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Professional Legal Training Course 2024

Practice Material

Professionalism: Ethics

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Printed for the May 2024 Session
of the Professional Legal Training Course

Law Society
of British Columbia

A requirement for admission to the bar of British Columbia, the Professional Legal Training Course is supported by grants from the Law Society of British Columbia and the Law Foundation of British Columbia.
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PROFESSIONALISM: ETHICS

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Chapter 1

Ethics[1]

[§1.01] Introduction to These Materials

This chapter of *Professionalism: Ethics* starts by addressing the fundamental duties of lawyers and the sources of those duties. Then it covers the Law Society's role in regulating lawyers and protecting the public. It identifies various components of the Law Society that oversee, evaluate and discipline lawyers. It also covers liability that lawyers might face for various breaches, and the role of the Lawyers Indemnity Fund when a lawyer is facing a claim. Finally it canvasses particular ethical issues that commonly arise in practice, including duties to the court and conflicts of interest.

It is important to note that the other parts of the *Practice Material* also address ethics and a lawyer's duties to be competent, because such duties are integral to all legal practice. These are examples of such discussion in other parts of the *Practice Material*:

- Anti-money laundering measures—see *Professionalism: Practice Management*, Chapter 7.
- Conduct in court—see *Civil*, Chapter 7.
- Communicating with clients—see *Professionalism: Practice Management*, Chapters 3 and 5.
- Fees, limitation dates, and retainers—see *Professionalism: Practice Management*, Chapter 4.
- Trust accounting—see *Professionalism: Practice Management*, Chapter 6.
- Undertakings—see *Real Estate*, Chapter 5.

[§1.02] The *BC Code*

Lawyers need more than a knowledge of substantive law and a facility with skills and procedures to guide their actions when representing a client. A lawyer also contends with questions of professional responsibility, which the lawyer must consider and resolve daily.

The legal profession has codified its expectations of practitioners, to some extent. An authority that should be consulted in British Columbia to help resolve ethical dilemmas is the *Code of Professional Conduct for British Columbia* (the "*BC Code*" or "the Code"). The *BC Code* is published by the Law Society of British Columbia as part of the *Member's Manual*.

Lawyers are expected to become familiar with the rules and commentary in the *BC Code*.

The introduction to the *BC Code* makes six key points:

(1) One of the hallmarks of civilized society is the rule of law. Its importance is reflected in every legal activity in which citizens engage. As participants in a justice system that advances the rule of law, lawyers hold a unique and important role in society. Self-regulatory powers have been granted to the legal profession in Canada on the understanding that the profession will exercise those powers in the public interest. Part of that responsibility is ensuring the appropriate regulation of the professional conduct of lawyers.

Members of the legal profession who draft, argue, interpret and challenge the law of the land can attest to Canada's robust legal system. They also acknowledge the public's reliance on the integrity of the people who work within the legal system and the authority exercised by the governing bodies of the profession.

While lawyers are consulted for their knowledge and abilities, more than mere technical proficiency is expected of them. A special ethical responsibility comes with membership in the legal profession. This *Code of Professional Conduct for British Columbia* attempts to define and illustrate that responsibility in terms of a lawyer's professional relationships with clients, the justice system and other members of the profession.

(2) The *Legal Profession Act* provides that it is the object and duty of the Law Society of British Columbia to uphold and protect the public interest in the administration of justice. A central feature of that duty is to ensure that lawyers can identify and maintain the highest standards of ethical conduct. This Code attempts to assist lawyers to achieve that goal.

While the Code should be considered a reliable and instructive guide for lawyers, the obligations it identifies are only the minimum standards of professional conduct expected of members of the profession. Lawyers are encouraged to aspire to the highest standards of competence, integrity and honour in the practice of their profession, whether or not such standards are formally addressed in the Code.

(3) The Code is published under the authority of the Benchers of the Law Society of British Columbia for the guidance of BC lawyers. It is significantly

[1] Prepared and updated by staff lawyers of the Law Society of British Columbia, most recently in March 2024.

related to the Federation of Law Societies' Model Code of Professional Conduct, though there are points of variance from the Model Code that the Benchers have considered to be appropriate for guiding practice in British Columbia. Where there is a corresponding provision in the Model Code, the numbering of the *BC Code* is similar to that of the Model Code.

The *BC Code* is not a formal part of the Law Society Rules but, rather, an expression of the views of the Benchers about standards that British Columbia lawyers must meet in fulfilling their professional obligations.

(4) The Code is divided into three components: rules, commentary and appendices. Each of these components contains some statements that are mandatory, some that are advisory and others with both mandatory and advisory elements. Some issues are dealt with in more than one place in the Code, and the Code itself is not exhaustive of lawyers' professional conduct obligations.

In determining lawyers' professional obligations, the Code must be consulted in its entirety and lawyers should be guided in their conduct equally by the language in the rules, commentary and appendices.

Mandatory statements have equal force wherever they appear in the Code.

(5) A breach of a provision of the Code by a lawyer may or may not be the basis of disciplinary action against that lawyer. A decision by the Law Society to take such action will include a consideration of the language of the provision itself and the nature and seriousness of the conduct in question.

(6) The correct or best answer to ethical questions that arise in the practice or lives of lawyers may often be difficult to discern, whether or not the Code addresses the question directly. Lawyers should always be aware that discussion of such questions with Benchers, Law Society practice advisors, or other experienced and trusted colleagues is the approach most likely to identify a reasonable course of action consistent with lawyers' ethical obligations. This Code is intended to be a valuable asset for lawyers in the analysis, discussion and resolution of such issues.

The Law Society practice advisors have extensive experience providing advice on ethics questions. They are available to give confidential advice, free of charge, to lawyers, articled students, and temporary articled students on ethics and practice management issues.

The *BC Code* provides guidance with respect to many common issues that lawyers face, by reference to lawyers' duties to relate to clients, the courts, other lawyers and the public, generally, with the utmost probity and good faith. For clarity, "probity" means more than mere honesty, and means having high ethical principles. There is also an aspirational aspect to the *BC Code*: it encourages lawyers and articled students to aspire to the most honourable conduct of which they are capable. That conduct may not always be identified by specific Code rules, but awareness of it and a commitment to practice according to it is an important element of a lawyer's calling.

Chapter 2

Competence[1]

[§2.01] What Is Competence

The Practice Standards Committee has adopted six components of competent practice. A competent lawyer will:

(a) have the intellectual, emotional and physical capacity to carry out the practice of law;

(b) demonstrate professional responsibility and ethics;

(c) set up and maintain office systems and file organization suitable for the current or anticipated practice of the lawyer;

(d) communicate in a timely and appropriate manner with clients, counsel and others, and document those communications in an appropriate manner;

(e) have an adequate knowledge of substantive and procedural law in the areas practiced, be able to apply the law to a client's affairs and determine when the problems exceed the lawyer's ability; and

(f) develop and apply technical skills such as drafting, negotiation, advocacy, research and problem solving to appropriately carry out a client’s instructions.

The *BC Code*, section 3.1 sets out guidelines concerning the competence of lawyers and the quality of service to be provided by lawyers; some of these guidelines are discussed in the sections below.

[§2.02] Identifying the Legal Problems

In considering whether to take on a matter, you need to identify the legal issues involved. Doing so will help you assess your competence to handle the matter, determine what your first steps are, and identify any urgent steps you need to take. Knowing the legal issues is necessary so that you can properly advise your client.

Perhaps your client has a claim or has been wronged. Perhaps your client is concerned about a potential claim by someone else, or needs direction about their responsibilities or how to handle a situation. Your client is probably concerned about some of these things:

- finding out about their rights or duties;
- seeking a remedy if they have suffered harm; or
- defending themselves against actual or anticipated claims.

Start by identifying the legal issues and the legal principles that govern the situation. Determine the sources of obligations and the elements of any causes of action. The elements of a cause of action are those things that a plaintiff needs to establish to prove their claim. Claims might be based on rights at common law or arising from statute. Civil claims must be proven on a balance of probabilities (as distinct from criminal claims, which generally require proof beyond a reasonable doubt). For more on claims and duties under criminal statutes, see the *Practice Material: Criminal Procedure*. For more on civil claims and duties in particular practice areas, see the applicable *Practice Material* volumes such as *Business*, *Civil*, *Family*, *Real Estate* and *Wills*.

Below is an overview of basic common law principles about contracts and torts. These claims are discussed in more detail in the *Practice Material: Ethics*, Chapter 4 in the context of claims against lawyers. That chapter also canvasses breach of fiduciary duty.

1. Contracts

(a) Basics

If your client has a contract, obtain the contract and read it carefully. There might be more than one relevant contract, or there might be relevant amendments or addenda incorporated into the contract. Valid contracts may be oral (unless a statute requires they be written, such as the *Law and Equity Act*, s. 59, which requires that a contract for the sale of land must be in writing).

The basic elements of a valid contract start with an intention to create legal relations. One party makes an offer, the other party accepts it, and then the parties exchange consideration. Consideration might be money or something of value, or it might be the mutual promises the parties exchange about performing the contract. The contract should be sufficiently clear on its key terms. Especially in a contract for real estate, it should be clear on the three P’s: the **price**, who the **parties** are, and the **property** (or performance) that is the subject matter of the contract.

While parties are generally free to contract on terms as they see fit, there are general principles of contractual interpretation, including these:

- The parties carefully choose words to express their obligations, so if they use different words than those they previously used to

[1] Prepared and updated by staff lawyers of the Law Society of British Columbia, most recently in March 2024.

express obligations, they mean to impose different obligations.

- If there is a written contract, it presumably contains all the operative terms of the parties' agreement, unless it incorporates other terms by reference or is deemed to incorporate statutory terms in specific situations (such as trustee remuneration as described in the *Trustee Act*, s. 88, or the warranty of fitness in the *Sale of Goods Act*, s. 18).
- The parties cannot contract out of some terms or requirements that are set by statute (such as minimum severance terms set by the *Employment Standards Act*, or the provisions in the *Legal Profession Act*, s. 67 prohibiting retainers on contingency in family matters).

(b) Breach and Remedies

If one party fails to perform their contractual obligation, the other party has a right to claim breach, and might be able to sue the breaching party. If the breach is so fundamental that it goes to the heart of the contract, the innocent party can treat the contract as at an end. If the breach is minor, however, the parties will continue to perform their other obligations while the innocent party pursues a claim relating to that minor breach. In some cases the contract might specify that breach of a particular term gives a party the right to treat the contract as at an end. If the contract does not specify the remedy for a particular breach, a court might be asked to decide.

Some contracts describe how the remedy should be calculated. For example, the contract might specify a penalty payable for a particular breach. Alternatively, a financial contract where a debtor is making instalment payments might include an acceleration clause. An acceleration clause says that, in the event of breach, the person who is owed money has the right to claim the entire amount owed, not just the amount of the payments in arrears. The contract might also specify the procedure the parties must follow if a dispute arises. It may be that the contract says that if a dispute arises the parties must pursue mediation or arbitration.

If one party has not breached the contract but indicates their intention to do so, this may amount to "anticipatory breach" where the innocent party may elect to either accept that the contract is at an end and pursue damages, or affirm the contract and require the breaching party to perform.

If the contract does not contain the procedure to follow in the event of a dispute, the remedy payable, or how to calculate the amount of damages, some general principles apply:

- The innocent party might choose to sue for damages, which is monetary compensation to match the loss the innocent party suffered from the breach. Courts normally award contract damages that put the innocent party in the position they would have enjoyed had the contract been properly performed.
- In some circumstances, such as a contract for the sale of unique real estate, the innocent party might have a right to the remedy of specific performance. That remedy forces the breaching party to perform the contract, since damages would not be sufficient compensation.
- In some circumstances there might be statutes that govern remedies and procedure, such as a financing contract in a secured transaction that is subject to the *Personal Property Security Act*, or a contract that cannot be performed and is governed by the *Frustrated Contract Act*.

(c) Defences

If the wronged party sues for breach of contract, the defendant might raise a defence. The defendant might be able to establish that the contract was founded on a mistake, or the parties were never of the same mind as to what they agreed. It might arise that the defendant was not even a party to the contract, perhaps because the contract was not with the defendant personally but with a corporate entity that has limited liability. Other possible defences might arise:

- unconscionability, undue influence, duress or a lack of capacity, if a party was being taken advantage of or did not have the ability to enter into the contract due to being underage or mentally unwell; or
- the contract was for an illegal purpose or was contrary to public policy.

2. Torts

(a) Basics

If your situation does not involve obligations under a contract, there might be duties arising from tort. The same situation might also give rise to claims in both contract and tort. For example, if a former employee is claiming they were wrongfully dismissed, they might be claiming breach of the terms of the employment contract and also harm arising from the tortious manner of the dismissal itself. Other examples of claims in tort are

trespass, defamation, battery, conversion, and intentionally interfering with another party's contractual relations. One of the most common tort claims is negligence. The general basis of liability for negligence is discussed in the *Practice Material: Ethics,* Chapter 4.

(b) Breach and Remedies

Some torts, such as trespass and defamation, are actionable without proof of damage: the mere fact that the trespass or defamation occurred is enough for a court to order a remedy. Most claims in tort arise when the innocent party suffers harm from the other party's wrongful act, and the remedy is typically damages (monetary compensation) to return the innocent party to the position they would have been in had the wrong not occurred. Occasionally the wronged party might be seeking punitive damages, which go beyond restoring the innocent party and aim at punishing the party who caused harm.

Sometimes a claim might seek an injunction, either combined with the remedy of damages or as a stand-alone remedy. For example, the plaintiff might want the court to order the defendant to stop doing something that is harmful to the plaintiff.

(c) Defences

The defendant might be able to raise as a defence that they were misnamed as a party, or the alleged tort was committed by a different party. If there is more than one defendant, they might blame each other. Other defences might include making a counterclaim against the plaintiff, or blaming a third party.

Sometimes a defendant is insured, and the insurer will step in to defend the claim on behalf of the defendant.

Some defences are specific to particular claims. A defence to a claim that a statement was defamatory might be that the statement was true, or was made in a context where the statement was protected by privilege. A defence to a claim of trespass to property might be that the property owner allowed the alleged trespasser to come onto the property. Defences to negligence include that the defendant did not cause the harm the plaintiff suffered, or owed no duty to the plaintiff, or owed a duty but discharged it.

Negligence requires that damage be proven, but after the court finds that some (or all) of the parties are liable in negligence, the next step is deciding what the quantum of liability will be for each party. More than one defendant might be jointly liable, meaning that liability for the damages is spread among them. If the defendants are jointly and severally liable, that means that the plaintiff could pursue any one defendant for the entire amount of the court's ruling on the quantum of damages.

In BC, the *Negligence Act* allows a court to apportion liability according to the degree of damage caused by the different participants. The plaintiff, for instance, might have contributed to their own injury by being careless. If a court finds that a plaintiff is contributorily negligent, that court will first find the entire quantum of damages that would restore the plaintiff to the position that the plaintiff would be in but for the negligence, and then decide what percentage of the plaintiff's damages was caused by the plaintiff's own negligence, and reduce the award by that percentage.

[§2.03] Duty to Be Competent

1. Knowledge and Skill

The lawyer owes the client a duty to competently perform any legal services undertaken on the client's behalf. *BC Code* rule 3.1-1 defines a "competent lawyer" as 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 the following:

(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.

Lack of legal knowledge and skills may be a problem when new laws are enacted and old laws are repealed. Most lawyers have difficulty keeping current in all areas of practice. The best most can do is maintain high levels of skill and knowledge in certain areas and, when asked to do work outside those areas, either take the time to attain the requisite level of knowledge, work with another professional who has expertise in that subject area, or advise the client to go elsewhere for that service.

This kind of advice may be difficult for some practitioners to follow for fear of losing valuable clients. Working in an area where one does not have sufficient knowledge, however, may have serious consequences. It may result in the loss of professional reputation, negligence claims, and remedial and/or disciplinary action from the Law Society for failing to render competent service.

Lawyers must be aware that they might lack competence for particular tasks because they lack the substantive or procedural knowledge required. Faced with such a task, a lawyer must decline to act unless client instructions permit involving a lawyer who is competent in that area of law or, if appropriate, a subject-matter expert: *BC Code*, rule 3.1-2, commentary [6] and [7]. Before accepting retainers, lawyers must be honestly satisfied that they have the ability and capacity to handle the matters in issue: Code rule 3.1-2, commentary [5].

The *BC Code* sets out factors that are relevant in determining whether a lawyer has employed the necessary degree of knowledge and skill in a matter. Relevant factors include the complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is appropriate to involve a lawyer of established competence in the field in question: Code rule 3.1-2, commentary [3].

Language regarding the duty to be competent in the use of technology was added to the *BC Code* in March 2024 (rule 3.1-2 commentaries [4.1] and [4.2]). In regard to technology, the Law Society has also posted a practice resource on professionally responsible use of generative AI on its website.

2. Quality of Service

A lawyer must serve each client in a competent, conscientious, diligent and efficient manner, so as to provide a quality of service at least equal to that which would be expected of a competent lawyer in a similar situation: Code rule 3.2-1 and commentary [2]. Code rule 3.2-1, commentary [5] provides key examples that illustrate expected practices of a lawyer.

Lawyers must function in a practice setting that allows for the timely, organized, professional and cost-effective delivery of legal services to clients.

Lack of efficient law-office management prompts many complaints to the Law Society and insurance claims against lawyers. The main types of mistakes and complaints are reviewed in the *Practice Material: Professionalism: Practice Management*. When handling complaints caused by practice management errors, the Law Society normally distinguishes between an isolated slip and a more general problem. Several minor complaints about a lawyer might raise questions about the lawyer's competence. In some cases there may be evidence of a more serious problem with a particular lawyer taking chances by lowering standards of practice in order to minimize cost or effort and maximize monetary returns.

3. Cultural Competence

In our diverse society, part of a lawyer's duty to competently serve the client's interests is to appreciate the client's cultural expectations and needs. The question is not whether improving cultural competence is necessary, but whether you can practice competently without it, according to the article "Working in a Diverse Society: The Need for Cultural Competency" in the *Benchers' Bulletin* (2016: No. 4, Winter). The article states that lawyers cannot achieve the levels of practice competence and client service that they are mandated to achieve without improving their cultural competence.

That article discusses what cultural competence is and why it is important:

- Cultural competence includes being self-aware of how one's cultural background and privilege shapes one's assumptions, and the limits of one's ability to truly empathize with someone who is different.
- It also includes communicating effectively and interacting appropriately with people of different genders or different ethnic or socio-economic backgrounds.

