SERVING *the* PUBLIC INTEREST

THE LAW SOCIETY OF ALBERTA

CODE OF PROFESSIONAL CONDUCT

AMENDMENT TABLE – 2009_V1

Amended	Description of Change	Version No.	Amendment Authorized	Amendment Effective	Amendment Source	Other Impact
Chapter 6, New Rule 5.1 & Commentary	New Rule applicable to conflicts and short-term legal services provided by non-profit legal service providers	2009_V1	Benchers	June 6, 2009	Bencher's June 2009 Meeting	

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CHAPTER 1
RELATIONSHIP OF THE LAWYER TO SOCIETY AND THE JUSTICE SYSTEM

STATEMENT OF PRINCIPLE

A lawyer shares the responsibilities of all persons to society and the justice system and, in addition, has certain special duties as an officer of the court and by virtue of the privileges accorded the legal profession, including a duty to ensure that the public has access to the legal system.

RULES

1. A lawyer must respect and uphold the law in personal conduct and in rendering advice and assistance to others.

2. A lawyer should seek to improve the justice system.

3. A lawyer must not act in a manner that might weaken public respect for the law or justice system or interfere with its fair administration.

4. A lawyer should support and contribute to the profession's efforts to make legal services available to all who require them, regardless of ability to pay.

5. ,A lawyer must not decline to act in a meritorious matter unless the lawyer makes reasonable efforts to assist the client in obtaining competent representation.

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6. A lawyer must be courteous and candid in dealings with others.

7. A lawyer's position must not be used to take unfair advantage of any person or situation.

8. Except under extraordinary circumstances, a lawyer must not record a conversation with anyone, nor enable a third party to hear the conversation, without first obtaining the consent of the person to whom the lawyer is speaking.

9. A lawyer must not harass any person or discriminate against any person on the basis of race, language, creed, colour, national or ethnic origin, gender, religion, marital status, sexual orientation, age, mental disability or physical disability or otherwise or on the basis of any similar personal attribute.

10. A lawyer must not sexually harass a colleague, staff member, client or other person.

COMMENTARY

General

G.1 Lawyers have a quasi-official position in society by virtue of the privileges conferred on them by the state. Such privileges include the profession's right of self-regulation as well as its exclusive entitlement to advise others of their rights and limitations under the law, to represent them as advocates and to appear on their behalf in a court of law. *The Legal Profession Act* provides that no person other than a lawyer is authorized to practise law.

As a consequence of this position of privilege, lawyers have certain enhanced responsibilities to society. The first is to ensure that competent and high-quality legal services are readily available at reasonable cost to those who require them. Lawyers also have an obligation to ensure that legal services are generally available to those that require them, and have an obligation to support legal aid plans and referral services, and to act on a *pro bono* basis in appropriate cases. There is an obligation on lawyers to educate the public and to assist the public, in recognizing when legal assistance may be of benefit and in making an informed decision as to which lawyer or firm to retain (see also Chapter 5 – *Advertising*). As

well, lawyers have a responsibility not to use their position to unfair advantage and must deal with others in an honourable manner.

As officers of the court lawyers also have obligations with respect to the administration of justice. For example, they must safeguard the due process of law and the proper operation of institutions of justice. As Rule #2 makes clear, constructive efforts to improve the justice system are consistent with this obligation. In contrast, behaviour that is destructive or scornful of the justice system is inconsistent with a lawyer's position and responsibilities.

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R.1 A lawyer must respect and uphold the law in personal conduct and in rendering advice and assistance to others.

C.1 Due to the connection of lawyers with the administration of justice and the public scrutiny to which their actions will be subjected, a breach of law committed by a lawyer has potentially serious implications. A lawyer therefore has an ethical as well as a legal obligation to obey the law.

"The law" for the purposes of Rule #1 is to be broadly interpreted and includes common law, such as tort law, in addition to criminal and quasi-criminal statutes, However, not every breach of the law will be considered conduct deserving of sanction. The Law Society's primary concern is to protect the public and the integrity of the profession by ensuring that each member of the profession is an appropriate individual to practise law. All relevant circumstances of an offence will therefore be taken into account, including its nature and seriousness and the existence of previous violations. Behaviour that is notorious or public in nature or that has a dishonourable element (such as failure to pay a civil debt in the absence of a legitimate dispute or other justification) is the kind of conduct that may invoke ethical sanction.

A lawyer must also exhibit respect for the law in dealings with others. As to advising or assisting a client to commit a crime or fraud see Rule #11 of Chapter 9*, The Lawyer as Advisor,* and Rule #4 of Chapter 12*, The Lawyer in Corporate and Government Service*. Generally, any involvement of a lawyer with illegal conduct, however indirect, has the potential to encourage public disrespect for the law itself as well as the profession and its members.

Even the honest belief of a lawyer in the unjustness of a law does not justify advocating that a client or any other person deliberately violate the law. A lawyer in these circumstances has an obligation to seek amendment or abolition of the law through the normal democratic process (see Rule #2). However, Rule #1 is not intended to prevent a lawyer from advising a client who, in good faith and on reasonable grounds, desires to challenge or test a law through a violation of the law, provided that this is the most effective means of achieving the client's objective and the violation does not involve injury or material damage to any person or property.

R.2 A lawyer should seek to improve the justice system.

C.2 Efforts to improve the justice system, including constructive criticism of its operation and institutions, are consistent with a lawyer's responsibilities to the administration of justice. Legal training and the opportunity to observe the justice system in operation uniquely qualify lawyers to evaluate and seek improvements to that system. The justice system includes not only the courts and the judiciary, but all public institutions involved with the administration of justice such as the legal profession, the police department, and various governmental departments and agencies, including legislative bodies.

Implicit in Rule #2 is the duty to report misconduct by persons connected with the justice system. See also Rule #4 of Chapter 3, *Relationship of the Lawyer to The Profession,* respecting the duty to report the misconduct of colleagues in the legal profession.

A lawyer's efforts to improve the justice system must be constructive and *bona fide* in nature. Whether seeking a legislative or administrative change, speaking out against an injustice or perceived weakness in the system or expressing other criticism, a lawyer must act with intelligence, professionalism and due deliberation.

Moreover, the party or parties to whom criticism is expressed must be appropriate under the circumstances. In some instances, this will be the Law Society; in others, the Judicial Council, the police department, the police commission or the media. In deciding whether to publicize criticism through the media, a lawyer must consider all possible consequences, such as loss of control over how the lawyer’s comments are ultimately reported and inability of the subject of the criticism to respond in any meaningful way.

Although proceedings and decisions of the courts are properly subject to scrutiny and criticism by all citizens, a lawyer who chooses to criticize such matters or the judiciary itself must take into account the following considerations:

- an opinion expressed by a lawyer may be given particular weight or credibility due to the lawyer's professional knowledge and connection with the legal system;
- if a lawyer voicing an opinion has been involved in the proceedings at issue, the lawyer's comments may be, or may appear to be, partisan rather than objective; and
- judges are often prohibited by law or custom from speaking in their own defence. In this regard, a lawyer may in some circumstances have an obligation not only to refrain from expressing criticism, but to defend the court if it is the subject of unjust criticism.

Finally, a lawyer seeking reform to the justice system must disclose whether it is sought in the public interest, on the lawyer's own behalf or on behalf of a client, although the name of a client may not be divulged in the absence of express or implied authorization. (see Rule # 2 of Chapter 7, *Confidentiality*)

R.3 A lawyer must not act in a manner that might weaken public respect for the law or justice system or interfere with its fair administration.

C.3 Society expects that the legal profession will play a leading role in protecting the integrity of the justice system and ensuring that it functions properly. A lawyer's behaviour is incompatible with this role if it encourages public disdain or disregard for the administration of justice. Examples are deliberate flouting of the law or other flagrant disrespect for an aspect of the justice system; irresponsible or unjustified allegations of corruption or partiality; criticism that is ill-considered or malicious; disrupting judicial or administrative proceedings; and suggesting to a client or other person that evasion of the law is acceptable.

R.4 A lawyer should support and contribute to the profession's efforts to make legal services available to all who require them, regardless of ability to pay.

C.4 The right of every person to legal counsel creates a corresponding obligation on the part of society and the profession to supply legal representation. Such representation must be available in fact, and not merely in theory, or the right to counsel is meaningless.

Members of society with the most pressing need for legal services often encounter difficulty in obtaining representation because of economic or social disadvantages. Lawyers should be willing to assist such persons through participating in legal aid programs, accommodating requests by the court to represent parties appearing before the court, and reducing or waiving fees in appropriate circumstances.

A lawyer should be slow to decline to act for a disadvantaged client unless the refusal has substantial ethical justification. For example, a representation may be prohibited by the rules of this Code relating to competence or conflicts of interest, or it may be likely to place an unreasonable burden on the lawyer. In such cases it is proper for the lawyer to refuse the representation but, depending on the circumstances, there may be an obligation to assist the client in finding other counsel. (see Rule #3 of Chapter 2, *Competence,* and Rule #5 of Chapter 1. *Relationship of the Lawyer to Society and the Justice System*).

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R.5 A lawyer must not decline to act in a meritorious matter unless the lawyer makes reasonable efforts to assist the client in obtaining competent represenation.

C.5 *"Client"* in the context of Rule #5 includes a potential or prospective client. A lawyer is generally entitled to decline to act in any matter provided that reasonable efforts are made to ensure that a meritorious cause does not go unrepresented. Such efforts would normally consist of referring the client to a firm member, directing the client to a lawyer referral service or legal aid program, or identifying for the client two or three lawyers believed to be competent in the area in question.

A lawyer should be slow to exercise the right to decline a representation when the client is disadvantaged in some respect, particularly if the court has requested that the lawyer act for the disadvantaged client. See Commentary 4 of Chapter 1, for a discussion of the considerations that apply. If a lawyer is permitted or obligated by this Code

to decline a representation requested by the court, that lawyer must then cooperate with the court, if so requested, in reasonable efforts to obtain counsel for the client.

It is improper to decline a representation solely because it involves allegations of misconduct on the part of a colleague. The client with a meritorious claim against a lawyer should not encounter undue difficulty in obtaining competent representation. A willingness to act in such a situation as well as to report ethical violations to the Law Society is consistent with a lawyer's duties to the profession and the public (see also Rule #4 and accompanying Commentary of Chapter 3, *Relationship of Lawyer to the Profession*).

If a client's position or claim is clearly without merit, the lawyer must decline to act (see Rule #1 of Chapter 10, *The Lawyer as Advocate*) and has no obligation to assist the client to find another lawyer.

If a lawyer is not competent to handle a particular matter, it is generally improper for the lawyer to act but, again, the lawyer must exert reasonable efforts to assist the client in obtaining competent representation (see Rule #3 of Chapter 2, *Competence*).

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R.6 A lawyer must be courteous and candid in dealings with others.

C.6 A lawyer has an obligation to refrain from conduct that is rude, dishonest or misleading or that is otherwise inconsistent with the lawyer's professional standing. This obligation includes the duty to respond within a reasonable time, given all of the circumstances, to telephone calls, correspondence and other communications. A lawyer also has a responsibility to refrain from employing means in the representation of a client having no substantial purpose other than to embarrass, delay or annoy another party. (see Commentaries 1 and 2 of Chapter 10, *The Lawyer as Advocate*).

If a lawyer is dealing on a client's behalf with an unrepresented person, the duty of candour requires special efforts to clarify the lawyer's role. In particular, it is necessary to explain that comments and information offered by the lawyer are likely to be partisan in nature and that the lawyer is not acting in the interests of the unrepresented person (see also Rule #5 of Chapter 11, *The Lawyer as Negotiator*).

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R.7 A lawyer's position must not be used to take unfair advantage of any person or situation.

