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# 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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## **PREFACE**

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

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

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

Disciplinary assessment of a lawyer's conduct will be based on all facts and circumstances as they existed at the time of the conduct, including the willfulness and seriousness of the conduct, the existence of previous violations and any mitigating factors. A lawyer may seek an opinion from the Law Society with respect to a proposed course of conduct which, if followed, will generally protect the lawyer against subsequent disciplinary action.

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

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



## CHAPTER 10 THE LAWYER AS ADVOCATE

### STATEMENT OF PRINCIPLE

**When acting as advocate, a lawyer has a duty to advance the client's cause resolutely and to the best of the lawyer's ability, subject to limitations imposed by law or professional ethics.**

### RULES

1. A lawyer must not take any step in the representation of a client that is clearly without merit.
  2. A lawyer must use reasonable efforts to expedite the litigation process.
  3. A lawyer representing an accused or potential accused must not influence the complainant or potential complainant with respect to the laying, prosecution or withdrawal of criminal charges.
  4. A lawyer shall not personally, and shall not advise a client to:
    - (a) lay or threaten to lay a criminal or quasi-criminal charge; or
    - (b) make or threaten to make a complaint against a lawyer to a law society, or
    - (c) agree to withhold the laying of, or to withdraw, a criminal or quasi-criminal charge, or
    - (d) agree to withhold the making of, or to withdraw, a complaint against a lawyer to a law society,for the collateral purpose of enforcing the payment of a civil claim or securing any other civil advantage for a client of the lawyer.
- Feb2005;Dec2005*
5. A lawyer must not participate in the preparation or delivery of a document resembling a document issued by a court or other authority and intended to deceive the recipient.
  6. When a lawyer is required by law to notify one or more parties of a step taken or to be taken in a matter, the lawyer must notify all parties to the matter.
  7. A lawyer must not communicate with the court respecting a matter unless the other parties to the matter (or, if represented, their counsel) are present or have had reasonable prior notice, or unless the circumstances are exceptional and are disclosed fully and completely to the court.
  8. In an *ex parte* proceeding, a lawyer must (subject to confidentiality - see Rule #7 of Chapter 7, *Confidentiality*) inform the court of all material facts known to the lawyer that will enable the court to make an informed decision, whether or not the facts are adverse.
  9. Except with the consent of all parties, a lawyer must not appear before a judge or a court when the lawyer's past or present relationship with the judge or the court would create a reasonable apprehension of bias.
  10. A lawyer must not act as counsel in any proceeding in which it is likely that the lawyer will give evidence that will be contested.
  11. A lawyer must not express a personal opinion or belief to the court as to the facts in evidence.
  12. A lawyer's dealings with the court must be courteous and respectful.
  13. A lawyer must not misrepresent to the court the identity of the lawyer's client or witness, the client's position in the litigation nor the issues to be determined in the litigation.





14. A lawyer must not mislead the court nor assist a client or witness to do so.
15. Upon becoming aware that the court is under a misapprehension as a result of submissions made by the lawyer or evidence given by the lawyer's client or witness, a lawyer must (subject to confidentiality - see Rule #7 of Chapter 7, *Confidentiality*) immediately correct the misapprehension.
16. When the court requests that a lawyer answer a question or provide information, the following rules apply:
  - (a) The lawyer may decline to respond on the ground that to answer the question or provide the information
    - (i) would contravene the lawyer's obligations of confidentiality, or
    - (ii) would have the effect of making the lawyer a witness in the proceeding, or
    - (iii) would be detrimental to the client's interests, the lawyer not being required to respond by any other provision of this Code.
  - (b) The lawyer who chooses to respond must do so in a complete and truthful manner.
17. (a) A lawyer's representations to the court concerning the facts of a case must be limited to representations supported by the evidence.  
 (b) A lawyer's representations to the court concerning the law must be supported by judicial decision or other legal authority unless the lawyer informs the court that there is no such support.
18. A lawyer must inform the court of relevant adverse authority of which the lawyer is aware and that has not been raised by opposing counsel.
19. A lawyer must not introduce or otherwise bring to the court's attention facts or evidence that the lawyer knows to be inadmissible.
20. A lawyer must not counsel or participate in:
  - (a) the obtaining of evidence or information by illegal means;
  - (b) the falsification of evidence;
  - (c) the destruction of property having potential evidentiary value or the alteration of property so as to affect its evidentiary value; or
  - (d) the concealment of property having potential evidentiary value in a criminal proceeding.
21. A lawyer must treat with fairness all witnesses and others involved in a matter.
22. A lawyer must not advise or encourage a witness or potential witness in a matter to refrain from communicating with other parties involved in the matter, subject to the exceptions set forth in Commentary 22.
23. A lawyer must not permit or participate in a payment or other benefit to a witness in excess of reasonable compensation.
24. A lawyer must not counsel a witness to give evidence that is untruthful or misleading.
25. A lawyer involved in a proceeding:
  - (a) must not, during a cross-examination, obstruct the cross-examination in any manner; and
  - (b) must not, during a break in a cross-examination, discuss with the witness the evidence that that witness has given or is about to give.