The article cites Patricia Barkaskas, academic director of the Indigenous Legal Clinic in Vancouver:

> Barkaskas explains that, when lawyers start to work with a client, their first inclination is to dive immediately into the legal issue, asking specific and detailed questions about the legal matter. But that line of questioning is not always effective or informative, particularly for clients who come from oral traditions. Their culture, history and knowledge is passed on through the telling of stories from generation to generation. Being asked question after question by a lawyer can feel like an interrogation or an assault.

Barkaskas explains that lawyers who lack the cultural competence to effectively communicate with clients may not get the full story in interviewing their clients, or may leap to solutions that do not serve their clients' real interests. The article states:

> Open-ended questions and discussions, on the other hand, help lawyers learn the necessary context and background, which then helps them find out what their clients desire in a legal outcome.
>
> A client coming in to discuss a protection order might start out by saying they want their family back together. Barkaskas recommends asking for more information. "We might say, 'Tell me more about that. How does that look?'"
>
> "That client might tell you that they weren't raised in a family together and how important it is for their family to stay together, that their partner is more than just a parent. They might tell you that their separation has ripple effects on the whole community."
>
> While the immediate and obvious answer may be a protection order, a culturally competent approach takes into account the client's perspective. It will often take more work on the lawyer's part to find a legal remedy that addresses the client's needs holistically.
>
> "For example, that might include explaining to the client that a temporary protection order is possible, which can outline specific terms that balance the client's safety, and the safety of any children, against their instructions about wanting the family to remain intact."

In 2015 the Truth and Reconciliation Commission released its calls to action, which included a call for increased cultural competency and for lawyers to receive appropriate cultural competency training. The Law Society struck a Truth and Reconciliation Advisory Committee in response.

In July 2018, the Benchers approved an action plan to guide the Law Society's moral and ethical obligation to advance truth and reconciliation and its specific response to the Truth and Reconciliation Commission's calls to action. The action plan includes commitments to the following:

- increasing the legal profession's appreciation of Indigenous laws within the Canadian legal system; and
- cultural competence training for lawyers.

On December 6, 2019, the Benchers approved a new requirement for all practising lawyers in BC to complete a course to address core aspects of Indigenous intercultural competence and Call to Action 27 of the Truth and Reconciliation Commission. The course was piloted in 2021, and was officially launched in January 2022. The course provides information regarding the colonization of BC and Canada, as well as the impacts of colonization and colonial laws and policies on Indigenous peoples. Topics include:

- Indigenous laws and legal traditions;
- the evolution of the relationship between the Crown and Indigenous peoples;
- policies and laws to eliminate the rights, governments, cultures, resources, lands, languages and institutions of Indigenous peoples, including residential schools; and
- social, political and economic success, resilience and reconciliation.

The online course is constructed in modules and is eligible for annual continuing professional development credit. Under Law Society Rule 3-28.1, all practising lawyers are required to complete the course.

4. Health and Emotional Conditions

Competency may be adversely affected by factors such as stress, relationship issues, or physical or mental health issues, including addiction. These personal challenges may lead to other issues affecting competency. For example, a marriage breakdown or death in the family could cause severe emotional challenges, which might be related to a lawyer using unhealthy coping behaviours.

Lawyers who are overwhelmed by personal challenges or who suffer from mental health problems might fail to promptly respond to telephone calls, or might even neglect their practice. It is no coincidence that "Mental illness is disproportionately represented in disciplinary cases," according to Megan Seto in "Killing Ourselves: Depression as an Institutional, Workplace and Professional Problem" (*Western Journal of Legal Studies* (2012) 2:2).

The Law Society has demonstrated its commitment to changing the way lawyers understand and respond to mental health and substance abuse. The Law Society formed a Mental Health Task Force in 2018. It has two key goals:

(1) reduce stigma of mental health issues, and

(2) review the Law Society's discipline and admissions processes to consider how best to deal with mental health and substance use issues.

The Law Society's publication *Benchers' Bulletin* (2018: No. 4, Winter, pages 10–11) features an article on "Mental Health and Wellness Update: Law Society Takes Action to Reduce Stigma." The article starts by asserting:

> [M]ental health and substance use issues are serious and pervasive concerns within the legal profession. Both US and Canadian research has documented that those in the legal profession experience mental health and substance use issues at alarmingly high rates, likely due at least in part to a culture and to stressors unique to the legal profession.

Brook Greenberg, KC, Bencher and Chair of the Law Society's Mental Health Task Force, is quoted in the *Benchers' Bulletin* (p. 11) as saying that, "healthier lawyers have the potential to be better lawyers, and supporting wellness within the profession will improve lawyers' practices, benefiting both practitioners and the public."

In December 2019, the Benchers approved changes to the duty to report rule (*BC Code*, rule 7.1-3) and its commentary, to remove potentially stigmatizing language and barriers for lawyers who may seek help for mental health issues.

Effective April 2022, a new alternative discipline process was created for circumstances in which a health issue has contributed to lawyer misconduct, to enable lawyers to participate in a consent-based process and improve their ability to meet their professional responsibilities (Rules 3-4(3), 3-8(2) and (2.1), 3-9(3) and 3-9.1 to 3-9.10).

For more information on the Mental Health Task Force and the Law Society's commitment to improving mental health for the legal profession, see the Law Society's website: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyer-well-being-hub/.

5. Detecting Incompetence

The profession and the public depend on lawyers to identify incompetence because the public lacks the expertise to detect it. *BC Code* rule 7.1-3(e) requires that, unless to do so would breach solicitor-client confidentiality or privilege, a lawyer must report to the Law Society any conduct that raises a substantial question as to the competency of a lawyer.

When determining if a report to the Law Society is required, the observing lawyer may find it helpful to discuss their concerns with other lawyers in their firm, a Bencher, or a practice advisor.

Note that a lawyer must not *threaten* to report another lawyer's past conduct to the Law Society (see *BC Code*, rule 3.2-5) or make a report rooted in malice or an ulterior motive: rule 7.1-3, commentary [1].

BC Code rule 7.8-1, commentary [1] distinguishes between the ethical and contractual obligations to report errors to one's client and the obligations to report to the Lawyers Indemnity Fund (see Chapter 5).

[§2.04] Role of the Law Society

The Law Society regulates lawyers and law firms in the public interest. The Law Society sets the criteria for admission into the profession, including pre-call legal education. In addition, the Law Society sets and enforces standards of competency for lawyers. The Law Society's legislated mandate and authority comes from the *Legal Profession Act*, S.B.C. 1998, c. 9 (the "Act"). The Law Society Rules specify policy and procedure. In addition, the *BC Code* provides rules for lawyer conduct.

Past President Herman Van Ommen, KC, discussed the role of the Law Society in fostering professional responsibility in the following excerpt from the *Benchers' Bulletin* (2017: No. 4 Winter):

> Reflecting on this past year as president brought back memories of when I acted as counsel for the Law Society in discipline hearings. The experience of dealing with those files instilled in me the importance of professionalism, a fuller appreciation of the trust we as lawyers enjoy and must protect, as well as kindled a desire to serve the public, which led me to become a Bencher.
>
> The Law Society's mandate is to protect the public. We do this by setting and upholding standards for the education, professional responsibility and competence of practising lawyers. Perhaps the most public-facing way we fulfil our mandate is through our Professional Regulation Department. The department handles complaints against lawyers, investigates possible lawyer misconduct and incompetence, takes custodianship of lawyers' practices when they are unable to practice, conducts discipline cases and takes action against those engaged in the unauthorized practice of law. All of this work is integral to our status as a self-regulating profession.
>
> Most complaints about lawyers each year are resolved by Law Society staff. Often, cases are resolved by staff working with the lawyer to address issues and ensure that they will not be repeated. Staff also help resolve issues between lawyers and between clients and lawyers to restore relationships. Where more serious concerns about conduct warrant further action, the department investigates and may refer cases to the Discipline Committee. Only about 15 per cent of complaints are referred to the Discipline Committee to determine the appropriate disciplinary response and approximately 25 cases each year proceed to a disciplinary hearing.
>
> As president, I have continued to be part of the professional regulation process as a member of disciplinary panels. Each panel includes a member of the public in addition to one Bencher and one non-Bencher lawyer.

Our hearings adhere to principles of administrative law. Fairness is accorded to those involved. Hearings are public and all decisions are published on the Law Society website. To ensure our processes are timely, transparent and accessible, the Law Society has worked with law societies across Canada to create and meet national standards.

During my tenure as a Bencher, the Law Society has moved increasingly toward proactive regulation wherever possible, to prevent issues from occurring in the first place. We publish discipline advisories with cautionary advice to lawyers. We also publish summaries of conduct reviews. The Benchers also are available to lawyers who have identified concerns themselves and are seeking advice and guidance for how to remain in compliance with our professional responsibilities. Our law firm regulation initiative is a significant move toward preventing problems before they occur. All of these efforts are positive improvements in how the Law Society supports lawyers to practise competently and ethically.

In previous columns, I shared some of the other positive developments at the Law Society to enhance public confidence in the legal profession over the course of this year. We put our oar in the water with a vision for legal aid adopted earlier this year, we held our first annual Rule of Law Lecture, and we engaged with the provincial government and MLAs from all parties. We updated our website. In partnership with the Continuing Legal Education Society of BC, we held a symposium to collect ideas on how the Law Society can help turn the law into a tool for reconciliation with Indigenous people and communities. We dedicated ourselves to ensuring the legal profession's voice and participation in matters that affect the public we serve.

There are many more initiatives under way, with more work to do in the coming year.

Regulating in the public interest is achieved by the Benchers serving on a number of committees and task forces, and through organization at the staff level.

Concerning the law firm regulation initiative cited above, the Law Society Rules and *Legal Profession Act* were amended in 2018 to give the Law Society the authority to regulate law firms. The registration of law firms began in May 2018. On October 25, 2019, the Benchers approved the implementation of self-assessment for all law firms across the province. Using tools developed by the Law Society, firms will assess their own practice management systems, policies and procedures. This process will help them flag problems and issues before they affect clients or lead to complaints. Implementation is being rolled out in phases, and firms will need to fulfill their self-assessment requirements once every three years.

1. Credentials Committee

The Credentials Committee of the Law Society has responsibility for all pre-call qualifications and training of lawyers. The mandate of the Credentials Committee includes enrolling articling students, supervising the articling program, screening applicants for call and admission, and reinstating lawyers. It also governs transfer from other jurisdictions. The Committee is also responsible for reviewing applications relating to a student's failed standing in PLTC and for considering any matters arising from the articling system.

2. Practice Standards Committee

The Practice Standards Committee has primary authority over competency-related matters post-call. Law Society Rule 3-16 sets out the Committee's objectives:

(a) to recommend standards of practice for lawyers;

(b) to develop programs that will assist all lawyers to practise law competently; and

(c) to identify lawyers who do not meet accepted standards in the practice of law, and recommend remedial measures to assist them to improve their legal practices.

The function of the Practice Standards Committee is set out in Rules 3-15 to 3-25 of the Law Society Rules and s. 27 of the *Legal Profession Act*. Section 27 reads:

Practice standards

27(1) The benchers may

(a) set standards of practice for lawyers,

(b) establish and maintain a program to assist lawyers in handling or avoiding personal, emotional, medical or substance abuse problems, and

(c) establish and maintain a program to assist lawyers on issues arising from the practice of law.

(2) The benchers may make rules to do any of the following:

(a) establish a practice standards committee and delegate any or all authority and responsibility under this section, other than rule-making authority, to that committee;

(b) permit an investigation into a lawyer's competence to practise law if

(i) there are reasonable grounds to believe that the lawyer is practising law in an incompetent manner, or

(ii) the lawyer consents;

(c) require a lawyer whose competence to practise law is under investigation to answer questions and provide access to information, files or records in the lawyer's possession or control;

(d) provide for a report to the benchers of the findings of an investigation into the competence of a lawyer to practise law;

(d.1) permit the practice standards committee established under paragraph (a) to make orders imposing conditions and limitations on lawyers' practices, and to require lawyers whose competence to practise law has been investigated to comply with those orders;

(e) permit the benchers to order that a lawyer, a former lawyer, an articled student or a law firm pay to the society the costs of an investigation or remedial program under this Part and set and extend the time for payment;

(f) permit the discipline committee established under s. 36(a) to consider

(i) the findings of an investigation into a lawyer's competence to practise law,

(ii) any remedial program undertaken or recommended,

(iii) any order that imposes conditions or limitations on the practice of a lawyer, and

(iv) any failure to comply with an order that imposes conditions or limitations on the practice of a lawyer.

(3) The amount of costs ordered to be paid by a person under the rules made under subsection (2)(e) may be recovered as a debt owing to the society and, when collected, the amount is the property of the society.

(3.1) For the purpose of recovering a debt under subsection (3), the executive director may

(a) issue a certificate stating that the amount of costs is due, the amount remaining unpaid, including interest, and the name of the person required to pay it, and

(b) file the certificate with the Supreme Court.

(3.2) A certificate filed under subsection (3.1) with the Supreme Court is of the same effect, and proceedings may be taken on it, as if it were a judgment of the Supreme Court for the recovery of a debt in the amount stated against the person named in it.

(4) Rules made under subsection (2)(d.1)

(a) may include rules respecting

(i) the making of orders by the practice standards committee, and

(ii) the conditions and limitations that may be imposed on the practice of a lawyer, and

(b) must not permit the imposition of conditions or limitations on the practice of a lawyer before the lawyer has been notified of the reasons for the proposed order and given a reasonable opportunity to make representations respecting those reasons.

To help lawyers deliver consistently high-quality legal services and comply with the objectives under Law Society Rule 3-16, the Practice Standards Committee has established remedial and other programs. The Committee is also responsible for dealing with competency concerns that arise with respect to particular lawyers.

Lawyers are referred to the Practice Standards Committee from a number of sources—the Professional Conduct Department staff, the Complainants' Review Committee, the Discipline Committee or Tribunal hearing panels. The most common source of referral is from Professional Conduct staff after they have completed investigating a complaint.

When complaints are referred to the Practice Standards Committee, the Committee must decide whether the information indicates sufficient evidence of competency problems and, if so, what further action the Committee should take to assist the lawyer.

Once the Practice Standards Committee has identified a competency problem, the Committee has several options under the Act and Rules. For example, under Law Society Rule 3-17, the Committee has the power to make all inquiries and investigations that it considers desirable.

Sometimes the Committee orders a competency complaint review under Rule 3-17(3)(c). For this review, the lawyer must meet and discuss the circumstances of the complaint with a lawyer or Bencher designated by the Practice Standards Committee, who then reports to the Committee.

When the Committee finds there are reasonable grounds to believe that a lawyer may be practising incompetently, the Committee orders a "practice review" (Rule 3-17(3)(d)). The primary purpose of the review is to assist the lawyer to recognize and constructively address practice problems. The review is normally conducted by a Law Society staff lawyer and by a practising lawyer.

A practice review generally takes one day in the lawyer's office. The lawyer and reviewer will discuss the lawyer's personal circumstances as well as their office systems and practice management skills. The reviewer will also randomly select a number of the lawyer's files for review. Once the review is completed, a copy of the reviewers' report, together with recommendations, goes to the lawyer for a response. The Committee then reviews the report and any response. The Committee may accept, reject or alter the recommendations of the reviewers. The Committee recommendations form part of the lawyer's professional conduct record.

The remedial recommendations in practice review reports address specific problems in the practice. A

Practice Standards Committee staff lawyer oversees any remedial work the Committee recommends.

The Committee frequently recommends the lawyer do one or more of the following:

(a) access support and resources to assist them with their intellectual, emotional and physical capacity to carry out the practice of law (the Committee may require the lawyer to complete specific course work);

(b) maintain and use appropriate retainer letters;

(c) maintain a conflicts database containing sufficiently detailed entries, and search the database before opening any new file;

(d) complete a file-opening sheet for each new file, containing sufficient details (including things like limitation dates and retainer funds received);

(e) maintain an electronic list of files, containing details such as the lawyer responsible and the location of stored files;

(f) create and use a task management and reminder or bring-forward ("BF") system, for each file, on which BF dates are set and carefully monitored;

(g) take detailed notes of communications on each file to ensure that there is a full record;

(h) close files systematically within six months of completing the work on any file, and use a file-closing checklist to keep track of outstanding documents, undertakings, trust monies, etc.; and

(i) arrange with another lawyer to cover the practice in case of an emergency, including preparing and signing a power of attorney for the successor lawyer to access the trust account.

In rare circumstances, the practice review reveals other difficulties, or the lawyer is unable or unwilling to respond to remedial recommendations. Under Law Society Rule 3-20(1), the Practice Standards Committee can impose conditions and limitations on a lawyer's practice when the lawyer has refused or failed to respond to recommendations the Committee made under Law Society Rule 3-19. Alternatively, these concerns may be referred to the Discipline Committee of the Law Society pursuant to Law Society Rule 3-21 (see Chapter 3).

3. Practice Advisors

The practice advisors at the Law Society are available by phone or email to give advice to lawyers, articled students, and temporary articled students. All communications with practice advisors are strictly confidential, except in cases of trust fund shortages.

Practice advisors provide their views and refer you to helpful resources. Their advice covers a variety of ethical and practice topics:

- the Law Society Rules and the *BC Code*;
- ethics advice (e.g. confidentiality, conflicts, undertakings and withdrawing from a file);
- practice advice (e.g. billing, client files and law-office management);
- managing client relationships and relationships with other lawyers;
- client identification and verification;
- frauds, scams, and anti-money laundering; and
- personal coping and stress management.

Practice advisors can be contacted by email at practiceadvice@lsbc.org, by phone at 604.443.5797, or through booking an appointment in Advice Decision-Making Assistant (ADMA) (lawsociety.bc.ca). For requesting practice advice, the department offers the following suggestions (*Benchers' Bulletin* 2010: No. 4 Winter):

> If you require advice from a practice advisor, please consider the following suggestions to help us help you:
>
> 1. Ask your question of one practice advisor only. If you have contacted more than one advisor, let the advisor know so that only one person is handling your request. If you telephone or email more than one person, it can actually take longer to receive a reply as the advisors have to sort out who will respond.
> 2. Ask your question at the beginning of your call. You can fill in background details as necessary.
> 3. Call us yourself. Too often lawyers ask an assistant or a student to call for help, and the caller does not understand the lawyer's question or have sufficient information.
> 4. If a complaint has been made against you, it is too late to call a practice advisor for help. The appropriate time to call an advisor for help is before a complaint is made.
> 5. If you leave a voicemail message, provide the following information:
>   - your full name, including the spelling of your surname;
>   - your phone number and local (saying it twice is helpful);
>   - the name of your law firm;
>   - the subject matter and your question; and
>   - whether the matter is time-sensitive.
>
> Above all, please speak clearly and slowly. We cannot return your call if we do not understand who is calling

and your telephone number. We want to hear from you and we're here to help.

