

CHAPTER 3 – RELATIONSHIP TO CLIENTS

3.1 COMPETENCE

Definitions

3.1-1 In this section,

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

- (a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises;
- (b) investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;
- (c) implementing as each matter requires, the chosen course of action through the application of appropriate skills, including:
 - i. legal research;
 - ii. analysis;
 - iii. application of the law to the relevant facts;
 - iv. writing and drafting;
 - v. negotiation;
 - vi. alternative dispute resolution;
 - vii. advocacy; and
 - viii. problem solving;
- (d) communicating at all relevant stages of a matter in a timely and effective manner;
- (e) performing all functions conscientiously, diligently and in a timely and cost-effective manner;
- (f) applying intellectual capacity, judgment and deliberation to all functions;
- (g) complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;

- (h) recognizing limitations in one's ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;
- (i) managing one's practice effectively;
- (j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and
- (k) otherwise adapting to changing professional requirements, standards, techniques and practices.

Competence

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

Commentary

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

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

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

- (a) the complexity and specialized nature of the matter;
- (b) the lawyer's general experience;
- (c) the lawyer's training and experience in the field;
- (d) the preparation and study the lawyer is able to give the matter; and
- (e) whether it is appropriate or feasible to refer the matter to, or associate

or consult with, a lawyer of established competence in the field in question.

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

[4A] To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.

[4B] The required level of technological competence will depend upon whether the use or understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including:

- (a) the lawyer's or law firm's practice areas;
- (b) the geographic locations of the lawyer's or firm's practice; and
- (c) the requirements of clients.

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

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

- (a) decline to act;
- (b) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or
- (c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

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

[7A] When a lawyer considers whether to provide legal services under a limited scope retainer the lawyer must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement for such services does not exempt a lawyer from the duty to provide competent representation. The lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rule 3.2-1A.

[7B] In providing short-term summary legal services under Rules 3.4-2A – 3.4-2D, a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term summary legal services may be required or are advisable, and encourage the client to seek such further assistance.

[8] A lawyer should clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. A lawyer should only express his or her legal opinion when it is genuinely held and is provided to the standard of a competent lawyer.

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

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

[10A] When it becomes apparent that the client has misunderstood or

misconceived the position or what is really involved, the lawyer should explain, as well as advise, so that the client is apprised of the true position and fairly advised about the real issues or questions involved.

[11] Intentionally left blank.

[11.1] Lawyers who provide legal services through civil society organizations to clients are required to control the delivery of legal services. The lawyer should take care to:

- (a) act on behalf of the client's interest;
- (b) advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide through the civil society organization; and
- (c) avoid conflicts of interest between the client and the civil society organization.

[11.2] Where other services are provided through the civil society organization, or where the lawyer's services are provided together with other services, the lawyer should take care to protect client confidentiality and privilege, and should only disclose client confidential or privileged information with client consent, or as required by law.

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

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

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

[15] **Incompetence, Negligence and Mistakes** - This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However,

evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

3.2 QUALITY OF SERVICE

Quality of Service

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

Commentary

[1] This rule should be read and applied in conjunction with Section 3.1 regarding competence.

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

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

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

Examples of expected practices

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

- (a) keeping a client reasonably informed;
- (b) answering reasonable requests from a client for information;
- (c) responding to a client's telephone calls;
- (d) keeping appointments with a client, or providing a timely explanation or

apology in circumstances when unable to keep such an appointment;

- (e) taking appropriate steps to do something promised to a client, or informing or explaining to the client when it is not possible to do so;
- (f) ensuring, where appropriate, that all instructions are in writing or confirmed in writing;
- (g) answering within a reasonable time any communication that requires a reply;
- (h) ensuring that work is done in a timely manner so that its value to the client is maintained;
- (i) providing quality work and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;
- (j) maintaining office staff, facilities and equipment adequate to the lawyer's practice;
- (k) informing a client of a proposal of settlement, and explaining the proposal properly;
- (l) providing a client with relevant information about a matter and never withholding information from a client or misleading the client about the position of a matter in order to cover up neglect or a mistake;
- (m) making a prompt and complete report when the work is finished or, if a final report cannot be made, providing an interim report where one might reasonably be expected;
- (n) avoiding the use of intoxicants or drugs, that interferes with or prejudices the lawyer's services to the client;
- (o) being civil.

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

[7] In providing short-term limited legal services under Rules 3.4-2A – 3.4-2D, a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term limited legal services may be required or are advisable, and encourage the client to seek such further assistance.

Limited Scope Retainers

3.2-1A Before undertaking a limited scope retainer the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.

Commentary

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

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

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

[4] A lawyer who is providing legal services under a limited scope retainer should consider how communications from opposing counsel in a matter should be managed (See rule 7.2-6A)

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

Honesty and Candour

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

Commentary

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

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

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

Language Rights

3.2-2A A lawyer must, when appropriate, advise a client of the client's language rights, including the right to proceed in the official language of the client's choice.

3.2-2B Where a client wishes to retain a lawyer for representation in the official language of the client's choice, the lawyer must not undertake the matter unless the lawyer is competent to provide the required services in that language.

Commentary

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

[2] The choice of official language is that of the client not the lawyer. The lawyer should be aware of relevant statutory and Constitutional law relating to language rights including the Canadian Charter of Rights and Freedoms, s.19(1), Part XVII of the Criminal Code and section 23.2 of the Divorce Act regarding language rights in courts under federal jurisdiction and in criminal and divorce proceedings. The lawyer should also be aware that provincial or territorial legislation may provide additional language rights, including in relation to aboriginal languages. With regard to Manitoba in particular, section 23 of the Manitoba Act, 1870 sets out constitutional guarantees to ensure full and equal access to the Legislature, the laws and the courts in either French or English or both official languages.