C.7 The opportunity for abuse is present in any position of privilege, including the quasi-official position in society held by a member of the legal profession. Lawyers must therefore conduct themselves in a manner that excludes any suggestion of abuse. With regard to clients, a lawyer is frequently in a dominant position due to legal knowledge and professional experience. The client, in contrast, may be made particularly vulnerable by the client's legal problem. As a consequence, lawyers must ensure that the relationship formed with clients is not condescending or manipulative, but one of mutual trust and respect. Furthermore, any appearance of unfair advantage or undue influence must be avoided. As to business transactions with clients (see Rule #9 of Chapter 6, *Conflicts of Interest*).

With regard to third parties, the taking of an unfair advantage equates to conduct that a normal person, acting reasonably, would consider to be dishonourable (see also Commentary G.1 of Chapter 8, *The Lawyer and the Business Aspects of Practice*). Negotiation with an unrepresented party is the subject of Rule #5 of Chapter 11, *The Lawyer as Negotiator*.

A lawyer who seeks political or social reform through espousal of a cause must ensure that clients continue to receive independent representation and that no client becomes a tool for the lawyer to advance a personal cause or belief (see Rule #8 of Chapter 6, *Conflicts of Interest*).

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R.8 Except under extraordinary circumstances, a lawyer must not record a conversation with anyone, nor enable a third party to hear the conversation, without first obtaining the consent of the person to whom the lawyer is speaking.

C.8 This rule is intended to operate independently of laws dealing with invasion of privacy. An example of a circumstance that would justify recording a conversation without consent is a police request that a telephone conversation be recorded to protect a lawyer who has been threatened.

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R.9 A lawyer must not harass any person or discriminate against any person on the basis of race, language, creed, colour, national or ethnic origin, gender, religion, marital status, sexual orientation, age, mental disability or physical disability or otherwise or on the basis of any similar personal attribute.

C.9 A lawyer has an ethical obligation to recognize the essential dignity of each individual and the principle of equal rights and justice for all persons. Rule #9 applies to lawyers' personal, social and professional relationships with all persons and classes of persons, including clients and prospective clients, employees, other lawyers, and society in general. Rule #9 is not intended to prohibit practices that are reasonable and justifiable or otherwise permissible under principles of general law. Discrimination is where a person or a group is disadvantaged, denied an opportunity or treated adversely because of a distinction relating to personal attributes within the prohibited grounds. Stereotyped views often cause discriminatory conduct. In some cases strictly equal or even-handed application of rules or policies may be discriminatory against a person or a group because of the differing impact those rules or policies have on those individuals or groups. This is called adverse discrimination and creates a duty to take reasonable steps to accommodate the special needs of those individuals and groups.

Harassment may encompass conduct which:

(a) undermines another person’s dignity by causing embarrassment, discomfort or humiliation;

(b) creates an intimidating or hostile environment for the recipient of the harassment;

(c) is an abuse of one's status and exploits the power imbalance between the person or persons engaging in harassing conduct and the recipient of the harassment;

(d) if submitted to or rejected, affects decisions regarding the person’s future. If the recipient of the harassment is a client, this may affect the future provision of legal advice and services. In the employment context this may include matters such as promotion, salary, benefits and job security;

(e) either explicitly or implicitly must be submitted to as a term or condition prescribed by the harasser; for example, as a condition for the provision of legal services or as a condition of employment.

Harassment can be sexual, discriminatory or personal in nature. Sexual harassment is specifically addressed in Commentary 10. Discriminatory harassment is harassment focused on a personal characteristic within one of the prohibited grounds. It could take the form of name-calling nicknames (for an individual or a group of people), demeaning the character of a person or group of persons or telling jokes about a person or a group of people.

Personal harassment is disrespectful and degrading conduct generally that is not specifically focused within the prohibited grounds. It includes conduct that is rude, insulting, belittling or vindictive (see also Rules #2, #6 and #7 in this chapter and related commentaries).

The key in determining whether conduct is harassment is the impact the conduct has had on the complainant, not the intent with which it was done. Harassment is different from offending a person; it involves undermining another person's personal integrity.

The rule against harassment applies in the workplace. Employers and others in positions of authority have a positive duty to provide a harassment-free working environment that does not undermine personal integrity, economic potential or both. Legal employers are expected to have a harassment policy in place explaining both the conduct expected in that work place and the steps to be taken if an employee wishes to make a complaint about conduct.

The rule against harassment is a pervasive rule. It applies to lawyers' relations with clients, other lawyers, others who work in the justice system (judges, court officials and staff, the police and prison guards, etc.) and members of the general public.

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R.10 A lawyer must not sexually harass a colleague, staff member, client or other person.

C.10 A lawyer is ethically bound to promote the dignity and equality of all those in the work environment by avoiding discriminatory practices in compliance with Rule #9 and, specifically, by rejecting sexual harassment.

Verbal or physical conduct having a sexual element constitutes sexual harassment when:

(a) it undermines another person's dignity by causing embarrassment, discomfort, humiliation or offence;

(b) it interferes with a person's work performance by creating an intimidating or hostile work environment;

(c) submission to or rejection of such conduct affects decisions regarding that person's employment, including matters such as promotion, salary, benefits and job security; or

(d) submission to such conduct is made, either explicitly or implicitly, a term or condition of employment or the rendering of professional services.

Sexual harassment can occur as behaviour by men toward women, by women toward men, between men or between women. Sexual assault is an obvious example of sexual harassment. Other examples include the following behaviours in situations in which the offender knows or ought to know that the behaviour is unwelcome, embarrassing or offensive or will adversely affect a recipient's work environment (see paragraphs (a) through (d) above):

- telling sexist jokes, displaying material of a sexual nature or using sexually suggestive gestures;
- using sexually derogatory or degrading words to describe an individual or persons of one gender or sexual orientation;
- making innuendos, inquiries, propositions, requests or demands of a sexual nature;
- leering;
- pinching, patting, rubbing or other physical contact.

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CHAPTER 2
COMPETENCE

STATEMENT OF PRINCIPLE

A lawyer has a duty to be competent and to render competent services.

RULES

1. A lawyer, to be competent, must possess the skills and attributes relevant to each matter undertaken on behalf of a client and must apply them in a manner appropriate to that matter.

2. A lawyer must not act or continue to act in any matter in which it may be reasonably foreseen that the lawyer will be unable for any reason to provide competent services.

3. A lawyer who is prevented from acting or continuing to act by Rule #2 must make reasonable efforts to assist the client in obtaining competent representation.

4. A lawyer may assign to support personnel only those tasks that they are competent to perform and must ensure that they are properly trained and supervised.

5. A lawyer must refrain from conduct that impairs the lawyer's capacity or motivation to provide competent services.

COMMENTARY

General

G.1 *Aspects of competence:* The competence of lawyers is essential to the satisfactory operation of the legal system since it directly affects the ability of clients to enforce and benefit from legal rights. This principle applies whether a lawyer is acting as an advocate in the courtroom, where the proper functioning of the adversary system is dependent on the competence of counsel for all parties, or as a solicitor (for example, in the preparation of a contract).

Competence is a continuum rather than an absolute standard of perfection. It is not expected that a lawyer will achieve a general condition of competence throughout all categories of legal services, but a lawyer should strive to attain the upper range of the continuum in those areas in which the lawyer practises.

The term "competence" eludes precise definition because it encompasses a broad range of characteristics. Some of these, discussed in more detail below, are the following:

(a) professionalism;
(b) knowledge of the law, legal procedures and legal institutions;
(c) sound professional judgment;
(d) skill;
(e) management and organization;
(f) intellectual and emotional capacity to perform competently;
(g) experience; and
(h) maintenance and improvement of knowledge and skills. A lawyer has an obligation to maintain legal skills and knowledge and to keep abreast of developments in the lawyer's areas of practice. A lawyer should also seek to improve competence on an ongoing basis to facilitate optimum performance in each matter and should annually prepare a professional development plan. The plan may reflect many different learning activities in order to achieve these goals.

(a) *Professionalism*. This characteristic comprises attitudes and values such as dedication to the client's welfare, good work habits, an understanding of client relations, a general determination to practise ethically and a high regard for the interests of society generally. An important aspect of professionalism is attention to quality of service. A lawyer must be conscientious, diligent and efficient in providing services. All deadlines must be met unless the lawyer is able to offer a reasonable explanation and no prejudice to the client will result. Whether or not a specific deadline applies, a lawyer must be prompt in prosecuting a matter, responding to communications and reporting developments to the client. In the absence of developments, contact with the client must be maintained to the extent reasonably expected by the client.

(b) *Knowledge of the law, legal procedures and legal institutions.* Lack of legal knowledge in a particular area will not always prevent a lawyer from acting since it may be possible to acquire the requisite knowledge within a reasonable time at no undue expense to the client. However, the lawyer must also consider whether other circumstances, such as lack of experience or skill, would make it unwise to agree to act despite the lawyer's ability to become technically knowledgeable in the area (see paragraph (g) below).

(c) *Sound professional judgment.* The following are attributes that contribute to professional judgment:

(i) ability to assess the strengths and weaknesses of a client's case and recommend an appropriate course of action;

(ii) ability to recognize one's limitations and issues beyond one's competence;

(iii) ability to identify problems created by an excessive workload and the steps that must be taken to correct the situation;

(iv) ability to assess whether the nature of a matter will justify the legal costs of bringing it to its conclusion. A lawyer may be aware at the outset of a matter, or may become aware during the course of a matter, that the costs of performing the requested services completely and competently will be disproportionately high (for example, the appeal of a relatively small judgment to the Supreme Court of Canada). This fact must immediately be brought to the client's attention. If the client is not prepared to pay the full legal costs as estimated by the lawyer, it will be necessary for the lawyer to decide whether to withdraw or to perform the services for something less than an amount that fairly compensates the lawyer. As to situations in which the client requests abbreviated services, (see paragraph (c)(v) below);

(v) ability to balance the obligation to be thorough with the obligation to be economical. While it is ethically improper to spend a client's money foolishly or unnecessarily, it is also unacceptable to curtail the scope of services in an effort to minimize legal fees when to do so would compromise the lawyer's standard of competence. A lawyer must therefore carefully assess in each case in which a client desires abbreviated or partial services whether, under the circumstances, it is possible to render those services in a competent manner. It may be permissible, for example, to prepare and register a non-arm's-length transfer of land without attending to closing or the handling of funds, provided that the client understands and accepts the risks involved. It may not be permissible to prepare an abbreviated or simplified contract which, when viewed objectively, is incomplete or insufficient to protect the client's interests. In this case, if the client is not willing to pay the costs of an adequately detailed document, the lawyer must withdraw or provide complete services for less than an amount that fairly compensates the lawyer.

In circumstances in which abbreviated or partial services may be rendered competently, the client must be fully apprised of the risks and limitations of the retainer. Discussions with the client in this regard must be confirmed in writing.

(d) *Skill.* This attribute is essentially the ability to translate legal knowledge into action. Skill involves the mastering of various techniques, including the following:

- interviewing
- counselling
- research
- negotiating
- communicating, orally and in writing
- drafting
- advocacy
- examining witnesses

(e) *Management and organization.* To be competent, a lawyer's services must be economical, timely and efficient. A lawyer must therefore have adequate staff, equipment and facilities. As well, a law office should implement support systems that effectively deal with aspects of daily practice such as the following:

- work management
- accounting
- file management
- monitoring of limitation dates
- quality control of legal and office processes and documents
- monitoring of conflicts of interest

(f) *Intellectual and emotional capacity to perform competently. A* lawyer's capacity may be impaired by alcohol or drug abuse, personal problems, health problems, work overload or excessive involvement in outside activities. Motivation, a key aspect of capacity, may also be affected by a more specific or temporary condition such as mental block. In such a case, the most effective solution is often to turn the matter over to another lawyer.

(g) *Experience*. Lack of experience may not always prevent a lawyer from acting since, assuming that no undue delay or expense is created for the client, an inexperienced lawyer may be able to competently handle a matter through research, study, and possibly the supervision or assistance of colleagues. However, certain representations, such as the handling of a murder trial, clearly require experience.