4. Advisory Committees and Task Forces

The Benchers regularly strike advisory committees and task forces to report or advise on particular issues or areas that the Benchers identify. These advisory committees and task forces often include non-Bencher members who have a particular interest and skill relating to the area or issue. The recommendations contained in committee and task force reports are not Law Society policy unless and until the recommendations are formally adopted by the Benchers.

These are the current Law Society Advisory Committees:

(a) Equity, Diversity and Inclusion Advisory Committee

This committee monitors developments on issues affecting equity and diversity in the legal profession and the justice system. It reports to the Benchers on those developments and assists the Benchers with priority planning.

(b) Truth and Reconciliation Advisory Committee

This committee provides guidance and advice to the Law Society on legal issues affecting Indigenous people in the province, including those highlighted in the Truth and Reconciliation Commission of Canada's report and recommendations. The committee monitors and reports to the Benchers on those developments, advises the Benchers on priority planning and develops recommendations and initiatives.

5. Supporting Inclusion

Lawyers have a special duty to respect the requirements of human rights law: see *BC Code*, rule 6.3 and commentary.

(a) Annual Practice Declaration

In 2013, the Annual Practice Declaration was amended to enable the Law Society to learn more about the demographic composition of the legal profession in British Columbia and consider ways to advance its commitment that the legal profession reflect the diversity of the province. Each year, lawyers are asked to volunteer information about themselves anonymously. Survey questions focus on broad categories of self-identity. The information provided by lawyers helps the Law Society better understand demographic trends, identify barriers that some groups face for entering and remaining in the profession, and develop programs and initiatives to promote equity, diversity and inclusivity in the legal profession. In 2020, the Law Society published information and analysis of the data collected from 2013 to 2019 on its website at: www.lawsociety.bc.ca/our-initiatives/equity-and-diversity-centre/demographics-of-the-legal-profession/.

(b) Model Policies

The Law Society offers a number of model policies designed to help law firms achieve equity and diversity in the workplace.

(c) Enhancements to the Lawyer Directory to Support Inclusivity

The Law Society has made it possible for lawyers to add their pronouns and a title/honorific to their Lawyer Directory profile that is available on the website.

The Lawyer Directory is an important tool for the public and other legal professionals to help people find the names, contact information and practising status of lawyers licensed in BC. The change to the Lawyer Directory will make it easier for public consumers of legal services and legal professionals who are searching for or looking up lawyers using the directory to know which pronouns and/or title/honorific to use when communicating or interacting with them.

(d) Keeping Women Lawyers in the Profession

For many years the Law Society has been investigating discriminatory practices that impact women in the profession. Many recent studies within Canada and the United States have confirmed that the number of women lawyers remaining in private practice has not improved significantly over the past 20 years.

The Retention of Women in Law Task Force was established by the Benchers on April 4, 2008. The creation of this Task Force was recommended by the former Women in the Legal Profession Task Force ("WILP") in its final report in January 2008, to advise the Benchers on the best approach to address these complex issues. Specifically, WILP recommended drafting a business case for the retention of women within law firms that would consider material such as a Law Society of Upper Canada report, Women's Bar Association of DC's reports, and other material.

The Benchers adopted The Retention of Women in Law Task Force Report at the July 2009 meeting. Access both the Report and the *Business Case for Retaining Women in Private Practice* on the Law Society's website (www.lawsociety.bc.ca/our-initiatives/equity-and-diversity/supporting-women-lawyers-in-bc/).

The Law Society urges firms to consider the business case for retaining and advancing women lawyers in private practice. The business case does not suggest that women should receive special treatment. It stresses the competitive advantages of creating firms that retain and advance talented lawyers, with a focus on serving clients in effective ways. The business case contains reference materials and best practices to assist firms of all sizes.

The following excerpt comes from the Law Society *Benchers' Bulletin* 2009: No. 3 Fall.

> **Law Society presents business case for retention of women in private practice**
>
> An exodus of women from the legal profession and a looming shortage of lawyers has prompted the Law Society to develop a business case for keeping women lawyers in private practice.
>
> In 2008, the Retention of Women in Law Task Force was charged with preparing the business case and presented its final report at the July Benchers meeting this year.
>
> Kathryn Berge, QC, who chaired the task force, reported that "one third of new women lawyers called in 2003 had dropped out of the profession by 2008. This happened during a time when a record number of women entered the profession, yet today women lawyers still represent only 29 per cent of private practice lawyers in the province."
>
> The business case explains the demographic issues facing the legal profession in BC and explains the business advantages of retaining and advancing women in private practice. However, it does not suggest that women should receive special treatment. It stresses the competitive advantages of creating firms that retain and advance talented lawyers, with a focus on serving clients in effective ways that make business sense and people sense.
>
> "The benefits of retaining women lawyers are significant," said Berge, who practises in a small firm in Victoria. "Keeping and developing talent increases efficiency, client service, lawyer morale and future recruitment ability. This holds true in both good and bad times. There is also the benefit of a stronger and more sustainable firm culture based on merit, flexibility and diversity."
>
> The business case has already received considerable attention in the media. Over the next few months, members of the task force will be speaking to law firms, law-related organizations and others to promote the business case and increase awareness of the benefits of retaining women lawyers in private practice.
>
> For background on prior committees and initiatives, please see the 2005: No. 3 July-August and 2005: No. 2 April-May *Benchers' Bulletins*.

(e) Supporting Indigenous Lawyers

The Law Society has identified the retention of Indigenous lawyers in the profession as a key objective. In May 2018 the Law Society released its Truth and Reconciliation Action Plan, which includes a commitment to support Indigenous lawyers, articled students and law students in BC, and a commitment to ensure the cultural competence of all lawyers.

To address this important issue, PLTC includes components on the legacy of residential schools, Indigenous child welfare and *Gladue* sentencing principles, among others.

Also, the Law Society has created an Indigenous Lawyers Mentorship Program, the first of its kind in North America. The program has four goals:

(i) support the development of the knowledge, skills and attributes needed by Indigenous lawyers to be successful in their legal careers;

(ii) assist Indigenous lawyers in developing strategies to mitigate common issues that arise for many Indigenous legal professionals;

(iii) promote collegiality to expand and strengthen the professional networks of Indigenous lawyers; and

(iv) foster the retention and advancement of Indigenous lawyers in BC.

(f) Equity Advisor

The Law Society provides the legal profession in BC with the services of an Equity Advisor who can assist with resolving concerns about discrimination and discriminatory harassment. Lawyers, articled students, law students and support staff of legal employers are all free to contact the Equity Advisor. The service is voluntary, confidential and free to participants. The Equity Advisor's role includes the following functions:

(i) **Intake and advice:** Receive inquiries, provide information and discuss options with individuals and employers;

(ii) **Mediation:** Resolve concerns informally with the consent of both the complainant and respondent; and

(iii) **Reporting:** Provide anonymized statistical reports on incidents of discrimination and discriminatory harassment addressed by the Equity Advisor, as well as the proactive measures the Equity Advisor takes to prevent discrimination and discriminatory harassment in the legal profession.

The Equity Advisor is a Law Society employee in the Practice Advice Department. Calls to the Equity Advisor are strictly confidential, protected by the same measures that safeguard the confidentiality of all calls to practice advisors. The Equity Advisor is separate from the Law Society complaint and discipline process.

If an issue is not resolved through the Equity Advisor, an individual may make a complaint to the Law Society. A complainant could make a complaint without consulting the Equity Advisor.

The Equity Advisor, Sarah Sharp, can be reached on their office line at 604.605.5303 or by email at equity@lsbc.org.

6. Counselling and Help

(a) The Law Society funds personal counselling and referral services through TELUS Health One. Services are confidential and available at no cost to individual BC lawyers and articled students and their immediate families.

TELUS Health One can help with life's challenges—work stress, interpersonal conflict, career moves, parenting and childcare, managing money, caring for elders, or health issues.

The Law Society website has a lawyer well-being Frequently Asked Questions and more information about TELUS Health One and the other wellbeing resources available here: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyer-well-being-hub/. . TELUS Health One log in details are available in the Member Portal.

(b) The Lawyers Assistance Program (24-hour confidential line: 604.685.2171) is an independent peer-counselling program funded by the Law Society. The Program is outside of the disciplinary process. It supports lawyers and their immediate family members by providing resources and referral for financial and legal concerns, as well as professional counselling services in a wide range of areas:

(i) relationships, sexuality, family violence, and other family concerns;

(ii) alcohol and drug dependency;

(iii) life transitions, career and work-related concerns;

(iv) stress, anxiety, and anger management; and

(v) grief and bereavement, trauma response, and critical-incident stress debriefing.

(c) The Law Society provides lawyers with access to LifeSpeak, a digital wellness platform that offers anonymous access range of resources and content, including a library of short, digestible videos, live Q&A web-chats with mental health experts and blog posts. LifeSpeak's Ask an Expert function provides a forum featuring qualified mental health professionals responding live to anonymous questions; users can log in to ask a question or read the transcript at later point in time. Learn more about LifeSpeak here: https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/lawyer-well-being-hub/. Login information is available in the Member Portal.

7. Practice Support and Resources

The Law Society offers written resources and precedent material to lawyers and articled students on its website (www.lawsociety.bc.ca). These resources include the following:

- practice resources on ethics and practice issues;
- the *Practice Checklists Manual*; and
- online educational programs, like the Practice Management Course, Practice Refresher Course, the Legal Research Course and the Communications Toolkit.

Chapter 3

Discipline and Professional Conduct[1]

[§3.01] Complaints and Discipline

This chapter describes the Law Society's complaints investigation and discipline process. The chapter starts by setting out the Law Society's statutory mandate and powers, then describes the discipline process. Finally, it covers various adverse findings and outcomes including professional misconduct, conduct unbecoming a lawyer, and incompetence.

[§3.02] Law Society's Role in Reviewing Conduct

1. The Law Society's Statutory Mandate

This chapter details the role and function of the Discipline Committee, although other committees may consider matters of professional conduct from time to time. These other committees include the Practice Standards Committee, the Credentials Committee, and the Complainants' Review Committee. All of these committees serve the mandate of the Law Society as set out in s. 3 of the *Legal Profession Act*, S.B.C. 1998, c. 9 (the "Act"):

> (3) It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
>
> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

Thus, in investigating complaints and exercising its discipline function, the Law Society has a duty to protect the public and satisfy the public that, as a self-regulating professional body, it holds its licensees accountable for their actions. At the same time, the Law Society must protect lawyers from unfounded allegations, and resolve complaints fairly and as quickly as possible.

2. Professional Conduct Department's Approach to Complaints

The Professional Conduct Department of the Law Society consists of staff lawyers, accountants, investigators, paralegals and assistants. This team investigates and assesses complaints against lawyers and law firms in British Columbia.

Although complaints can be categorized or identified by a variety of features (for example, serious versus minor), each complaint is unique and is considered in light of its circumstances. The lawyers and paralegals in the Professional Conduct Department make every effort to respond to every complaint effectively and efficiently.

In essence, the staff lawyers in the Professional Conduct Department aim to investigate and refer serious and provable instances of misconduct (about 10% of all complaints received) for disciplinary or remedial action within one year, and to resolve or close the remaining 90% of complaints as quickly as possible. A successful resolution might include a lawyer or law firm agreeing to take remedial steps:

(a) apologizing to an offended client, opposing party or lawyer;

(b) fulfilling an undertaking or other professional obligation;

(c) paying an outstanding practice debt;

(d) responding to a neglected communication; or

(e) attending to a delayed or overdue task.

The Law Society considers outcomes to be positive where complainants are satisfied that their concerns have been heard and considered fairly, and lawyers gain insight into managing client expectations, improving communications, and avoiding unnecessary complaints in the future. Satisfying both sides, however, is not always possible. Staff lawyers are skilled in dealing with conflict, and they may take hard positions with lawyers or law firms involved, or the complainants, as circumstances dictate.

3. Jurisdiction

The Law Society may inquire into the conduct or competence of a lawyer, law firm, articled student, or a visiting lawyer permitted to practise in British Columbia.

[1] Prepared and updated by staff lawyers of the Law Society of British Columbia, most recently in March 2024.

Disciplinary penalties may be imposed for conduct that amounts to professional misconduct, conduct unbecoming the profession (as defined in s. 1 of the Act), incompetent performance of duties, or contravention of the Act or a rule made under it. These penalties are detailed in s. 38(5) and include a reprimand, a fine not exceeding $50,000, conditions on the lawyer's practice, suspension, or disbarment.

Articled students who contravene the Act or whose behaviour amounts to professional misconduct or conduct unbecoming the profession may be subject to penalties including a reprimand, a fine not exceeding $5,000, a lengthened articling period, or the setting aside of their enrolment (s. 38(6)).

A law firm that contravenes the Act may be subject to penalties including a reprimand or a fine not exceeding $50,000, or both (s. 38(6.1)).

Under the National Mobility Agreement, lawyers from reciprocating provinces generally are entitled to practise law in BC for 100 business days in each calendar year, provided they do not establish an economic nexus in the province (Rules 2-15 to 2-27). Rules 4-45 and 4-46 govern discipline of visiting lawyers and of BC lawyers practising out-of-province.

[§3.03] Complaints Process

This section describes the Law Society's regular complaints investigation process and touches on some related processes that may be available.

A new Alternative Discipline Process may be available to divert a lawyer from the regular discipline process if health issues contributed to the misconduct. Where that process might become available and what it could involve is described in more detail in §3.03(4) below.

1. Making a Complaint

Under Rule 3-2 of the Law Society Rules, "[a]ny person may deliver a written complaint against a lawyer or law firm to the Executive Director." Under Rule 3-4(1), the Executive Director must consider every complaint received. In addition, Rule 3-4(2) states that "[i]nformation received from any source that indicates that a lawyer's conduct may constitute a discipline violation must be treated as a complaint under these rules."

As provided in Rule 3-1, the complaints in issue may concern practising lawyers, former lawyers, articled students, visiting lawyers, practitioners of foreign law or law firms.

The Law Society receives complaints in a variety of ways that include the Law Society website's online form, mail, facsimile and email. Complaints come from a variety of sources that include clients, litigation parties, lawyers (including self-reports), the Attorney General, judges and newspaper articles.

In addition, matters are referred to the Professional Conduct Department for investigation from other departments at the Law Society. For example, the Trust Assurance Department, which is responsible for the Law Society's compliance audit program, refers matters that raise professional conduct concerns. Examples of such referred conduct are misappropriation of funds, non-payment of trust administration fees, and accounting breaches.

2. Lawyer-Initiated Complaints

A lawyer is required to report misconduct of other lawyers in several circumstances. Rule 7.1-3 of the *BC Code* states:

> 7.1-3 Unless to do so would involve a breach of solicitor-client confidentiality or privilege, a lawyer must report to the Society, in respect of that lawyer or any other lawyer:
>
> (a) a shortage of trust monies;
>
> (a.1) a breach of undertaking or trust condition that has not been consented to or waived;
>
> (b) the abandonment of a law practice;
>
> (c) participation in criminal activity related to a lawyer's practice;
>
> (d) [rescinded];
>
> (e) conduct that raises a substantial question as to the honesty, trustworthiness, or competence of a lawyer; and
>
> (f) any other situation in which a lawyer's clients are likely to be materially prejudiced.

Rule 7.1-3 was amended in December 2019 to removed potentially stigmatizing language. The commentary to this rule was also amended to remove barriers to lawyers seeking help for mental health issues.

It is important to distinguish a lawyer's duty to report another lawyer's misconduct (rule 7.1-3) from threatening to report past misconduct. Under *BC Code* rule 3.2-5, threatening to report another lawyer's past illegal or unprofessional conduct is prohibited, to prevent lawyers from improperly trying to gain advantage for themselves or their clients. A lawyer is also prohibited from making a report rooted in malice or an ulterior motive (rule 7.1-3, commentary [1]). However, it may be acceptable to forewarn another lawyer that it would be improper to act in a certain way and that the lawyer will be reported to the Law Society if the misconduct occurs in the future.

When there are complaints or problems between two lawyers other than conduct under rule 7.1-3,

before making a complaint to the Law Society, lawyers should consider whether it is appropriate to have a third party mediate (such as a local Bencher or a senior practitioner). Law Society staff can often assist lawyers in conflict with one another to view the problem objectively, or can recruit the assistance of a Bencher for mediation.

3. Number and Type of Complaints Received

In the last few years, the Law Society has received about 1,300 complaints annually. Despite the large number of complaints received, the majority have not revealed serious lawyer misconduct. In 2019, 87% of the complaints were closed without further action. This includes complaints that fell outside the Law Society's jurisdiction (fee disputes, for example), complaints that were withdrawn, and complaints that were determined to be invalid or unprovable. About 28% of the complaints that were closed at the staff level involved some minor error or misconduct that was resolved without referral to the Discipline Committee or the Practice Standards Committee. The remaining 13% of complaints resulted in a referral to one of those committees.

Complaints by non-clients—such as other lawyers, judges, opposing parties in litigation, creditors, regulatory agencies, witnesses, doctors, and other professionals—make up many of the complaints. A significant number of complaints are about lawyers who have been the subject of previous complaints.

There are common themes in complaints:

(a) inadequate or poor communication with clients, other lawyers, or the Law Society (this is the most frequent complaint made by clients against lawyers);

(b) delay in taking action on a file;

(c) breaches of professional responsibility, such as breach of an undertaking, rudeness, etc.;

(d) disputes over fees and accounts;

(e) conflicts of interest; and

(f) failure to pay practice debts.

Staff advise complainants that fee disputes are outside of the Law Society's jurisdiction, encourage clients to discuss fee disputes with their lawyers, and inform them of fee reviews conducted by the Supreme Court registrar. Staff also inform complainants of the fee mediation program offered by the Law Society.