[3] A lawyer should, when appropriate, inform the client of the client's language rights relating to a client's matter, including where applicable:

- (a) subsection 19(1) of the *Canadian Charter of Rights and Freedoms* which provides for the right to use English or French in, or in any pleading in or process issuing from, any court established by Parliament;
- (b) Part XVII of the *Criminal Code* (Language of Accused) which primarily provides for the right of an accused whose language is one of the official languages of Canada to be tried before a judge or a judge and jury, if applicable, who speak the official language of the accused or, if the circumstances warrant, both official languages;
- (c) subsection 23.2 of the *Divorce Act* which recognizes the right of any person to use either English or French, or both official languages, in a proceeding conducted under that Act;
- (d) section 23 of the *Manitoba Act, 1870* which provides for the right to use English or French in, or in any pleading or process issuing from, any court of Canada or any courts of the Province of Manitoba and which requires provincial legislation to be enacted in both English and French.

[4] When a lawyer considers whether to provide the required services in the official language chosen by the client, the lawyer should carefully consider whether it is possible to render those services in a competent manner as required by Rule 3.1-2 and related Commentary.

Advising Clients

3.2-2C A lawyer must obtain the client's instructions and in doing so, provide informed and independent advice.

Commentary

[1] Lawyers provide legal services based upon the client's instructions. In order to provide appropriate instructions, the client should be fully and fairly informed. There may not be a need for the lawyer to obtain explicit instructions for every single step on a matter. Before taking steps, a lawyer should consider whether and to what extent the client should be consulted or informed. Fundamental decisions such as how to plead and what witnesses to call almost always require prior consultations. The same may not be so with less fundamental decisions. When in doubt, the lawyer should consult with the client. A lawyer should obtain instructions from the client on all matters not falling within the express or implied authority of

the lawyer.

[2] A lawyer should clearly specify the facts, circumstances and assumptions upon which an opinion is based. If it is apparent that the client has misunderstood or misconceived the lawyer's advice, matters concerning the position taken or what is really involved in the matter, the lawyer should explain the matter further to the client to a sufficient degree so that the client does understand.

[3] A lawyer should not provide advice if the lawyer's personal views of the client, others involved or the issue will affect the lawyer's independence on the matter. For example, a lawyer's relationship (personal, financial, or previously strained with the client, opposing counsel or the opposing party) could affect the lawyer's ability to objectively assess a matter.

[4] When a lawyer is requested to provide independent legal advice or independent representation, the lawyer should treat the client as if he or she were the lawyer's own client for those purposes. The client is not the referring party. The lawyer should not treat the task as one that can be taken lightly.

[5] If requested by a client to do so, a lawyer should assist the client in obtaining a second opinion by cooperating with the second lawyer. A lawyer is not obliged, however, to assist a client who is really attempting to coerce the formulation of a favourable opinion or is acting unreasonably in some other respect.

[6] If a lawyer has difficulty contacting a client to obtain instructions, the lawyer ought to take reasonable steps to locate the client. If those efforts fail, the lawyer should consider withdrawing in accordance with section 3.7 (Withdrawal from Representation).

When the Client is an Organization

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

Commentary

[1] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and gives instructions through its officers, directors, employees, members, agents or representatives, the lawyer should

ensure that it is the interests of the organization that are served and protected. Further, given that an organization depends on persons to give instructions, the lawyer should ensure that the person giving instructions for the organization is acting within that person's actual or ostensible authority.

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

Encouraging Compromise or Settlement

3.2-4 A lawyer must advise and encourage the client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

Commentary

[1] The lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options.

Threatening Criminal or Regulatory Proceedings

3.2-5 A lawyer must not, in an attempt to gain a benefit for the client, threaten, or advise a client to threaten:

- (a) to initiate or proceed with a criminal or quasi-criminal charge; or
- (b) to make a complaint to a regulatory authority.

Commentary

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

[2] It is not improper, however, to notify the appropriate authority of criminal or quasi-criminal activities while also taking steps through the civil system. Nor is it

improper for a lawyer to request that another lawyer comply with an undertaking or trust condition or other professional obligation or face being reported to the Society. The impropriety stems from threatening to, or actually using, criminal or quasi-criminal proceedings to gain a civil advantage.

Inducement for Withdrawal of Criminal or Regulatory Proceedings

3.2-6 A lawyer must not:

- (a) give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;
- (b) accept or offer to accept, or advise a person to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or regulatory authority to enter such discussions; or
- (c) wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

Commentary

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

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

the consent of the Crown or regulatory authority.

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

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

Dishonesty, Fraud by Client or Others

3.2-7 A lawyer must never:

- (a) knowingly assist in or encourage any dishonesty, fraud, crime, or illegal conduct;
- (b) do or omit to do anything that the lawyer ought to know assists in or encourages any dishonesty, fraud, crime, or illegal conduct by a client or others; or
- (c) instruct a client or others on how to violate the law and avoid punishment.

Commentary

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

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

[3] If a lawyer has suspicions or doubts about whether he or she might be

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

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

Dishonesty, Fraud when Client an Organization

3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows that the organization has acted, is acting or intends to act dishonestly, fraudulently, criminally or illegally must do the following, in addition to his or her obligations under rule 3.2-7:

- (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer that the proposed conduct is, was or would be dishonest, fraudulent, criminal, or illegal and should be stopped;
- (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed wrongful conduct to be stopped, advise progressively the next highest persons or groups including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the conduct was, is or would be dishonest, fraudulent, criminal, or illegal and should be stopped; and
- (c) if the organization, despite the lawyer's advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with the rules in section 3.7.