(h) *Maintenance and improvement of knowledge and skills.* A lawyer has an obligation to maintain legal skills and knowledge and to keep abreast of developments in the lawyer's areas of practice. A lawyer should also seek to improve competence on an ongoing basis to facilitate optimum performance in each matter and should annually prepare a professional development plan. The plan may reflect many different learning activities in order to achieve these goals.

G.2 *Incompetence vs. negligence:* The ethical rules governing competence do not necessarily correspond to the legal rules governing negligence. An isolated incident or inadvertent error may constitute negligence and be legally actionable without amounting to incompetence. Conversely, conduct that (for example) evidences gross neglect in a particular matter, or a pattern of neglect or mistakes in different matters, may prompt Law Society intervention although it has not resulted in any loss or damage to a client.

G.3 *Steps in rendering competent service:* To render competent service in a particular matter, a lawyer will normally complete the following steps:

(a) Gather all of the facts relevant to the client's problem;

(b) Formulate and assess the material issues raised by the fact situation;

(c) Assess and, if necessary, research the law that applies to the client's problem;

(d) Develop an appropriate legal strategy to address the client's problem in consultation with the client;

(e) Execute the legal strategy in a thorough yet economical manner that is responsive to the needs of the client.

In some cases, a lawyer may have a responsibility to suggest that experts be retained in areas in which the lawyer cannot competently advise the client, such as financial and accounting matters or family counselling. However, the services of experts must not be engaged on the client's behalf without the client's consent.

R.1 A lawyer, to be competent, must possess the skills and attributes relevant to each matter undertaken on behalf of a client and must apply them in a manner appropriate to that matter.

(see paragraph (h) of Commentary G.1)

R.2 A lawyer must not act or continue to act in any matter in which it may be reasonably foreseen that the lawyer will be unable for any reason to provide competent services.

C.2 The circumstances potentially preventing a lawyer from rendering competent service in a matter may be of a personal or professional nature. For example, a lawyer may have personal feelings or beliefs about a client or issue that would foreseeably create an impairment of professional judgment if a particular matter were undertaken (see Rule #8 of Chapter 6*, Conflicts of Interest*).

Professionally, a lawyer may have unusually heavy commitments that would prevent the appropriate attention to a matter or its timely prosecution. Timeliness in this context is not determined solely by the lawyer's calendar or the welfare of the client; the lawyer must also consider the legitimate interests of opposing parties, the interests of the administration of justice generally, and other relevant factors such as the possible application of the *Charter of Rights and Freedoms.* As a consequence, the client's willingness to accept delay will not of itself be sufficient to justify a lawyer's agreeing to act in a matter if the lawyer will be unable to advance the matter with reasonable timeliness.

Alternatively, a lawyer may lack the necessary knowledge, skills or experience to perform competently. As noted in paragraphs (b) and (g) of Commentary G.1, there are situations in which it may be appropriate for a lawyer to become competent in order to undertake a matter. However, the lawyer must be realistic in assessing how completely and efficiently the missing elements of competence can be acquired as well as the possibility of prejudice to the client's position.

Rule #2 also applies to a lawyer who becomes unable to act competently in the course of a matter already underway. In such a situation the lawyer ought to obtain assistance from other counsel or withdraw. See Rules #3 and #4 of Chapter 14*, Withdrawal and Dismissal,* for a discussion of a lawyer's duties and responsibilities in connection with withdrawal.

R.3 A lawyer who is prevented from acting or continuing to act by Rule #2 must make reasonable efforts to assist the client in obtaining competent representation.

C.3 "Client" in the context of Rule #3 includes a potential or prospective client. Reasonable efforts to assist the client would normally consist of referring the client to a firm member, directing the client to a lawyer referral service or legal aid program, or identifying for the client two or three lawyers believed to be competent in the area in question.

R.4 A lawyer may assign to support personnel only those tasks that they are competent to perform and must ensure that they are properly trained and supervised.

C.4.1 *General:* The obligation to train employees extends to ethical guidance (see, for example, Rule #4 of Chapter 7, *Confidentiality*).

Supervision of every employee must be meaningful and effective. In particular, if a staff member is assisting a lawyer in providing services that are legal in nature rather than clerical, the standard of supervision required is extremely high. A system for periodic evaluation of employees facilitates the monitoring of competence on an ongoing basis.

Certain tasks in the provision of legal services may not be delegated to a non-lawyer. These include the following:

- accepting new cases;
- exercising professional judgment;
- negotiating or compromising a matter with another lawyer or third party;
- approving legal documents;
- advising on the merits of a case;
- setting fees;
- exercising judgment with respect to accepting, imposing or amending trust conditions;
- exercising judgment with respect to giving or accepting undertakings.

C.4.2 *Students-at-law:* A lawyer has particular duties and obligations with respect to students-at-law. Most importantly, a lawyer must provide proper and complete articles to each student accepted, whether or not the firm will be in a position to hire all students as associates.

A firm must offer its students a variety of experiences in different areas of the law and legal practice. A firm with only a limited range of files should arrange with the approval of the Law Society to have the student work at another office for an appropriate period. It is also essential that students be provided with training in office procedures and the use of office systems and equipment.

A student-at-law is uniquely in need of support and supervision. A student's work and ability to deal with clients must be monitored on an ongoing basis. Each student should be alerted to common pitfalls such as the misuse of precedents, excessive reliance on staff, and inattention to proofreading and other detail. Accessibility and receptiveness to students are important aspects of a proper program of supervision and training.

R.5 A lawyer must refrain from conduct that impairs the lawyer's capacity or motivation to provide competent services.

(see paragraph (f) of Commentary G.1)

CHAPTER 6
CONFLICTS OF INTEREST

STATEMENT OF PRINCIPLE

In each matter, a lawyer's judgment and fidelity to the client's interests must be free from compromising influences.

RULES

1. A lawyer must not represent opposing parties to a dispute.

2. A lawyer must not act for more than one party in a conflict or potential conflict situation unless all such parties consent and it is in the best interests of the parties that the lawyer so act.

3. (a) Except with the consent of the client, a lawyer must not represent a person whose interests are directly adverse to the immediate interests of a current client.

   (b) Except with the consent of the client or approval of a court pursuant to (c), a lawyer must not act against a former client if the lawyer has confidential information that could be used to the former client's disadvantage in the new representation.

   (c) With the approval of a court, a lawyer may act personally against a former client where another lawyer in the firm has confidential information that could be used to the former client's disadvantage in the new representation.

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4. When:

   (a) a lawyer transfers from one firm ("former firm") to another ("new firm"), and

   (b) either the transferring lawyer or the new firm is aware at the time of the transfer or later discovers that:

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

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

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

   then the following rules apply:

   (c) If the transferring lawyer does not possess confidential information respecting the former client that, if disclosed to a member of the new firm, could prejudice the former client ("prejudicial confidential information"), the new firm and the transferring lawyer must comply with the requirements set forth in the commentary relating to this paragraph (c).

   (d) If the transferring lawyer possesses prejudicial confidential information, the new firm must cease to act in the matter unless the new firm and the transferring lawyer have complied with the requirements set forth in the commentary relating to this paragraph (d).

5. When two 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 conflict or potential conflict, the merged firm may continue acting for more than one party only in compliance with Rule #2.

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

5.1. (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.

Jun2009

6. (a) A lawyer must not personally represent a party to a dispute when a related person is acting for an opposing party.

(b) Unless all parties consent, a lawyer must not personally represent a party to a matter when a related person is representing another party to the matter and those parties are in a conflict or potential conflict situation.

(c) If a relationship exists that does not, pursuant to paragraph (a) or (b) or Rule #8, prevent a lawyer from acting in a matter but that raises a reasonable apprehension of impropriety, the lawyer must disclose the relationship to the client.

7. A lawyer must not act when there is a conflict or potential conflict between lawyer and client unless the client consents and it is in the client's best interests that the lawyer so act.

8. A lawyer must not act personally in a matter when the lawyer's objectivity is impaired to the extent that the lawyer would be unable to properly and competently carry out the representation.

9. A lawyer must not engage in a business transaction with a client of the lawyer who does not have independent legal representation unless the client consents and the transaction is fair and reasonable to the client in all respects.

COMMENTARY

General

G.1 *Definitions:* The terms "firm", "firm member" and "lawyer" are defined in *Interpretation.* They have particular relevance to conflicts of interest because a rule prohibiting a lawyer from acting will also generally prevent a member of the same firm from acting. It is therefore important to know who will be considered a firm member in this context.

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,

for the purposes of this chapter, "firm" includes lawyers practising law from the same premises but otherwise practising law independently of one another. A lawyer doing project work for a firm pursuant to contract may also be viewed as a firm member under certain circumstances. (see *Interpretation*)

Rules #6 and #8 of this chapter prohibit a lawyer from acting personally and are not intended to apply to other firm members. The circumstance disqualifying the lawyer is sufficiently personal that it should not taint others by association.

G.2 *Lawyers in public office:* A lawyer who has held public office may have special considerations in ensuring that a subsequent representation is free from compromising influences. For example, a lawyer should not accept private employment in a matter in which the lawyer has had substantial involvement in an adjudicative capacity since it may appear that, in discharging those adjudicative duties, the lawyer was influenced by the prospect of subsequent employment. Similarly, a lawyer should refrain from rendering legal advice on a ruling made by a tribunal of which the lawyer is a member, or was a member at the time the ruling was made.

G.3 *General:* The term "conflict of interest" is usually employed in the sense of competing client interests; however, a personal interest, loyalty, belief or feeling of a lawyer may also clash with an interest of the client or otherwise interfere with the lawyer's professional judgment. Rules #1 through #5.1 deal with conflicting client interests, while Rules #6 through #9 address the difficulties potentially created by a consideration personal to a lawyer.

Jun2004

R.1 A lawyer must not represent opposing parties to a dispute.

C.1.1 *General:* The existence of an actual dispute precludes multiple 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. However, it is sometimes difficult to determine whether a dispute exists.

While a litigation matter clearly qualifies as a dispute from the outset, parties who appear to have differing interests or who even 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 a certain point however, a conflict or potential conflict may develop into a dispute, in which event the lawyer would be compelled by Rule #1 to cease acting for more than one party and perhaps to withdraw altogether.

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

- degree of hostility, aggression and "posturing";
- importance of the matters not yet resolved;
- 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 with respect to that party's position.

When in doubt, a lawyer should cease acting.

C.1.2 *Mediation or arbitration:* Rule #1 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.

(see also Commentary G.2 of Chapter 15, *The Lawyer in Activities Other Than the Practice of Law*)

R.2 A lawyer must not act for more than one party in a conflict or potential conflict situation unless all such parties consent and it is in the best interests of the parties that the lawyer so act.

C.2.1 "Conflict" means the situation existing when the parties in question are *prima facie* differing in interest but there is no dispute among the parties in fact. Examples include vendor and purchaser, mortgagor and mortgagee, insured and insurer, estranged spouses, and lessor and lessee. "Potential conflict" means the situation existing when the parties in question are *prima facie* aligned in interest and there is no dispute among the parties 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; 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.

Most 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 freely 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 represent more than one of them in the same matter.

Yet professional loyalty remains an important aspect of the lawyer/client relationship, and many clients will be unhappy when their lawyer's attentions are divided. Acting in a conflict or potential conflict situation increases a lawyer's vulnerability to charges of professional misconduct. The apparent consent of those involved may be challenged on the grounds of misrepresentation or overreaching. Moreover, the client in a multiple representation context will expect to pay less than the normal fee for one client, creating another possible point of contention.

Consequently, although Rule #2 permits multiple representation in certain circumstances, this type of retainer must be approached by a lawyer with caution, particularly if a conflict rather than potential conflict is involved. 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 after the fact that each client received representation equal to that which would have been rendered by independent counsel.

