lawyer must also disclose and explain the nature of any actual or potential conflict of interest to the client. If the lawyer does not choose to make disclosure of material facts or a conflict of interest, or cannot do so without breaching confidentiality, the lawyer must not proceed with the transaction.

The client must be advised of the advantages of retaining independent counsel. The nature of the matter may require that the client have independent legal representation. At a minimum, the lawyer must recommend that the client seek independent legal advice. If the client elects to waive independent legal advice, the lawyer must still make an independent assessment of whether he or she is able to proceed, considering the nature of the transaction. All discussions with the client should be clearly documented and confirmed in writing.

Payment of Fees

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.

Where a client proposes to pay for legal services by transferring an interest in a corporation, property, investment or other enterprise, the lawyer must, at a minimum, recommend that the client receive independent legal advice.

See also “Gifts and Bequests”, below, regarding fees paid to lawyers for the administration of an estate.

Lending and Borrowing

A lawyer must not borrow money from a client unless:

- the client is a lending institution whose business includes lending money to members of the public, or
- the client is a related person and the lawyer is able to discharge the onus of proving that the client's interests were fully protected by independent legal advice.

If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must disclose and explain the nature of the conflicting interest to the client, recommend that the client receive independent legal representation, and obtain the client's consent.

A lawyer must not personally guarantee, or otherwise provide security for, any indebtedness in respect of which a client is a borrower or lender unless:

- the lender is providing funds solely for the lawyer or a related person,
- the transaction is for the benefit of a non-profit or charitable institution, and the lawyer is a member or supporter of such institution, either individually or together with others, or
- 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 the lawyer has otherwise complied with these rules.

Gifts and Bequests

A "transaction" includes the acceptance of a gift or bequest. A lawyer is not entitled to make a profit from clients other than through fair professional remuneration. If a gift or bequest from a client appears to be unearned or disproportionately substantial, it is prima facie not "fair and reasonable" to the client as required by this rule and a presumption of undue influence is raised. A lawyer must refuse to accept a gift that is other than nominal unless the client has received independent legal advice.

A lawyer may prepare an instrument giving the lawyer or another firm member a gift or benefit from a client, including a testamentary gift, where the client is a family member of the lawyer or another firm member. A lawyer must otherwise refuse to draft an instrument effecting a gift or bequest to the lawyer or any related person or entity.

A lawyer may draft a client's will to include a clause directing that the executor retain the lawyer's services in the administration of the client's estate, but only if the client expressly instructs the lawyer to do so. Express instructions from the client are also required if the will contains a clause dealing with the lawyer's fees, whether the lawyer is acting as executor, the estate's lawyer, or both.

Compassionate Loans – Alberta

Lawyers sometimes find themselves in situations where their clients have claims but are in dire financial circumstances and request a loan (which for these purposes includes a cash advance on prospective recovery) from the lawyer, with little or no prospect of repayment other than from the proceeds of the case. Because of the inequality of the bargaining positions of the lawyer and the client in these situations, and the inevitable appearance that the lawyer is taking advantage of the client, a lawyer must not make a loan to such a client other than on a no-interest, no-charges basis;

however, it may be appropriate for a lawyer to make a compassionate loan to such a client, to be repaid out of the proceeds of the case or otherwise. A compassionate loan is one made for the purpose of relieving the client's personal or financial distress and which carries no interest or other charges, reflecting the fact that the loan is intended as a compassionate gesture and not as a commercial transaction.

A lawyer must not make a compassionate loan if, as a result of the lawyer's expectation of recovering fees, disbursements, and the loan from the proceeds of the case, the lawyer has a financial interest in the case that is so disproportionate that the lawyer's objectivity will be impaired. After making a compassionate loan, a lawyer's objectivity or judgment may be adversely affected by a reassessment of the case. In that event, the lawyer must cease to act.

This commentary applies to the conduct of a lawyer personally or that of related persons, including any arrangement pursuant to which the lawyer benefits directly or indirectly, such as, for example, a referral by a lawyer to a lender who is a member of the lawyer's immediate family or a lender controlled by a member of the lawyer's immediate family.

Conflicts Arising from Relationships with Others

2.04 (14) A lawyer must not personally represent a party to a dispute when a family member is acting for an opposing party and, unless all parties consent, a lawyer must not personally represent a party to a matter when a family member is representing another party to the matter and those parties are in a conflict or potential conflict situation.

Commentary

If a relationship exists that does not, pursuant to this rule, prevent a lawyer from acting in a matter but where doing so may raise a reasonable apprehension of impropriety, the lawyer must disclose the relationship to the client (see also Rule 4.01(3) - avoidance of apprehension of bias when appearing before a tribunal).

For the purposes of this rule, "family member" means the spouse, child, sibling, parent, grandchild or grandparent of a lawyer, and any person who is a member of the lawyer's household.

This rule applies only to the lawyer having the relationship in question and not to other members of the lawyer's firm.

A close familial relationship is inconsistent with the adversarial nature of legal representation in a dispute. In contrast, the absence of a dispute may permit related lawyers to act provided that the lawyer's objectivity is not impaired. If, however, the situation constitutes a conflict or potential conflict, the consent of all parties must be obtained.

A lawyer may have a close relationship with a person not qualifying as a family member. That relationship may nonetheless be relevant to a particular representation. For example, a lawyer may be married to the secretary of opposing counsel; lawyers acting on opposing sides of a matter may be cousins or close friends; or opposing counsel may be a member of a small firm in which the lawyer's spouse practises. In these and similar situations, the relationship must be disclosed to the client.

Pro Bono Service – Alberta

2.04 (15) (a) A lawyer engaged in the provision of short-term legal services through a non-profit legal services provider, without any expectation that the lawyer will provide continuing representation in the matter:

(i) May provide legal services, unless the lawyer is aware that the clients' interests are directly adverse to the immediate interests of another current client of the individual lawyer, the lawyer's firm or the non-profit legal services provider; and

(ii) May provide legal services, unless the lawyer is aware that the lawyer or the lawyer's firm may be disqualified from acting due to the possession of confidential information which could be used to the disadvantage of a current or former client of the lawyer, the lawyer's firm, or the non-profit legal services provider.

(b) In the event a lawyer provides short-term legal services through a non-profit legal services provider, other lawyers within the lawyer's firm or providing services through the non-profit legal services provider may undertake or continue the representation of other clients with interests adverse to the client being represented for a short-term or limited purpose, provided that adequate screening measures are taken to prevent disclosure or involvement by the lawyer providing short-term legal services.

Commentary

This rule provides guidance in managing conflicts of interest for lawyers volunteering in a pro bono setting. Improving access to justice is an important goal of the legal profession. Lawyers have a duty to facilitate access to justice: Rule 3.01(1). Also, lawyers have a duty to participate in pro bono

activities: Rule 1.01(1). This objective should be balanced with all other factors in determining whether a lawyer should be disqualified from a representation because of a conflict of interest.

