

CHAPTER 7 – RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

7.1 RESPONSIBILITY TO THE SOCIETY AND THE PROFESSION GENERALLY

Communications from the Society

7.1-1 A lawyer must reply promptly and completely to any communication from the Society.

Meeting Financial Obligations

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

Commentary

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

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

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

[4] **Medical Reports** Where a lawyer has requested a medical report and, upon receipt of same, is of the view that the fee being charged by the reporting physician is unreasonable in the circumstance, and the lawyer and the physician are unable to agree, it would not be inappropriate for the lawyer to pay such amount as he or she deems reasonable and to make a complaint to the College of Physicians and Surgeons. In making the initial request for a report, the lawyer may wish to agree to pay such "reasonable fee" as may be charged for the report rather than simply agreeing to pay the account when received. The lawyer may also, where appropriate, ask the physician for an estimate of the fee in advance.

[5] **Government Remittances** A lawyer is under both an ethical and legal

obligation to remit on a timely basis statutory deductions for income tax, Canada Pension Plan and employment insurance which have been withheld on behalf of employees. Due to the special nature of these deductions, the obligation to remit same to the government is even greater than a lawyer's general obligation to pay bills and accounts relating to the lawyer's practice on a timely basis.

[6] A lawyer is also obliged to remit on a timely basis the Goods and Services Tax (GST) collected during the course of business. GST funds are considered to be business related funds rather than client trust funds, and should be processed through a lawyer's general bank account.

[7] Insurance Deductibles Where a lawyer has notified the Society of a potential claim and it may be possible to repair the situation, the cost of retaining outside counsel to do the repair work will be subject to the lawyer's deductible. Repair costs in excess of the lawyer's deductible will be paid by the Society. In appropriate circumstances, the Society may give approval to the lawyer to do their own repair work, in which case the lawyer will bear his or her own costs. Lawyers are not to retain outside counsel to do repair work without first notifying the Society. The Society will not be responsible for any repair costs where the lawyer retains counsel without prior notification to and approval by the Society.

Duty to Report

7.1-3 Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

- (a) the misappropriation or misapplication of trust monies;
- (b) the abandonment of a law practice;
- (c) participation in criminal activity related to a lawyer's practice;
- (d) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness or competency as a lawyer;
- (e) conduct that raises a substantial question about the lawyer's capacity to provide professional services; and
- (f) any situation in which a lawyer's clients are likely to be materially prejudiced.

Commentary

[1] Unless a lawyer who departs from proper professional conduct or competence is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer). In all cases, the report must be made without malice or ulterior motive.

[2] Nothing in this rule is meant to interfere with the traditional lawyer-client relationship.

[3] Instances of conduct described in this rule can arise from a variety of stressors, physical, mental or emotional conditions, disorders or addictions. Lawyers who face such challenges should be encouraged by other lawyers to seek assistance as early as possible. The Society supports professional support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. A lawyer who provides such counselling does so on a confidential basis but will have an ethical duty to disclose any confidences to the extent necessary if:

- (a) required by law or by order of a court of competent jurisdiction; or
- (b) 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 that such disclosure is necessary to prevent the death or harm; and
- (c) the lawyer does not reasonably believe that such disclosure will cause harm to the disclosing lawyer or to the lawyer's family or associates.

7.2 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

7.2-1 A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.

Commentary

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

[2] Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

[3] A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.

[4] A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

7.2-2 A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client's rights.

7.2-3 A lawyer must not use any device to record a conversation between the lawyer and a client or another lawyer, even if lawful, without first informing the other person of the intention to do so.

Communications

7.2-4 A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

7.2-5 A lawyer must answer with reasonable promptness all professional letters and communications from other lawyers that require an answer, and a lawyer must be punctual in fulfilling all commitments.

7.2-6 Subject to rules 7.2-6A and 7.2-7, if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person's lawyer:

- (a) approach, communicate or deal with the person on the matter; or
- (b) attempt to negotiate or compromise the matter directly with the person.

7.2-6A Where a person is represented by a lawyer under a limited scope retainer on a matter, another lawyer may, without the consent of the lawyer providing the limited scope legal services, approach, communicate or deal with the person directly on the matter unless the lawyer has been given written notice of the nature of the legal services being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer.