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 there is a conflict or potential conflict, the lawyer must consider all relevant factors, including the following:

- complexity of the transaction;
- whether there are terms yet to be negotiated and the complexity and contentiousness of those terms;
- whether considerable extra cost, delay or inconvenience would result from using more than one lawyer;
- availability of another lawyer of comparable skill;
- whether the lawyer is peculiarly familiar with the parties' affairs;
- 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;
- 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
- ability of the parties to make informed, independent decisions.

Furthermore, the requirement that the multiple 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 multiple representation, there are circumstances in which a lawyer may not agree. Examples include representing opposing arm's-length parties in complex

commercial transactions involving unique, heavily-negotiated terms. In these situations, the advantages of retaining a single lawyer are outweighed by the risks.

May2001

C.2.2 *Disclosure and consent:* If a lawyer determines that multiple representation is permissible, the consent of the parties must then be obtained. See the definitions of "consent" and "disclosure" in *Interpretation.* Consent in this context will be valid only if full and fair disclosure has been made by the lawyer (to all parties together unless completely impractical) of the advantages and disadvantages of, first, retaining one lawyer and, second, retaining independent counsel for each party. Such 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 (see Commentary 2.3).

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's continuing to represent one of them. Consent given before the fact is ineffective since the party granting the consent will not at that time be in possession of all relevant information.

While it is not mandatory that either disclosure or consent in connection with multiple representation be in writing, the lawyer will have the onus of establishing that disclosure was sufficient and that informed consent was granted. Therefore, it is advisable to document the process in some manner (such as memorandum to file or follow-up letter) and to obtain written confirmation from the client wherever possible.

If a lawyer is proposing to act for both 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 multiple representation will not provide a justification for cutting corners or failing in other respects to fulfill the duties and responsibilities owed by lawyer to client.

C.2.3 *Multiple representation without sharing of information:* In certain circumstances, knowledgeable clients in a conflict or potential conflict situation may desire representation by the same firm without the mutual sharing of material information referred to in Commentary 2.2. It may be acceptable for a firm to agree to act in such a situation provided that an effective screening device can be erected and the clients are fully apprised of, and understand, the risks associated with the arrangement. Such advice must be given by counsel that is independent of the firm involved.

This kind of arrangement remains an exception to the general rule, however, and should be undertaken only when the justification is clear. In particular, multiple representation with or without the sharing of information is unacceptable in a dispute or when the risk of divergence of interests is high. Responsibility remains with the lawyers to consider the factors outlined in Commentary 2.1 and to independently judge the advisability of the representation. Furthermore, the lawyers and clients involved must consider beforehand the risk that the screening device may be breached, intentionally or otherwise, or that a lawyer acting for one of the clients will obtain information confidential to the other client through a legitimate outside source. In such a circumstance, it would be necessary for the firm to cease acting for all clients in the matter.

C.2.4 *Single client in dual capacity:* Special considerations apply when a lawyer is representing one client acting in two possibly conflicting roles. The consent of the client recedes in importance and the lawyer's independent assessment of the best interests of the client becomes more important. For example, a lawyer acting for an estate when the executor is also a beneficiary must be sensitive to divergence of the interests of the client in those two capacities. Such divergence could occur if the client is a surviving spouse who is the beneficiary of only part of the estate. It is obviously in the spouse's interests to apply to the court to receive a greater share of the estate; however, this course of action is detrimental to the other beneficiaries and therefore inconsistent with the neutral role of executor. The lawyer would likely be obliged by Rule #2 to refer the client elsewhere with respect to the application for relief since, despite the client's consent the lack of independent representation would not operate in the client's best interests.

R.3 (a) Except with the consent of the client, a lawyer must not represent a person whose interests are directly adverse to the immediate interests of a current client.

(b) Except with the consent of the client or approval of a court pursuant to (c), a lawyer must not act against a former client if the lawyer has confidential information that could be used to the former client's disadvantage in the new representation.

(c) With the approval of a court, a lawyer may act personally against a former client where another lawyer in the firm has confidential information that could be used to the former client's disadvantage in the new representation.

C.3.1 Lawyers' duties to former clients are primarily concerned with protecting confidential information. Their duties to current clients are more extensive, being based on the broad fiduciary principle of loyalty, which prevails irrespective of whether there is a risk of disclosure of confidential information.

Because of the definition of "firm", "firm member" and "lawyer" in *Interpretation*, the disqualification of a lawyer under Rule # 3 will usually also mean the disqualification of all lawyers in the firm. See Commentary G.1 of this chapter. However, Rule 3(c) allows a lawyer to act personally against a former client when another lawyer in the firm is disqualified if the court approves after taking into consideration the requirements of Commentary 3.3.

A client is a current client if the lawyer is currently acting for the client, and may be a current client if a reasonable person would believe that the lawyer has an ongoing duty of loyalty to the 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, a lawyer must take into consideration all the circumstances of the solicitor/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
- whether the client uses other lawyers for the same type of work
- whether the retainer was for one matter only, or for an open-ended series of matters (if a lawyer's employment is clearly limited to a specific matter, the relationship usually terminates when the matter has is completed; if the lawyer serves a client over a substantial period in a variety of matters, the client may reasonably assume that the relationship is ongoing unless the lawyer gives notice of withdrawal or termination)
- whether the client reasonably believes the relationship is on-going
- whether the lawyer has made representations that encouraged the client to believe that the relationship is on-going
- whether the lawyer has an ongoing relationship with a parent, subsidiary, affiliate or related entity of the client
- the seriousness of the matters for which the lawyer was retained, analyzed from the client's point of view
- whether the lawyer has confidential information that could be used to the client's disadvantage in the new representation
- whether the lawyer or the client has taken steps to terminate the relationship by, for example, the lawyer asserting in a reporting letter that the relationship is not an ongoing one or the client transferring all files to another lawyer

In addition, in determining the scope of the duty of loyalty owed to a current client, the lawyer may take into account whether the lawyer provides substantive legal services or merely provides a registered office, an address for service, a facility for routine filings or the like.

Where there may be doubt, the lawyer should clarify with the client whether the solicitor-client relationship is an on-going one, preferably in writing, so the client will not mistakenly believe that the lawyer is continuing to look after the client's interests when the lawyer has ceased to do so.

Having determined that a client is a current client, even if there is no dispute between the current client and the other person (disputes are dealt with in Rule #1), a lawyer must not, without consent, undertake a new

representation or take a step in an existing representation that is directly adverse to the client's immediate interests, even if the matters are wholly unrelated. However, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing enterprises in unrelated litigation, does not require consent of the clients. This ethical standard is the same as the legal standard referred to by the Supreme Court of Canada in *R. v. Neil* 2002 SCC 70.

C.3.2 "*Confidential information*" means all information concerning a client's business, interests and affairs acquired in the course of the lawyer/client relationship (see Chapter 7, Confidentiality). A lawyer's knowledge of personal characteristics or corporate policies that are notably unusual or unique to a client will bar an adverse representation if such knowledge could potentially be used to the client's disadvantage. An example is the knowledge that a 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 person who has consulted a lawyer in the lawyer's professional capacity may be considered a former client for the purposes of Rule # 3 although the lawyer did not agree to represent that person or did not render an account to that person (see also Commentary G.1 of Chapter 7, Confidentiality).

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 eventually act against a former client when the information becomes outdated or irrrelevant to the point that it no longer has the potential to prejudice the former client.

A lawyer may be prevented by other rules of this Code from acting in circumstances in which the lawyer possesses confidential information (see, for example, Rule # 6 of Chapter 7, Confidentiality). However, as with the rule presently under discussion, consent of the parties involved may permit a lawyer to act despite the lawyer's knowledge of confidential information. "Consent" comprises several elements, including full disclosure. See the definitions of "consent" and "disclosure" in Interpretation.

C.3.3 A lawyer seeking court approval to act personally against a former client where another lawyer in the firm has confidential information that could be used to the client's disadvantage in the new representation shall satisfy the court, on notice to the former client, that:

(a) it is in the interests of justice to approve the representation, having regard to all the relevant circumstances, including the adequacy of the measures taken under paragraph (b), the extent of prejudice to any party, the good faith of the parties and the availability of suitable alternative counsel; and

(b) the lawyer's firm has taken reasonable measures to ensure that no improper disclosure of the client's confidential information will occur.

C.3.4 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 doing 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, unless the conflict is resolved by the consent of the existing client and the prospective client or Court approval, decline the representation and refuse to receive further information. 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, notwithstanding Chapter 9, Commentary G.1. 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.

Subject to Rule #5 and Commentary # 5, Rule 3 applies to a merged law firm.

Jun2004;Feb2005

R.4 When:

(a) a lawyer transfers from one firm ("former firm") to another ("new firm"), and

(b) either the transferring lawyer or the new firm is aware at the time of the transfer or later discovers that

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

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

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

then the following rules apply:

(c) If the transferring lawyer does not possess confidential information respecting the former client that, if disclosed to a member of the new firm, could prejudice the former client ("prejudicial confidential information"), the new firm and the transferring lawyer must comply with the requirements set forth in the commentary relating to this paragraph (c).

(d) If the transferring lawyer possesses prejudicial confidential information, the new firm must cease to act in the matter unless the new firm and the transferring lawyer have complied with the requirements set forth in the commentary relating to this paragraph (d).

C.4 As noted in Commentary G.1, "firm" and "firm member" are defined broadly for the purposes of this Code and, in particular, this chapter. (see *Interpretation*)

The increasing movement of lawyers among firms creates particular concerns in the area of conflicts. The priority of a firm engaging an experienced lawyer must be to minimize fears of former clients of the lawyer with respect to disclosure of confidential information while maintaining the fact and appearance of propriety.

Paragraph (c) of Rule #4: If the transferring lawyer does not possess prejudicial confidential information, the following procedures must be followed:

(a) The transferring lawyer must execute an affidavit or sworn declaration to that effect;

(b) The new firm must notify its client and the former client (or the former client's counsel, if represented) of the relevant circumstances and intended action and must deliver to each of those persons a copy of the transferring lawyer's affidavit or sworn declaration;

(c) The transferring lawyer must not participate in any manner in the new firm's representation of its client in that matter nor disclose any confidential information respecting the former client unless the former client consents; and

(d) No member of the new firm may, unless the former client consents, discuss with the transferring lawyer the new firm's representation of its client or the former firm's representation of the former client.

Paragraph (d) of Rule #4: If the transferring lawyer possesses prejudicial confidential information, the new firm must cease representation of its client in the matter unless:

(a) The former client consents to the continued representation; or

(b) The new firm establishes the following to the satisfaction of a court of law, after notifying its client and the former client (or the former client's counsel, if represented) of the relevant circumstances and intended action:

(i) It is in the interests of justice that the representation continue having regard to all relevant circumstances, including the adequacy of the measures taken under paragraph (ii) below, the extent of prejudice to any party, the good faith of the parties and the availability of suitable alternative counsel; and

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

"Consent" comprises several elements, including full disclosure. See the definitions of "consent" and "disclosure" in *Interpretation.*

Anyone who has an interest in or who represents a party in a matter referred to in Rule #4 may apply to a court of law for a determination of any matter arising under Rule #4.

The primary purpose of the rules of this chapter is protection of the client's interests. It is unethical for a lawyer to challenge the continued representation of a client by another firm as a tactic and in the absence of any genuine concern as to impropriety.

Jun2004

R.5 When two 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 conflict or potential conflict; the merged firm may continue acting for more than one party only in compliance with Rule #2;

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

C.5 Like the preceding rule, Rule #5 is designed primarily for the protection of client interests. "Merger" includes an association that creates a firm as defined in *Interpretation.*

A merger is distinguishable from lawyer movement between firms because there is always knowledge of confidential information. However, since only one firm is involved rather than two, continuing to act for all parties in a matter may be prohibited by Rule #1 or Rule #2. In evaluating the best interests of the clients pursuant to Rule #2, 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, a conflict or a potential conflict), all parties must consent. "Consent" comprises several elements, including full disclosure. See the definitions of "consent" and "disclosure" in *Interpretation.*

R.5.1 (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.