For the purposes of this rule, the term “non-profit legal services provider” means volunteer pro bono and non-profit legal services organizations, including Legal Aid Alberta. These non-profit legal services providers have established programs through which lawyers provide short-term legal services.

“Short-term legal services” means advice or representation of a summary nature provided by a lawyer to a pro bono client under the auspices of a non-profit organization with the expectation by the lawyer and the pro bono client that the lawyer will not provide continuing representation in the matter. It is in the interests of the public, the legal profession and the judicial system that lawyers be available to individuals through these organizations. Although a lawyer-client relationship is established in such a limited consultation, there is no expectation that the lawyer’s representation of the pro bono client will continue beyond it. Such programs or services are normally offered in circumstances which make it difficult to systematically identify conflicts of interest, despite the best efforts and existing practices of non-profit legal services organizations. Further, the limited nature of the legal services being provided significantly reduces the risk of conflicts of interest with other matters being handled by the consulting lawyer’s firm.

Accordingly, the rule requires compliance with the usual rules which govern conflicts of interest only if the consulting lawyer has actual knowledge that he or she may be disqualified as the result of a potential or actual conflict. Such a conflict may involve a lawyer’s relationship between an existing or former client and the consulting lawyer, the lawyer’s firm or the non-profit legal services provider. In most cases, it is expected that the existence of a potential conflict will be identified through the conflict identification processes employed by non-profit legal services organizations or by the individual lawyer who may identify a conflict before or at the time of meeting with the pro bono client receiving the short-term legal services.

The personal disqualification of a lawyer providing legal services through a non-profit legal services provider shall not be imputed to other participating lawyers. If, however, the lawyer intends to represent the pro bono client on an ongoing basis after commencing the short-term limited retainer, the other rules governing conflicts of interest will apply.

The confidentiality of information obtained by a lawyer providing short-term legal services pursuant to this rule must be maintained. If not, a lawyer’s firm, or other lawyers providing services under the auspices of the non-profit legal services provider, will not be able to act for other clients where there is a conflict with the pro bono client. Without restricting the scope of screening measures which may be appropriate, the following are examples of some measures which may be taken to ensure confidentiality:

- The lawyer who provided the short-term legal services shall have no involvement in the representation of another client whose interests conflict with those of the pro bono client, and shall not have any discussions with the lawyers representing the other client.
- Discussions involving the relevant matter should take place only with the limited group of firm members working on the other client’s matter.

- The relevant files may be specifically identified and physically segregated and access to them limited only to those working on the file or who require access for specifically identified or approved reasons.
- It would also be advisable to issue a written memo to all lawyers and support staff, explaining the measures which have been undertaken.
- See Rule 2.04(10) and related commentary for additional suggestions.

Provided this rule has been complied with, the lawyer providing short-term legal services does not require consent of the pro bono client or another client whose interests are in conflict with the pro bono client. However, if the lawyer is or becomes aware of a conflict, then it may not be waived by consent. In that case, the lawyer shall not provide short-term legal services.

When offering short-term legal services, lawyers should also assess whether the pro bono client may require additional legal services, beyond a limited consultation. In the event that such additional services are required or advisable, the lawyer should explain the limited nature of the consultation and encourage or assist the pro bono client to seek further legal assistance.

2.05 Preservation of Clients' Property

Preservation of Clients' Property

2.05 (1) (a) In this rule, "property" includes a client's money, securities as defined in the Alberta Securities Act, original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client's correspondence, files, reports, invoices and other such documents, as well as personal property including precious and semi-precious metals, jewellery and the like.

(b) A lawyer must:

(i) observe all relevant rules and law, including the duties of a professional fiduciary, about the preservation of a client's property entrusted to a lawyer; and

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

Commentary

The duties concerning safekeeping, preserving, and accounting for clients' money and other property are set out in the Rules of the Law Society, Rules 119-119.46.

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.

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.

If the lawyer withdraws from representing a client, the lawyer is required to comply with Rule 2.07 (Withdrawal from Representation).

Notification of Receipt of Property

2.05 (2) A lawyer must promptly notify a client of the receipt of any money or other property of the client, unless satisfied that the client is aware that they have come into the lawyer's custody.

Identifying Clients' Property

2.05 (3) A lawyer must clearly label and identify clients' property and place it in safekeeping distinguishable from the lawyer's own property.

2.05 (4) A lawyer must maintain such records as necessary to identify clients' property that is in the lawyer's custody.

Accounting and Delivery

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

Commentary

Money held in trust by a lawyer to the credit of a client may not be applied to fees incurred by the client unless an account has been rendered to the client. This rule permits the use of trust money held to the credit of a client to pay an outstanding account not only in the matter in respect of which the trust money was received, but in any previous matter handled by the lawyer for the same client. This rule is not, however, intended to be an exhaustive statement of the considerations that apply to the payment of a lawyer's account from trust. The handling of trust money generally is governed by the Rules of the Law Society. Those Rules must also be complied with in the application of trust money to fees earned by a lawyer.

2.05 (6) If a lawyer is unsure of the proper person to receive a client's property, the lawyer must apply to a tribunal of competent jurisdiction for direction.

Commentary

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

The duties of a lawyer with respect to the handling of client property that is evidence of a crime are complex and may impose additional duties beyond those described in this rule (See Rule 4.01(9) and Commentary).

2.06 Fees and Disbursements

Reasonable Fees and Disbursements

2.06 (1) A lawyer must not charge or accept a fee or disbursement, including interest or other charges, unless it is fair and reasonable and has been disclosed in a timely fashion.

Commentary

What is a fair and reasonable fee depends on such factors as:

(a) the time and effort required and spent;

(b) the difficulty of the matter and the importance of the matter to the client;

(c) whether special skill or service has been required and provided;

(d) the results obtained;

(e) fees authorized by statute or regulation;

(f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;

(g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;

(h) any relevant agreement between the lawyer and the client;

(i) the experience and ability of the lawyer;

(j) any estimate or range of fees given by the lawyer; and

(k) the client's prior consent to the fee.

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

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

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

Contingent Fees and Contingent Fee Agreements

2.06 (2) Subject to Rule 2.06 (1), a lawyer may enter into a written agreement in accordance with governing legislation that provides that the lawyer's fee is contingent, in whole or in part, on the outcome of the matter for which the lawyer's services are to be provided.

Commentary

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 and the amount of the expected recovery. Party-and-party costs received by a lawyer are the property of the client and should therefore be accounted for to the client in accordance with the Alberta Rules of Court, Rule 10.7. The test is whether the fee, in all of the circumstances, is fair and reasonable.