The fact that many complaints concern breaches of professional responsibility demonstrates the need for lawyers to review the *BC Code* on a regular basis, not just in law school and at PLTC. Lawyers need to be aware of the red-flag areas (most of which are reviewed in Chapter 6) and to seek advice if there is a problem or potential problem. The Lawyers Assistance Program ("LAP") provides confidential outreach, support, education and referrals to members of the legal community, including lawyers and their families, articled students, and support staff. In addition, advice may be available from senior practitioners or Law Society staff including the practice advisors, the Benchers, and the CBA Practice Advisory Panels.

Family and civil litigation (excluding motor vehicle) consistently attract the greatest number of complaints. Real estate, wills and estates, and administrative law represent a smaller, but significant, source of complaints. In 2022, complaints in these areas, expressed as a percentage of total complaints, were as follows:

(a)	civil litigation (non-motor vehicle)	17%
(b)	motor vehicle litigation	12%
(c)	real estate (residential)	12%
(d)	family law	8%
(e)	wills and estates	7%
(f)	administrative	5%

Regardless of the area of law, however, the majority of complaints had a communication or quality of service element.

4. Alternative Discipline Process

A new Alternative Discipline Process (the "ADP") was introduced in April 2022 when the Benchers approved changes to the Law Society Rules. The ADP is currently a pilot program.

Before a complaint is referred to the Discipline Committee, the Executive Director has discretion to determine if the lawyer should be diverted from the regular disciplinary process (Rule 3-8(2.1)) to one focused on the support and management of an underlying health issue (Rule 3-4(3)). The ADP may be available to a lawyer whose health issue may have contributed to an alleged discipline violation (Rules 3-9.1 to 3-9.10)). The lawyer will be asked to provide health-related information to support eligibility for the ADP (Rule 3-9.3).

Decisions about eligibility for the ADP are made on a case-by-case basis, considering the public interest and input from complainants. In considering whether a referral to the ADP is consistent with the public interest, the Executive Director reviews all the circumstances of the case, including:

- the nature and seriousness of the alleged misconduct;

- the impact on the Law Society's ability to protect the public; and
- the impact on the public's confidence in the profession and in self-regulation.

If, at any point during the ADP the lawyer's participation ceases to be in the public interest, the file will be returned to the regular disciplinary process.

The Executive Director may delay notifying a complainant that the lawyer is being considered for the ADP (Rule 3-9(3)) until health information has been received and assessed. The complainant may provide a statement about the impact the alleged conduct has had on them, and will be informed of the outcome.

A lawyer accepted for the ADP negotiates a consent agreement with the Executive Director. Terms of the agreement might include treatment, practice conditions, restitution or other remedial steps (Rule 3-9.4).

5. Investigating Complaints

Rules 3-5 to 3-7 provide the Executive Director with discretion in investigating a complaint. In practice, the investigation is delegated to the staff of the Professional Conduct Department.

After a complaint is received, the Executive Director may authorize an investigation into the validity of the complaint by seeking further information and particulars (substantiation). Rule 3-5(3) provides that the Executive Director may decline to investigate a complaint in some cases:

- it is outside the Law Society's jurisdiction or should have been made to some other body (for example, the Registrar, the Ombudsperson, Judicial Council, etc.);
- it is frivolous, vexatious or an abuse of process; or
- it does not allege facts that, if proven, would constitute a discipline violation.

Most complaint investigations start by providing a copy or summary of the complaint to the lawyer about whom the complaint has been made. Sometimes, however, investigations are conducted by telephone. Either way, the lawyer is informed of the complaint and asked to respond. Then the lawyer's response is communicated to the complainant.

A lawyer must cooperate fully in an investigation (Law Society Rule 3-5(7) and *BC Code* rule 7.1-1). The Law Society can require a lawyer to produce files and records, attend an interview, provide written responses, and provide access to their business premises (Rule 3-5(8)). The lawyer must provide the information sought even if it is privileged or confidential (s. 88 of the Act, Rule 3-5(11)).

Failure to produce requested documents and information during the course of an investigation may result in an administrative suspension (Rule 3-6). An administrative suspension will continue until the Law Society receives the required documents, information or response, to the satisfaction of the Executive Director. The administrative suspension will also form a part of the lawyer's professional conduct record.

6. Concluding the Investigation

At the conclusion of the investigation, Professional Conduct staff assess the complaint to determine whether further action is warranted.

At any stage during the investigation, it may be possible for the lawyer to make a consent agreement with the Executive Director (Rule 3-7.1). The lawyer must admit to the discipline violation and agree to terms that may include the following:

(a) completing a course of study or remedial program to the satisfaction of the Executive Director;

(b) practising subject to conditions or limitations on practice;

(c) paying a fine;

(d) suspending practice for a specified time period; or

(e) undertaking not to practice law.

It is sometimes difficult for a lawyer who is the subject of a complaint to respond objectively. Even if the complaint involves a relatively minor matter, it is often a good idea to retain another lawyer to assist in addressing the complaint.

If the evidence gathered in the investigation supports an allegation of misconduct or incompetency, and there is no consent agreement with the lawyer, the complaint will be referred to the Discipline Committee or the Practice Standards Committee to consider what further action should be taken.

The Law Society notifies the lawyer and complainant in writing of any action taken.

7. The Decision to Take No Further Action and the Complainant's Right to Review

A decision to take no further action on a complaint is based on one of the following conclusions (Rule 3-8):

(a) the complaint is not valid, or its validity cannot be proven;

(b) the complaint does not disclose conduct serious enough to warrant further action; or

(c) the matter giving rise to the complaint has been resolved.

A complainant who is dissatisfied with the decision to take no further action has the right to request a review of that decision by the Complainants' Review Committee (Rule 3-14). However, if the decision was made on the basis that the complaint was outside the Law Society's jurisdiction, was frivolous, vexatious or an abuse of process, or does not allege facts that, if proven, would constitute a discipline violation, then there is no right to review by the Complainants' Review Committee (Rule 3-5(3)). Complainants may apply to the Complainants' Review Committee for a review of the decision within 30 days, subject to the discretion of the chair to extend the time limit (Rule 3-14(2) and (3)).

The Complainants' Review Committee is appointed by the President and must have at least one Appointed (lay) Bencher (Rule 3-13). In practice, an Appointed Bencher chairs the Complainants' Review Committee. The Committee reviews the complete complaint file and must do one of the following (Rule 3-14(5)):

(a) confirm the decision to take no further action;

(b) refer the complaint to the Practice Standards Committee or the Discipline Committee, with or without recommendations; or

(c) direct that further investigation be conducted.

The parties and the Executive Director are notified, in writing, of the decision of the Complainants' Review Committee. No written report is issued. The Complainants' Review Committee usually confirms the staff decision to close the file.

Complainants who are dissatisfied with the manner in which the Law Society handles their complaint can take their concerns to the Office of the Ombudsperson. Section 10(1) of the *Ombudsperson Act* provides:

> The Ombudsperson, with respect to a matter of administration, on a complaint or on the Ombudsperson's own initiative, may investigate
>
> (a) a decision or recommendation made,
>
> (b) an act done or omitted, or
>
> (c) a procedure used
>
> by an authority [including the Law Society] that aggrieves or may aggrieve a person.

[§3.04] The Discipline Committee Process

1. Structure of the Discipline Committee

The Discipline Committee consists of a chair and vice chair (both of whom must be Benchers) and other individuals appointed by the President of the Law Society under Rule 4-2(1). The Discipline Committee makes decisions on what action, if any, to take on the complaints it considers.

Under Rule 4-17(1), the Discipline Committee or the chair of the Committee may order a hearing into the conduct or competence of a lawyer by directing that the Executive Director issue a citation against the lawyer. The Tribunal Chair must then establish a hearing panel to adjudicate the matter (Rule 5-2; this process is described further below in §3.05).

2. Initial Consideration by the Discipline Committee

Parts 4 and 5 of the Law Society Rules contain provisions governing the Discipline Committee and disciplinary processes, including citation hearings, conduct reviews and conduct meetings.

The Discipline Committee considers complaints referred by the staff, the Complainants' Review Committee or any other committee. After considering the complaint, which may involve further enquiries and investigations, the Discipline Committee must do one of the following (Rule 4-4(1)):

- decide that no further action be taken on the complaint;
- authorize the chair or other Bencher member of the Discipline Committee to send a letter to the lawyer concerning the lawyer's conduct ("Conduct Letter");
- require the lawyer or law firm to attend a meeting with one or more Benchers or lawyers to discuss the lawyer's conduct ("Conduct Meeting");
- require the lawyer or law firm to appear before the Conduct Review Subcommittee; or
- direct that a citation be issued against the lawyer.

The Chair of the Discipline Committee also has the power to order investigations into the books, records, and accounts of lawyers or former lawyers who appear to have committed discipline violations (Rule 4-55).

3. Conduct Letter and Conduct Meeting

When the Discipline Committee authorizes a Conduct Letter to be sent to the lawyer under Rule 4-4(1)(b) of the Law Society Rules, a copy of the letter or, if directed by the Discipline Committee, a summary of the letter, is provided to the complainant. The Conduct Letter does not form part of the lawyer's professional conduct record and it is not admissible in the hearing of a citation (Rule 4-9(2)).

Under Rule 4-10, when the Discipline Committee orders a Conduct Meeting, the meeting must be held in private and neither the record of the order under Rule 4-4(1)(c) nor the record of the conduct meeting forms part of the lawyer's professional conduct record. In addition, a Bencher or other lawyer who has participated in the Conduct Meeting is not permitted to testify in the hearing of a citation as to any statement made by the lawyer or law firm during the Conduct Meeting, unless the lawyer or law firm puts the matter in issue.

4. Conduct Review Subcommittee

Rules 4-11 to 4-16 of the Law Society Rules deal with conduct reviews. The conduct review process responds to complaints that may indicate professional misconduct but do not warrant issuing a citation. The Conduct Review Subcommittee (the "Subcommittee"), appointed by the Discipline Committee or its chair, consists of one or more lawyers, at least one of whom is a Bencher (to act as chair). When a conduct review is ordered, the meeting is informal (although counsel may be present) and without court reporters or sworn evidence. The meeting is private, but the Subcommittee may, in its discretion, permit the complainant to attend either all or part of the meeting, with or without the right to speak.

Following a conduct review, the Subcommittee prepares a written report of its findings, conclusions and recommendations. The lawyer has 30 days to dispute the report (Rule 4-13(1)). The Subcommittee may order a further meeting (which follows the procedure of the first meeting) and may amend its report as a result of that second meeting. The (amended) report is then presented to the Discipline Committee.

Upon reviewing the report, the Discipline Committee must do one or more of the following (Rule 4-13(6)):

(a) decide to take no further action;

(b) refer the lawyer to the Practice Standards Committee;

(c) substitute another decision under Rule 4-4; or

(d) direct that a citation be issued against the lawyer.

Pursuant to Rule 4-4(4), at any time before the Discipline Committee makes a decision under Rule 4-13(6), the Discipline Committee may rescind its decision requiring the lawyer to appear before the Subcommittee, and may substitute another decision under Rule 4-4(1).

If a citation is issued and a hearing is held, the conduct review report is not admissible at the hearing (Rule 4-16). Members of the Subcommittee cannot testify as to any statements made by the respondent during the conduct review, unless asked to by the respondent. In most cases, the Subcommittee resolves the matter and recommends to the Discipline Committee that no further action be taken.

5. Practice Standards Committee

The aim of the Practice Standards Committee is to assist lawyers to improve their knowledge or skills in carrying on the practice of law. The relevant provisions are found in Rules 3-15 through 3-25. The Practice Standards Committee also deals with complaints where a competency problem plays a role in conduct that could warrant disciplinary proceedings. In general, the Practice Standards Committee procedures are less formal than discipline proceedings.

If it appears the lawyer has a competency problem, the matter may be referred to the Practice Standards Committee either before or after a conduct review or the hearing of a citation.

6. The Citation

The Discipline Committee or the Chair of the Committee may order a hearing into the conduct or competence of a lawyer by directing the Executive Director to issue a citation against the lawyer (Rule 4-17(1)).

When a citation is issued, it must be served on the respondent within 45 days, unless the Discipline Committee or its chair gives other direction (Rule 4-19). Service is described in Rule 10-1. The citation must be clear and specific enough to give the respondent notice of the alleged misconduct and the transaction in question (Rule 4-18).

Under Rule 4-20, once the respondent has been notified of the direction to issue a citation, the Executive Director must publish the existence of the citation and its status to the public, and may publish the outcome in due course.

A party or individual affected may apply to the Law Society President asking that their name be redacted in publishing the citation (Rule 4-20.1). However, there must be extraordinary circumstances that outweigh the public interest in knowing who has been cited.

The citation contains allegations of misconduct against the lawyer. The Law Society bears the onus of proving these allegations. If it cannot prove the allegations, then the citation is dismissed.

7. Interim Suspension/Conditions

Under Rule 3-10, an interim action board may make interim orders with respect to a lawyer or articled student who is the subject of a citation under Part 4 or an investigation under Rule 3-5. Before an interim action board takes action, there must be a public protection proceeding before the board at which Law Society counsel is present (Rule 3-12(2)). The proceeding is initiated on application by the Discipline Committee, Practice Standards Committee, or the Executive Director, and can be without notice to the lawyer if the interim action board is satisfied on reasonable grounds that notice would not be in the public interest (Rule 3-12(3)).

When a proceeding is initiated under Rule 3-12(3), the President must appoint an interim action board consisting of three or more Benchers who are not members of the Discipline Committee. If the interim action board is satisfied, on reasonable grounds, that extraordinary action is necessary to protect the public, it may impose conditions or limitations on the lawyer's practice or the enrolment of an articled student, or suspend the lawyer or the enrolment of the articled student (Rule 3-10(2)). The order is effective until one of these further events:

(a) final disposition of the existing citation or any citation authorized under Part 4 [*Discipline]* arising from the investigation; or

(b) rescission, variation or further variation under Rule 3-12.

The suspension or imposition of practice conditions may be with or without notice to the lawyer. After the order is made, the Executive Director immediately notifies the lawyer in writing (Rule 3-12.1).

The Law Society may publish limitations and conditions placed on a lawyer who is subject to such an interim order. Under Rule 3-11, a lawyer or articled student who is under investigation or has been cited may be required to submit to a medical examination concerning the ability of the lawyer to practise law or the articled student to complete articles.

A lawyer or student who is the subject of an order for interim suspension or practice conditions under Rule 3-10(2) may apply to the Tribunal to have the order rescinded or varied. The procedure to be followed is set out in Rule 3-12.3. When an order has been made under Rule 3-10(2) with notice, the onus is on the lawyer to show cause why the order should be rescinded or varied (Rule 3-12.3(13). If the order was made without notice, the onus is on the Law Society counsel (Rule 3-12.3(14)).

8. Summary Hearing Process

Pursuant to Rule 5-4.5, the summary hearing process may be used to seek a citation and bring an aspect of a lawyer's conduct before a hearing panel for quick disposition. This may occur before the lawyer's conduct is fully investigated. A summary hearing may be suitable, for example, when a member has refused to respond to correspondence from the Law Society regarding a complaint investigation (Rule 3-6).

In these circumstances, the failure to respond to the Law Society is a discrete issue apart from the underlying complaint. A hearing panel can consider the conduct and then make an order that is appropriate in the circumstances, perhaps ordering an interim suspension or ordering the lawyer to respond within a specified timeframe.

In addition to failures to respond to the Law Society, Rule 5-4.5 permits proceeding by way of a summary hearing when the citation alleges only a breach of a Rule, a breach of an undertaking given to the Law Society, or a breach of an order made under the *Legal Profession Act* or Law Society Rules.

[§3.05] Hearing Procedure

The hearing of a citation is governed by Part 5–Tribunal, Hearings and Appeals. The "Tribunal" under this Part is made up of the Tribunal Chair, hearing panels, review boards, and motions adjudicators (Rule 5-1.1). The Tribunal Chair is an independent lawyer who is appointed by the Benchers for a two-year term.

Under Rule 5-2, the Tribunal Chair establishes a hearing panel to adjudicate the matter. The hearing panel must generally be chaired by a lawyer and include at least one Bencher who is a lawyer (Rule 5-2(3)), but there are exceptions. Rule 5-2(2) says the panel may consist of one Bencher who is a lawyer in these situations:

(a) no facts are in dispute;

(b) the hearing is to consider an admission under Rule 5-6.5;

(c) the hearing is a summary hearing (Rule 5-4.5);

(d) the hearing is to consider a preliminary question under Rule 5-4.3; or

(e) the Tribunal chair considers it is not otherwise possible to convene a panel in a reasonable time.

1. Consent Dispositions of Citations

At least 14 days before the hearing of a citation commences, the lawyer may tender a conditional admission of a discipline violation to the Discipline Committee (Rule 4-29). The Chair of the Discipline

Committee has discretion to waive the time limit. If the Discipline Committee accepts the admission, those parts of the citation to which the conditional admission applies are resolved, the admission is recorded on the lawyer's professional conduct record, and both the lawyer and the complainant are notified of the disposition. An admission tendered under Rule 4-29 must not be used against the lawyer in any proceeding unless the admission is accepted by the Discipline Committee.

Under Rule 4-48, notice to the profession is circulated in various situations, including when the lawyer's admission is accepted or when action is taken at the conclusion of a hearing.

The parties to a proceeding might also rely on Rule 5-6.5 to jointly submit to the hearing panel an agreed statement of facts and the respondent's admission of a discipline violation and consent to a specified disciplinary action. If the hearing panel accepts the agreed statement of facts and the respondent's admission of a discipline violation, the admission is recorded on the lawyer's professional conduct record, the disciplinary action is imposed, and the Executive Director must notify the respondent and the complainant of the disposition. The panel must not impose disciplinary action under Rule 5-6.5(2)(b) that is different from the specified disciplinary action consented to by the respondent unless (a) each party has been given the opportunity to make submissions respecting the disciplinary action to be substituted, and (b) imposing the specified disciplinary action consented to by the respondent would be contrary to the public interest in the administration of justice. An admission of conduct tendered in good faith by a lawyer during negotiation that does not result in a joint submission under Rule 5-6.5(1) is not admissible in a hearing of the citation. An admission rejected by the hearing panel is not admissible against the respondent in any proceeding.

2. Pre-Hearing Procedure

Part 5 provides for pre-hearing procedural rules, such as setting hearing dates (Rule 5-4.1) and obtaining disclosure of the Law Society's evidence or of the circumstances of misconduct alleged in the citation (Rules 5-4.6 and 5-4.7). Rule 5-4.4 contains provisions about joining two or more citations in a hearing, and severing allegations in a citation, before a hearing begins. Rule 5-4.2 contains provisions related to the procedure for amending an allegation in a citation (either before or during the hearing).