C.5.1 As noted in Commentary G.1, "firm" and "firm member" are defined broadly for the purposes of this Code and, in particular, this chapter (see *Interpretation*).

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 client under the auspices of a non-profit organization with the expectation by the lawyer and the 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 are available to individuals through these organizations. While a lawyer-client relationship is established, there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs or services are normally offered in circumstances which make it difficult to systematically screen for 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, Rule #5.1 requires compliance with the usual rules which govern conflicts of interest only if the consulting lawyer has actual knowledge that he or she is disqualified as the result of a 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 screening 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 client receiving the short-term legal services.

The personal disqualification of a lawyer providing legal services through a non-profit legal services provider will not be imputed to other participating lawyers. If, however, the lawyer intends to represent the client on an ongoing basis after commencing the short-term limited retainer, the other Rules in this Chapter 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 partners and associates in his or her 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 client who has obtained, or is obtaining, short-term legal services. Without restricting the scope of screening measures which may appropriately be undertaken in a particular set of circumstances, the following are some examples of proper 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 client who received short-term legal services from the lawyer, 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 policy to all lawyers and support staff, explaining the screening measures which have been undertaken.

No consent is required from either the client who received short-term legal services, or the client whose interests may conflict with the client receiving short-term legal services, to allow a lawyer, the lawyer's firm or a non-profit legal services provider to act for any client whose interests conflict with those of the client who has received short-term legal services, provided there has been compliance with Chapter 6, Rule 5.1(b). Rule 5.1(a) does not contemplate that a conflict, of which a lawyer is or becomes aware when engaged in the provision of short-term legal services through a non-profit legal services provider, may be waived by consent.

When offering short-term limited legal services, lawyers should also assess whether the 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 the client to seek further legal assistance.

Jun2009

R.6 (a) A lawyer must not personally represent a party to a dispute when a related person is acting for an opposing party.

(b) Unless all parties consent, a lawyer must not personally represent a party to a matter when a related person is representing another party to the matter and those parties are in a conflict or potential conflict situation.

(c) If a relationship exists that does not, pursuant to paragraph (a) or (b) or Rule #8, prevent a lawyer from acting in a matter but that raises a reasonable apprehension of impropriety, the lawyer must disclose the relationship to the client.

C.6 "Related person" is defined to mean the spouse, child, sibling, parent, grandchild or grandparent of a lawyer, and any person who is a member of the lawyer's household.

Rule #6 applies only to the lawyer having the relationship in question and not to other members of the lawyer's firm. (see Commentary G.1)

Rules 6(a) and 6(b): A close familial relationship is inconsistent with the adversarial nature of legal representation in a dispute, the meaning of which is discussed in Commentary 1.1. In contrast, the absence of a dispute may permit related lawyers to act provided that Rule #8 does not apply. However, if the situation constitutes a conflict or potential conflict (see Commentary 2.1), the consent of all relevant parties must be obtained.

Rule 6(c): A lawyer may have a close relationship with a person not qualifying as a related person. 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 also practises. In these and similar situations, the relationship must be disclosed to the client.

R.7 A lawyer must not act when there is a conflict or potential conflict between lawyer and client unless the client consents and it is in the client's best interests that the lawyer so act.

C.7 A lawyer may have a loyalty, financial interest, personal belief or outside activity that is or may potentially be in conflict with a client interest. If this situation would materially impair the lawyer's ability to carry out the representation properly and competently, the lawyer may not act: Rule #8.

If the conflicting interest of the lawyer does not create an actual impairment of 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 independently evaluate all relevant factors. It is insufficient to rely on the client's assessment in this regard.

Rule #7 further requires that the client consent to the representation after full disclosure by the lawyer of the nature of the conflicting interest and the advantages of the client's retaining other counsel. Since the onus will be on the lawyer to establish that disclosure was sufficient and informed consent granted, it is advisable that these matters be confirmed in writing.

Commentary 2.1 sets forth certain considerations that should be taken into account by a lawyer in a multiple representation situation. Many of the same considerations, read with the necessary changes in reference, would appropriately be weighed by the lawyer in determining whether a particular representation would offend Rule #7. See also the definitions of "consent" and "disclosure" in *Interpretation.*

R.8 A lawyer must not act personally in a matter when the lawyer's objectivity is impaired to the extent that the lawyer would be unable to properly and competently carry out the representation.

C.8 The two preceding commentaries refer to situations in which a lawyer's professional objectivity in a matter may be threatened or destroyed by circumstances personal to the lawyer, such as a family or other close relationship; an outside activity, a financial interest; 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.

In all of these circumstances, a lawyer must recognize the point at which it is not or is no longer in the client's best interests to be represented by the lawyer. This may be so even if the lawyer is led to unduly favour the client's position, since the result may be overly-optimistic advice or an unrealistic recommendation.

R.9 A lawyer must not engage in a business transaction with a client of the lawyer who does not have independent legal representation unless the client consents and the transaction is fair and reasonable to the client in all respects.

C.9 "Business transaction" includes lending or borrowing money buying or selling property, accepting a gift or bequest, giving or acquiring an ownership, security or other pecuniary interest in a company or other venture, recommending an investment and entering into a common business venture.

As with all rules in this Code, Rule #9 must be observed in the spirit as well as the letter. If a related person or an affiliated entity of a lawyer transacts business with a client of the lawyer, there may be an actual or apparent impropriety depending on the circumstances. Relevant factors include whether the lawyer knew of the transaction in advance and gave explicit or implicit approval; whether the lawyer stood to gain a direct or indirect benefit; whether and to what extent the lawyer has control over the client and the related person or affiliated entity, and the nature of the relationship between the lawyer and the related person or affiliated entity, as well as the presence or absence of the factors noted in Rule #9.

The wisest course for a lawyer is to never engage in a business transaction with a client. A blanket prohibition would, however, fail to acknowledge the realities of lawyer/client relationships and the fact that a particular business transaction may appear to both parties to be mutually advantageous.

Before engaging in such a transaction, a lawyer must carefully consider the fiduciary obligations of the lawyer and the likely presumption of undue influence should the client later become dissatisfied. The lawyer will have the onus of proving that the transaction was fair and reasonable from the client's perspective. Subsequent discrepancies between the client's version of events and the lawyer's may be resolved in favour of the client. These factors will override any apparent benefits of the transaction if a client is clearly in an unequal bargaining position due to age, financial position, lack of education or experience, or other similar circumstances.

Even if a client is relatively sophisticated, the lawyer must objectively assess whether the client would agree to the same terms and conditions with a person other than the lawyer, and whether the lawyer stands to incur a benefit or advantage that, with due diligence, the lawyer would prevent someone else from obtaining in a transaction with the client. Despite favourable responses to these and similar questions, the client must be advised of all of the advantages of retaining independent counsel. Such consultations should be clearly documented and preferably confirmed in writing. The nature of the matter may also require that the client, while not independently represented in the transaction, obtain independent legal advice regarding the advisability of the transaction.

As noted above, "business transaction" includes the acceptance of a gift or bequest. A lawyer is traditionally 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 Rule #9 and a presumption of undue influence is raised. Therefore, a lawyer must refuse to draft any instrument effecting a gift or bequest to the lawyer or to a related person or affiliated entity of the lawyer. Moreover, a lawyer must refuse to accept a gift that is other than nominal unless the client has clearly received adequate independent advice.

Rule #9 is not intended to prevent a lawyer from acting as a regular customer of the client. It is therefore proper for a lawyer to borrow money on normal terms and conditions from a client that is a lending institution and otherwise deal in the ordinary course of business with clients offering goods or services to the public.

Compassionate Loans

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 is 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.

However, 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. See Rules #7 and #8 and commentaries in this chapter. If a lawyer's objectivity or judgment is impaired because of a reassessment of a case after a loan has been made, the lawyer must cease to act.

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

Feb2004

It is requested that this document be permanently retained. It is suggested that it be inserted in the Code of Professional Conduct, at the end of Chapter 6, *Conflicts of Interest*.

MEMORANDUM RE MULTIPLE REPRESENTATION, Commentary 2.1

November, 1998

The profession will recall that since the introduction of the new Code of Professional Conduct on January 1, 1995, there has been considerable discussion and debate over the issue of multiple representation in the new home situation. Multiple representation, generally, is not prohibited. Chapter 6, *Conflicts of Interest*, Rule 2 provides:

> A lawyer must not act for more than one party in a conflict or potential conflict situation unless all such parties consent and it is in the best interests of the parties that the lawyer so act.

However, the commentary to that rule contains the following:

> Although the parties to a particular matter may expressly request multiple representation, there are circumstances in which a lawyer may not agree. Examples include ... acting for both purchaser and builder in the construction of a new home.

There has, from the outset been uncertainty as to the intent of this commentary and disagreement as to its scope. This has given rise to varying practices among the lawyers involved in this area. The issues have been addressed by the CBA Real Estate Sections and by the Professional Responsibility Committee but because an amendment to the Code might be involved, ultimate resolution lay with the benchers. At their meeting of November 28, 1997, the benchers heard from several practitioners in the area who outlined the various positions and issues. They then struck a committee to further consider the matter and to return with a recommendation as to whether the above commentary should be amended to delete the prohibition in the builder/purchaser situation, or whether such prohibition should continue, perhaps with clarification.

The result of the committee's efforts was the following recommendation to the benchers:

> The Code of Conduct be amended by deleting the words "and acting for both builder and purchaser in the construction of a new home" from Commentary 2.1 to Rule # 2 of Chapter 6, *Conflicts of Interest*, where found on page 57.

The recommendation was accepted by the benchers at their October 9, 1998 meeting by passing a resolution in the same wording.

Notwithstanding the effect of the proposed amendment, the benchers expressed concern for the position of the purchaser who is represented by the same lawyer who represents the builder, and often the builder's mortgage lender. Accordingly, they draw to the attention of all members, the wording of Rule 2 which requires that the multiple representation be "in the best interests of the parties," and wording of the commentary on page 56 which provides:

> Furthermore, the requirement that the multiple 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.

Commentary 2.1 provides many factors for the lawyer to consider in making the independent evaluation. Included are:

- 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
- 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

These factors, among the many others in the commentary, must be considered in the light of the kinds of problems that can be anticipated in the builder/purchaser scenario. The problems can be as minor as the badly hung door, or as major as the effect of the determination of who is the "owner" for holdback purposes under the *Builders' Lien Act*.

It must also be remembered that when there has been an evaluation that multiple representation is in the best interests of the clients, the lawyer will have to be "able to demonstrate after the fact that each client received representation equal to that which would have been rendered by independent counsel."

These concerns apply to all multiple representations. Indeed, that was one of the reasons for the benchers' resolution, i.e. no basis to justify different treatment for the builder/purchaser situation. Nonetheless, practitioners in this area should be sensitive to the inherent potential conflicts and the fact that it is frequently a "once in a lifetime" event for the purchaser, and therefore, carefully apply the criteria in evaluating the interests of the clients.

Notwithstanding the amendment to the Code, the benchers recognize that lawyers for builders will still, from time to time, be dealing with unrepresented purchasers. The benchers wish to remind members, therefore, that courts have frequently found a lawyer/client relationship because of the perception of the "client." This is of particular concern in the new home situation where, frequently, the builder advertises that its lawyer is also acting for the purchaser. In addition, the signing of documents by the purchaser at the office of the lawyer for the builder and other contacts which may occur, further exacerbate the problem.

Accordingly, when dealing with the unrepresented purchaser the lawyer should be particularly cautious. Once again, the Code of Conduct provides direction.

Chapter 1, *Relationship of the Lawyer to Society and the Justice System*, Commentary 7:

> If a lawyer is dealing with an unrepresented person, the duty of candour requires special efforts to clarify the lawyer's role. In particular, it is necessary to explain that comments and information offered by the lawyer are likely to be partisan in nature and that the lawyer is not acting in the interests of the unrepresented person.