Although a lawyer is generally permitted to terminate the professional relationship with a client and withdraw services if there is justifiable cause as set out in Rule 2.07, special circumstances apply when the retainer is pursuant to a contingency agreement. In such circumstances, the lawyer has impliedly undertaken the risk of not being paid in the event the suit is unsuccessful. Accordingly, a lawyer cannot withdraw from representation for reasons other than those set out in Rule 2.07(5) (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

2.06 (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

The two main categories of charges on a statement of account are fees and disbursements. A lawyer may charge as disbursements only those amounts that have been paid or are required to be paid to a third party by the lawyer on a client's behalf. However, a subcategory entitled "Other Charges" may be included under the fees heading if a lawyer wishes to separately itemize charges such as paralegal, word processing or computer costs that are not disbursements, provided that the client has agreed to such costs.

Subject to any special agreement with the client, a final account should be rendered within a reasonable time after completion of the services.

See the Alberta Rules of Court, Rule 10.2, respecting the content of lawyers' accounts.

Party-and-party costs received by a lawyer are the property of the client and should therefore be accounted for to the client. See the Commentary to Rule 2.06 (2) respecting contingency matters.

Joint Retainer

2.06 (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

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

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

(a) the fee is reasonable and does not increase the total amount of the fee charged to the client; and

(b) the client is informed and consents.

2.06 (7) A lawyer must not:

(a) in connection with the referral of clients, directly or indirectly share, split, or divide his or her fees with any person who is not a lawyer; or

(b) give any financial or other reward for the referral of clients or client matters to any person who is not a lawyer.

Commentary

This 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 rule does not prohibit a lawyer from:

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

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

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

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

Lawyers may pay non-lawyers for direct and reasonable advertising costs (including a lawyer referral service), and are also allowed to compensate employees and other persons for general marketing and public relations services, whether by salary, profit sharing, bonus or otherwise, provided the compensation is not directly related to a specific client matter.

Exception for Multi-discipline Practices and Interjurisdictional Law Firms

2.06 (8) Rule 2.06 (7) does not apply to:

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

(b) sharing of fees, cash flows or profits by lawyers who are members of an interjurisdictional law firm.

Commentary

An affiliation is different from a multi-disciplinary practice established in accordance with the rules, regulations or by-laws under the governing legislation, or an interjurisdictional law firm, however structured. An affiliation is subject to Rule 2.06 (7). In particular, an affiliated entity is not permitted

to share in the lawyer's revenues, cash flows or profits, either directly or indirectly through excessive inter-firm charges, for example, by charging inter-firm expenses above their fair market value.

Payment and Appropriation of Funds

2.06 (9) 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

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

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.

2.06 (10) If the amount of fees or disbursements charged by a lawyer is reduced on a review or assessment, the lawyer must repay the money to the client as soon as is practicable.

Prepaid Legal Services Plan

2.06 (11) A lawyer who accepts a client referred by a prepaid legal services plan must advise the client in writing of:

(a) the scope of work to be undertaken by the lawyer under the plan; and

(b) the extent to which a fee or disbursement will be payable by the client to the lawyer.

2.07 Withdrawal from Representation

Withdrawal from Representation

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

Commentary

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.

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 the Rules of Court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question. See Rule 2.07 (6), Manner of Withdrawal.

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.

When a law firm is dissolved or a lawyer leaves a firm to practise elsewhere, it usually results in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the change. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles set out in this rule, and, in particular, should try to minimize expense and avoid prejudice to the client. The client's interests are paramount and, accordingly, the decision whether the lawyer will continue to represent a given client must be made by the client in the absence of undue influence or harassment by either the lawyer or the firm. Each party should be willing to agree that certain clients be contacted by the other party. As to clients whom both parties wish to contact, a neutrally worded letter should be jointly formulated that clearly leaves the decision about future representation to the client. Accordingly, either or both the departing lawyer and the law firm may notify clients in writing that the lawyer is leaving and advise the client of the options available: to

have the departing lawyer continue to act, have the law firm continue to act, or retain a new lawyer. Should advice be actively sought by the client, the response of the lawyer contacted must be professional and consistent with the client's best interests.

With respect to other dealings between the departing lawyer and the firm, reasonable notice should be given by the departing lawyer to the firm in advance of notice to clients. The lawyer and firm must come to a mutually acceptable arrangement respecting work in progress and disbursements outstanding on files that are to be transferred with the lawyer. The transfer of a file and, consequently, the progress of a client matter, should not be unduly delayed. When a client chooses to remain with the firm, it is generally improper to charge the client for time expended by another firm member in becoming familiar with the file.

Optional Withdrawal

2.07 (2) If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

Commentary

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

Non-payment of Fees

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

Commentary

When the lawyer withdraws because the client has not paid the lawyer's fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial. Also see the Commentary to Rule 2.07 (4).

Withdrawal from Criminal Proceedings

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

(a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any money received on account of fees and disbursements;

(c) notifies Crown counsel that the lawyer is no longer acting; and

(e) complies with the applicable Rules of Court.

Commentary

In Alberta, when a lawyer seeks to withdraw in criminal proceedings the usual practice is to apply for leave in open court.

A lawyer who has withdrawn, or intends to withdraw, because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn. If the court requests that the lawyer provide reasons for withdrawal, then the lawyer may indicate that there are “ethical reasons” or an inability to obtain proper instructions, making the least possible disclosure of privileged information. In certain circumstances, the court may refuse to allow a lawyer to withdraw for non-payment of fees.

Obligatory Withdrawal

2.07 (5) A lawyer must withdraw if:

(a) discharged by a client;

(b) a client persists in instructing the lawyer to act contrary to professional ethics; or

(c) the lawyer is not competent to continue to handle a matter.

Manner of Withdrawal

2.07 (6) When a lawyer withdraws, the lawyer must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.

2.07 (7) On discharge or withdrawal, a lawyer must:

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

Commentary

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

If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement on the client's position. Generally speaking, a lawyer should not enforce a lien if to do so would prejudice materially a client's position in any uncompleted matter. Material prejudice is more than mere inconvenience to the client. A lawyer should not enforce a solicitor's lien for non-payment if the client is prepared to enter into an arrangement that reasonably assures the lawyer of payment in due course. When a matter is being transferred to other counsel, the transferring lawyer may request that the receiving lawyer undertake to pay an outstanding account from the money ultimately

recovered by that lawyer. Where the matter in question is subject to a contingency agreement, the lawyers may agree to divide the contingent fee on the basis of an apportionment of total effort required to effect recovery.

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.

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.

Subject to Rule 2.04 (Conflicts of Interest) and Rule 2.03 (Confidentiality), 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 and should seek to avoid any unseemly rivalry, whether real or apparent.