Rule 5-4.8 describes the procedure for a notice to admit. At least 45 days before the day set for the hearing of the citation, Law Society counsel or the respondent may ask the other party to admit the truth of specified facts or the authenticity of specified documents. A party who is served with a request and fails to respond in accordance with the Rule is deemed, for the purposes of the hearing only, to have admitted the truth of the fact described in the request or the authenticity of the document attached. Rule 5-5 sets out the process for compelling witnesses to attend the hearing and for the production of documents for the hearing.

A pre-hearing conference may be held at any time before the hearing begins, with or without a request by any party (Rule 5-5.1). The Tribunal Chair sets the date and designates a motions adjudicator to preside. The conference is intended to facilitate more effective case management and may be used for many purposes: to simplify issues, to amend the citation, to obtain admissions or agreed statements of fact, to obtain discovery of documents, to deal with privilege or confidentiality issues, to consider allowing all or part of the hearing to be conducted in written form, or to consider any other matter that may aid in the fair and expeditious disposition of the issue (Rule 5-5.1(7)). The motions adjudicator may make orders on application or on the motions adjudicator's own motion to aid in the fair and expeditious disposition of the citation, including orders setting hearing dates, establishing a hearing plan and a timeline for the completion of procedures, directing parties to provide witness lists and summaries of witness evidence, setting rules respecting expert witnesses, and allowing submissions in writing (Rule 5-5.1(10)).

Before the hearing begins, a party may apply for an order that the hearing be adjourned (Rule 5-5.2).

Rule 5-1.4 permits the Tribunal Chair to issue practice directions which supplement the pre-hearing procedural Rules. The current Practice Directions and Forms together with instructions and guides can be found on the LSBC Tribunal website.

3. The Hearing

Rule 5-6 sets out hearing procedures. Subject to the *Legal Profession Act* and the Law Society Rules, the Tribunal may determine the practice and procedure to be followed at a hearing (Rule 5-1.1(1)). The hearing is open to the public unless the hearing panel orders otherwise under Rule 5-8.

The lawyer whose conduct is the subject of the hearing has a right to appear personally or with counsel. If the lawyer fails to attend or remain in attendance at the hearing, the panel may proceed without them under s. 42 of the *Legal Profession Act.* The inquiry generally starts with opening statements by counsel, followed by Law Society evidence, followed by the lawyer's evidence, if any, and ending with submissions as to facts.

The hearing panel may accept as evidence an agreed statement of facts, oral evidence, affidavit evidence, evidence tendered in a form agreed to by the respondent or applicant and Law Society counsel, admissions made or deemed to be made under Rule 5-4.8, or any other evidence it considers appropriate.

The parties may also call witnesses to testify. Under Rule 5-6(4), every witness who testifies must take an oath or make a solemn affirmation and is subject to cross-examination. The panel may make inquiries of a witness as it considers desirable. Under s. 41(2)(a) of the *Legal Profession Act*, the lawyer or a representative of the law firm is considered a compellable witness.

After hearing evidence, the panel will make findings of facts and will rule on each allegation (Rule 5-6.3). If the panel rules against the lawyer, the panel will invite the parties to make submissions on disciplinary action (Rule 5-6.4).

The panel must impose one or more of the sanctions set out in s. 38(5) of the *Act*. The sanctions include a reprimand, fine, conditions or limitations on the lawyer's practice, suspension or disbarment. The respondent may be ordered to pay costs, which are calculated pursuant to Rule 5-11 and the Tariff set out in Schedule 4 of the Law Society Rules.

Rules 4-47 to 4-48 outline the extent to which the action taken by the hearing panel is published. Public notice is required of an interim suspension, suspension or disbarment. Decision summaries are published and circulated to the profession, except in extraordinary circumstances dictated by the public interest. Rule 4-49 permits a hearing panel to withhold the identity of the lawyer if the panel imposed a sanction that does not include a suspension or disbarment, *and* publication could reasonably be expected to identify an individual other than the lawyer and that individual would suffer serious prejudice as a result. The same rule also directs that if all of the allegations in the citation are dismissed, the publication must not identify the lawyer, unless they consent in writing.

[§3.06] Appeal From the Hearing Panel Decision

The lawyer may apply, in writing, for a review on the record by a review board (s. 47(1) of the *Legal Profession Act*). The lawyer must apply within 30 days after being notified of a disciplinary action decision. The lawyer does not have a right to review the facts and determination decision until after the sanction has been imposed. The lawyer may apply for an extension of time to initiate a review, if necessary (Rule 5-19.1). After hearing the lawyer and counsel for the Law Society, the review board may confirm the decision of the hearing panel or substitute a decision that the panel could have made.

Within 30 days after a decision of a hearing panel, the Discipline Committee may refer a decision of a hearing panel under s. 38(4), (5), (6), (6.1), or (7) for a review on the record by a review board, under s. 47(3). The review board may confirm the decision or substitute a decision that the panel could have made.

The internal standard of review is the longstanding standard articulated in *Law Society of BC v. Hordal*, 2004 LSBC 36 and *Law Society of BC v. Berge*, 2007 LSBC 07. The standard of review is correctness, subject to two qualifications:

(1) where a finding is based on *viva voce* evidence and credibility is in issue, the review board should defer to the hearing panel and only intervene in cases where the panel made a clear and palpable error; and,

(2) where the review is of a disciplinary action decision and the review involves the duration or amount of sanction, as opposed to the type of sanction, the review board should accept the decision of the hearing panel as correct if the sanction imposed falls within the range of sanctions imposed in similar cases.

Under s. 47(4), a review board has discretion to hear evidence that is not part of the record. In exercising its discretion, the review board will consider the tests for admissibility in the civil and criminal context: *Law Society of BC v. Goldberg*, 2007 LSBC 55.

There are also other avenues of appeal. Under s. 48 there exists a statutory right of appeal to the Court of Appeal of any decision, determination or order of a panel or review board. The standard of review is correctness for questions of law, and palpable and overriding error for questions of fact or questions of mixed fact and law. There may also be a remedy under the *Judicial Review Procedure Act*.

In *Pierce v. Law Society of British Columbia*, 1993 CanLII 765 (BC SC),[2] the petitioner challenged the validity of three citations issued against him by the Law Society. The petitioner cited three grounds for the challenge:

(1) section 45(1) [now s. 38(4)] of the *Legal Profession Act* is too vague or overly broad and, therefore, contrary to s. 7 of the *Charter of Rights and Freedoms*;

[2] The summary of this case is taken from a paper by Jeffrey G. Hoskins, KC, "Practice—Professional Responsibility" in the 1994 *Annual Review of Law and Practice* (Vancouver: CLE) at pp. 463-464. Reprinted with permission.

(2) no reasonable and probable grounds showed that discipline violations had occurred in the case of each of the citations; and

(3) the Discipline Committee had not completed a conduct review procedure that it had initiated before one of the citations had been issued.

On the question of vague language in the case of professional discipline where criminal consequences such as imprisonment are impossible, Clancy J. was alert to the concern about a "standardless sweep":

> Serious consequences flow from an adverse finding of a panel. Vagueness of language to a degree that permits a "standardless sweep" is contrary to principles of fundamental justice, whether or not the statute deprives a lawyer of his physical liberty. Where, as here, the right allegedly infringed is the right to practice a profession, fundamental justice militates against a lack of standards against which a member of that profession may measure his conduct.

However, when considering the provision in question, the judge found that "professional misconduct" and "conduct unbecoming a member" of the Law Society, in that context, were not vague or overly broad so as to offend the *Charter*. "Professional misconduct" was said to be sufficiently well settled so that "no member should be in doubt as to the type of conduct proscribed." "Conduct unbecoming" is defined in s. 1 of the *Legal Profession Act* in terms that, in the context of the provisions of the Act governing citations, are restricted to the conduct and competence of lawyers. As a result, the terms were held not to be pervasively vague and the section was found to be constitutionally valid.

The Court also rejected the second ground for review of the citations. The Court found that a *prima facie* case need not be established before a citation could be issued:

> Assuming he does not abuse or exceed his authority and acts in good faith, it is sufficient if the chairman has reasonable grounds to believe the citation should issue.

In any case, the decision to authorize a citation is not reviewable under the *Judicial Review Procedure Act* since it is not a "statutory power of decision" as defined in s. 1 of that Act.

Finally, the Court held that the Law Society did not have to complete the conduct review procedure before initiating a citation, particularly since the conduct review was abandoned after the petitioner had objected to it.

[§3.07] Standard of Financial Responsibility

Under s. 32(1), the Benchers may make rules establishing standards of financial responsibility relating to the integrity and financial viability of a lawyer's practice or the practice of a law firm. If these standards are not met, the Discipline Committee may suspend the lawyer or impose conditions on the practice of the lawyer under Rule 3-52(4), providing the Discipline Committee gives the lawyer notice and reasons and a reasonable opportunity to make representations respecting those reasons. A lawyer who becomes the subject of bankruptcy proceedings, in circumstances where the lawyer's willful neglect of creditors, financial irresponsibility or personal extravagance contributed to the bankruptcy, will be deemed to have conducted themselves in a manner unbecoming a member (Rule 3-51(2)).

Rule 3-49 sets out the minimum standards of financial responsibility for lawyers. Instances of failing to meet the minimum standards include failing to satisfy an entered monetary judgment within seven days, becoming an "insolvent lawyer" (defined in Rule 3-47), failing to produce records on a compliance audit, failing to deliver a trust report, failing to report and pay the trust administration fee, and failing to provide electronic accounting records when required.

All lawyers are required under Rule 3-50 to notify the Executive Director of the Law Society in the event of the lawyer's failure to satisfy a "monetary judgment" as defined in Rule 3-47. This includes a foreclosure order, a garnishment order under the *Income Tax Act* for tax debt, any final order or statutory requirement to pay money, and any judgment against a multi-disciplinary practice in which the lawyer has an ownership interest.

Regardless of whether an appeal respecting the judgment has been commenced, notification to the Executive Director must include the following:

(a) the circumstances of the judgment, including whether the creditor is a client or a former client; and

(b) the lawyer's proposal for satisfying the judgment.

Lawyers who become insolvent must also notify the Executive Director and provide further information, as set out in Rule 3-51(1).

A lawyer or student becomes insolvent under the Rules if certain specified proceedings are commenced under the *Bankruptcy and Insolvency Act*. The proceedings consist of an application for a bankruptcy order under s. 43; an assignment of property for the benefit of creditors under s. 49; a proposal under s. 50 or s. 66.12; a notice of intention to make a proposal under s. 50.4; and an application for a consolidation order under s. 219.

An insolvent lawyer is prohibited from operating a trust account, except with the permission of the Executive Director and with a second signatory who is a member of the Law Society (Rule 3-51(3)).

Rule 3-51(4) requires undischarged bankrupts to resign corporate directorships, in accordance with s. 124 of the *Business Corporations Act*. This applies to law corporations as well as other corporations.

Rule 7.1-2 of the *BC Code* provides that a lawyer has a professional duty, apart from any legal liability, to meet financial obligations incurred, assumed or undertaken in the course of practice. Such obligations might include agency accounts or obligations to other lawyers, amounts ordered payable by registrars or public officials, or fees payable to witnesses, sheriffs, court reporters or experts.

The Law Society regularly receives complaints from physicians because lawyers have not paid them for medical-legal reports that they prepared at the lawyer's request. In the absence of an agreement that specifies otherwise, the lawyer is liable to pay the fees of such expert witnesses.

The Executive Director may refer any matter concerning a lawyer's failure to meet the minimum standards of financial responsibility to the Discipline Committee. The Discipline Committee may investigate further, suspend the lawyer, or impose conditions and limitations on their practice (Rule 3-52).

[§3.08] Convictions

Subject to certain exceptions, Rule 3-97 requires lawyers and articled students who have been **charged** with an offence under federal or provincial law, or an equivalent offence in another jurisdiction, to self-report to the Executive Director and provide "written notice of the charge." No notification is required if the lawyer or articled student is issued or served with a ticket as defined in the *Contraventions Act* (Canada) or a violation ticket as defined in the *Offence Act*.

Rule 4-52 provides that, on proof that a lawyer or former lawyer has been convicted of an offence that was proceeded with by way of indictment, or an equivalent offence in another jurisdiction, the Benchers may, without following the procedures provided for in the Act or the Rules, summarily suspend or disbar the lawyer or former lawyer. Rule 4-53 requires that the lawyer be notified and given the opportunity to make written submissions before the Benchers make a final decision, except in extraordinary circumstances.

Section 15(3) of the *Legal Profession Act* prohibits lawyers who are suspended or disbarred, or who otherwise lose their licence to practise as a result of disciplinary proceedings, from practising law as defined in s. 1 of the Act. This prohibition applies whether or not they are paid or expect payment for their services.

[§3.09] Appointment of a Custodian

Under s. 50 of the Act, the Law Society may apply to the BC Supreme Court for appointment of a custodian of a lawyer's property and to manage or, where appropriate, wind up the legal business of the lawyer. The Law Society applies to intervene in a lawyer's practice only when it is necessary in the public interest. Grounds for appointment of a custodian include the following:

(a) a lawyer consents to the appointment;

(b) a lawyer abandons the practice of law or dies;

(c) a lawyer is unable to practise by reason of physical or mental incapacity; or

(d) a lawyer is disbarred or suspended from practice in British Columbia or any other jurisdiction.

Before applying for a custodianship order, the Custodianship Department will consider whether measures short of a custodianship, such as a locum arrangement, are available and appropriate.

[§3.10] Adverse Determinations Under the *Legal Profession Act*

Decisions of hearing panels are available on the LSBC Tribunal's website (https://www.lsbctribunal.ca/).

The following are the adverse determinations available to the Law Society hearing panel pursuant to s. 38(4)(b) of the Act:

(i) professional misconduct;

(ii) conduct unbecoming the profession;

(iii) a breach of the *Legal Profession Act* or the *Law Society Rules*;

(iv) incompetent performance of duties undertaken in the capacity of a lawyer; or

(v) if the respondent is not a member of the Law Society, conduct that would, if the respondent were a member, constitute professional misconduct, conduct unbecoming the profession, or a breach of the Act or the rules.

1. Professional Misconduct

Professional misconduct is not a defined term in the *Legal Profession Act*, the Law Society Rules or the *BC Code*, but it has been considered by hearing panels in several cases and has been defined as a "marked departure from that conduct the Law Society expects" of lawyers (*Law Society of BC v. Martin*, 2005 LSBC 16 and *Re: Lawyer 12*, 2011 LSBC 35).

The Supreme Court of Canada approved the approach taken by the Law Society of Upper Canada (LSUC) to assessing professional misconduct in *Groia v. LSUC*, 2018 SCC 27. The SCC said that the LSUC's determination of professional misconduct was entitled to deference.

Some examples of the types of conduct that have qualified as professional misconduct are summarized below.

(a) Misappropriation of Client Trust Funds

In *Law Society of BC v. Ali*, 2007 LSBC 18 and 2007 LSBC 57, a lawyer was cited for misappropriation and disbarred, despite having no prior conduct record. The lawyer transferred trust money to the lawyer's personal accounts, in several transactions, without rendering bills to the clients. The panel considered the mental element for misappropriation. Deviating from Ontario case law, the panel held that intention to steal is not required for a finding of misappropriation. It held that the lawyer's conduct, "whether deliberate or a matter of incompetence or negligence, [was] so gross as to prove a sufficient mental element of wrongdoing."

In *Law Society of BC v. Blinkhorn*, 2009 LSBC 24 and 2010 LSBC 8, a lawyer was disbarred for misappropriating trust funds in seven separate client matters. The panel emphasized the seriousness of misappropriation, stating that "the use in the citation of decorous language such as 'misappropriated' and 'misled,' rather than the more plain-speaking 'stole' and 'lied,' cannot obscure the fact that stealing and lying is exactly what he did, repetitively, for an extended period of time." The panel confirmed that the appropriate sanction for misappropriation will always be disbarment unless the member can point to extraordinary mitigating circumstances that satisfy the panel that disbarment is not necessary to protect the public interest and preserve the reputation of the legal profession.

In *Law Society of BC v. Tak*, 2014 LSBC 57, a lawyer was disbarred for misappropriating trust funds from eight clients. "Misappropriation of client trust funds is perhaps the most egregious misconduct a lawyer can commit," the panel said. "Wrongly taking clients' money is the plainest form of betrayal of a client's trust."

In *Law Society of BC v. Sas*, 2015 LSBC 19 and 2016 BCCA 341, a lawyer was suspended for billing improper disbursements to clients, and failing to deliver the bills to clients, for the purposes of cleaning up or "zeroing out" residual trust balances. The panel concluded that some of the misconduct amounted to misappropriation, based on wilful blindness.

In a decision of a Law Society review board (2020 LSBC 31), the lawyer had misappropriated client funds for personal use. The review board agreed with the earlier panel's findings that the lawyer had been suffering from an addiction disorder, but said that misusing the client funds still met the test for misappropriation.

(b) Fraudulent Activity

In *Law Society of BC v. McCandless*, 2010 LSBC 9, a lawyer was disbarred. He had continued to act for a company investing pooled funds into a scheme, after learning that the BC Securities Commission alleged the scheme was fraudulent. The panel held that the lawyer need not know whether the scheme was a fraud; it was enough that he was alerted to the possibility. He had a professional obligation to advise his clients of the possible fraud. The situation was worsened when the lawyer paid dividends to the client company's shareholders using his own company's money after the scheme's assets were frozen, giving shareholders the mistaken impression that their investment was secure. The panel considered the gravity of the misconduct and that it put the public and the reputation of the profession in jeopardy.

In *Law Society of BC v. Rai*, 2011 LSBC 2; and *Law Society of BC v. Nielsen*, 2009 LSBC 8, lawyers were suspended for their role in mortgage frauds. Neither of them were knowing participants; rather, they allowed themselves to be duped by fraudsters.

In *Law Society of BC v. Bauder*, 2012 LSBC 13 and 2013 LSBC 7, a lawyer was sanctioned for fraudulent conduct in his personal life. The lawyer attempted to fraudulently obtain personal mortgage financing by falsifying documents and misrepresenting both the purchase price and the down payment. The panel held that it was professional misconduct: by drafting false documents and using his position as a lawyer to have the vendor initial them, the lawyer's conduct fell within his professional sphere. He was suspended for four months.

In *Law Society of BC v. Gounden*, 2021 LSBC 07, a lawyer was suspended for 16 months for wrongfully double-reporting expenses and seeking double reimbursement of claims amounting to less than $4,000.