Chapter 4, *Relationship of the Lawyer to Other Lawyers*, Commentary G.2:

> 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, candour and good faith that are owed to professional colleagues.

Chapter 11, *The Lawyer as Negotiator*, Rule #5:

> When negotiating with an opposing party who is not represented by counsel, a lawyer must:
>
> (a) advise the party that the lawyer is acting only for the lawyer's client and is not representing that party, and,
>
> (b) advise the party to retain independent counsel.

When communicating with an unrepresented purchaser in respect of the above matters, it is best to either do so in writing or confirm oral discussions in writing.

The benchers hope that the foregoing will be helpful to those lawyers who practice in this area.

CHAPTER 7
CONFIDENTIALITY

STATEMENT OF PRINCIPLE

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

RULES

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

2. A lawyer must not disclose the identity of a client nor the fact of the lawyer's representation.

3. A lawyer must preserve and keep confidential property of a client under the lawyer's control.

4. A lawyer must take reasonable steps to ensure the maintenance of confidentiality by all persons engaged or employed by the lawyer.

5. A lawyer must continue to hold a client's information in confidence despite conclusion of the matter or termination of the lawyer/client relationship.

6. A lawyer who possesses confidential information of a client or former client:

   (a) must not use such information for the lawyer's personal benefit nor the benefit of a firm member or a related person or affiliated entity of the lawyer; and

   (b) must not act or continue to act for another client if the lawyer would have a duty to disclose such information to that client.

7. When, in other provisions of this Code, an ethical obligation of lawyers is stated to be subject to confidentiality:

   (a) confidential information of a client must not be disclosed to any party without the client's consent;

   (b) a lawyer must seek the client's consent to disclosure of confidential information to the extent necessary to permit the lawyer to fulfill the ethical obligation; and

   (c) in the event that consent is withheld, the lawyer must withdraw.

8. The foregoing rules of this chapter are subject to the following:

   (a) A lawyer must disclose confidential information to the Law Society when required to do so by the Law Society;

   (b) A lawyer must disclose confidential information when required to do so by law;

   (c) A lawyer must disclose confidential information when necessary to prevent a crime likely to result in death or bodily harm, and may disclose confidential information when necessary to prevent any other crime;

   (d) 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;

   (e) A lawyer may use or disclose confidential information of a client when expressly or impliedly authorized by the client;

(e.1) A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct;

(f) A lawyer may disclose confidential information when reasonably necessary for the lawyer to properly prosecute an action or defend a claim or allegation in a dispute with a client.

Nov2001

9. When confidential information is disclosed by a lawyer pursuant to Rule #8, the lawyer must disclose the minimum information required to give effect to Rule #8 and no more.

COMMENTARY

General

G.1 Frank and unreserved communication between lawyer and client encourages people to seek early legal assistance and facilitates the full development of facts, which in turn enables a lawyer to render effective professional service. The maintenance of confidentiality is central to the credibility of the profession and the trust that must be reposed in a legal advisor. As a result, a lawyer's professional duties with regard to confidentiality are defined largely in terms of the lawyer/client relationship.

On the other hand, the obligation to treat information as confidential may arise although a lawyer/client relationship has not been established. For example, a lawyer may acquire through the discovery process information that relates primarily to a party to a matter other than the lawyer's client. Improper use or disclosure of such information would reflect poorly on the lawyer and the profession while possibly damaging the other party and contravening legal authority.

Moreover, a lawyer is likely to be viewed as a confidant by persons other than clients. The rules of this chapter apply in principle, therefore, to the confidences of' anyone seeking advice or assistance on a matter invoking a lawyer's professional knowledge, although the lawyer may not render an account to or agree to represent that person. As a consequence, a lawyer should be cautious in accepting confidential information on an informal or preliminary basis since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter (see Rule #3 of Chapter 6, *Conflicts of Interest*). Similarly, a lawyer should decline to accept information from another lawyer or a third party on condition that it be kept confidential from the lawyer's client, and should refrain from requesting a colleague to accept such a condition. Acquisition of information under these circumstances may compel withdrawal because the lawyer's promise to maintain confidentiality may interfere with the duty to disclose to the client all information that must be disclosed to enable a proper representation. (see Commentary 6)

G.2 *Definitions:* The terms "firm", "firm member" and "lawyer" are defined in *Interpretation.* They have particular relevance to confidentiality because a lawyer's duty to keep client information confidential extends to each member of the lawyer's firm and, if a lawyer is prevented from acting due to possession of confidential information, a member of the same firm is also prevented from acting. It is therefore important to know who will be considered a firm member in this context.

A lawyer doing project work for a firm pursuant to contract may be viewed as a firm member under certain circumstances. (see *Interpretation*)

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, for the purposes of this chapter, "firm" includes lawyers practising law from the same premises but otherwise practising law independently of one another.

To comply with the requirements of Chapter 6, *Conflicts of Interest*, lawyers in space-sharing arrangements must also 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. Where a conflicts 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 previously-acting lawyer. Thus, the implied consent to disclosure of information referred to in Rule #8(e) extends to all the lawyers practising in such an arrangement.

G.3 *Confidentiality vs. privilege:* The ethical rules respecting confidentiality must be distinguished from the evidentiary rules of privilege. The latter are designed to prevent certain documents and communications passing between lawyer and client from being admitted as evidence in judicial proceedings. The ethical rules are wider since they apply whether or not a judicial proceeding is involved, and without regard for the nature or source of the information or the fact that others share the knowledge. A lawyer should become familiar with statutory provisions dealing with privilege and the related area of search and seizure (such as those contained in the *Criminal Code,* the *Income Tax Act* and the *Charter of Rights and Freedoms),* and must be prepared to assert privilege on a client's behalf when appropriate.

G.4 *Disclosure or use of confidential information:* Rules #1 through #7 are subject to Rule #8, which permits disclosure or use of confidential information under certain circumstances. The most common justification for disclosure or use is the client's express or implied consent. (see Rule #8(e) and accompanying commentary)

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

C.1 "Confidential information" means all information concerning a client's business, interests and affairs acquired in the course of the lawyer/client relationship. Information about a client may come to the lawyer from a source other than the client and may not relate directly to the client's matter. Such information will nonetheless be confidential if acquired by the lawyer in the course of acting.

A lawyer's duty of secrecy is not affected by the fact that the lawyer is representing the client in a public forum, nor by the availability or actual disclosure of information through other sources such as the media. A lawyer must have the client's express or implied authorization before confirming any such information to a third party.

The duty to respect a client's confidences is not limited to business discussions; it applies as well to communications with spouse, friends and family members. Once information has been divulged, a lawyer is unable to ensure that it will not be repeated or used for inappropriate purposes. Similarly, it is improper to discuss a client's affairs with colleagues unless they are persons to whom the lawyer is expressly or impliedly authorized to make disclosure. Even when such discussions are authorized, they should take place under appropriate circumstances. Indiscreet shop-talk among lawyers, whether or not the client is named, could result in prejudice to the client if overheard by third parties able to identify the subject matter. Moreover, discussions of this nature reflect adversely on the lawyers concerned and the legal profession generally.

A lawyer should not assume that a particular fact about a client, although apparently harmless, can be disclosed by the lawyer to a third party. Details such as the client's social insurance number and address are confidential unless Rule #8 applies.

From time to time, the revelation of confidential information may be in a client's interests and may even be impliedly authorized by the client (see Rule #8(e)). Examples are disclosure of confidential details to outside consultants retained with the client's permission, and disclosure to a client seeking to purchase property that another client has suitable property for sale. However, the client may have valid reasons for wishing to suppress disclosure despite its apparent benefits. The most prudent course is therefore to obtain the client's express consent in these circumstances.

R.2 A lawyer must not disclose the identity of a client nor the fact of the lawyer's representation.

C.2 The identity of clients falls within the general ambit of confidential information. While disclosure of this information may seem inconsequential, there are circumstances in which it would embarrass or damage the

client. Disclosure of client names by a lawyer known to do only matrimonial or criminal defence work is an example.

Like the five rules which follow, however, Rule #2 is subject to the exceptions described in Rule #8. Therefore, if a lawyer obtains a client's express authorization, it may be appropriate to include the client's name in a firm brochure or otherwise disclose the fact of the representation. Even if it becomes public knowledge that a client has retained counsel (through a newspaper column, for example, that identifies the client as a party to litigation), a lawyer should obtain the client's consent before disclosing the lawyer's role in the matter. The client's consent is implied when disclosure is necessary to carry out the retainer or to conduct the lawyer's business in the ordinary course. (see Rule #8(e) and accompanying commentary)

R.3 A lawyer must preserve and keep confidential property of a client under the lawyer's control.

C.3 Property of a client that is temporarily in the possession or under the control of a lawyer must be used solely for the purposes expressly or impliedly authorized by the client. "Property" includes money and securities; documents such as correspondence, wills, title deeds, minute books, licenses, certificates and other papers; and personal property such as jewellery and corporate seals.

Access to client files, within the confines of the law office or otherwise, must be strictly limited to those legitimately entitled to access. Leaving client papers in view, particularly where casual visitors to the law office might encounter them (such as a meeting room or coffee lounge), is a potential breach of confidentiality. Nor should a lawyer work on a file in a public place such as an airplane without taking appropriate safeguards.

In any dealings with client property, a lawyer must follow procedures that will facilitate its return in suitable condition and with confidentiality intact. If a lawyer leaves practice or relocates, appropriate steps must be taken to return wills and other important original documents to clients, or at least to ensure that clients will have ready access to such documents after the lawyer's departure.

A lawyer's responsibilities with respect to client property are those of a professional fiduciary and not a mere bailee. If a third party advances a claim to such property, the lawyer's recourse is to the courts.

A lawyer is entitled to a solicitor's lien over property of the client under certain circumstances. However, there is a general duty to decline to enforce a lien for non-payment of legal fees if the client is unable to pay and assertion of the lien would materially prejudice the client's position in any uncompleted matter. (see also Rule #9 of Chapter 13, *Fees*, and Commentary 3 of Chapter 14, *Withdrawal and Dismissal*)

R.4 A lawyer must take reasonable steps to ensure the maintenance of confidentiality by all persons engaged or employed by the lawyer.

C.4 A lawyer has implied authority (see Rule #8(e)) to disclose the affairs of clients to partners and associates in the firm and, to the extent necessary, to other personnel such as students-at-law, legal assistants, secretaries, paralegals and filing clerks; agents retained by the lawyer, such as search companies and expert witnesses; and outside consultants, such as computer technicians and accountants. However, the lawyer must take reasonable steps to ensure that client information is not used improperly in any respect by employees and that confidentiality is maintained during the period of employment and afterwards. A lawyer who shares office space, equipment or support staff with others must also ensure that such arrangements are structured in a manner that protects confidentiality.

R.5 A lawyer must continue to hold a client's information in confidence despite conclusion of the matter or termination of the lawyer/client relationship.

C.5 Once a lawyer is impressed with the obligation to hold information in confidence, disclosure at any time thereafter is improper unless Rule #8 applies. Therefore, a lawyer should not convey confidential information to a successor lawyer on a change of solicitors unless satisfied that the client has authorized such disclosure. The obligation of confidentiality also survives the death of a client.

R.6 A lawyer who possesses confidential information of a client or former client:

(a) must not use such information for the lawyer's personal benefit nor the benefit of a firm member or a related person or affiliated entity of the lawyer; and

(b) must not act or continue to act for another client if the lawyer would have a duty to disclose such information to that client.