Commentary

[1] The past, present, or proposed misconduct of an organization may have

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

[2] This rule speaks of conduct that is dishonest, fraudulent, criminal or illegal. Such conduct includes acts of omission.

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

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

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

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

Clients with Diminished Capacity

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

Commentary

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

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

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

[4] In some circumstances when there is a legal representative, the lawyer may disagree with the legal representative's assessment of what is in the best interests

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

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

3.3 CONFIDENTIALITY

Confidential Information

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

- (a) expressly or impliedly authorized by the client;
- (b) required by law or a court to do so;
- (c) required to deliver the information to the Law Society; or
- (d) otherwise permitted by this rule.

Commentary

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

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

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

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

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

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

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

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

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

[9] In some situations, the authority of the client to disclose may be implied. For example, in court proceedings some disclosure may be necessary in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client's affairs to partners and associates in the law firm and, to the extent necessary, to non-legal staff, such as secretaries and filing clerks and to others whose services are used by the lawyer. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, students and other lawyers engaged under contract with the lawyer or with the firm

of the lawyer the importance of non-disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.

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

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

Use of Confidential Information

3.3-2 The lawyer must not use or disclose a client's or former client's confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.

Commentary

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

Mandatory Disclosure

3.3-3 When required by law, by order of a tribunal of competent jurisdiction, or pursuant to *The Legal Profession Act* and the regulations/by-laws/rules thereunder a lawyer must disclose confidential information, but the lawyer must not disclose more information than is required.

3.3-3A A lawyer must disclose confidential information, but only to the extent necessary:

- (a) if the lawyer has reasonable grounds for believing that an identifiable person or group is in imminent danger of death or serious bodily harm and believes disclosure is necessary to prevent the death or harm; and
- (b) the lawyer does not reasonably believe that such disclosure will cause harm to the lawyer or to the lawyer's family or to the lawyer's associates.

Commentary

[1] While a lawyer is generally justified in obeying a court order to disclose confidential information, this may not be the case where a lawyer believes in good faith that the order is in error. In these circumstances, provided that an appeal from the order is taken, the lawyer has an obligation to withhold disclosure pending final adjudication of the matter.

[2] A decision to disclose the confidential information of a client cannot be taken lightly. In making that decision the lawyer should be guided by the commentary to rule 3.3-3B. In the case of mandatory disclosure a significant factor to be considered is the imminence of the perceived danger. In the absence of an imminent danger, there may be other alternatives available to the lawyer short of disclosure.

[3] Mandatory disclosure of imminent danger of death or bodily harm is not conditional on a crime occurring. Accordingly, this rule could apply in circumstances such as a threatened suicide or self-mutilation.

[4] A lawyer will be relieved from the mandatory obligation to disclose information arising from a reasonable belief that a person is in imminent danger of death or serious bodily harm if the lawyer reasonably believes that disclosure will bring harm upon the lawyer or the lawyer's family or colleagues. This might occur where the lawyer expects that the client is likely to retaliate or has threatened retaliation.

Permitted Disclosure

3.3-3B A lawyer may divulge confidential information, but only to the extent necessary:

- (a) with the express or implied authority of the client concerned;

- (b) in order to establish or collect a fee;
- (c) in order to secure legal or ethical advice about the lawyer's proposed conduct;
- (d) if the lawyer has reasonable grounds for believing that a crime is likely to be committed and believes disclosure could prevent the crime; or
- (e) if the lawyer has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility.

Commentary

[1] When a client undermines the lawyer and client relationship by impugning the lawyer's conduct or refusing to pay the lawyer's account, fairness dictates that there is a waiver of confidentiality to such an extent so as to allow a lawyer to defend the allegations or prosecute the claim for fees.

[2] Clients are entitled to have information with respect to past conduct held in confidence but the same rationale does not apply with respect to a prospective crime. While the principles relating to solicitor-client confidentiality warrant special protection in our judicial system, disclosure may be permissible in limited circumstances in the interests of protecting the public.

[3] A decision to disclose pursuant to rules 3.3-3B(d) and (e) should be made only in exceptional circumstances. The decision to do so can be based on a number of factors including:

- Are there reasonable grounds for believing that a crime will be carried out?
- What is the nature of the crime and its impact? How serious is the crime? For example, is it a petty crime without a victim, or a crime that can potentially harm one or more persons or their property? Is it a crime that is likely to involve violence?
- Is the information, if disclosed, likely to prevent the crime?
- Will the information be disclosed through other means in any event, or does urgency dictate more immediate action?
- Does the client envision involving the lawyer in the events relating to the crime? Is the lawyer being duped into participating in a fraud, for

example?

- Is the communication part of a conspiracy to commit a crime or in furtherance of a crime? If so, no (evidentiary) privilege attaches to it as it cannot be said to be a legitimate communication for the purpose of obtaining legal advice.
- Is there reliance on the lawyer by a victim?
- What is the impact of disclosure on the client? Will disclosure make a difference to the client? For example, could the client be subject to a reduced charge if the crime is not carried out?
- What is the impact on the lawyer's practice?
- What is the impact on the lawyer? Are there concerns about the personal safety of either the lawyer or the lawyer's family?
- What will disclosure mean to the administration of justice and our legal system?
- What does the lawyer's conscience say?

[4] Once a decision to disclose is made, the lawyer will then need to consider how to disclose, to whom, and how to ensure that the disclosure is no more than is necessary to prevent the crime or dangerous situation at the court facility from occurring. Furthermore, the lawyer must also be mindful of the obligations under Rule 2.02 (2) to be honest and candid with the client and to inform the client of the disclosure where appropriate.