In *Law Society of BC v. Pelletier*, 2023 LSBC 3 and 2023 LSBC 47, a lawyer was disbarred. He accepted into his trust account funds that he knew were the proceeds of a securities fraud being investigated in the United States. It was found that he knowingly assisted in what he knew was fraudulent activity.

(c) Failure to Respond

(i) To the Law Society

In *Law Society of BC v. Hall*, 2003 LSBC 34 and 2004 LSBC 1, the lawyer failed to provide a substantive response to the Law Society respecting a complaint

against him, despite repeated requests. This particular case shows the misconduct of failing to respond to the Law Society being compounded by earlier findings of similar misconduct (see *Law Society of BC v. Hall*, 2003 LSBC 11). The hearing panel ordered that he be suspended for one month, undertake to respond to all correspondence from the Law Society's Professional Conduct Department, and pay costs.

In *Law Society of BC v. Tak*, 2009 LSBC 25, a lawyer failed to respond to communications from the Law Society's Professional Conduct Department. In finding that the lawyer's conduct amounted to professional misconduct, the hearing panel said a lawyer's failure to respond impairs the Law Society's ability to govern lawyers effectively, and is a grave matter. The hearing panel also noted that "persistent, intransigent failure to respond to the Law Society communications brings the legal profession into disrepute." The lawyer was ordered to pay a fine of $2,000 and costs, as well as to provide substantive and timely responses to the Law Society.

On two further occasions, this same lawyer was cited for failing to respond to the Law Society. Since the pattern of misconduct persisted, a substantially longer suspension of four months was ordered (*Law Society of BC v. Tak*, 2011 LSBC 1 and 2011 LSBC 5).

There are more recent examples of lawyers being disciplined for failing to respond to the Law Society: *Law Society of BC v. Cunningham*, 2017 LSBC 37; *Law Society of BC v. Jessacher*, 2015 LSBC 43; *Law Society of BC v. Farion*, 2016 LSBC 25 and 2017 LSBC 5.

In 2022 a lawyer who repeatedly failed to respond to the Law Society during its investigations into five separate complaints against him was declared to be ungovernable and was disbarred (*Law Society of BC v. Lessing,* 2022 LSBC 07).

(ii) To a Non-Lawyer

In *Law Society of BC v. Smith*, 2005 LSBC 27, in the course of representing a client in a personal injury action, the lawyer failed to respond to communications from a non-lawyer at an insurance company. The hearing panel held that the lawyer's conduct amounted to professional misconduct. The panel emphasized that the duty for all lawyers to respond promptly is a duty that is owed not only to fellow lawyers and to the Law Society but also to lay persons with whom the lawyer may be dealing in the course of acting for a client.

(iii) To Opposing Counsel

In *Law Society of BC v. Niemela*, 2013 LSBC 15, a lawyer failed to respond to opposing counsel for a 13-month period. The matter was subsequently resolved and the lawyer apologized to opposing counsel. The panel considered previous findings of professional misconduct against the lawyer for failure to respond to opposing counsel and to the Law Society. The panel ordered a $15,000 fine and $6,424 in costs, and made an order that he enter into a practice supervision arrangement. The panel noted that if he was cited again for similar misconduct, a future hearing panel should consider a lengthy suspension.

(d) Misleading Conduct

(i) Misrepresentations to a Court

In *Law Society of BC v. Samuels*, 1999 LSBC 36, while defending two youths on criminal charges, the lawyer implied to the court that he had recently contacted the mothers of his clients when, in fact, he had not. The lawyer later wrote to apologize for his inaccurate statement to the judge who had presided in the matter, and the judge accepted his apology. The lawyer admitted to the Discipline Committee and to a discipline hearing panel that his conduct in misleading the court constituted professional misconduct. The panel accepted the lawyer's admission and proposed disciplinary action and accordingly ordered that he be suspended for 90 days and pay costs.

In *Law Society of BC v. Ahuja*, 2017 LSBC 26, a lawyer had slept through his alarm on the morning of a flight to a trial, then made false or misleading representations to his client and to the court that he had missed his flight due to overbooking. A day after the incident, he admitted his mistake to his firm's partners. He also sent letters of apology to the court and to the client, and self-reported the matter to the Law Society. He was suspended for one month and ordered to pay $3,500 in costs.

(ii) Misrepresentations to Clients or the Law Society

In *Law Society of BC v. Strandberg*, 2001 LSBC 26, a lawyer failed to commence a Small Claims Court action in a timely way.

He later advised the client and reported to the Law Society that he had commenced an action. He also fabricated documents in support of his assertion. The lawyer admitted to professional misconduct. The panel noted that the lawyer's misconduct was worthy of significant sanction, and grappled with whether the misleading behaviour was more egregious than the fabrication of documents, ultimately saying (para. 6) that,

> …the untruthfulness to the client stings most because it has the greatest effect upon the reputation of our profession.

He was suspended for one month, ordered to pay a $15,000 fine and pay $2,000 towards the costs of the proceedings.

In a decision of the Law Society hearing panel (2003 LSBC 16), a lawyer lied to a client by telling her that a property in which she was claiming an interest had been sold, when it had not, and by telling her that he would receive the sale proceeds in trust, when he knew this was untrue. On the strength of this representation, the client entered into an agreement to purchase a strata property. The lawyer gave trust cheques unsupported by deposits and made assurances that funds would be available to complete the purchase, knowing that these assurances were false. The hearing panel found that the member's conduct constituted professional misconduct. The panel reviewed the serious nature of the misconduct, the harm to the client, his previous discipline for similar conduct and his addiction to drugs (he had since sought treatment and abstained from both alcohol and drugs). The panel was not convinced that disbarment was necessary for public protection. The panel ordered that the member be suspended from practice for 18 months and pay costs. Before resuming practice, he would be required to satisfy a board of examiners that his competency to practise was not affected by alcohol or drugs and, if he was permitted to practice, he could do so only as a partner, employee or associate.

In *Law Society of BC v. Liggett*, 2012 LSBC 7, a lawyer misrepresented to the Law Society his availability to attend his disciplinary hearing. He maintained that he would be in trial for two days, when he knew that one day had been cancelled. His conduct was held to be reckless, rather than deliberate. The panel imposed a one-month suspension to impress upon the public and the profession the seriousness of lawyers' obligations to their governing body.

In *Law Society of BC v. Simons*, 2012 LSBC 23, a lawyer failed to disclose to his client all relevant information regarding her case; namely, that he had not been advancing it according to her instructions and that the defendants were pursuing a dismissal for want of prosecution. The panel held that lawyers must be forthright and honest with clients, members of the public, and other members of the profession. The panel imposed a one-month suspension.

In *Law Society of BC v. Nejat*, 2019 LSBC 16, a lawyer was retained to act in an appeal of a family matter. The lawyer told his client that work had been completed when it had not been, and misled the client about the status of the appeal when it had been dismissed. In addition to misleading his client, the lawyer also made misrepresentations to the Court, stating that he had instructions to bring an application to extend time when he did not. The lawyer admitted to misconduct and resigned from the Law Society for a period of 12 years.

(e) Breach of Undertaking

In *Law Society of BC v. Kruse*, 2001 LSBC 32 and 2002 LSBC 15, while representing the vendor in a real estate transaction, a lawyer gave his undertaking to the purchaser's solicitor that he would "pay or cause to be paid" all arrears of property tax from the sale proceeds. Following the conveyance, the lawyer believed the client had sent a cheque for the taxes, but did not know it had been dishonoured. The lawyer did not know the taxes remained unpaid, until the new owner received a notice for the tax arrears and interest. The Law Society sought an explanation from the vendor's lawyer, but he failed to reply substantively to communications. The discipline hearing panel found that his breach of undertaking and his failure to reply to the Law Society constituted professional misconduct. The panel noted that this was a particularly egregious instance of misconduct, and ordered the lawyer to pay a $12,000 fine (with respect to his breach of undertaking), a $3,000 fine (with respect to his failure to respond) and $6,640.90 in costs.

In *Law Society of BC v. Heringa*, 2003 LSBC 10, while representing two clients in the mortgaging of their property in 1997, the lawyer breached his undertaking to the solicitor for the mortgage lender by failing to discharge an existing first mortgage from title. The hearing

panel found the lawyer's conduct constituted professional misconduct. The panel observed that a reliance on undertakings is fundamental to the practice of law and that serious and diligent attention by lawyers to fulfilling undertakings is essential for maintaining public trust in the profession. The panel ordered that the lawyer arrange to discharge the mortgage, be suspended for one month, be referred to the Practice Standards Committee and pay costs of the discipline proceedings.

Pursuant to s. 48 of the *Legal Profession Act* the lawyer appealed the decision of the hearing panel to the Court of Appeal (2004 BCCA 97). The Court of Appeal rejected the appeal, referring as follows to the "heart of the panel's decision":

> Undertakings are not a matter of convenience to be fulfilled when the time or circumstances suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided by one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.
>
> The trust and confidence vested in lawyer's undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.

In *Law Society of BC v. Hammond*, 2004 BCCA 560, the hearing panel found the lawyer had breached undertakings in a real estate transaction but found that the undertakings were poorly drafted and did not specifically refer to the amounts in dispute as they normally would, such that these amounts had to be implied into the undertaking. The panel found it was appropriate in the circumstances to imply a term to the undertaking and commented generally about the importance of undertakings to the profession, by saying, at para. 55:

> These undertakings are regarded as solemn, if not sacred, promises made by lawyers, not only to one another, but also to members of the public with whom they communicate in the context of legal matters. These undertakings are integral to the practice of law and play a particularly important role in the area of real estate transactions as a means of expediting and simplifying those transactions.

(f) Conflict of Interest

In *Law Society of BC v. Guo*, 2023 LSBC 46, the lawyer, who had a lengthy discipline record, was found to have represented multiple clients when they had competing interests, and to have mixed her personal financial interests with her clients' business dealings. One client paid her for what he thought was an interest in a business, believing she was both his lawyer and business partner. The lawyer transferred her shares to other parties without her client's knowledge. She did this with other clients in the course of representing both their immigration and business law matters. Also, the lawyer was not following proper procedure in opening client files or maintaining records of whom she had had confidential discussions with. She was not maintaining trust funds properly, leading to losses. She was not responding to the Law Society's concerns. She was declared to be ungovernable and was disbarred.

In *Law Society of BC v. Spears*, 2017 LSBC 29, a lawyer admitted to professional misconduct for causing a company owned or controlled by him to borrow $69,000 from his clients. The Law Society permitted him to resign in the face of discipline and agree not to apply for reinstatement for a period of seven years. He was ordered to pay $26,539.17 in costs.

In *Law Society of BC v. Jenab*, 2006 LSBC 30, the lawyer was retained to do legal work on behalf of companies owned by a husband and wife. While acting for the companies and both the husband and the wife, the lawyer engaged in an intimate relationship with the husband. The lawyer admitted she failed to advise the wife of the conflict of interest that arose out of the lawyer acting for the husband and wife while involved in an intimate relationship with the husband. She also admitted acting for the husband, the wife and the wife's company while an actual or potential conflicted existed, without advising the parties of the conflict or advising them to seek independent legal advice. The lawyer was suspended for one month and ordered to pay costs.

In *Law Society of BC v. Hattori*, 2009 LSBC 9, a lawyer accepted a joint retainer to represent a group of three clients who were residual beneficiaries under a contested will, as well as a municipality that was to receive real property under the will. Under the retainer, the lawyer represented both the residual beneficiaries and the municipality in two separate actions involving the estate. On one action the residual beneficiaries and the municipality took different positions on the sale of an estate asset, but the

lawyer sold the asset, overlooking the residual beneficiaries' position. The lawyer admitted that he acted in a conflict of interest by disregarding the residual beneficiaries' instructions, and failed to provide service that would be expected of a competent lawyer in a similar situation. The lawyer admitted that this conduct constituted professional misconduct. The hearing panel accepted the lawyer's admissions and ordered that he pay a $3,000 fine and costs. The panel emphasized the importance for all lawyers to exercise great caution from the outset in accepting and managing a joint retainer (now rule 3.4-5 of the *BC Code*).

(g) Breach of Confidentiality

In *Law Society of BC v. Ewachniuk*, [1995] L.S.D.D. No. 255, a lawyer acted in a motor vehicle accident case and received a settlement offer from ICBC. Although the lawyer recommended the offer, his client did not accept it. Shortly afterwards, the client terminated the lawyer's retainer and went to a new lawyer. The lawyer wrote to the new lawyer taking the position that he was entitled to a percentage fee based on the settlement offer because the client had unreasonably refused it. The lawyer sent a copy of his letter to the ICBC adjuster on the file. The lawyer admitted that in sending a copy of his letter to ICBC he had improperly disclosed confidential client information about the terms of the retainer and his advice to the client to accept the settlement offer. The hearing panel accepted his admission and proposed disciplinary action of a $2,500 fine plus $1,000 towards the cost of the hearing.

In *Law Society of BC v. McLeod*, 2014 LSBC 16 and 2015 LSBC 3, a lawyer had been representing clients in two civil actions and was seeking to be removed as counsel in one of the actions. The hearing panel found that the lawyer had disclosed confidential client information in a notice of application and supporting affidavit he had filed seeking to be removed as counsel. The application and supporting affidavit had been served on the opposing party. The panel ordered a one-week suspension, a fine of $2,500 and costs of $5,000.

(h) Threatening to Report to a Regulatory Body

In *Law Society of BC v. Chetty*, [1997] L.S.D.D. No. 47, a lawyer represented shareholders in a company that had been purchased by another company, R. Ltd. There was a dispute between the shareholders and R. Ltd.

One of the shareholders prepared a draft letter to R. Ltd. for the lawyer to review, in order to save some fees required for an opinion letter. The lawyer made some minor changes to the letter, provided some general advice on defamation law, and advised the client as to the need to be factually accurate in the allegations made. The final version was sent on firm letterhead to in-house counsel at R. Ltd. This letter read, in part:

> . . . Such admission is further proof of the fraudulent practices, deception and misrepresentations being carried out by R. Ltd. in its daily business practices. No doubt heavy fines and various other legal implications could result from these findings when presented to proper authorities. . .
>
> We believe that this letter adequately states the position and demands of the former shareholders. If you wish to discuss this matter, please do not hesitate to contact the writer at your earliest convenience; however, in any event, if we have not had a positive response within five business days of this date we will, without further notice to you, take whatever steps we deem necessary to protect our clients. Please govern yourselves accordingly.

The lawyer did not have instructions from his clients to report R. Ltd. to the authorities as he suggested. The lawyer admitted that while his letter appeared to demand settlement if a complaint to an authority was to be avoided, it was never his intention to exact an advantage in the civil dispute. The lawyer's admission of misconduct contrary to Chapter 4, Rule 2 (now rule 3.2-5 of the *BC Code*) was accepted and endorsed on his professional conduct record.

(i) Threatening Criminal Proceedings

In a 1990 disciplinary action (1990: No. 2), while acting as the executor and solicitor for an estate, the lawyer acted against the interests of the legatees, rendered accounts which were at times inappropriate, and threatened criminal proceedings against one of the beneficiaries for intermeddling with the assets and administration of the estate. While a solicitor in a conveyance, the lawyer inadvertently breached his undertaking. The Committee concluded that the lawyer's errors in judgment constituted incompetence amounting to professional misconduct and that, in threatening criminal proceedings against one of the beneficiaries, the lawyer breached Chapter 4, Rule 2 of the *Professional Conduct Handbook* (now rule 3.2-5 of the *BC Code*). The lawyer was reprimanded, suspended for one month, prohibited from acting as the principal to an articled student until permitted to do so by the Credentials Committee, and ordered to complete a remedial studies program in probate practice.

In a 1997 discipline action (1997: No. 2), counsel admitted to the Discipline Committee that, by writing the letters she had written to opposing counsel, she had violated Chapter 4, Rule 2 (now *BC Code* rule 3.2-5). In this case, the Discipline Committee received a complaint from opposing counsel about two letters written by the lawyer. The lawyer represented a woman who was seeking damages against a man who she alleged had sexually assaulted her throughout her teenage years. In the first letter the lawyer wrote: "We have not as yet filed the Writ. We believe filing the Writ will attract criminal prosecution." To which the complainant replied: "I do not follow why you fear that filing the Writ will bring about criminal proceedings. The Crown does not search the Registry looking for files to prosecute so far as I am aware. I can only assume that you are saying that your client intends to complain to the police if there is no settlement." The lawyer, in turn, replied: "It is my client's position that filing the Writ would expose her privacy and therefore she would have no hesitation in filing the criminal complaint should filing the Writ become necessary. In other words, my client is prepared to go the whole nine yards if we do not receive your offer to settle promptly." The lawyer's admission was endorsed on her professional conduct record.

In *Law Society of BC v. Hittrich*, 2019 LSBC 24 and 2020 LSBC 27, a lawyer representing a client in a proceeding against the Director of Children, Family and Community Services sent a letter to opposing counsel threatening to expose alleged perjury by representatives of the Director unless the Director agreed to resolve the litigation in favour of his client. This action was considered an improper threat for an improper purpose and found to constitute professional misconduct. The lawyer was suspended for three months and ordered to pay costs.

(j) Quality of Service

In *Law Society of BC v. McTavish*, 2018 LSBC 2, a lawyer was retained to assist a client in resolving his mother's estate. The estate was relatively simple with only one significant asset and two beneficiaries: the client and his brother. It took nearly four years to obtain probate, and throughout the retainer, there were lengthy periods of delay and inactivity. The lawyer failed to keep his client reasonably informed about the matter and failed to respond to his communications for a seven-month period. The panel found that the lawyer had failed to provide the quality of service expected of a competent lawyer, and that the conduct constituted professional misconduct. The lawyer admitted to professional misconduct and proposed a fine of $6,000, which the panel accepted.

In *Law Society of BC v. Menkes*, 2016 LSBC 24, a lawyer was retained to handle a personal injury claim. He filed a notice of claim in the Small Claims Registry, but did not serve the notice of claim on the defendants. The lawyer delayed in taking steps to advance his client's claim, failed to respond to his client's communications and failed to take steps that he told the client he would take. The panel held that the misconduct was serious, and that the duty to provide "quality and appropriate legal services" is at the core of a lawyer's duty to the client. The matter proceeded by way of a conditional admission of professional misconduct and an agreement to disciplinary action consisting of a $7,500 fine plus over $1,250 in costs.