C.6 "Lawyer" includes all members of a lawyer's firm. For the purposes of this Code and, in particular, this chapter, "firm" and "firm member" are defined broadly. (see *Interpretation*)

Rule 6(a): A lawyer is prohibited not only from actively disclosing confidential information of a client or former client, but from using it to personal advantage or for the benefit of a firm member, related person or affiliated entity. Use of information for the benefit of other persons connected with the lawyer may also offend the spirit of Rule #6(a) if the lawyer could be seen to benefit indirectly from such use. However, Rule #6(a) is subject to client consent. (see Rule #8(e) and accompanying commentary)

Rule 6(b): As noted in Commentary G.1 of Chapter 9, *The Lawyer as Advisor*, 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:

- the lawyer is in possession of confidential information of a current or former client that is material to that matter or representation;
- the current or former client will not consent to disclosure of the information to the other client or potential client (see Rule #8(e)); and
- 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.

Rules #3, #4 and #5 of Chapter 6, *Conflicts of Interest*, also deal with the relationship between possession of confidential information and a lawyer's ability to act or continue to act.

R.7 When, in other provisions of this Code, an ethical obligation of lawyers is stated to be subject to confidentiality:

(a) confidential information of a client must not be disclosed to any party without the client's consent;

(b) a lawyer must seek the client's consent to disclosure of confidential information to the extent necessary to permit the lawyer to fulfill the ethical obligation; and

(c) in the event that consent is withheld, the lawyer must withdraw.

C.7 Various rules of this Code require that a lawyer correct a material misrepresentation that has originated with the lawyer or with a person subject to the lawyer's control and direction (such as a client or witness) when the court or an opposing party is continuing to rely on the representation. See, for example:

- Rule #2 of Chapter 4, *Relationship of the Lawyer to Other Lawyers*;
- Rule #15 of Chapter 10, *The Lawyer as Advocate*;
- Rule #2 of Chapter 11, *The Lawyer as Negotiator*.

The steps that must be taken to correct the misapprehension of the court or the other party will depend on all relevant circumstances. Occasionally, the obligation may be satisfied by merely advising the court or opposing party not to rely on the information. In other situations, fulfilment of the obligation requires communication of information that is not confidential (such as the fact that an error has been made in calculating the cash to close a real estate transaction), in which case the client's consent to disclosure need not be obtained. However, if the misrepresentation may be corrected only through disclosure of confidential information, the lawyer's duties with respect to confidentiality prohibit such disclosure without obtaining the client's consent. The lawyer must therefore seek the client's consent so that the lawyer can correct the misrepresentation. If consent is withheld, the lawyer is

obliged to cease acting. See Chapter 14, *Withdrawal and Dismissal*, with respect to duties associated with withdrawal.

If a matter has been concluded, the client's refusal of consent to disclosure will effectively prevent the lawyer from taking any further action.

R.8 The foregoing rules of this chapter are subject to the following:

(a) A lawyer must disclose confidential information to the Law Society when required to do so by the Law Society;

(b) A lawyer must disclose confidential information when required to do so by law,

(c) A lawyer must disclose confidential information when necessary to prevent a crime likely to result in death or bodily harm, and may disclose confidential information when necessary to prevent any other crime;

(d) 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;

(e) A lawyer may use or disclose confidential information of a client when expressly or impliedly authorized by the client;

(e.1) A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct;

(f) A lawyer may disclose confidential information when reasonably necessary for the lawyer to properly prosecute an action or defend a claim or allegation in a dispute with a client.

C.8.1 *Relationship with law:* A disclosure of confidential information that is required by Rule #8 may be expressly prohibited by legislation, in which case the legislation would govern. (see also Commentary 2(c) of *Interpretation*)

C.8.2 *Rule #8(a):* In some circumstances, such as disciplinary proceedings under the *Legal Profession Act,* the Law Society may direct a lawyer to disclose information that is confidential, in which case the lawyer must comply irrespective of client consent. If, however, the lawyer receives no such directive, the client's consent to disclosure of confidential information must be obtained. An example is lawyer initiated contact with the Law Society respecting the misconduct of a colleague. (see Rule #4 of Chapter 3, *Relationship of the Lawyer to the Profession*)

Rule #8(b): While a lawyer is generally justified in obeying a court order to disclose confidential information, this will not be the case if a lawyer believes in good faith, based on reasonable grounds, that the order is in error and that the law does not require disclosure. In these circumstances, the lawyer has an obligation to withhold disclosure pending final adjudication of the matter. (see Chapter 1, *Relationship of the Lawyer to Society and the Justice System*)

Rule #8(c): A client who seeks an advocate with respect to past conduct is entitled to have disclosures held in confidence by the advocate. The same rationale does not apply to a prospective crime since the client has no right to expect the lawyer to assist in future misconduct. Included within the concept of "prospective crime" are crimes of an ongoing nature that have a prospective element, such as the making of a false statement in a prospectus upon which third parties are continuing to rely. Also included are past crimes having consequences yet to occur that will constitute a new or added offence. An example is the offence of secreting a bomb on an aircraft that will be aggravated to homicide if the bomb explodes. However, Rule #8(c) is not intended to apply to a test-case scenario. (see Commentary 1 of Chapter 1, *Relationship of the Lawyer to Society and the Justice System*)

A lawyer advised of a prospective crime by a client must first assess whether it is reasonable to assume that the client will carry out the expressed intention. In doing so, the lawyer must evaluate factors such as the client's history and the nature and extent of the lawyer/client relationship. If the crime seems reasonably likely to be

effected and is likely to result in death or bodily harm, disclosure must be made to the extent necessary to prevent the crime.

If the prospective crime does not involve death or bodily harm and disclosure is therefore discretionary, the lawyer must evaluate the risk to the safety or property of others. The prospect of a "victimless" crime without serious consequences may not warrant disclosure.

As suicide is not a crime, this sub-rule does not authorize disclosure of a threat of suicide. See the discussion under Rule #8(e) below.

Rule #8(d): While multiple representation is generally discouraged, there are circumstances in which it is in the best interests of the parties involved. (see Commentary 2.1 of Chapter 6, *Conflicts of Interest*) 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.

A limited exception to the mutual sharing of information in a multiple representation is discussed in Commentary 2.3 of Chapter 6, *Conflicts of Interest*.

Rule #8(e): A client's express authorization of disclosure or use of confidential information must be genuine and informed. A lawyer must take reasonable steps to ensure that the client understands how such disclosure or use will affect the client's interests, particularly if the lawyer stands to incur personal benefit from the client's waiver of confidentiality. An example is the lawyer who solicits such a waiver to facilitate the writing of a memoir or autobiography. Whether this constitutes ethical conduct will be determined by all relevant circumstances, including the nature of the client information in question; the manner in which it is presented by the lawyer in the publication; and whether the consequences for the client (such as effect on the client's reputation or ease of identification of the client although not named) were within the contemplation of the client at the time consent was granted.

Implied authorization to disclosure of confidential information arises from the contract of retainer between lawyer and client. An implicit term of that contract is that the lawyer will be permitted to disclose confidential information to the extent necessary to carry out the retainer and also to conduct the lawyer's business in the ordinary course. For example, a lawyer must reveal certain information in pleadings and to firm members and staff (see Commentary 4). As well, a lawyer is entitled to provide client-related information to the firm's auditors and bankers (including, in the latter case, a listing of accounts receivable), and probably to outside consultants retained to assist in firm management. Whether a particular disclosure without prior consent falls within the ambit of day-to-day management of the firm will depend on all relevant circumstances, including the nature and extent of the disclosure and the role of the party to whom the information is given.

A client will also be taken to have impliedly authorized disclosure of confidential information to safeguard the client's health or property when the client is physically or mentally incapacitated. An example is disclosure of information to family members of a client in support of an application under the *Dependent Adults Act.* Again, whether a particular disclosure is justified will be determined by all relevant circumstances. The lawyer should be in a position to demonstrate that disclosure is in the client's best interests.

The implied authority of a lawyer to reveal confidential information is subject to an express limitation or prohibition by the client. It may also be overridden by special circumstances, such as the fact that a particular client is a person in the public eye or would be exposed to personal risk if disclosure was made.

Threat of suicide. As confidentiality is fundamental to the lawyer-client relationship, and as the Code does not expressly deal with disclosure issues arising from a threat of suicide, no disclosure can be made without careful review of all of the circumstances. Rule 8(e) permits disclosure of confidential information of the client when "expressly or impliedly authorized by the client". A lawyer should, if possible, discuss with the client whether the lawyer may disclose an apparent intent to commit suicide and, if so, to whom. Disclosure might be made, for example, to a relative, a mental health agency or expert, the court or the police. The circumstances supporting an implicit authorization to disclose an intended suicide will be exceptional.

In the event the lawyer determines that the client has expressly or impliedly authorized disclosure, the lawyer must disclose the minimum information, in accordance with Rule 9. threat

The lawyer's personal experience, beliefs or moral views on suicide are clearly subordinate to the lawyer's ethical obligations to maintain the confidential information of their client. In considering the possible disclosure of

information in the content of a threat of suicide under this Rule, a lawyer may wish to confidentially consult another lawyer or the Law Society Practice Advisors pursuant to Rule 8(e.1)

If the lawyer concludes that there exists no express or implied authorization to disclose confidential information about a threat of suicide, the lawyer may also consider whether the client lacks capacity to provide proper instructions. Rules 7.1 and 7.2 of Chapter 9 of the Code provide for the taking of protective legal action by a lawyer for the benefit of an incapacitated client.

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Rule #8(e.1): Usually, a lawyer who needs to disclose confidential information to secure legal or ethical advice from another lawyer about the lawyer's proposed conduct will be impliedly authorized to make the disclosure under Rule 8(e) or will obtain the client's consent, such as when the client is pressing the lawyer to act in a way that the lawyer is concerned may be contrary to ethics or law and the client does not want the lawyer to get advice from a colleague. In such cases, the lawyer may disclose confidential information without the client's consent for the purpose of securing legal or ethical advice from another lawyer. In making such disclosure, a lawyer must limit the disclosure in accordance with Rule 9 of Chapter 7, *Confidentiality*. A lawyer who receives such information must keep it confidential, subject to Rule 4 of Chapter 3, *Relationship of the Lawyer to the Profession*.

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Rule #8(f): This exception to confidentiality arises when a client undermines the lawyer/client relationship through actions such as impugning the lawyer's conduct or character or refusing to pay the lawyer's account. The result is a forfeiture or an implied waiver of the right to confidentiality, since both lawyer and client must presumably disclose some confidential information in support of their respective positions.

A lawyer's discretion with respect to disclosure is wider when the lawyer is defending against a claim or allegation by a client. In this situation it may be appropriate for the lawyer to respond to the media or another third party. Conversely, if the lawyer is in the position of complainant or plaintiff, disclosure will generally be limited to disclosure to the court to the extent necessitated by the litigation process.

R.9 When confidential information is disclosed by a lawyer pursuant to Rule #8, the lawyer must disclose the minimum information required to give effect to Rule #8 and no more.

C.9 When it appears that disclosure of confidential information is warranted, a lawyer should, first, carefully assess exactly what information should be disclosed; and, second, afford the client the opportunity to either make disclosure personally or persuade the lawyer that the apparent need for disclosure is based on incorrect information. These steps will ensure that confidential information is not disclosed by a lawyer in haste or when inappropriate to do so.

CHAPTER 14
WITHDRAWAL AND DISMISSAL

STATEMENT OF PRINCIPLE

Having agreed to act in a matter, a lawyer has a duty not to withdraw without legal or ethical justification.

RULES

1. A lawyer may withdraw upon reasonable notice to the client when justified by the circumstances. Circumstances that may justify, but not require, withdrawal include the following:

   (a) the client fails after reasonable notice to provide funds on account of fees or disbursements in accordance with the agreement made with the lawyer;

   (b) the client's conduct in the matter is dishonourable or motivated primarily by malice;

   (c) the client is persistently unreasonable or uncooperative in a material respect;

   (d) the lawyer is unable to locate the client or to obtain proper instructions; or

   (e) there is a serious loss of confidence between lawyer and client.