Commentary

[1] Where notice as described in rule 7.2-6A has been provided to a lawyer for an opposing party, the opposing lawyer is required to communicate with the person's lawyer, but only to the extent of the limited representation as identified by the lawyer. The opposing lawyer may communicate with the person on matters outside of the limited scope retainer.

7.2-7 A lawyer who is not otherwise interested in a matter may give a second opinion to a person who is represented by a lawyer with respect to that matter.

Commentary

[1] Rule 7.2-6 applies to communications with any person, whether or not a

party to a formal adjudicative proceeding, contract or negotiation, who is represented by a lawyer concerning the matter to which the communication relates. A lawyer may communicate with a represented person concerning matters outside the representation. This rule does not prevent parties to a matter from communicating directly with each other.

[2] The prohibition on communications with a represented person applies only where the lawyer knows that the person is represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but actual knowledge may be inferred from the circumstances. This inference may arise when there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of the other lawyer by closing his or her eyes to the obvious.

[3] Rule 7.2-7 deals with circumstances in which a client may wish to obtain a second opinion from another lawyer. While a lawyer should not hesitate to provide a second opinion, the obligation to be competent and to render competent services requires that the opinion be based on sufficient information. In the case of a second opinion, such information may include facts that can be obtained only through consultation with the first lawyer involved. The lawyer should advise the client accordingly and, if necessary consult the first lawyer unless the client instructs otherwise.

7.2-8 A lawyer retained to act on a matter involving a corporation or other organization represented by a lawyer must not approach an officer or employee of the organization:

- (a) who has the authority to bind the organization;
- (b) who supervises, directs or regularly consults with the organization's lawyer; or
- (c) whose own interests are directly at stake in the representation,

in respect of that matter, unless the lawyer representing the organization consents or the contact is otherwise authorized or required by law.

Commentary

[1] This rule applies to corporations and other organizations. "Other organizations" include partnerships, limited partnerships, associations, unions, unincorporated groups, government departments and agencies, tribunals,

regulatory bodies and sole proprietorships. This rule prohibits a lawyer representing another person or entity from communicating about the matter in question with persons likely involved in the decision-making process for a corporation or other organization. If an agent or employee of the organization is represented in the matter by a lawyer, the consent of that lawyer to the communication will be sufficient for purposes of this rule. A lawyer may communicate with employees or agents concerning matters outside the representation.

[2] A lawyer representing a corporation or other organization may also be retained to represent employees of the corporation or organization. In such circumstances, the lawyer must comply with the requirements of section 3.4 (Conflicts), and particularly rules 3.4-5 to 3.4-9. A lawyer must not represent that he or she acts for an employee of a client, unless the requirements of section 3.4 have been complied with, and must not be retained by an employee solely for the purpose of sheltering factual information from another party.

7.2-9 When a lawyer deals on a client's behalf with an unrepresented person, the lawyer must:

- (a) urge the unrepresented person to obtain independent legal representation;
- (b) take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
- (c) make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

Commentary

[1] If an unrepresented person requests the lawyer to advise or act in the matter, the lawyer should be governed by the considerations outlined in Rules 3.4-5 through 3.4-9 (Joint Retainers).

Inadvertent Communications

7.2-10 A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent must promptly notify the sender.

Commentary

[1] Lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this rule requires the lawyer to notify the sender promptly in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a document has been lost. Similarly, this rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this rule, “document” includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[2] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.

Undertakings and Trust Conditions

7.2-11 A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted.

Commentary

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

[2] Trust conditions should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed in writing and communicated to the other party at the time the property is delivered. Trust conditions should be accepted in writing and, once accepted, constitute an obligation on the accepting lawyer that the lawyer must honour personally. The lawyer who delivers property without any trust condition cannot

retroactively impose trust conditions on the use of that property by the other party.

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

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

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

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

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

7.3 OUTSIDE INTERESTS AND THE PRACTICE OF LAW

Maintaining Professional Integrity and Judgment

7.3-1 A lawyer who engages in another profession, business, or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer's professional integrity, independence, or competence.

Commentary

[1] The lawyer must not carry on, manage or be involved in any outside interest in such a way that makes it difficult to distinguish in which capacity the lawyer is acting in a particular transaction, or that would give rise to a conflict of interest or duty to a client.

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

7.3-2 A lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer's independent judgment on behalf of a client.