3.3-4 If it is alleged that a lawyer or the lawyer's associates or employees:

- (a) have committed a criminal offence involving a client's affairs;
- (b) are civilly liable with respect to a matter involving a client's affairs;
- (c) have committed acts of professional negligence; or
- (d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

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

3.3-5 Intentionally left blank.

3.3-6 Intentionally left blank.

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

Commentary

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

[2] In these situations (see Rules 3.4-17 to 3.4-23 on Conflicts From Transfer Between Law Firms), rule 3.3-7 permits lawyers and law firms to disclose limited information. This type of disclosure would only be made once substantive discussions regarding the new relationship have occurred.

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

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

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

- (a) limit access to the disclosed information;

- (b) not use the information for any purpose other than detecting and resolving conflicts; and
- (c) return, destroy, or store in a secure and confidential manner the information provided once appropriate confidentiality screens are established.

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

3.4 CONFLICTS

Duty to Avoid Conflicts of Interest

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

Commentary

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

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

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

The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests

[4] The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is based on trust. It is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of

candour and the duty to avoid conflicting interests.

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

Other Duties Arising from the Duty of Loyalty

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

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

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

Identifying Conflicts

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

- (a) the immediacy of the legal interests;
- (b) whether the legal interests are directly adverse;
- (c) whether the issue is substantive or procedural;
- (d) the temporal relationship between the matters;
- (e) the significance of the issue to the immediate and long-term interests of the clients involved; and
- (f) the clients' reasonable expectations in retaining the lawyer for the

particular matter or representation.

Examples of Areas where Conflicts of Interest May Occur

[10] Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive.

- (a) A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.
- (b) A lawyer provides legal advice on a series of commercial transactions to the owner of a small business and at the same time provides legal advice to an employee of the business on an employment matter, thereby acting for clients whose legal interests are directly adverse.
- (c) A lawyer, an associate, a law partner or a family member has a personal financial interest in a client's affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.
 - i. A lawyer owning a small number of shares of a publicly traded corporation would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer's judgment or loyalty to the client.
- (d) A lawyer has a sexual or close personal relationship with a client.
 - i. Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client's right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer's firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client's work.
- (e) A lawyer or his or her law firm acts for a public or private corporation

and the lawyer serves as a director of the corporation.

- i. These two roles may result in a conflict of interest or other problems because they may
 - A. affect the lawyer's independent judgment and fiduciary obligations in either or both roles,
 - B. obscure legal advice from business and practical advice,
 - C. jeopardize the protection of lawyer and client privilege, and
 - D. disqualify the lawyer or the law firm from acting for the organization.
- (f) Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute.
 - i. The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

The Role of the Court and Law Societies

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

Consent

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

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

- (b) Consent may be inferred and need not be in writing where all of the following apply:
- i. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;
 - ii. the matters are unrelated;
 - iii. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and
 - iv. the client has commonly consented to lawyers acting for and against it in unrelated matters.

Commentary

Disclosure and Consent

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

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

[2A] While this rule does not require that a lawyer advise a client to obtain independent legal advice about the conflict of interest, in some cases the lawyer should recommend such advice. This is to ensure that the client's consent is informed, genuine and uncoerced, especially if the client is vulnerable or not sophisticated.

[3] Following the required disclosure, the client can decide whether to give consent. As important as it is to the client that the lawyer's judgment and freedom of action on the client's behalf not be subject to other interests, duties or obligations, in practice this factor may not always be decisive. Instead, it may be only one of several factors that the client will weigh when deciding whether or not to give the consent referred to in the rule. Other factors might include, for example, the

availability of another lawyer of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another lawyer, and the latter's unfamiliarity with the client and the client's affairs.

Consent in Advance

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

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

Implied Consent

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

client, and there must be a reasonable basis upon which to conclude that the client has commonly accepted that lawyers may act against it in such circumstances.

Short-term Summary Legal Services

3.4-2A In rules 3.4-2B to 3.4-2D “Short-term summary legal services” means advice or representation to a client under the auspices of a pro bono or not-for-profit legal services provider with the expectation by the lawyer and the client that the lawyer will not provide continuing legal services in the matter.

3.4-2B A lawyer may provide short-term summary legal services without taking steps to determine whether there is a conflict of interest.

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

3.4-2D A lawyer who provides short-term summary legal services must take reasonable measures to ensure that no disclosure of the client's confidential information is made to another lawyer in the lawyer's firm.

Commentary

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

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

[3] Confidential information obtained by a lawyer providing the services described in Rule 3.4-2A-2D will not be imputed to the lawyers in the lawyer's firm or

to non-lawyer partners or associates in a multi-discipline partnership. As such, these individuals may continue to act for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services, and may act in future for another client adverse in interest to the client who is obtaining or has obtained short-term summary legal services.

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

Dispute

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

Commentary

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

Concurrent Representation with Protection of Confidential Client Information

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

- (a) disclosure of the risks of the lawyers so acting has been made to each client;
- (b) the lawyer recommends each client receive independent legal advice, including on the risks of concurrent representation;
- (c) the clients each determine that it is in their best interests that the lawyers so act and consent to the concurrent representation;

- (d) each client is represented by a different lawyer in the firm;
- (e) appropriate screening mechanisms are in place to protect confidential information; and
- (f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary

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

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

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

[4] In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see Rule 3.4-20).