In *Law Society of BC v. Wesley*, 2015 LSBC 5 and 2016 LSBC 7, a lawyer failed to enter an order made at a Judicial Case Conference regarding child support, access and custody for approximately 20 months. The lawyer failed to inform her client of the risks of not entering the order. As a result, the client was unable to have the order enforced by the Family Maintenance Enforcement Program. The panel concluded that the lawyer's conduct was a culpable neglect of her duties, which amounted to professional misconduct.

In *Law Society of BC v. Scheirer*, 2022 LSBC 46, a lawyer failed to provide the quality of service expected, and also misconducted himself. The Law Society urged that where misconduct is of more than one type, they be considered globally in fashioning a remedy. The lawyer, contrary to rule 3.2-1 of the *BC Code*, failed to keep his client reasonably informed about her family law matter and failed to respond to requests for information. Also, the lawyer did not take substantive steps to advance her matter. He also failed to maintain an appropriate file to preserve client facts and documents and the advice that he provided her. He was suspended for six months and ordered to pay costs of $24,084. Other troubling aspects of his behaviour later resulted in his conviction for sexual assault. He was disbarred following further disciplinary proceedings (2023 LSBC 50).

(k) Civility

In *Law Society of BC v. Johnson*, 2014 LSBC 8 and 2014 LSBC 50, the lawyer had an altercation outside a courtroom with a police officer, who was a potential witness, and made an in-

appropriate remark to him. While the hearing panel believed that the lawyer was provoked by the police officer, it concluded that the defence of provocation did not apply. The panel stated that the "profession must know that courtesy, civility, dignity and restraint should be the hallmarks of our profession and that lawyers must strive to achieve such." The panel ordered a 30-day suspension and costs of $10,503.05. The decision was upheld by a review panel (2016 LSBC 20).

In *Law Society of BC v. Lanning*, 2009 LSBC 2, a lawyer represented the husband in a family law matter and exchanged letters with the wife who was unrepresented. In 12 of those letters, the lawyer critiqued the wife's correspondence and engaged in name-calling and personal criticism. By way of explanation, the lawyer asserted that the communications were a "brilliant but unorthodox strategy" to "crush," "squelch," or "defeat" the wife in order to advance his client's interests. The hearing panel referred to the *Canons of Legal Ethics* and emphasized that a lawyer's communications must be courteous, fair and respectful and that a lawyer is to refrain from personal remarks or references and to maintain objectivity and dignity. The lawyer's letters to the unrepresented wife in this case were rude, deliberately provocative and belittling of an opposing party. Even if his purpose was to advance the interests of his client, this does not justify the incivility and discourtesy contained in the letters. The panel noted that lawyers face many challenges in dealing with unrepresented litigants, particularly in family matters. Parties can easily descend into name calling and uncivil language. The panel urged lawyers to rise above this behaviour. The hearing panel held that the lawyer's correspondence fell markedly below the standards expected of lawyers and that it amounted to professional misconduct. The panel ordered that the lawyer be reprimanded and pay a fine of $2,500 and costs of $6,600.

In *Law Society of BC v. Laarakker*, 2011 LSBC 29 and 2012 LSBC 2, a lawyer responded to a demand letter sent to his client. The demand, from an Ontario lawyer representing a retailer, proposed to pursue the BC client for damages from the client's minor child shoplifting. The BC lawyer's response to the demand made personal and discourteous remarks to the Ontario lawyer. Before sending the letter to the Ontario lawyer, the BC lawyer also posted comments online about the Ontario lawyer's practice of sending demand letters to parents of minor children caught shoplifting at the retailer's stores. Online, the lawyer called the Ontario lawyer a "sleazy operator" and said, "This guy is the kind of lawyer that gives lawyers a bad name." In finding the lawyer had committed professional misconduct, the hearing panel considered the *Canons of Legal Ethics*:

> The duties described in those Canons are not restricted to situations where the lawyer agrees with the position, or the practice style, of the opposing lawyer or party. The duty of courtesy and good faith applies to all counsel, regardless of one's feelings about them. The Canons specifically note that "personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers which cause delay and promote unseemly wrangling.

In *Law Society of BC v. Harding*, 2022 LSBC 34, a lawyer had a history of making flippant and uncivil remarks about opposing counsel, which he claimed were made out of zealous advocacy and trouble restraining his outbursts. Although he provided letters from lawyers who supported his position that he was a capable senior lawyer motivated by zeal, the panel said that such rudeness corrodes civility, and a discipline hearing is not a popularity contest among lawyers. He was suspended for two months and ordered to pay costs of $14,000.

(l) Improper Commissioning of Documents

In *Law Society of BC v. Wong*, 2012 LSBC 15, a lawyer was ordered to pay a $3,500 fine and $3,000 in costs for instructing his associate to prepare what the lawyer called a "take-out affidavit" and financial statement. On the lawyer's instructions, the associate sent their client the affidavit with the jurat blank. The associate administered the oath over the phone. The client returned the signed signature page to the associate, who inserted the date of swearing as the day that the associate had administered the oath over the phone. The client was never physically present before the lawyer to properly satisfy what were then the requirements of swearing an affidavit.

In *Law Society of BC v. Grant*, 2003 LSBC 9, a lawyer was reprimanded and ordered to pay costs for improperly witnessing a client's oath on a financial statement. The client swore the first page of a blank form of a financial statement after reviewing a pencilled copy of it. Before swearing the affidavit to which the financial statement would be appended, the client had confirmed that its contents were true and correct, and had authorized the lawyer's staff to type up the pencilled copy of the financial statement. The statement was typed up on the

executed form and not altered from the pencilled version. The panel characterized the lawyer's professional misconduct as a "technical breach," as the pencilled version of the document existed at the time the affiant swore the blank form. The lawyer had self-reported her conduct to the Law Society.

In *Law Society of BC v. Cranston*, 2006 LSBC 36, a lawyer signed a bill of sale as a witness of the signature of a vendor on the transfer of a boat from a father to his son. The son had been a client of the lawyer. The vendor father did not appear before the respondent to sign the bill of sale, and did not in fact sign it, which the respondent knew when he signed the document. The lawyer explained he signed the document because he believed it was part of a "family joke." The lawyer admitted his professional misconduct, was reprimanded and ordered to pay a fine and costs.

In *Law Society of BC v. Skapski*, 2012 LSBC 8, a lawyer sought to circumvent regulations of the Department of Fisheries and Oceans. He dated and affixed his signature to a document that had been declared before him eight years earlier. He was reprimanded and fined $2,000.

(m) Tampering With a Witness

In *Law Society of BC v. Ewachniuk*, 2000 LSBC 18, a lawyer intimidated two American witnesses, dissuading them from giving evidence in Canada. The witnesses' evidence would have been damaging to the lawyer's clients. In addition, the lawyer asked Canadian Crown Counsel to lay charges against the witnesses to prevent them from travelling to Canada to give evidence. The Committee found the lawyer guilty of professional misconduct for both actions. Because the lawyer attempted to subvert the course of justice and because his behaviour went against the very fundamental duties of a lawyer, he was found unfit to practice, disbarred, and ordered to pay costs of the disciplinary hearing.

(n) Charging Excessive Fees/Altering Time Sheets to Obtain Increased Fees

In *Law Society of BC v. Hudson*, 2014 LSBC 2, a lawyer was disbarred for knowingly submitting numerous false invoices to the Legal Services Society (LSS) on her behalf and on behalf of other lawyers employed at her firm. The invoices also included falsely billing for time spent by lawyers in order to recover time spent by legal assistants, as the LSS did not permit billing for work performed by legal assistants. The hearing panel concluded that disbarment was the only appropriate sanction as "any other sanction would compromise the public confidence in the profession's integrity and suggest that the legal profession does not take dishonesty committed by lawyers seriously."

In *Law Society of BC v. King,* 2007 LSBC 22 and 2007 LSBC 52; and *Law Society of BC v. Dennison,* 2007 LSBC 23 and 2007 LSBC 51, two lawyers were associated with law firms that performed contract work for the Department of Justice. The two lawyers had certification authority for submitting the accounts to the Department of Justice for work done. The lawyers, in effect, subcontracted the actual work to associates in an office that was located in a different town. A forensic accountant determined that the lawyers had altered the time sheets the subcontracting associates had submitted, thereby inflating the hours spent on the files and submitting false accounts to the Department of Justice. Over the course of 15 months, the Department of Justice was wrongfully billed more than $277,000. The lawyers were cited for professional conduct or conduct unbecoming. The panel found that the lawyers knew or ought to have known that the altered accounts would be presented for payment, although the panel did not find any evidence that the lawyers personally benefited from the billing inflation. The panel found that the lawyers had falsified documents for the purpose of defrauding the Department of Justice. The panel concluded that this behaviour (i.e. deliberate dishonesty, involving relatively large amounts of money over an extended period of time) is among the most serious types of breach that can be committed by a lawyer. The panel ordered the lawyers be disbarred and to pay costs.

In [1997] L.S.D.D. No. 52, a lawyer rendered accounts over a period of 14 months to the LSS for Legal Aid services that he was not entitled to bill for. The lawyer also deposited two trust cheques to his general law firm account, instead of to his trust account, and did not immediately discover or correct the trust shortfall. In determining the sanction, the hearing panel considered that at the time of the events in question the lawyer was experiencing depression and extreme psychological stress due to the breakdown of his marriage. The panel determined that a sanction less than disbarment would meet the best interests of the public and the profession. He was suspended for 18 months and ordered to pay costs.

(o) Failure to Pay Practice Debts

In *Law Society of BC v. Edwards*, [1996] L.S.D.D. No. 21, a lawyer requested a medical

report from a doctor and the doctor testified at the trial of a personal injury case. The doctor rendered two bills to the lawyer which remained unpaid for over a year. During that time, the lawyer rendered a bill to his client for a percentage of the amount recovered on the judgment in the client's favour, plus disbursements and costs. The lawyer deducted the amount of his bill from the payment of the judgment and sent the balance to his client. Although the bill included the amount of the doctor's bills as disbursements, the lawyer did not pay the doctor's bill using the money he received. The hearing panel found that the lawyer's failure to pay the doctor's bill from the money he received on account of disbursements and the excessive fee represented by the addition of costs to the bill, amounted to professional misconduct and ordered that the lawyer be reprimanded and required to pay $1,000 towards the costs of the hearing.

In *Law Society of BC v. Evans*, 2000 LSBC 20, following a fee review, the lawyer's fees were reduced by the registrar and issued a certificate in favour of the clients for the amount reduced. The clients filed the certificate in the Supreme Court and it was accordingly deemed a judgment under the provisions of the *Legal Profession Act*. The lawyer did not pay the judgment or notify the Law Society that it remained unpaid. The lawyer admitted his actions constituted professional misconduct and he was reprimanded and ordered to pay costs.

(p) Obligations Regarding Payment of GST/PST

In *Law Society of BC v. Purvin-Good*, 2004 LSBC 5, a lawyer declared bankruptcy and provided the Law Society with a copy of the proposal he made pursuant to the *Bankruptcy and Insolvency Act*, which revealed he had failed to pay GST and PST collected in the course of his practice. The lawyer was cited for his failure to remit funds collected for PST and GST and for failing to meet financial obligations incurred in the course of his practice. The lawyer admitted his conduct constituted professional misconduct and was fined and ordered to pay costs.

In *Law Society of BC v. Welder*, 2007 LSBC 29, the lawyer failed to remit funds collected to pay GST and PST, as required by statute. A judgment for over $14,900 was filed against the lawyer for PST owed. The lawyer did not satisfy this judgment within seven days, and then failed to notify the Executive Director of the Law Society of the judgment and his proposal to satisfy it, in breach of Rule 3-50. He admitted, and the hearing panel found, that his conduct constituted professional misconduct. The panel ordered that the lawyer be fined $2,500 and reprimanded. Because of uncertainty over the lawyer's total indebtedness, the panel further ordered that he consult with a licensed trustee in bankruptcy who would report to the Law Society. Further, the panel ordered that the lawyer provide the Law Society with quarterly statutory declarations setting out his total fee billings and total GST and PST remittances for each quarter, until relieved of the condition by the Discipline Committee.

(q) Failure to Supervise Staff

In *Law Society of BC v. Morris*, [1992] L.S.D.D. No. 17, the lawyer professionally misconducted himself in allowing his secretary to handle hundreds of estate files without adequate supervision. In many instances, the secretary met with clients to take instructions, prepared wills without supervision, gave legal advice, and attended on the execution of wills, all contrary to provisions of the *BC Code*. Following a Practice Review, the lawyer was cited. The lawyer proposed to the Discipline Committee that, as a condition of practice, he review all his estate files and that he correct all problems at his own (considerable) expense. After he had finished this process, an experienced wills practitioner retained by the Law Society reviewed the files and found that he had taken appropriate steps to correct problems on the files. The Committee ordered that the lawyer complete a wills drafting course administered by the Law Society at his own expense, and pay costs of the Law Society Practice Reviews totalling $6,130.

In *Law Society of BC v. Visram*, [1992] L.S.D.D. No. 22, a lawyer professionally misconducted himself by failing to properly supervise C who was employed by him as a legal assistant. After receiving complaints, the member knew that that C had misrepresented himself as a lawyer, and wrote a lengthy letter of response to the Law Society about the complaints about allowing C to run client files without supervision. After writing this letter, C misrepresented himself as an articled student. The lawyer was then willfully blind to C's actions by failing to supervise them. The lawyer also failed to maintain a direct relationship with some clients and to assume full professional responsibility for work done for clients. The lawyer was reprimanded; ordered to undergo a practice review at his cost and to undertake any remedial programs recommended by the Competency Committee; undertake not to act as a principal to an articled student without prior written consent of the Law Society and to pay costs.

(r) Participating in Suspicious Activity (Anti-Money Laundering Concerns)

In *Law Society of BC v. Pelletier*, 2023 LSBC 3 and 2023 LSBC 47, the lawyer accepted into his trust account funds that he knew were the proceeds of a securities fraud being investigated in the United States. It was found that he knowingly assisted in laundering funds without providing any legal services. He was disbarred.

In *Law Society of BC v. Gurney*, 2017 LSBC 15 and 2017 LSBC 32, a lawyer used his trust account to transfer almost $26 million in connection with four line-of-credit agreements in which his client was the sole borrower. The lawyer had not provided any legal services and was effectively acting as a bank or deposit-taking institution. The hearing panel found that the lawyer had breached his professional and ethical duties by failing to make reasonable inquiries about the transactions, and by using his trust account as a conduit for funds, notwithstanding "the series of transactions being objectively suspicious." The lawyer was suspended for six months and ordered to pay to the Law Society $26,845, representing disgorgement of the "fee" that had been paid to him.

In *Law Society of BC v. Hsu*, 2019 LSBC 29, a lawyer's client was found by the BC Securities Commission to have committed fraud by deceiving investors and misappropriating over $5 million in investor funds. The lawyer was found to have engaged in conduct she ought to have known assisted or encouraged the fraud, and of taking on a securities file when she was not competent to do so. She had helped create the investment structure, which offered no protection to investors and left them with a false sense of security. She did not question her client as to whether he was registered to sell securities or actually owned the shares he purported to sell, among other things. She also permitted the use of the firm's trust account to receive and disburse investment funds. The lawyer was suspended for three months and ordered to pay costs of $1,000. She was also restricted from practising in the area of securities law until relieved by the Discipline Committee.

In *Law Society of BC v. Hammond*, 2020 LSBC 30, a lawyer allowed his trust account to be used to receive and disburse funds without providing any legal services in connection with the matter or making any inquiries about the underlying transactions. While there was no evidence of fraud or loss, the lawyer failed to fulfill his required role as gatekeeper of his trust account. The lawyer was suspended for two weeks and ordered to pay costs of $1,000. A two-week suspension was also ordered in *Law Society of BC v. Daignault*, LSBC 2020 18, where a lawyer also allowed his trust account to be used without providing any substantial legal services in connection with the trust matters.

In *De Lange, Admission and Undertaking dated November 7, 2022*, a citation was issued March 3, 2021 and on November 7, 2022 the lawyer entered into an admission of misconduct and undertaking to the Discipline Committee (Rule 4-29). The lawyer admitted that in 65 transactions over a period of three years he allowed his trust account to be used to receive and disburse funds in suspicious circumstances without making reasonable inquiries. The lawyer agreed to a suspension from practice for 15 years, and agreed that if he were ever to seek to become licensed again, he would face a credentials hearing.

(s) Sexual Harassment

In *Law Society of BC v. Butterfield*, 2017 LSBC 02, a lawyer made a conditional admission of professional misconduct for sexually harassing two of his employees. The lawyer's conduct included making inappropriate comments of a sexual nature, which the lawyer incorrectly viewed as humorous banter but instead caused significant distress to both employees. Once the employees' concerns were raised with the lawyer, he apologized and modified his behaviour, including introducing new office policies to prevent similar occurrences from happening in the future. The lawyer consented to pay a fine in the amount of $10,000, costs of the hearing, and to complete a sensitivity training course.

2. Conduct Unbecoming

Under s. 1(1) of the Rules, "'conduct unbecoming a lawyer' includes any matter, conduct or thing that is considered, in the judgment of the Benchers, a panel or a review board,

(a) to be contrary to the best interest of the public or of the legal profession, or

(b) to harm the standing of the legal profession."

Rule 2.2-1[3] of the *BC Code* provides further guidance:

> Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

In *Law Society of BC v. Berge*, 2005 LSBC 28 at para. 77 (upheld on review 2007 LSBC 7), the hearing panel cited with approval the "useful working distinction" between professional misconduct and conduct unbecoming which was set out in *Law Society of BC v. Watt*, 2001 LSBC 16 at para. 5:

> In this case the Benchers are dealing with conduct unbecoming a member of the Law Society of British Columbia. We adopt as a useful working distinction that professional misconduct refers to conduct occurring in the course of a lawyer's practice while conduct unbecoming refers to conduct in the lawyer's private life.

This distinction was recently affirmed in *Law Society of BC v. Scheirer*, 2023 LSBC 18, where a lawyer was found guilty of sexual assault and the behaviour was treated as a professional misconduct matter, not a matter of conduct unbecoming, because it occurred in the course of his legal practice.