2. A lawyer must withdraw upon reasonable notice to the client when:

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

   (b) the client persists in instructions that the lawyer knows will result in the lawyer's assisting the client to commit a crime or fraud;

   (c) the lawyer is unable to act competently or with reasonable promptness; or

   (d) the lawyer's continued employment would violate the lawyer's obligations with respect to conflict of interest.

3. If a lawyer withdraws or is discharged from a matter, the lawyer must endeavour to avoid prejudice to the client and must cooperate with successor counsel.

4. Upon withdrawal or dismissal, a lawyer must promptly render a final account and must account to the client for money and property received from the client.

5. Before assuming conduct of a matter previously handled by another lawyer, a lawyer must be reasonably satisfied that the other lawyer has withdrawn or been discharged by the client.

COMMENTARY

General

G.1 As noted in Commentary 5 of Chapter 1, *Relationship of the Lawyer to Society and the Justice System*, a lawyer has no general duty to agree to act in a particular case. Having agreed to act, however, a lawyer may not withdraw without regard for professional considerations such as loyalty to the client; the duty to facilitate access to the legal system and enforcement of legal rights; and the inconvenience that would result to the client from change of counsel. It is inappropriate for a lawyer to withdraw on capricious or arbitrary grounds.

In contrast, a client has the freedom to terminate the lawyer/client relationship at will. While termination by the client need not be justified, the absence of justification may affect the extent and nature of a lawyer's post-termination duties (see Commentary 3).

G.2 *Lawyers employed by corporations and government:* The principles of withdrawal have unique application to lawyers in the employ of corporations and government. Some, such as Rule #1(a), are obviously inapplicable. (see Commentary 4 of Chapter 12, *The Lawyer in Corporate and Government Service*, for further discussion)

G.3 *Reasonable notice:* Reasonable notice of withdrawal is required to be given in all circumstances. An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. Whether the court, opposing parties or others should also be notified will depend on the nature of the matter. Statutory provisions such as the *Rules of Court* may require such notification, or it may be dictated by professional courtesy.

How quickly a lawyer may cease acting after notification will depend on all relevant circumstances. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel and should not be left unrepresented on the eve of trial or at another critical stage. Nor should withdrawal or an intention to withdraw be permitted to seriously inconvenience witnesses, waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question. However, if withdrawal is mandatory, prevailing circumstances may override such considerations. For example, an intentional deception by the client may justify withdrawal immediately after notification or at a critical stage.

In the case of advance warning of an intention to withdraw if a client fails to fulfill an obligation in default, such as payment of the lawyer's account, every effort should be made to ensure that withdrawal will occur at an appropriate time in the proceedings and will not violate the general principles of the preceding paragraph.

Reasonable notice will vary according to whether withdrawal is optional or mandatory (see Commentaries 1 and 2).

R.1 A lawyer may withdraw upon reasonable notice to the client when justified by the circumstances. Circumstances that may justify, but not require, withdrawal include the following:

(a) the client fails after reasonable notice to provide funds on account of fees or disbursements in accordance with the agreement made with the lawyer;

(b) the client's conduct in the matter is dishonourable or motivated primarily by malice;

(c) the client is persistently unreasonable or uncooperative in a material respect;

(d) the lawyer is unable to locate the client or to obtain proper instructions;

(e) there is a serious loss of confidence between lawyer and client.

C.1 As noted in Commentary G.1, withdrawal may not be capricious or arbitrary. However, there are clearly situations in which a lawyer should have the option of withdrawing although not compelled to do so by law or professional ethics. For a general discussion of the requirement of reasonable notice, see Commentary G.3. In the case of optional withdrawal, it is generally appropriate to continue acting until the client has had ample opportunity to retain and instruct replacement counsel.

(a) *Non-payment:* Withdrawal may be an option when the client has failed to pay an account or a retainer in accordance with an agreement in that respect, assuming that the fee involved is fair and reasonable and the client has been provided with sufficient information regarding fees and disbursements (see Chapter 13, *Fees*).

Although non-payment may be a justification for withdrawal, a lawyer ought to seriously consider continuing to act if the extent of the client's default is minor; if the amount of work left to be done is minimal; if non-payment is due to the client's inability to pay; or if the client would be placed in peril as a result of withdrawal.

(b) *Dishonourable or malicious conduct:* Examples of dishonourable conduct by a client are persistent improper contact of an opposing party in order to pressure settlement and persistently rude, offensive or abusive behaviour toward others involved in a matter. While many legal problems, especially those that are adversarial, contain an element of malice, it is only when malice constitutes the primary or substantial motivation of the client that a lawyer should consider withdrawal.

(c) *Lack of cooperation:* Examples of uncooperative client behaviour are refusal to fulfill undertakings, failure to attend examinations or meetings, and the making of unrealistic demands or unnecessary telephone calls. When such behaviour becomes persistent or repetitive, it may seriously interfere with the reasonable and proper discharge of a representation and may therefore justify withdrawal.

(d) *Missing client or absence of instructions:* The efforts that must be exerted to locate a missing client are discussed in Commentary 6 of Chapter 9, *The Lawyer as Advisor.* If they are unsuccessful, or if a lawyer is unable to obtain proper instructions for some other reason, it is necessary to assess the extent to which the lawyer is able and willing to continue to represent the client through implied instructions or as otherwise permitted by law. In making this assessment, the lawyer should be aware of the unique considerations that apply when a client is incapacitated (see Rule #7 and accompanying commentary of Chapter 9, *The Lawyer as Advisor*) Withdrawal may also at some point become mandatory depending on the nature and scope of the representation, the necessity for express instructions and the remoteness of the possibility, in the case of an incapacitated client, that a legal representative will be appointed.

(e) *Loss of confidence:* Situations typical of a serious loss of confidence include a client's deliberate deception of a lawyer and repeated disagreements between lawyer and client over a range of issues. While a single instance of disagreement or failure of the client to accept and act on the lawyer's advice may not reflect a loss of confidence, factors such as the significance of the issue involved and whether acceptance of the client's position would reflect poorly on the lawyer will be relevant.

R.2 A lawyer must withdraw upon reasonable notice to the client when:

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

(b) the client persists in instructions that the lawyer knows will result in the lawyer's assisting the client to commit a crime or fraud;

(c) the lawyer is unable to act competently or with reasonable promptness; or

(d) the lawyer's continued employment would violate the lawyer's obligations with respect to conflict of interest.

C.2 For a general discussion of reasonable notice, see Commentary G.3. In the case of mandatory withdrawal, the notice period should normally be as short as possible since continuing to act will place the lawyer in violation of other obligations. Specifically, if withdrawal is required by paragraph (a) or (b), the lawyer's continued representation will be carried out contrary to the client's instructions; under paragraph (c), continued representation will be incompetent; and under paragraph (d), continued representation will violate conflicts principles.

(a) *Breach of ethics:* Withdrawal is mandatory when a client insists on improper conduct. Rule #2(a) is not intended to apply to a mere suggestion of such conduct that is not pursued by the client after receiving and considering the lawyer's advice.

An example falling within Rule #2(a) is a client's refusal to permit the lawyer to disclose confidential information necessary to correct a misapprehension of the court or opposing counsel occurring through the client's perjury (see Rule #2 of Chapter 4, *Relationship of the Lawyer to Other Lawyers*, and Rule #15 of Chapter 10, *The Lawyer as Advocate*). The client's instructions place the lawyer in breach of an ethical obligation and the lawyer must therefore withdraw.

If there are outstanding undertakings or trust conditions in a matter, the lawyer must ensure that these obligations are fulfilled despite withdrawal. For example, if a purchaser of real estate insists that a lawyer improperly withhold funds from the closing amount or impose a "trust on a trust" with respect to a portion of the closing amount, the lawyer must not only decline to do so but must, before withdrawing, comply with the trust conditions earlier accepted by the lawyer.

For further guidance in specific areas, see the following:

- criminal or fraudulent conduct: Rule #11 of Chapter 9, *The Lawyer as Advisor*, and Rule #4 of Chapter 12, *The Lawyer in Corporate and Government Service*;
- client-generated misrepresentation of opposing party or court: Rule #2 of Chapter 4, *Relationship of the Lawyer to Other Lawyers*; Rule #15 of Chapter 10, *The Lawyer as Advocate*; and Rule #2 of Chapter 11, *The Lawyer as Negotiator*;
- refusal of client to consent to disclosure of confidential information required by ethics: Rule #7 of Chapter 7, *Confidentiality*.

(b) *Perpetration of crime or fraud:* A dishonest client may attempt to use the professional services or facilities of a lawyer to implement an improper purpose such as money-laundering, concealing stolen property or making a fraudulent conveyance. A lawyer may not implement instructions that the lawyer knows to have such an object, and must withdraw from the representation if the client persists in those instructions. Knowledge will be attributed to the lawyer when a reasonable argument cannot be made for any other interpretation of the facts available to the lawyer.

(c) *Lack of competence:* After a matter is undertaken, it may become evident that the lawyer cannot devote the necessary attention to the matter, cannot deal with it expeditiously, or lacks the necessary knowledge, skills or experience to perform competently. In any of these circumstances, the lawyer is obliged by this rule to withdraw (see also Chapter 2, *Competence*, and Rule #4 and accompanying commentary of Chapter 9, *The Lawyer as Advisor*).

(d) *Conflict of interest:* Through no fault of the client, a lawyer may find that continued representation of the client will place the lawyer in violation of this Code as it applies to conflicts of interest. The lawyer must then withdraw.

R.3 If a lawyer withdraws or is discharged from a matter, the lawyer must endeavour to avoid prejudice to the client and must cooperate with successor counsel.

C.3 A withdrawing lawyer may have duties additional to those outlined in Rule #3. For example, a lawyer may be obliged to assist the client in locating replacement counsel if withdrawal has occurred pursuant to paragraph (c) or (d) of Rule #2, but may not be so obliged if withdrawal has been precipitated by the client's improper or unreasonable conduct.

A withdrawing lawyer should not enforce a solicitor's lien for non-payment of fees if the client is prepared to enter into an arrangement that reasonably assures the lawyer of payment in due course. Successor counsel may also be requested to undertake to pay an outstanding account from the monies ultimately recovered by that counsel. Where the matter in question is subject to a contingency agreement, the lawyers may agree to divide the contingent fee on the basis of apportionment of total effort required to effect settlement.

Although a lawyer must cooperate with successor counsel, confidential information should not be disclosed unless expressly or impliedly authorized by the client. (see Commentary 5 of Chapter 7, *Confidentiality*)

R.4 Upon withdrawal or dismissal, a lawyer must promptly render a final account and must account to the client for money and property received from the client.

C.4 In every instance of withdrawal or dismissal, a lawyer must account to the client for all funds received from the client and render a final statement of account. It may also be appropriate to provide a final report as to the status of the client's matter. Finally, the lawyer (subject to the proper assertion of a solicitor's lien) is obliged to deliver to the client other property of the client in the lawyer's possession, such as documents, securities, title deeds and minute books, or dispose of them in accordance with the client's instructions.

All of the foregoing must be executed promptly upon withdrawal or dismissal. Unreasonable delay in accounting to the client, returning money or property to the client or delivering the file to a successor lawyer is unethical conduct.

R.5 Before assuming conduct of a matter previously handled by another lawyer, a lawyer must be reasonably satisfied that the other lawyer has withdrawn or been discharged by the client.

C.5 A lawyer's ability to accept employment in a matter known to have been previously handled by another lawyer is subject to the constraints of professional and courteous dealings among counsel. (see Chapter 4, *Relationship of the Lawyer to Other Lawyers*)

Both the withdrawing and successor lawyer must cooperate in facilitating a smooth transition with as little inconvenience and expense to the client as possible. A successor lawyer has no general duty to ensure that the previous lawyer has been paid, but it is appropriate to encourage the client to resolve an outstanding account. In some situations, refusing to undertake a matter pending settlement of the account may also be acceptable provided that the client is not deprived of counsel at a critical stage or subjected to other undue prejudice or hardship.