Joint Retainers

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

- (a) the lawyer has been asked to act for both or all of them;
- (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

[1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

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

- (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
- (b) in accordance with Rule 3.3-1, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and
- (c) the lawyer would have a duty to decline the new retainer, unless:
 - i. the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;
 - ii. the other spouse or partner had died; or
 - iii. the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

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

3.4-6 If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that client and another client in a matter or transaction, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.

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

Commentary

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

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

- (a) the lawyer must not advise them on the contentious issue and must:
 - i. refer the clients to other lawyers; or
 - ii. advise the clients of their option to settle the contentious issue by direct negotiation in which the lawyer does not participate, provided:
 - A. no legal advice is required; and
 - B. the clients are sophisticated.
- (b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

Commentary

[1] This rule does not prevent a lawyer from arbitrating or settling, or attempting

to arbitrate or settle a dispute between two or more clients or former clients who are not under any legal disability and who wish to submit the dispute to the lawyer.

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

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

Commentary

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

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

Acting Against Former Clients

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

- (a) the same matter;
- (b) any related matter; or
- (c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

Commentary

[1] This rule guards against the misuse of confidential information from a

previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client's position on a matter that was central to a previous retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer ("the other lawyer") in the lawyer's firm may act in the new matter against the former client if:

- (a) the former client consents to the other lawyer acting; or
- (b) the law firm has:
 - i. taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the lawyer to any other lawyer, any other member or employee of the law firm, or any other person whose services the lawyer or the law firm has retained in the new matter; and
 - ii. advised the lawyer's former client, if requested by the client, of the measures taken.

Commentary

[1] The Commentary to rules 3.4-17 to 3.4-23 regarding conflicts from transfer between law firms provide valuable guidance for the protection of confidential information in the rare cases in which it is appropriate for another lawyer in the lawyer's firm to act against the former client.

Acting for Borrower and Lender

3.4-12 Subject to rule 3.4-14, a lawyer or two or more lawyers practising in partnership or association must not act for or otherwise represent both lender and borrower in a mortgage or loan transaction.

3.4-13 In rules 3.4-14 to 3.4-16 "**lending client**" means a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of its business.

3.4-14 Provided there is compliance with this rule, and in particular rules 3.4-5 to 3.4-9, a lawyer may act for or otherwise represent both lender and borrower in a

mortgage or loan transaction in any of the following situations:

- (a) the lender is a lending client;
- (b) the lender is selling real property to the borrower and the mortgage represents part of the purchase price;
- (c) the lawyer practises in a remote location where there are no other lawyers that either party could conveniently retain for the mortgage or loan transaction; or
- (d) the lender and borrower are not at "arm's length" as defined in the *Income Tax Act* (Canada).

3.4-15 Where a lawyer acts for both the borrower and the lender in a mortgage or loan transaction, the lawyer must disclose to the borrower and the lender, in writing, before the advance or release of the mortgage or loan funds, all material information that is relevant to the transaction.

Commentary

[1] What is material is to be determined objectively. Material information would be facts that would be perceived objectively as relevant by any reasonable lender or borrower. An example is a price escalation or "flip", where a property is re-transferred or re-sold on the same day or within a short time period for a significantly higher price. The duty to disclose arises even if the lender or the borrower does not ask for the specific information.

3.4-16 If a lawyer is jointly retained by a client and a lending client in respect of a mortgage or loan from the lending client to the other client, including any guarantee of that mortgage or loan, the lending client's consent is deemed to exist upon the lawyer's receipt of written instructions from the lending client to act and the lawyer is not required to:

- (a) provide the advice described in rule 3.4-5 to the lending client before accepting the retainer;
- (b) provide the advice described in rule 3.4-6; or
- (c) obtain the consent of the lending client as described in rule 3.4-7, including confirming the lending client's consent in writing, unless the lending client requires that its consent be reduced to writing.

Commentary

[1] Rules 3.4-15 and 3.4-16 are intended to simplify the advice and consent process between a lawyer and institutional lender clients. Such clients are generally sophisticated. Their acknowledgement of the terms of and consent to the joint retainer is usually confirmed in the documentation of the transaction (e.g. mortgage loan instructions) and the consent is generally deemed by such clients to exist when the lawyer is requested to act.

[2] Rule 3.4-16 applies to all loans when a lawyer is acting jointly for both the lending client and another client regardless of the purpose of the loan, including, without restriction, mortgage loans, business loans and personal loans. It also applies where there is a guarantee of such a loan.

Civil Society Organizations

3.4-16.1.1 When practising through a civil society organization, a lawyer shall establish a system to search for conflicts of interest of the civil society organization.

Conflicts from Transfer Between Law Firms

Application of Rule

3.4-17 In rules 3.4-17 to 3.4-23,

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

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

- (a) It is reasonable to believe the transferring lawyer has confidential information relevant to the new law firm’s matter for its client; or
- (b)
 - i. the new law firm represents a client in a matter that is the same as or related to a matter in which a former law firm represents or represented its client (“former client”);
 - ii. the interests of those clients in that matter conflict; and

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

Commentary

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

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

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

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

Commentary

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

Law Firm Disqualification

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

- (a) the former client consents to the new law firm's continued representation of its client; or
- (b) the new law firm has:
 - i. taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm; and
 - ii. advised the lawyer's former client, if requested by the client, of the measures taken.

Commentary

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

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

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

Guidelines: How to Screen/Measures to be Taken

1. The screened lawyer should have no involvement in the new law firm's representation of its client in the matter.
2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
4. The firm should take steps to preclude the screened lawyer from having access to any part of the file.
5. The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.
6. These Guidelines apply with necessary modifications to situations in which non-lawyer staff leave one law firm to work for another and a determination is made, before hiring the individual, on whether any conflicts of interest will be created and whether the potential new hire actually possesses relevant confidential information.