Duty of Successor Lawyer

2.07 (8) Before agreeing to represent a client, a successor lawyer must be satisfied that the former lawyer has withdrawn or has been discharged by the client.

Commentary

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

Chapter 3 – Marketing of Legal Services

3.01 Making Legal Services Available

Making Legal Services Available

3.01 (1) A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 3.01(2), may offer legal services to a prospective client by any means.

Commentary

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

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

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

Right to Decline Representation

A lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another lawyer qualified in the particular field and able to act. When a lawyer offers assistance to a client or prospective client in finding another lawyer, the assistance should be given willingly and, except where a referral fee is permitted by Rule 2.06 (6), without charge.

Restrictions

3.01 (2) In offering legal services, a lawyer must not use means that:

(a) are false or misleading;

(b) amount to coercion, duress, or harassment;

(c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered; or

(d) otherwise bring the profession or the administration of justice into disrepute.

Commentary

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

3.01 (3) A lawyer must not advertise that the lawyer will make loans to clients, whether such loans are characterized as loans or cash advances with respect to claims.

Commentary

This rule applies to the conduct of a lawyer personally or in relation to entities either related to or controlled by a lawyer.

3.02 Marketing

Marketing of Professional Services

3.02 (1) A lawyer may market professional services, provided that the marketing is:

(a) demonstrably true, accurate and verifiable;

(b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;

(c) in the best interests of the public and consistent with a high standard of professionalism.

Commentary

Examples of marketing that may contravene this rule include:

(a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;

(b) suggesting qualitative superiority to other lawyers;

(c) raising expectations unjustifiably;

(d) suggesting or implying the lawyer is aggressive;

(e) disparaging or demeaning other persons, groups, organizations or institutions;

(f) taking advantage of a vulnerable person or group; and

(g) using testimonials or endorsements that contain emotional appeals.

Advertising of Fees

3.02 (2) A lawyer may advertise fees charged for legal services provided that:

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee; and

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

3.03 Advertising Nature of Practice

3.03 A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

Commentary

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

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

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

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

3.04 Firm Names

3.04 Law firms are permitted to use trade names, initials, logos, symbols, or the names of individuals or their professional corporations, provided that they are not misleading or confusing, and are otherwise consistent with these rules.

Commentary

Firm names must accurately represent the firm and the work carried out by firm members. A firm name may consist of:

(a) the names of one or more individual lawyers;

(b) the names of one or more professional corporations;

(c) the names of existing or former partners or associates;

(d) a trade name; or

(e) any combination of (a), (b), (c) and (d).

The firm must be able to: (a) demonstrate sufficient connection or relationship with the name(s) included, and (b) use such qualifying words as necessary to ensure that a potential consumer of the firm's services understands it is a law firm and is not engaged in some other business. A law firm name must not include the name of any individual or other entity not entitled to practise law in Canada or any other jurisdiction. The firm name may include the name(s) of individuals currently or formerly entitled to practice law in Canada and in jurisdictions other than Canada. If using a trade name, the name should include such phrases as “Law”, “Law Firm”, “Lawyer”, or “Barristers and Solicitors”, so that it is clear that the activity of the firm is the practice of law.

The inclusion in a firm name of a person or entity not currently licensed or eligible to deliver legal services in Alberta, or a person who is no longer alive, does not constitute a representation that the named person or entity is available in the firm to deliver legal services.

A trade name must be carefully selected to avoid any misconception on the part of the public. For example, "University Legal Clinic" would be unacceptable because it implies a connection with another institution. A geographical trade name is improper if it leads a reasonable person to erroneously conclude that the law office is a public agency, or is the only law office available in that area or locality, or if the name misleads the public in another respect. A trade name which includes a reference to the lawyer’s area(s) of practice is allowed, as long as it is not misleading or confusing.

The name of a firm member who has become a judge may continue to be in the firm name (but not in the listing of names on the letterhead); however, no firm member may appear before that judge so long as the judge's name forms part of the firm name. This prohibition is necessary to preserve the appearance of justice and propriety (see Rule 4.01(3) and related commentary).

The use by a sole practitioner of the phrase "and Company" or "and Associates" after the lawyer's surname is misleading.

Limited liability partnership

A limited liability partnership, in addition to complying with the name regulations under the Partnership Act (Alberta), must ensure that any trade name used by the partnership clearly indicates the limited liability status of its partners.

Names listed on letterhead

Names listed on letterhead must accurately represent the status of the individual(s) named. For example:

(a) the status of an inactive or former member must be clearly indicated;

(b) the names of extraprovincial lawyers associated with the firm must be so described, together with the jurisdictions in which they are authorized to practice;

(c) the position or status of persons who are not lawyers (such as office manager, in house accountants, students at law and patent and trade mark agents) employed by the firm, must be clearly stated.

The status of a person whose name appears in the firm name only and is not listed on the letterhead does not require specification.

Chapter 4 – Relationship to the Administration of Justice

4.01 The Lawyer as Advocate

Advocacy

4.01 (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

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.

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

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

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.

A lawyer should refrain from expressing the lawyer's personal opinions on the facts in evidence of a client's case to a court or tribunal.

A lawyer must not communicate with a tribunal respecting a matter unless the other parties to the matter, or their counsel, are present or have had reasonable prior notice, or unless the circumstances are exceptional and are disclosed fully and completely to the court.

When a lawyer is required by law to notify one or more parties of a step taken or to be taken in a matter, the lawyer must notify all parties to the matter. Although certain steps appear to involve only

certain parties and not others, the interests of one or more of the other parties may be affected in a manner not immediately evident.

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. This situation creates an obligation on the lawyer present to prevent a manifestly unjust result by disclosing all material facts known to the lawyer that the lawyer reasonably believes are necessary to an informed decision.

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.

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.

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.

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.

4.01 (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) take any step in the representation of a client that is clearly without merit;

(c) unreasonably delay the process of the tribunal;

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

(e) 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;

(f) 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;

(g) 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;

(h) 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;

(i) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;

(j) introduce or otherwise bring to the tribunal's attention facts or evidence that the lawyer knows to be inadmissible;

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

(l) permit or participate in a payment or other benefit to a witness in excess of reasonable compensation;

(m) counsel a witness to give evidence that is untruthful or misleading;

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

(o) improperly dissuade a witness from communicating with other parties or from giving evidence, or advise a witness to be absent;

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

(q) discuss the testimony of a witness with a person excluded by the tribunal during such testimony;

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

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

(t) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal or quasi-criminal charge or complaint to a regulatory authority or by offering to seek or to procure the withdrawal of a criminal or quasi-criminal charge or complaint to a regulatory authority;

(u) needlessly inconvenience a witness; or

(v) appear before a court or tribunal while under the influence of alcohol or a drug or when it may be reasonably foreseen that the lawyer will be unable for any reason to provide competent services.