26. A lawyer involved in a proceeding must not discuss the testimony of a witness with a person excluded by the court during such testimony.
27. A lawyer must not enter a guilty plea, nor make an agreement with the prosecution to enter a guilty plea, on behalf of a client unless:
- (a) the client so instructs the lawyer after receiving full information and advice from the lawyer; and
  - (b) the client is prepared to admit in court the necessary factual and mental elements of the charge or charges.
28. When engaged as a prosecutor, a lawyer exercises a public function involving much discretion and power. Accordingly:
- (a) a lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial on the merits;
  - (b) a lawyer must act fairly and dispassionately;
  - (c) a lawyer must not do anything that might prevent an accused from being represented by or communicating with counsel;
  - (d) to the extent required by law or accepted practice, a lawyer must make timely disclosure to the accused or defence counsel of all known facts and witnesses, whether tending towards guilt or innocence.

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## COMMENTARY

### General

- G.1 Lawyers involved in the litigation process are those most frequently called upon to act as advocates. However, this chapter is not limited in application to litigation-related activities. It applies to any professional activity having an element of advocacy, regardless of whether the lawyer in question would be considered to be acting as a barrister or as a solicitor.
- G.2 The exclusive right of lawyers to speak for another citizen before a body that will adjudicate that person's legal rights and obligations creates corresponding duties not only to clients, but to opposing parties, the court, others involved in the litigation process and society at large. The duty to zealously represent the client is therefore not unqualified. Lawyers must actively participate in safeguarding the fairness, integrity and propriety of judicial proceedings, including efforts to govern the behaviour of clients and witnesses.

### R.1 A lawyer must not take any step in the representation of a client that is clearly without merit.

C.1 A lawyer has a duty to take full advantage of legal procedure for the benefit of each client and may assert a position on a client's behalf, including one that the lawyer does not believe will ultimately prevail, if the position is supportable by a good faith argument on the merits. A lawyer may have greater latitude if (for example) all of the facts have yet to be fully substantiated or the lawyer expects to develop further evidence through discovery.

It is an abuse of process, however, for a lawyer to commence or defend an action on grounds that are not, and have no chance of becoming, a legitimate and meritorious claim or defence. In evaluating the client's position and determining the extent to which it should be pursued, a lawyer must realistically assess all factual, evidential and jurisprudential factors bearing on the matter. A step taken for the sole purpose of embarrassing, inconveniencing or harassing another party is improper.

### R.2 A lawyer must use reasonable efforts to expedite the litigation process.

C.2 Unreasonable delay by lawyers, or delay sought merely to frustrate or inconvenience another party, brings discredit to the administration of justice. Lawyers therefore have a general duty to expedite litigation to the



than one week, it is permissible for counsel to discuss with the witness all issues arising out of the matter, including evidence that has been or is to be given, provided that opposing counsel has been advised of the lawyer's intention to do so. If opposing counsel objects, the matter must be resolved by the court having jurisdiction over the proceedings.

Second, Rule #25(b) is not intended to prevent discussions or consultations that are necessary to obtain the fulfilment of undertakings given during an examination for discovery. However, under no circumstances are such qualifications to be interpreted as permitting improper briefing such as that described in Rule #24 and accompanying commentary.

Rule #25(b) may be modified or waived with the consent of counsel but, when the proceedings are before a court, consent of the court must also be sought and received.

Rule #25 is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has been retained by a witness under cross-examination, from consulting with the lawyer's new client.

While Rule #25 applies to proceedings before any decision-making body, it is subject to the rules of procedure established by the body in question.

**R.26 A lawyer involved in a proceeding must not discuss the testimony of a witness with a person excluded by the court during such testimony.**

C.26 While Rule #26 is necessarily limited to lawyers, discussion by anyone of testimony with those excluded during the testimony would undermine the court's direction. Accordingly, a lawyer who becomes aware that another person is engaging in such discussion must take reasonable steps to prevent it and should, if necessary, report it to the court.

**R.27 A lawyer must not enter a guilty plea, nor make an agreement with the prosecution to enter a guilty plea, on behalf of a client unless:**

- (a) the client so instructs the lawyer after receiving full information and advice from the lawyer; and
- (b) the client is prepared to admit in court the necessary factual and mental elements of the charge or charges.

C.27 Entering a plea is one of the matters falling outside the implied authority of a lawyer and must therefore be fully discussed with the client. It is preferable that a lawyer receive the client's written instructions with respect to plea. Because of the serious and long-lasting ramifications of a guilty plea, a client's instructions in this respect must be based on all relevant information, including the implications and possible consequences of the plea and the fact that the court is under no obligation to accept it. Assuming compliance with Rule #27, it is proper for a lawyer to agree with the prosecutor that a guilty plea will be entered to the offence charged, or to a lesser or included offence, and to agree on a disposition or sentence to be proposed to the court. However, a plea agreement may not involve a misrepresentation or misstatement of facts to the court (see Rule #14).

An agreement between the prosecution and defence regarding the plea to be entered is not considered a usual lawyers' undertaking due to the policy considerations involved. Either party may withdraw from the agreement prior to performance, although the withdrawing party should afford the other party ample notice. However, once the agreed-upon plea has been entered by the defence, it is generally improper for the prosecution to attempt to repudiate the agreement of the parties.

**R.28 When engaged as a prosecutor, a lawyer exercises a public function involving much discretion and power. Accordingly:**

- (a) a lawyer's prime duty is not to seek to convict, but to see that justice is done through a fair trial on the merits;
- (b) a lawyer must act fairly and dispassionately;
- (c) a lawyer must not do anything that might prevent an accused from being represented by or communicating with counsel;