How to Determine If a Conflict Exists Before Hiring a Potential Transferee

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

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

interest where lawyers transfer between firms.

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

Transferring Lawyer Disqualification

3.4-21 Unless the former client consents, a transferring lawyer referred to in rule 3.4-20 must not:

- (a) participate in any manner in the new law firm's representation of its client in the matter; or
- (b) disclose any confidential information respecting the former client except as permitted by rule 3.3-7.

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

Lawyer Due-Diligence for Non-Lawyer Staff

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

- (a) complies with rules 3.4-17 to 3.4-23; and
- (b) does not disclose confidential information:
 - i. of clients of the firm; or
 - ii. any other law firm in which the person has worked.

Commentary

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

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

3.4-24 [deleted]

3.4-25 [deleted]

3.4-26 [deleted]

Doing Business with a Client

Definitions

3.4-27 In rules 3.4-27 to 3.4-41,

“independent legal advice” means a retainer in which:

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client’s transaction;
- (b) the client’s transaction involves doing business with:
 - i. another lawyer, or
 - ii. a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded;
- (c) the retained lawyer has advised the client that the client has the right to independent legal representation;
- (d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from another lawyer;

- (e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given; and
- (f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of a proposed investment from a business point of view.

“independent legal representation” means a retainer in which:

- (a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client’s transaction; and
- (b) the retained lawyer will act as the client’s lawyer in relation to the matter.

Commentary

<p>[1] If a client elects to waive independent legal representation and to rely on independent legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or perfunctorily discharged.</p>
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“lawyer” includes an associate or partner of the lawyer, related persons as defined by the *Income Tax Act* (Canada), and a trust or estate in which the lawyer has a beneficial interest or for which the lawyer acts as a trustee or in a similar capacity.

“related persons” means related persons as defined in the *Income Tax Act* (Canada);

Transactions with Clients

3.4-28 A lawyer must not enter into a transaction with a client unless the transaction with the client is fair and reasonable to the client.

3.4-29 Subject to rules 3.4-30 to 3.4-36, where a transaction involves: lending or borrowing money, buying or selling property or services having other than nominal value, giving or acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment, or entering into a common business venture, a lawyer must, in sequence:

- (a) disclose the nature of any conflicting interest or how a conflict might develop later;

- (b) consider whether the circumstances reasonably require that the client receive independent legal advice with respect to the transaction; and
- (c) obtain the client's consent to the transaction after the client receives such disclosure and legal advice.

3.4-30 Rule 3.4-29 does not apply where:

- (a) a client intends to enter into a transaction with a corporation or other entity whose securities are publicly traded in which the lawyer has an interest; or
- (b) a lawyer borrows money from a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business.

Commentary

[1] The relationship between lawyer and client is a fiduciary one. The lawyer has a duty to act in good faith. A lawyer should be able to demonstrate that the transaction with the client is fair and reasonable to the client.

[2] In some circumstances, the lawyer may also be retained to provide legal services for the transaction in which the lawyer and a client participate. A lawyer should not uncritically accept a client's decision to have the lawyer act. It should be borne in mind that if the lawyer accepts the retainer the lawyer's first duty will be to the client. If the lawyer has any misgivings about being able to place the client's interests first, the retainer should be declined. This is because the lawyer cannot act in a transaction with a client where there is a substantial risk that the lawyer's loyalty to or representation of the client would be materially and adversely affected by the lawyer's own interest, unless the client consents and the lawyer reasonably believes that he or she is able to act for the client without having a material adverse effect on loyalty or the representation.

[3] If the lawyer chooses not to disclose the conflicting interest or cannot disclose without breaching confidence, the lawyer must decline the retainer.

[4] Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, that independent legal advice was received by the client, where required, and that the client's consent was obtained.

Documenting Independent Legal Advice

[5] A lawyer retained to give independent legal advice relating to a transaction should document the independent legal advice by doing the following:

- (a) provide the client with a written certificate that the client has received independent legal advice;
- (b) obtain the client's signature on a copy of the certificate of independent legal advice; and
- (c) send the signed copy to the lawyer with whom the client proposes to transact business.

Borrowing from Clients

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

- (a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public; or
- (b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer:
 - i. discloses to the client the nature of the conflicting interest; and
 - ii. requires that the client receive independent legal advice or, where the circumstances reasonably require, independent legal representation.

3.4-32 Subject to rule 3.4-31, if a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrows money from a client, the lawyer must:

- (a) disclose to the client the nature of the conflicting interest; and
- (b) require that the client obtain independent legal representation.

Commentary

[1] Whether a person is considered a client within rules 3.4-31 and 3.4-32 when lending money to a lawyer on that person's own account or investing money in a

security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.

[2] Given the definition of “lawyer” applicable to these Doing Business with a Client rules, a lawyer’s spouse or a corporation controlled by the lawyer would be prohibited from borrowing money from a lawyer’s unrelated client. Rule 3.4-32 addresses situations where a conflicting interest may not be immediately apparent to a potential lender. As such, in the transactions described in the rule, the lawyer must make disclosure and require that the unrelated client from whom the entity in which the lawyer or the lawyer’s spouse has a direct or indirect substantial interest is borrowing has independent legal representation.

Lending to Clients

3.4-33 A lawyer must not lend money to a client unless before making the loan, the lawyer:

- (a) discloses to the client the nature of the conflicting interest;
- (b) requires that the client:
 - i. receive independent legal representation; or
 - ii. if the client is a related person as defined by the *Income Tax Act* (Canada), receive independent legal advice; and
- (c) obtains the client’s consent.