Commentary

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.

Relevant adverse authority: A decision is relevant where it refers to any point of law on which the case in question might turn. Relevance does not include cases that have merely some resemblance to the case before the court on the facts; it "means cases which decide a point of law" on which the current case depends. With respect to the lawyer's obligation to discover the relevant law, the duty does not extend to searching out unreported cases. The lawyer does have an obligation to bring to the court's attention cases of which the lawyer has knowledge and, as well, the lawyer cannot

discharge this duty by not bothering to determine whether there is a relevant authority. Lawyers are not obliged to bring forward facts that the other side has omitted to bring to the court's attention. They are not obliged to make the other side's case. They are, simply, obliged to make sure that the court has before it all relevant legal authority, whether helpful or not.

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 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.

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 Rule 2.02(8-9) and accompanying commentary.

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

4.01 (3) Except with the consent of all parties, a lawyer must not appear before a judge or a tribunal when the lawyer's past or present relationship with the judge or the tribunal would create a reasonable apprehension of bias.

Commentary

The term "lawyer" is used in the sense of the individual lawyer. Most relationships contemplated by the Rule are sufficiently personal that others in the lawyer's firm should not be tainted by association. On the other hand, circumstances are conceivable in which it would be unwise for a partner or associate of the lawyer having the relationship to appear before the judge or tribunal in question.

Impartiality is an essential element of judicial proceedings, from a substantive viewpoint and also in terms of society's perception of the justice system. Accordingly, lawyers have an ethical obligation to contribute to the fact and appearance of impartiality.

The first aspect of the Rule is the relationship between a lawyer and an individual judge. The Rule clearly prohibits a lawyer from appearing before a judge who is a relative or with whom the lawyer has a business relationship. Other close or intimate relationships may also bar a lawyer from appearing, depending on the circumstances.

With respect to a judge who was formerly with the lawyer's firm, the propriety of such an appearance will be governed by factors such as the length of time the judge has been on the bench and the nature and import of the judicial proceeding.

A second aspect of the Rule is the relationship between a lawyer and the tribunal. Relationships that may create a reasonable apprehension of bias include the following:

(a) A firm member may be a member of a tribunal, council or other official body. While the lawyer is generally prevented from appearing before the body itself, it is normally permissible to appear before a committee of the body if the firm member is not a member of that committee.

(b) A lawyer may at one time have had an association with a court, tribunal, council or other official body, as an employee or in the role of judge or adjudicator. The lawyer's subsequent appearance before the body as counsel may be improper because of actual or perceived collegiality with the current adjudicators, or because of a suspected "reverse bias" that could operate to the detriment of the lawyer's client. The passage of time will in most cases mitigate these considerations, two years being a standard benchmark. Other factors may also be present that are not mitigated by the passage of time. Whether there is an apprehension of bias in a particular case must therefore be determined by reference to all relevant circumstances.

In some instances, the other parties to a matter may consent to a lawyer's appearance before a judge or tribunal despite a past or present relationship, or the lawyer may have concluded on a consideration of all relevant factors that such an appearance is not improper. Nonetheless, an appropriately impartial atmosphere must be maintained during the proceeding, which will not be the case if the lawyer displays undue familiarity in discussions or dealings with the judge or tribunal.

Duty as Prosecutor

4.01 (4) 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

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. To the extent required by law and accepted practice, the prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

Disclosure of Error or Omission

4.01 (5) (a) A lawyer must not mislead a tribunal nor assist a client or witness to do so.

(b) Upon becoming aware that a tribunal is under a misapprehension as a result of submissions made by the lawyer or evidence given by the lawyer's client or witness, a lawyer must, subject to Rule 2.03 (Confidentiality), immediately correct the misapprehension.

Commentary

If a client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done, the lawyer should, subject to Rule 2.07 (Withdrawal from Representation), withdraw or seek leave to do so.

It is an obvious contravention of the rule for an advocate to lie to a tribunal. The rule applies as well, however, to an indirect misrepresentation. For example, a lawyer may not respond to a question from a tribunal in a technically correct manner that creates a deliberately misleading impression.

On the other hand, a lawyer is not required to inform a tribunal of facts that should have been brought forth by opposing counsel. If it becomes apparent that the tribunal is uninformed or misinformed on a factual matter through no fault of the lawyer or the lawyer's client or witness, a lawyer is justified in remaining silent.

A lawyer has a duty to correct a misapprehension arising from an honest mistake on the part of counsel or from perjury by the lawyer's client or witness. It may be a sufficient discharge of this duty to merely advise the tribunal not to rely on the impugned information.

The principle applies not only to statements that were untrue at the time they were made, but to those that were true when made but have subsequently become inaccurate due to a change in circumstance. For example, it may have been represented that a personal injury plaintiff is permanently disabled. If, prior to judgment, the plaintiff's condition undergoes material improvement, the lawyer must, subject to confidentiality, convey this information to the court.

Even if a matter has been judicially determined, the discovery of an error that may reasonably be viewed as having materially affected the outcome may oblige a lawyer to advise opposing counsel of the error. This may be the case notwithstanding that the appeal period has expired, since another remedy may be available to redress the mistake in whole or in part.

Briefly, if correction of the misrepresentation requires disclosure of confidential information, the lawyer must seek the client's consent to such disclosure. If the client withholds consent, the lawyer is obliged to withdraw.

Courtesy

4.01 (6) A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.

Commentary

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

Undertakings

4.01 (7) A lawyer must strictly and scrupulously fulfil any undertakings given and honour any trust conditions accepted in the course of litigation.

Commentary

A lawyer should also be guided by the provisions of Rule 6.02(13) (Undertakings and Trust Conditions).

Agreement on Guilty Plea

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

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

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

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

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

Commentary

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

Handling Evidence

4.01 (9) A lawyer must not counsel or participate in:

(a) the obtaining of evidence or information by illegal means;

(b) the falsification of evidence; or

(c) the destruction of property having potential evidentiary value or the alteration of property so as to affect its evidentiary value.

Commentary

Lawyers must uphold the law and refrain from conduct that might weaken respect for the law or interfere with its fair administration. A lawyer must therefore seek to maintain the integrity of evidence and its availability through appropriate procedures to opposing parties.

Paragraph (a) of Rule 4.01(9) prohibits a lawyer's involvement in the obtaining of evidence or information in a civil or criminal matter by means that are contrary to law, including the Charter of Rights and Freedoms and the Criminal Code.

The word "property" in paragraph (c) includes electronic information.Paragraph (c) is not intended to interfere with the testing of evidence as contemplated by the Rules of Court.