Commentary

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

[2] Where the outside interest is not related to the legal services being performed for clients, ethical considerations will usually not arise unless the lawyer's conduct might bring the lawyer or the profession into disrepute or impair the lawyer's competence, such as, if the outside interest might occupy so much time that clients' interests would suffer because of inattention or lack of preparation.

7.4 THE LAWYER IN PUBLIC OFFICE

Standard of Conduct

7.4 A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law.

Commentary

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

[2] Generally, the Society will not be concerned with the way in which a lawyer holding public office carries out official responsibilities, but conduct in office that reflects adversely upon the lawyer's integrity or professional competence may be the subject of disciplinary action.

[3] Lawyers holding public office are also subject to the provisions of section 3.4 (Conflicts) when they apply.

7.5 PUBLIC APPEARANCES AND PUBLIC STATEMENTS

Communication with the Public

7.5-1 Provided that there is no infringement of the lawyer's obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.

Commentary

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

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

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

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

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

[6] Lawyers are often called upon to comment publicly on the effectiveness of

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

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

Interference with Right to Fair Trial or Hearing

7.5-2 A lawyer must not communicate information to the media or make public statements about a matter before a tribunal if the lawyer knows or ought to know that the information or statement will have a substantial likelihood of materially prejudicing a party's right to a fair trial or hearing.

Commentary

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

7.6 PREVENTING UNAUTHORIZED PRACTICE

Preventing Unauthorized Practice

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

Commentary

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

7.7 RETIRED JUDGES RETURNING TO PRACTICE

7.7 A judge who returns to practice after retiring, resigning or being removed from the bench must not, for a period of three years, unless the Society approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions.

7.8 ERRORS AND OMISSIONS

Informing Client of Errors or Omission

7.8-1 When, in connection with a matter for which a lawyer is responsible, a lawyer discovers an error or omission that is or may be damaging to the client and that cannot be rectified readily, the lawyer must:

- (a) promptly inform the client of the error or omission without admitting legal liability;
- (b) recommend that the client obtain independent legal advice concerning the matter, including any rights the client may have arising from the error or omission; and
- (c) advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

Commentary

[1] In addition to the obligations imposed by Rule 7.8-1, the lawyer has the contractual obligation to report to the lawyer's insurer. Rule 7.8-2 also imposes an ethical duty to report to the insurer(s). Rule 7.8-1 does not relieve a lawyer from the duty to report to the insurer or other indemnitor even if the lawyer attempts to rectify.

Notice of Claim

7.8-2 A lawyer must give prompt notice of any circumstance that may give rise to a claim to an insurer or other indemnitor so that the client's protection from that source will not be prejudiced.

Commentary

[1] Under the lawyer's compulsory professional liability insurance policy, a lawyer is contractually required to give written notice to the insurer immediately after the lawyer becomes aware of any actual or alleged error or any circumstances that could give rise to a claim. The duty to report is also an ethical duty which is imposed on the lawyer to protect clients. The duty to report arises whether or not the lawyer considers the claim to have merit.

[2] The introduction of compulsory insurance has imposed additional obligations upon a lawyer, but these obligations must not impair the relationship and duties of the lawyer to the client. A lawyer has an obligation to comply with the provisions of the policy of insurance. The insurer's rights must be preserved and the lawyer, in informing the client of an error or omission should be careful not to prejudice any rights of indemnity that either of them may have under an insurance, client's protection or indemnity plan or otherwise. There may well be occasions when a lawyer believes that certain actions or a failure to take action have made the lawyer liable for damages to the client when, in reality, no liability exists. Further, in every case, a careful assessment will have to be made of the client's damages arising from the lawyer's negligence.

Co-operation

7.8-3 When a claim of professional negligence is made against a lawyer, he or she must assist and co-operate with the insurer or other indemnitor to the extent necessary to enable the claim to be dealt with promptly.

Responding to Client's Claim

7.8-4 If a lawyer is not indemnified for a client's errors and omissions claim or to the extent that the indemnity may not fully cover the claim, the lawyer must expeditiously deal with the claim and must not take unfair advantage that would defeat or impair the client's claim.

7.8-5 If liability is clear and the insurer or other indemnitor is prepared to pay its portion of the claim, a lawyer has a duty to pay the balance. (See also rule 7.1-2)