Guarantees by a Lawyer

3.4-34 Except as provided by rule 3.4-35, a lawyer retained to act with respect to a transaction in which a client is a borrower or a lender must not guarantee personally, or otherwise provide security for, any indebtedness in respect of which a client is the borrower or lender.

3.4-35 A lawyer may give a personal guarantee in the following circumstances:

- (a) the lender is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business,

and the lender is directly or indirectly providing funds solely for the lawyer, the lawyer's spouse, parent or child;

- (b) the transaction is for the benefit of a non-profit or charitable institution, and the lawyer provides a guarantee as a member or supporter of such institution, either individually or together with other members or supporters of the institution; or
- (c) the lawyer has entered into a business venture with a client and a lender requires personal guarantees from all participants in the venture as a matter of course and:
 - i. the lawyer has complied with rules 3.4-28 to 3.4-36; and
 - ii. the lender and participants in the venture who are clients or former clients of the lawyer have independent legal representation.

Payment for Legal Services

3.4-36 When a client intends to pay for legal services by transferring to a lawyer a share, participation or other interest in property or in an enterprise, other than a nonmaterial interest in a publicly traded enterprise, the lawyer must recommend but need not require that the client receive independent legal advice before accepting a retainer.

Commentary

[1] The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.
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Gifts and Testamentary Instruments

3.4-37 A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

3.4-38 A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

3.4-39 Unless the client is a family member of the lawyer, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer a gift or benefit from the client, including a testamentary gift.

Judicial Interim Release

3.4-40 A lawyer must not act as a surety for, deposit money or other valuable security for or act in a supervisory capacity to an accused person for whom the lawyer acts.

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

3.5 PRESERVATION OF CLIENTS' PROPERTY

Preservation of Clients' Property

3.5-1 In this rule, "property" includes a client's money, securities as defined in *The Securities Act*, C.C.S.M. c. S50, original documents such as wills, title deeds, minute books, licenses, certificates and the like, and all other papers such as client's correspondence, files, reports, invoices and other such documents as well as personal property including precious and semi-precious metals, jewellery and the like.

3.5-2 A lawyer must:

- (a) care for a client's property as a careful and prudent owner would when dealing with like property; and
- (b) observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

Commentary

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

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

[2A] A lawyer should be alert to the duty to claim on behalf of a client any privilege in respect of property seized or attempted to be seized by an external authority or in respect of third party claims made against the property. In this regard, the lawyer should be familiar with the nature of the client's common law privilege and with such relevant constitutional and statutory provisions as those found in the *Income Tax Act* (Canada), the *Charter* and the *Criminal Code*.

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

[4] If the lawyer withdraws from representing a client, the lawyer is required to comply with rule 3.7 (Withdrawal from Representation).

Notification of Receipt of Property

3.5-3 A lawyer must promptly notify a client of the receipt of any money or other property of the client, unless satisfied that the client is aware that they have come into the lawyer's custody.

Identifying Clients' Property

3.5-4 A lawyer must clearly label and identify clients' property and place it in safekeeping distinguishable from the lawyer's own property.

3.5-5 A lawyer must maintain such records as necessary to identify clients' property that is in the lawyer's custody.

Accounting and Delivery

3.5-6 A lawyer must account promptly for clients' property that is in the lawyer's custody and deliver it to the order of the client on request or, if appropriate, at the conclusion of the retainer.

3.5-7 If a lawyer is unsure of the proper person to receive a client's property, the lawyer must apply to a tribunal of competent jurisdiction for direction.

Commentary

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

3.6 FEES AND DISBURSEMENTS

Reasonable Fees and Disbursements

3.6-1 A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.

Commentary

- [1] What is a fair and reasonable fee will depend upon such factors as:
- (a) the time and effort required and spent;
 - (b) the difficulty of the matter and the importance of the matter to the client;
 - (c) whether special skill or service has been required and provided;
 - (d) the results obtained;
 - (e) fees authorized by statute or regulation;
 - (f) special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;
 - (g) the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer's inability to accept other employment;
 - (h) any relevant agreement between the lawyer and the client;
 - (i) the experience and ability of the lawyer;
 - (j) any estimate or range of fees given by the lawyer; and
 - (k) the client's prior consent to the fee.

[1A] A fee will not be fair and reasonable and may subject the lawyer to disciplinary proceedings if it is one that cannot be justified in the light of all pertinent circumstances, including the factors mentioned, or is so disproportionate to the services rendered as to introduce the element of fraud or dishonesty, or undue profit.

[2] The fiduciary relationship between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No fee, extra fees, reward, costs, commission, interest, rebate, agency or forwarding allowance, or other compensation related to professional employment may be taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client or, where the lawyer's fees are being paid by someone other than the client, such as a legal aid agency, a borrower, or a personal representative, without the consent of such agency or other person. An example of conduct which may offend this rule is a lawyer who applies little skill or effort in assisting a client in obtaining periodic indemnity benefits, and charges an administration fee for collecting such monies or a fee which is calculated as a percentage of such benefits.

[3] A lawyer should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest, as is reasonable and practical in the circumstances, including the basis on which fees will be determined. A legal assistant's time for tasks specific to the client, and for which the legal assistant is qualified and able to carry out, may be charged to the client at a fair and reasonable rate provided that the lawyer advises the client in advance, preferably in writing, of the intention to do so and the rate to be charged.

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

Civil Society Organization Clients

3.6-1.2 A lawyer providing legal services through a civil society organization shall not directly or indirectly charge a fee to the person for whose benefit the legal services are provided, but the lawyer may charge disbursements in accordance with rule 3.6-1.