Incriminating Physical Evidence

4.01 (10) A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

Commentary

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

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

A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its mere existence. A lawyer in possession of incriminating physical evidence should carefully consider his or her options. These options include, as soon as reasonably possible:

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

(b) 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; or

(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.

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

A lawyer 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. 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.

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

4.02 The Lawyer as Witness

Submission of Evidence

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

Commentary

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

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

4.03 Interviewing Witnesses

Interviewing Witnesses

4.03 Subject to the rules respecting communication with a represented party set out in Rule 6.02 (8-10), 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 advise or encourage a witness or potential witness in a matter to refrain from communicating with other parties involved in the matter.

Commentary

There is generally no property in a witness. To achieve the truth-seeking goal of the justice system, any person having information relevant to a proceeding must be free to impart it voluntarily and in the absence of improper influence. The rule does not, however, prevent a lawyer from responding in the negative if a witness specifically asks if it is mandatory to talk to opposing parties.

In Alberta, there are certain recognized exceptions to the rule:

(a) The lawyer's client. It is not only permissible but expected that a lawyer will not allow a client to discuss the merits of a case with an opponent except in the presence or with the consent of the lawyer.

(b) Decision makers within a corporate client. Since a corporation must act through human agents, it is necessary to identify those within a corporate client having authority to act on its behalf. Generally, all directors and officers, as well as management level personnel with decision-making authority, have sufficient identity with the corporation to be considered equivalent to the client for the purposes of this rule.

(c) Witnesses having a close connection and identification of interests with the client. A witness such as a spouse or child of the client may be so closely connected with the client that it would be contrary to that person's legitimate interests to discuss the case with opposing parties. In these circumstances, it is permissible to advise the witness against engaging in such discussions.

(d) The expert witness. Because an expert witness usually receives confidential information of the client, it would be inappropriate for that witness to communicate freely with all parties. In addition, an expert's report will likely be privileged as part of the solicitor's brief. With respect to an expert, such as an attending doctor, who can be characterized as both an ordinary and an expert witness, opposing counsel is entitled to question the witness on matters not subject to privilege.

However, such questioning should be conducted only on notice to the lawyer concerned due to the risk of improper disclosure, intentional or otherwise.

4.04 Communication with Witnesses Giving Evidence

4.04 (1) A lawyer involved in a proceeding must not, during an examination and a cross-examination, obstruct the examination and the cross-examination in any manner.

Communication with Witnesses Giving Evidence

4.04 (2) A lawyer must observe the following rules respecting communication with witnesses giving evidence:

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

(b) during cross-examination of the lawyer's own witness, the lawyer must not, without the direction of the tribunal, 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, the lawyer may, unless the tribunal directs otherwise, discuss with the witness any matter.

Commentary

The application of these rules may be determined by the practice and procedures of the tribunal and, subject to the direction of the tribunal, may be modified by agreement of counsel.

While a lawyer may communicate with a witness during the examination-in-chief or re-examination (where permitted by the rule), lawyers must also ensure that they do not engage in coaching of witnesses. While a lawyer may legitimately suggest alternative ways of presenting evidence so that it is better understood, it is improper to direct or encourage a witness to misstate or misrepresent the facts. An advocate's role is not to change or distort the evidence, but to assist the witness in bringing forth the evidence in a manner that ensures fair and accurate comprehension by the court and opposing parties. See Rule 4.01(2)(m).

In Alberta, and in the rest of Canada, there is no definitive consensus among lawyers respecting subparagraph (a). Some lawyers feel that the practice in civil matters may be different than in criminal matters. Others hold that, during examination-in-chief, the examining lawyer may discuss with the witness any matter that has not been covered in the examination up to that point.

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. The 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.

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 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.

While any testimony-related discussion is generally prohibited during breaks, there are two qualifications to the rule as it relates to examinations for discovery. First, if the examination for discovery of a witness is adjourned for longer than one week, it is permissible for counsel to discuss with the witness all issues arising out of the matter, including evidence that has been or is to be given, provided that opposing counsel has been advised of the lawyer’s intention to do so. If opposing counsel objects, the matter must be resolved by the court having jurisdiction over the proceedings.

This rule is not intended to prevent discussions or consultations that are necessary to fulfil undertakings given during an examination for discovery. However, under no circumstances are such qualifications to be interpreted as permitting improper briefing such as that described in this rule.

This 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.

This rule applies with necessary modifications to examinations out of court.

4.05 Relations with Jurors

Communications before Trial

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

Commentary

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

A lawyer should be aware of the provisions of the *Jury Act* (Alberta), setting out that certain communications by or with jurors and potential jurors may amount to contempt of court.

Disclosure of Information

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

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

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

Communication during Trial

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

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

4.05 (6) A lawyer must not have any discussion after trial with a member of the jury about its deliberations.

Commentary

The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of members of his or her family.

4.06 The Lawyer and the Administration of Justice

Encouraging Respect for the Administration of Justice

4.06 (1) A lawyer must encourage public respect for and try to improve the administration of justice.

Commentary

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

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

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.

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

Seeking Legislative or Administrative Changes

4.06 (2) A lawyer who seeks legislative or administrative changes must disclose the interest being advanced, whether the lawyer's interest, the client's interest or the public interest.

Commentary

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

4.07 Lawyers and Mediators

Role of Mediator

4.07 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

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

Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of Rule 2.04 (Conflicts) and its commentaries and the common law authorities.

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

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

Chapter 5 – Relationship to Students, Employees, and Others

5.01 Supervision

Direct Supervision Required

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

Commentary

A lawyer may permit a non-lawyer to act only under the supervision of a lawyer, so long as the lawyer maintains a direct relationship with the client. 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.

A lawyer who practises alone or operates a branch or part time office should ensure that

(a) all matters requiring a lawyer's professional skill and judgment are dealt with by a lawyer qualified to do the work; and

(b) no unauthorized persons give legal advice, whether in the lawyer's name or otherwise.

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.

Application

5.01 (2) In this rule, a non-lawyer does not include a student-at-law.

Delegation

5.01 (3) A lawyer must not permit a non-lawyer to:

(a) accept cases on behalf of the lawyer, except that a non-lawyer may receive instructions from established clients if the supervising lawyer approves before any work commences;

(b) give legal advice;

(c) exercise judgment in giving or accepting undertakings or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter, providing that, in any communications, the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated and the lawyer who is responsible for the legal matter is identified;

(d) act finally without reference to the lawyer in matters involving professional legal judgment;

(e) be held out as a lawyer;

(f) appear in court or actively participate in formal legal proceedings on behalf of a client except as set forth above, in a supporting role to the lawyer appearing in such proceedings or authorized by law or the Rules of Court;

(g) be remunerated on a sliding scale related to the earnings of the lawyer, unless the non-lawyer is an employee of the lawyer;

(h) conduct negotiations with third parties, other than routine negotiations if the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken;

(i) take instructions from clients, unless the supervising lawyer has directed the client to the non-lawyer for that purpose and the instructions are relayed to the lawyer as soon as reasonably possible;

(j) sign correspondence containing a legal opinion;

(k) sign correspondence, unless

- **(i) it is of a routine administrative nature,**
- **(ii) the non-lawyer has been specifically directed to sign the correspondence by a supervising lawyer,**
- **(iii) the fact the person is a non-lawyer is disclosed, and**

(iv) the capacity in which the person signs the correspondence is indicated;

(l) forward to a client or third party any documents, other than routine, standard form documents, except with the lawyer's knowledge and direction;

(m) perform any of the duties that only lawyers may perform or do things that lawyers themselves may not do; or

(n) set fees.

Commentary

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

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

In all matters using a system for the electronic submission or registration of documents, whether or not the system contains the electronic signature of the lawyer, a lawyer who approves the electronic registration of documents by a non-lawyer is responsible for the content of any document.

Suspended or Disbarred Lawyers

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

Commentary

Lawyers should also refer to the Alberta Legal Profession Act regarding the employment of suspended or disbarred lawyers.

Electronic Registration of Documents

5.01 (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 password or access phrase or number to others.

5.01 (6) When a non-lawyer employed by a lawyer has personalized encrypted electronic access to any system for the electronic submission or registration of documents or electronic searching of private or confidential information, the lawyer must ensure that the non-lawyer does not

(a) permit others to use such access; or

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

Commentary

The implementation of systems for the electronic submission or 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 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 password, access phrase or number.

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.

5.02 Students

Recruitment and Engagement Procedures

5.02 (1) A lawyer must observe any procedures of the Society about the recruitment and engagement of articling or law students.

Duties of Principal

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

Commentary

A principal or supervising lawyer is responsible for the actions of students acting under his or her direction. In Alberta, articling students are subject to the authority of the Society and bound by all of the provisions of the Code and the Rules of the Law Society. Consequently, they are subject to discipline by the Society for breaches and misconduct.

Duties of Articling Student

5.02 (3) An articling student must act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

5.03 Harassment and Discrimination

5.03 (1) The principles of human rights laws and related case law apply to the interpretation of this rule.

5.03 (2) A term used in this rule that is defined in human rights legislation has the same meaning as in the legislation.

5.03 (3) A lawyer must not sexually harass any person.

5.03 (4) A lawyer must not engage in any other form of harassment of any person.

5.03 (5) A lawyer must not discriminate against any person.

Commentary

A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.

Chapter 6 – Relationship to the Society and Other Lawyers

6.01 Responsibility to The Society and The Profession Generally

Communications from the Society

6.01 (1) A lawyer must reply promptly and completely to any communication from the Society.

Meeting Financial Obligations

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

Commentary

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.

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.

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

Duty to Report Misconduct

6.01 (3) Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

(a) the misappropriation or misapplication of trust money;

(b) the abandonment of a law practice;

(c) participation in criminal activity related to a lawyer's practice;

(d) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and

(e) any other situation in which a lawyer's clients are likely to be materially prejudiced.

Commentary

Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these 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 (for example, through another lawyer).

Nothing in this paragraph is meant to interfere with the lawyer-client relationship. In all cases, the report must be made without malice or ulterior motive.

Often, instances of improper conduct arise from emotional, mental or family disturbances, substance abuse or other addictions. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports the ASSIST Program and similar agencies in their commitment to the provision of counselling on a confidential basis. Therefore, a lawyer who is making a bona fide effort to have another lawyer seek help for such problems is not required to report to the Society non-criminal conduct of that lawyer that would otherwise have to be reported under the rule. However, the lawyer must advise the Society if there are reasonable grounds to believe that the other lawyer will engage in conduct that is criminal or is likely to harm any person or of any other conduct under the rule if the lawyer refuses or fails to seek help.

Encouraging Client to Report Misconduct

6.01 (4) A lawyer must encourage a client who has a claim or complaint of serious misconduct against a lawyer to report the facts to the Society as soon as reasonably practicable.

Commentary

In determining whether the matter involves "serious misconduct", refer to Rule 6.01(3) and the related commentary.

6.02 Responsibility to Lawyers and Others

Courtesy and Good Faith

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

Commentary

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

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.

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.

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.

6.02 (2) A lawyer must not lie to or mislead another lawyer.

Commentary

This rule expresses an obvious aspect of integrity and a fundamental principle. In no situation, including negotiation, is a lawyer entitled to deliberately mislead a colleague. When a lawyer (in response to a question, for example) is prevented by rules of confidentiality from actively disclosing the truth, a falsehood is not justified. The lawyer has other alternatives, such as declining to answer. If this approach would in itself be misleading, the lawyer must seek the client's consent to such disclosure of confidential information as is necessary to prevent the other lawyer from being misled. The concept of "misleading" includes creating a misconception through oral or written statements, other communications, actions or conduct, failure to act, or silence (See Rule 6.02(5), Correcting Misinformation).

6.02 (3) 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.

Commentary

This rule is directed at sharp practice. It becomes operative when two elements are present: an obvious mistake by opposing counsel, and a benefit flowing from that mistake to which the lawyer's client is clearly not entitled.

A clerical or arithmetical error is an example of an obvious mistake. However, an act or omission by another lawyer that appears questionable but that may have involved a conscious exercise of judgment is not a mistake of the kind contemplated by this rule. For example, an opponent's acceptance of an apparently unfavourable contract or settlement offer, or the failure of a Crown prosecutor to raise the criminal record of an accused, may have been the result of careful consideration, including factors of which the lawyer is not aware.

A client has no legal entitlement to a benefit created solely through error. Consequently, it is improper for a lawyer to knowingly proceed on the basis of an incorrect statement of adjustments or a transfer that misdescribes the property intended to be bought and sold. The benefit that would be obtained by the client is unwarranted and without independent legal support.

On the other hand, a defendant in a lawsuit has a legal right to insist that proceedings be brought within a certain period of time. Accordingly, while the missing of a limitation date by plaintiff's counsel may be an obvious mistake, the defendant's lawyer does not violate this rule by allowing the limitation period to expire.

6.02 (4) 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.

Correcting Misinformation

6.02 (5) If a lawyer becomes aware during the course of a representation that:

(a) the lawyer has inadvertently misled an opposing party, or

(b) the client, or someone allied with the client or the client's matter, has misled an opposing party, intentionally or otherwise, or

(c) the lawyer or the client, or someone allied with the client or the client's matter, has made a material representation to an opposing party that was accurate when made but has since become inaccurate,

then, subject to confidentiality, the lawyer must immediately correct the resulting misapprehension on the part of the opposing party.