Contingent Fees and Contingent Fee Agreements

3.6-2 Subject to rule 3.6-1 and section 55 of *The Legal Profession Act*, a lawyer may enter into a written agreement that provides that the lawyer's fee is contingent,

in whole or in part, on the outcome of the matter for which the lawyer's services are to be provided.

Commentary

[1] In determining the appropriate percentage or other basis of the contingency fee, a lawyer and client should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The lawyer and client may agree that, in addition to the fee payable under the agreement, any amount arising as a result of an award of costs or costs obtained as a part of a settlement is to be paid to the lawyer, which may require judicial approval under the governing legislation. In such circumstances, a smaller percentage of the award than would otherwise be agreed upon for the contingency fee, after considering all relevant factors, will generally be appropriate. The test is whether the fee, in all of the circumstances, is fair and reasonable.

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

Statement of Account

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

Joint Retainer

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

Division of Fees and Referral Fees

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

3.6-6 If a lawyer refers a matter to another lawyer because of the expertise and ability of the other lawyer to handle the matter, and the referral was not made because of a conflict of interest, the referring lawyer may accept, and the other lawyer may pay, a referral fee, provided that:

- (a) the fee is reasonable; and
- (b) the client is informed and consents.

3.6-7 A lawyer must not:

- (a) directly or indirectly share, split, or divide his or her fees with any person who is not a lawyer;
- (b) give any financial or other reward for the referral of clients or client matters to any person who is not a lawyer; or
- (c) give or receive any financial or other reward for the referral of clients or client matters when providing legal services through a civil society organization.

Commentary

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

- (a) making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;
- (b) entering into a lease under which a landlord directly or indirectly shares in the fees or revenues generated by the law practice;
- (c) paying an employee for services, other than for referring clients, based on the revenue of the lawyer's firm or practice; or
- (d) occasionally entertaining potential referral sources by purchasing meals, providing tickets to, or attending at, sporting or other activities or sponsoring client functions.

3.6-8 Intentionally left blank.

3.6-9 Intentionally left blank.

3.6-10 Intentionally left blank.

3.6-11 Intentionally left blank.

Prepaid Legal Services Plan

3.6-12 A lawyer who accepts a client referred by a prepaid legal services plan must advise the client in writing of:

- (a) the scope of work to be undertaken by the lawyer under the plan;
and
- (b) the extent to which a fee or disbursement will be payable by the client to the lawyer.

Solicitor's Lien

3.6-13 A lawyer must not assert a solicitor's lien against property of a client who is unable to pay the lawyer's account in circumstances in which to do so would materially prejudice the client.

Commentary

[1] A lawyer is entitled to assert a solicitor's lien over files, documents, money or other personal property of a client which is in the possession of the lawyer until the client has paid all of the lawyer's outstanding accounts. This retaining lien is possessory only and there are no means by which a lawyer can actively enforce it. As a general rule, however, a lawyer is not obliged to give copies of file material to the client or new counsel or even allow inspection of this property while asserting a lien. Conversely, a lawyer who withdraws without just cause in the course of a matter loses the possessory lien over the client's documents and must deliver the materials to the client or new solicitor. Some original documents such as corporate records required by law to be kept elsewhere cannot be the subject of a solicitor's lien.

[2] Liens claimed on property recovered or preserved, sometimes referred to as "charging liens" can only be asserted for the costs properly incurred in recovering or preserving the specific property in question.

[3] A lawyer has a 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 (material prejudice being understood to exceed mere inconvenience to the client). For example, a solicitor's lien should not be enforced when a trial or hearing is in progress or imminent. Nor should a lawyer enforce a solicitor's lien for non-payment if the client is prepared to enter into an agreement that reasonably assures the lawyer of payment in due course.

[4] Special considerations apply where a lawyer retained under a contingency agreement seeks to assert a lien for unpaid fees. This is because a contingent fee is generally not collectible until the completion of the matter. Where a lawyer withdraws or is discharged, the lawyer cannot insist on payment absent a provision in the contingency agreement allowing the lawyer to do so. Accordingly, the contingency agreement should clearly state what fees and disbursements will be payable in the event the lawyer withdraws or is discharged. A lawyer who is discharged or withdraws with just cause may require the client to pay outstanding disbursements prior to releasing the file only if the contingency agreement provides that the lawyer is entitled to full payment of the disbursements regardless of the outcome of the litigation. The lawyer may impose a trust condition on the new lawyer that file materials are forwarded on the condition that the former lawyer's fees are paid at the conclusion of the matter. When imposing such a trust condition, the former lawyer must acknowledge that the client retains the right to assess the lawyer's account through the courts or to be arbitrated in accordance with the rules of the Law Society.

- (g) notify opposing counsel or other interested parties that may need to know; and
- (h) comply with the applicable rules of court.

Commentary

[1] If an application to court is necessary, the lawyer should take care to ensure that any material filed does not violate solicitor-client privilege.

[1A] Steps taken to withdraw should be taken promptly so as to minimize any possible prejudice and costs to the client.

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

[2] If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement upon the client's position. Generally speaking, a lawyer should not enforce a lien if to do so would prejudice materially a client's position in any uncompleted matter. See rule 3.6-13.

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

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

[5] A lawyer who ceases to act for one or more clients should co-operate with the successor lawyer or lawyers and should seek to avoid any unseemly rivalry, whether real or apparent.

Duty of Successor Lawyer

3.7-10 Before agreeing to represent a client, a successor lawyer must be satisfied that the former lawyer has withdrawn or has been discharged by the client.

Commentary

[1] It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former lawyer, especially if the latter withdrew for good cause or was capriciously discharged.