Commentary

"Subject to confidentiality" (see Rule 2.03, Confidentiality)

Briefly, if correction of the misrepresentation requires disclosure of confidential information, the lawyer must seek the client's consent to such disclosure. If the client withholds consent, the lawyer is obliged to withdraw. The terminology used in this rule is to be broadly interpreted. A lawyer may have provided technically accurate information that is rendered misleading by the withholding of other information; in such a case, there is an obligation to correct the situation. In paragraph (c), the concept of an inaccurate representation is not limited to a misrepresentation that would be actionable at law.

See Rule 4.01(5), in respect of correcting misinformation in advocacy settings.

Communications

6.02 (6) 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.

6.02 (7) 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.

6.02 (8) Subject to Rules 6.02 (8.1) and (9), 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.

6.02 (8.1) 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.

6.02 (9) A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by another lawyer with respect to that matter.

Commentary

Rule 6.02(8) 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. Lawyers should be careful about email communications. For example, if a lawyer copies the client with an email sent to the opposing lawyer, then a response using "Reply to All" may result in an unintended communication by the opposing lawyer with the client.

This rule does not prevent parties to a matter from communicating directly with each other.

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.

Where notice as described in Rule 6.02(8.1) 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.

Rule 6.02(9) 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.

In appropriate circumstances, a lawyer must assist the client in obtaining a second opinion if requested by a client. The lawyer providing the initial advice should respond in a cooperative and positive manner. For example, sufficient information must be provided to the other lawyer upon request to render the second opinion an informed one. A lawyer is not obliged to assist in obtaining a second opinion when the client is attempting to coerce the formulation of a favourable opinion or is

acting unreasonably in another respect. However, the obligation to be cooperative and to review objectively and in good faith any second opinion obtained is unaffected.

6.02 (10) 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

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

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 Rule 2.04 (Conflicts). A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of Rule 2.04 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

6.02 (11) When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:

(a) advise 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 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

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

When dealing in a professional capacity with a non-lawyer representing another person, or with a person not represented by counsel, a lawyer has the same general duties of honesty, courtesy and good faith that are owed to professional colleagues.

The reference in this rule to unrepresented party is not intended to include professional advisors or persons having special qualifications who are retained for the purposes of negotiation, such as insurance adjusters and bank managers.

The lengths to which a lawyer must go in ensuring a party's understanding of these matters will depend on all relevant factors, including the party's sophistication and relationship to the lawyer's client and the nature of the matter.

Inadvertent Communications

6.02 (12) A lawyer who comes into possession of a privileged communication of an opposing party must not make use of it and must immediately advise the opposing lawyer or opposing party.

Commentary

Lawyers may receive privileged communications from opposing counsel or parties through inadvertence. On occasion, lawyers receive privileged communications of opposing parties as the result of the impropriety of their own clients or from third party informants.

Immediately upon realizing that the communication is a privileged communication of another party, the lawyer shall not continue to read the communication and must bring it to the attention of opposing counsel, then return or destroy it, without copies having been made. Knowledge that a communication is not intended for the lawyer receiving it will be imputed if, under the circumstances, it would have been unreasonable for the lawyer to come to any other conclusion.

A lawyer who innocently reads all or a portion of a privileged communication before becoming aware of its nature must advise opposing counsel of the lawyer’s possession of the communication and the extent to which the communication has been reviewed.

In the event there is a genuine dispute over the nature of the communication, it shall be permissible for the receiving lawyer to secure the communication, pending resolution of the dispute. The issue of whether or to what extent the communication may be copied or its contents disclosed or used must be resolved by agreement or by the court. In the meantime, it is improper to use the communication or disclose its contents in any manner.

This rule does not otherwise address the legal duties of a lawyer who has inadvertently or inappropriately received privileged communications or the remedies available to the party who seeks to assert privilege over the communication.

Undertakings and Trust Conditions

6.02 (13) A lawyer must not give an undertaking that cannot be fulfilled and must fulfil every undertaking given and honour every trust condition once accepted.

Commentary

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

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

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

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

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

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

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

6.03 Outside Interests and The Practice Of Law

Maintaining Professional Integrity and Judgment

6.03 (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

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.

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

Whether the activity in question is entirely unrelated to the practice of law or overlaps with the practice to some extent, the profession through the Society must maintain an interest in its nature and the manner in which it is conducted. While the Society's primary concern is with conduct that calls into question a lawyer's suitability to practise law or that reflects poorly on the profession, lawyers should aspire to the highest standards of behaviour at all times and not just when acting as lawyers. Membership in a professional body is often considered evidence of good character in itself. Consequently, society's expectations of lawyers will be high, and the behaviour of an individual lawyer may affect generally held opinions of the profession and the legal system.

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

Commentary

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

When the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the

profession into disrepute or impair the lawyer's competence, such as if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

6.04 The Lawyer in Public Office

Standard of Conduct

6.04 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

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

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.

Lawyers holding public office are also subject to the provisions of Rule 2.04 (Conflicts) when they apply.

6.05 Public Appearances and Public Statements

Communication with the Public

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

Commentary

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

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

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

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

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

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

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

Interference with Right to Fair Trial or Hearing

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

Commentary

A lawyer having any contact with the media is subject to the sub judice rule and should be aware of it. The rule is designed to ensure the fairness of the trial process to the parties involved. It may amount to contempt of court to publish a statement before or during a trial which may tend to prejudice a fair trial.

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

6.06 Preventing Unauthorized Practice

Preventing Unauthorized Practice

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

Commentary

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

See, generally, the *Legal Profession Act of Alberta*, sections 102 – 111.

6.07 Errors and Omissions

Informing Client of Errors or Omission

6.07 When, in connection with a matter for which a lawyer is responsible, a lawyer discovers a material error or omission that is or may be damaging to the client regardless of whether it is capable of rectification, the lawyer must:

(a) promptly inform the client of the error or omission;

(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

Even if the likelihood of a claim or liability is remote, the lawyer must report the matter to the Alberta Lawyers Insurance Association (ALIA). The duty to report a potential claim to the insurer is contractual while the duty to disclose an error to the client is an ethical or fiduciary one. The lawyer should exercise care not to prejudice the insurance coverage by admitting liability.

Frequently such an error is capable of correction without expense, delay or other prejudice to the client. Nonetheless, if the error is material, it must be reported to the client. An unsuccessful attempt at correction before informing the client will only exacerbate the situation and may aggravate the lawyer's responsibilities.

If the mistake has already created a problem for the client, the lawyer must advise the client to consider retaining other counsel. There may be circumstances when, at the client's request and in consultation with ALIA, it is appropriate for the lawyer to continue acting.