Conduct unbecoming can encompass a range of conduct, including these examples:

(a) Criminal and other illegal conduct

- assault (2005 LSBC 29),
- impaired driving (2009 LSBC 35),
- tax evasion (2006 LSBC 44, and [1971] B.C.J. No. 678 (C.A.)), and
- drug possession (2001 LSBC 16);

(b) Misleading or dishonest conduct

- consuming mouthwash and disposing of an open beer can, to avoid a breathalyzer demand after a crash (2005 LSBC 28, aff'd 2007 LSBC 7), and
- writing cheques back and forth on several personal accounts when the lawyer knew there were insufficient funds and that his credit line was exceeded (2015 LSBC 49);

(c) Lying on a Law Society application

- 2009 LSBC 23 (re: criminal record and prior use of another name), and
- 2009 LSBC 3 (re: criminal record);

(d) Breach of trust, fiduciary or other obligations

- taking unauthorized payments as director of a company (2001 LSBC 34),
- while acting as trustee, knowingly releasing trust funds in breach of trust terms (1999 LSBC 19), and
- as executor, failing, over a significant period, to renounce or to take steps required to administer the estate (2012 LSBC 6);

(e) Inappropriate public comments

- unwarranted comments about a judge ([1994] L.S.D.D. No. 194);

(f) Failing to comply with a court order

- in a custody and access dispute with a former spouse (1999 LSBC 26);

(g) Deemed conduct unbecoming

- financial irresponsibility contributing to bankruptcy (Rule 3-51(3)(a)), and
- failing to take reasonable steps to obtain discharge from bankruptcy (Rule 3-51(3)(b)).

3. Breach of the Act or the Rules

Discipline violations include breaches of the Act or the Rules even in the absence of professional misconduct, conduct unbecoming, and incompetence.

The distinction between an Act or rule breach and professional misconduct was considered by the hearing panel in *Law Society of BC v. Lyons*, 2008 LSBC 9 at para. 32:

> A breach of the Rules, does not, in itself, constitute professional misconduct. A breach of the *Act* or the Rules that constitutes a "Rules breach", rather than professional misconduct, is one where the conduct, while not resulting in any loss to a client or done with any dishonest intent, is not an insignificant breach of the rules and arises from the respondent paying little attention to the administrative side of practice (*Law Society of BC v. Smith*, 2004 LSBC 29).

The hearing panel in *Lyons* set out some facts to consider in determining whether a breach of the Act or rules would constitute professional misconduct (at para. 35):

> In determining whether a particular set of facts constitutes professional misconduct or, alternatively, a breach of the Act or the Rules, panels must give weight to a number of factors, including the gravity of the misconduct, its duration, the number of breaches, the presence or absence of mala fides, and the harm caused by the respondent's conduct.

Certain rule breaches are seen more frequently than others. These include:

(a) Failure to report unsatisfied judgment

Rule 3-50 requires lawyers to report judgments still unsatisfied seven days after entry. The report must include the lawyer's proposal to satisfy the judgment.

(b) Failure to report criminal or other charge

Subject to certain exceptions, Rule 3-39 requires lawyers to report "all relevant infor-

mation" when they have been charged with a federal or provincial offence.

(c) Breach of the cash transactions rules

Subject to certain exceptions, Rule 3-59 prohibits lawyers from accepting cash in an amount greater than $7,500 in respect of any one client matter or transaction. The rule also prescribes what a lawyer must do if the lawyer receives such cash.

(d) Breach of the client identification and verification rules

Rules 3-98 to 3-110 require lawyers to follow client identification and verification procedures when providing legal services. A lawyer is obligated to retain copies of documents used to verify a client's identity. There is no exemption from these rules for a lawyer's family and friends. Additional steps must be taken in non-face-to-face transactions.

(e) Breach of Law Society accounting rules

Division 7 of Part 3 of the Rules prescribes trust and other accounting rules with which lawyers must comply. Lawyers commonly hold large sums of money in trust. The rules cover matters including:

(i) What records must be kept,

(ii) How trust funds must be held,

(iii) What steps must precede withdrawals from trust,

(iv) What steps must follow discovery of a trust shortage, and

(v) What reports a lawyer must make to the Law Society.

It is also important to note that lawyers must not permit funds to be paid into or withdrawn from their trust accounts unless the funds are directly related to legal services provided by the lawyer or their law firm (Rule 3-58.1).

4. Incompetence

The nature of "incompetence" was considered in *Law Society of BC v. Goldberg*, 2007 LSBC 3, aff'd 2008 LSBC 13, aff'd 2009 BCCA 147. In the hearing decision, the panel commented upon competency at para. 50:

> A useful discussion of competence can be found in The Regulation of Professions in Canada by James T. Casey, commencing at page 13 though to page 14. In summary, the question is whether or not a mistake or mistakes made by a professional will be of such significance so as to demonstrate incompetence. Assessing incompetence is a function of looking at the nature and extent of the mistake or mistakes and the circumstances giving rise to it or them. It may be self-inflicted or the result of negligence or ignorance.

The hearing panel concluded at para. 63:

> …the affidavits drawn by the Respondent demonstrate a complete lack of knowledge of the law of evidence. The Respondent's written material demonstrated a serious lack of knowledge and skill for the reasons set out above.

On review, the review panel upheld the finding of incompetence in respect of the respondent's preparation and submission to court of materials in four criminal appeals. In doing so, it observed at para. 15 that "[i]ncompetence is the want of ability suitable to the task (see *Mason v. Registered Nurses' Association of British Columbia* (1979), 13 B.C.L.R. 218 (S.C.)."

Findings of incompetent performance of duty have been made in various circumstances, including:

(a) Repeatedly missing court appearances and making misrepresentations to the court (2011 LSBC 24); and

(b) Failing to maintain proper office procedures and neglecting client files ([1992] L.S.D.D. No. 20).

Chapter 4

Professional Liability[1]

[§4.01] Basis of Liability

Lawyers can be found liable to a client or former client for breach of contract, negligence, or breach of fiduciary duty. Lawyers may also be sued for breach of an undertaking, breach of trust, conspiracy, and fraud. The most common cause of action brought against a lawyer is negligence (including negligent misrepresentation).

A lawyer may be liable to a range of persons:

- A lawyer may be liable to the lawyer's client for breach of a contractual duty (that is, breach of the retainer agreement). An implied term of every retainer is to exercise due care, skill and judgment in the delivery of legal advice and legal services.
- A lawyer may be liable in negligence to persons with whom the lawyer has no contractual relationship, under the principles of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.).
- A lawyer may also be liable in negligence to persons with whom the lawyer has no contractual relationship, under the broader neighbour and proximity principles of *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) and its successor cases.
- A lawyer may be liable for breach of a fiduciary duty to persons with whom the lawyer has no contractual relationship (see §4.06).
- A lawyer may be liable to the lawyer's own client in negligence or for breach of a fiduciary duty in addition to liability for a concurrent breach of contractual duty.

[1] Updated by staff lawyers of the Law Society of British Columbia, most recently in March 2023. Dirk J. Sigalet, KC, of Sigalet & Co, reviewed this chapter in 2018 and 2012. This chapter was based originally on excerpts from "A Lawyer's Liability for Negligence—Care is Not Enough" by Keith R. Hamilton, prepared for the Law Society of BC in 1986, and on excerpts from materials prepared for CLE: A.K. Mackintosh, "Liability of Solicitors" (1983), K.C. MacKenzie, KC, "Breach of Fiduciary Duty" (1990) and G.R. Skittle, KC, "Liability for Erroneous Opinions and Professional Liability Insurance Coverage" (1990).

[§4.02] Evolution of Liability in Negligence

The lawyer's liability for professional negligence expanded as a result of three English cases that did *not* involve lawyer negligence. These cases established tests for the duty of care owed by defendants in negligence claims.

1. The Relationship of Proximity

Donoghue v. Stevenson, [1932] A.C. 562 (H.L.), the case of the snail in a bottle of ginger beer, held that the defendant manufacturer owed a duty of care to the plaintiff consumer, which shattered the privity-of-contract barrier. In *Donoghue v. Stevenson* at 580, Lord Atkin established the notion of a relationship of proximity in the following test:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

2. Reliance on Special Skill or Knowledge

The special duty of care set out in *Hedley Byrne* became an additional basis for liability. The plaintiff company asked their bankers for an opinion about the standing of a second company, and the bankers obtained an erroneous opinion about the second company from the second company's bankers. The plaintiff company sued the second company's bankers. *Hedley Byrne* was approvingly adopted by the Supreme Court of Canada in *Queen v. Cognos Inc*., [1993] 1 S.C.R. 87 at 109:

> The required elements for a successful *Hedley Byrne* claim have been stated in many authorities, sometimes in varying forms. The decisions of this Court […] suggest five general requirements: (1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

Hedley Byrne and subsequent cases establish that reliance upon the defendant is a crucial element to a finding of professional liability.

3. The Test of Neighbourliness

In *Anns*, a case involving a structural housing inspection by a local authority, the House of Lords brought together the *Donoghue v. Stevenson* principle of proximity with the *Hedley Byrne* principle of reliance on special skill or knowledge. *Anns* summarized a new two-stage test and an expanded duty of care, which has been interpreted by the Supreme Court of Canada in *Cooper v. Hobart*, 2001 SCC 79 at para. 30:

> At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? […]. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.

The principle in *Anns* that a "*prima facie* duty of care" arises wherever there is a sufficient relationship of "proximity or neighbourhood" has been applied several times in Canada to help establish an expanded duty of care for lawyers. The British Columbia Court of Appeal affirmed this view in *Kripps v. Touche Ross & Co.* (1992), 94 D.L.R. (4th) 284.

[§4.03] Scope of the Lawyer's Liability in Negligence

Claims against lawyers for negligence are generally brought by those to whom a lawyer owes a duty of care: clients and former clients. However, even non-clients, such as opposing parties in transactions or in litigation, beneficiaries (or disappointed beneficiaries) under a will, and people who placed money in trust with a lawyer, might make a claim against a lawyer.

Although a lawyer generally owes no duty of care to non-clients, apart from breaches of undertakings and of trust, there are circumstances in which a lawyer may be found liable to a non-client. For example, in *Tracy v. Atkins* (1979), 16 B.C.L.R. 223 (C.A.), a case involving a mortgage transaction, the lawyer took on a role of proximity to a non-client; the non-client relied on the lawyer, who was liable.

Also, a lawyer might be found to have a duty to non-clients to advise that they seek independent legal advice; see *De Cotiis v. McLellan*, 2009 BCCA 596 at paras. 26–27. In most situations, however, a non-client will be unable to establish the necessary reliance (and the lawyer's knowledge of that reliance) by the non-client. For further discussion of these issues, see *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.* (1989), 40 B.C.L.R. (2d) 288 (C.A.).

A lawyer cannot owe a duty of care to the opposite party in a commercial transaction: *Kamahap.* However, in *Elliott v. Hossack*, 1999 CanLII 6001 (B.C.S.C.), a lawyer was found liable to one partner in a business transaction because the lawyer had not made it clear to that partner that the lawyer did not act for him. Also, keep in mind a lawyer's duties with respect to self-represented litigants (see Chapter 6).

Generally, a barrister cannot owe a duty of care to the opposing party: see, for example, *Crooks v. Manolescu,* 1995 CanLII 1818 (B.C.S.C.). The courts will not impose on a lawyer a duty to a non-client if such a duty would conflict with that lawyer's duty to the client: *Smolinski v. Mitchell*, 1995 CanLII 1545 (B.C.S.C.).

A lawyer may be liable to a non-client if the lawyer's client is perpetrating a fraud with the lawyer's unwitting assistance. In *Dhillon v. Jaffer*, 2012 BCCA 156, a lawyer was liable in negligence for assisting the fraudster to sell her matrimonial home and receive all the proceeds while the other spouse was out of the country.

The duty of care that a lawyer who drafts a will could owe to disappointed beneficiaries is considered in *Smolinski* and in *Korpiel v. Sanguinetti*, [1999] CanLII 6524 (B.C.S.C.). See also *Practice Material: Wills*, Chapter 6.

Lawyers may also be liable for referrals to other professionals or advisors. See *Salomon v. Matte-Thompson*, 2019 SCC 14, in which the Supreme Court of Canada found a lawyer and his firm liable for over $7 million for investment losses for referring their clients to a financial advisor who later turned out to be involved in a Ponzi scheme. Gascon J., writing for the majority, stated:

> [96] This is not a case about a mere referral. It concerns a referring lawyer who, over the course of several years, recommended and endorsed a financial advisor and financial products, and encouraged his clients to retain their investments with that advisor. Further, in doing this, he failed to perform adequate due diligence, misrepresented investment information, committed breaches of confidentiality and acted despite being in a conflict of interest. In such a context, a lawyer cannot avoid liability by hiding behind the high threshold for establishing liability that applies in a case in which a lawyer has merely referred a client.

When referring a client to other service providers, a lawyer must act "competently, prudently and diligently" and be satisfied that the service provider is sufficiently competent for the mandate (*Salomon* at para. 45).

In British Columbia, a lawyer cannot contract out of liability for professional negligence: see Law Society Rule 8-3(c) and the *Legal Profession Act*, s. 65(3).

A lawyer is liable for the work performed by the law firm, even if it is delegated to non-lawyers, such as assistants, designated paralegals, or articling students.

[§4.04] Limitation Period

Under the current *Limitation Act*, which came into effect June 1, 2013, the limitation period for a claim against a lawyer is two years after the day on which the claim is discovered (s. 6(1)). Divisions 2 and 3 of the Act set out the rules that determine when a claim is discovered.

[§4.05] Standard of Care

The standard of care of a lawyer has been authoritatively stated by the Supreme Court of Canada in *Central Trust v. Rafuse* (1986), 31 D.L.R. (4th) 481 at 523:

> A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken: see *Hett v. Pun Pong*, [1890] 18 S.C.R. 290 at 292. The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor.

Tiffin Holdings Ltd. v. Millican et al. (1964), 49 D.L.R. (2d) 216 (Alta. S.C.), aff'd [1967] S.C.R. 183, discussed the standard of care as follows:

> Lawyers are bound to exercise a reasonable degree of care, skill and knowledge in all legal business they undertake. Their liability arises out of contract.
>
> The standard of care and skill which can be demanded from a lawyer is that of a reasonably competent and diligent solicitor.
>
> It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that the error or ignorance was such that an ordinarily competent lawyer would not have made or shown it.
>
> […]
>
> The obligations of a lawyer are, I think, the following:
>
> (1) To be skilful and careful;
>
> (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary;
>
> (3) To protect the interests of his client;
>
> (4) To carry out his instructions by all proper means;
>
> (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left him;
>
> (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.

The principles in *Central Trust* and *Tiffin Holdings* have been applied in many British Columbia court decisions (see e.g. *Lau v. Ogilvie*, 2010 BCSC 1589; *Campbell v. Ragona*, 2010 BCSC 1339; *Stratus Contracting Ltd. v. Zimmerman*, 2018 BCSC 2308 and *Thind v. Smith-Gander*, 2022 BCSC 1167).

The standard of care is not perfection: *Marbel Developments Ltd. v. Pirani* (1994), 18 C.C.L.T. (2d) 229 at 243 (B.C.S.C.) and *Carlsen v. Southerland*, 2006 BCCA 214. The law distinguishes between unreasonable mistakes breaching the standard of care and mere "errors in judgment" that any reasonable professional might have made, which therefore do not breach the standard of care: *Mac v. Wong*, 2019 BCSC 902 at para. 56, and *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 73.

The result is that a lawyer will not be held liable for an error in judgment. See, for example, *Sports Pool Distributors v. Dangerfield*, 2009 BCCA 483, where the Court of Appeal stated that a solicitor should not be found negligent for not obtaining a term in a transaction that, at a later date, may have been available:

> [31] A solicitor who accepts instructions to negotiate an agreement, even where, as here, he is expressly instructed to maximize his client's protection, cannot give any assurance the terms he will be able to obtain will necessarily achieve the level of protection the client wishes to have. […] [N]egotiations are by their nature always a matter of give and take. A solicitor can only attempt through his negotiating skill to minimize his client's risk. But the extent to which he can do so will invariably depend on the terms he is able to obtain. Some solicitors are, of course, better negotiators than others.
>
> [32] I do not consider a solicitor can be held to have been negligent in the conduct of negotiations because he did not obtain a term that, at a later time, it is said may have been available. It is not necessary to consider what the solicitor's position would have been here if the term had been available. […]

Lawyers must know the basics of the applicable law, and must be able to recognize circumstances that call for additional legal research. See *Central Trust* at 524:

> A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his "working knowledge," without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points.

A lawyer is expected to be aware of the relevant law, and refer the court to that law, according to *Lougheed v. Armbruster* (1992), 63 B.C.L.R. (2d) 316 (C.A.):

> [C]ounsel has a duty to be aware of all cases in point decided within the judicial hierarchy of British Columbia, which consists of the Supreme Court of Canada, this Court and the Supreme Court of British Columbia, and where applicable, one of its predecessor courts, the County Court, and to refer the court to any on which the case might turn.

Lawyers have a duty to warn their clients of any risk involved in proceeding in the manner recommended by the lawyer (see e.g. *Marbel Developments Ltd.*, *supra*).

[§4.06] Fiduciary Duty

According to the Supreme Court of Canada, where a relationship has as its essence discretion, influence over interests, and inherent vulnerability, a strong but rebuttable presumption arises that one party has a fiduciary duty to act in the best interests of the other: *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 647 and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 409, as explained by Grant and Rothstein, *Lawyers' Professional Liability*, 2nd ed. (Toronto: Butterworths, 1998), Chapter 3. The lawyer-client relationship falls into this category: lawyers owe fiduciary duties to their clients.

Fiduciary obligations for lawyers flow from three basic principles (Grant and Rothstein, *supra*):

(1) lawyers must represent their clients with undivided loyalty;

(2) lawyers must preserve their clients' confidences; and

(3) lawyers must make full disclosure of all relevant and material information relating to their clients' interests.

A fiduciary relationship can arise in one of two ways, according to *Sarzynick v. Skwarchuk*, 2021 BCSC 443 at para. 175:

(1) *per se* fiduciaries that come from certain established classes of relationships that include solicitor-client relationships: *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 at para. 115; and

(2) *ad hoc* fiduciary relationships that give rise to fiduciary obligations in the circumstances: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 36, and clarified in *Professional Institute*, *supra*, at para. 128.

A lawyer's breach of fiduciary duty was canvassed in *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534. The decision comments on misrepresentation or failure to disclose as a breach of a fiduciary duty. Fiduciary duty may be breached when the solicitor fails to inform a client of a relevant fact, or fails to advise the client to seek independent advice, even if the lawyer does not benefit personally from the non-disclosure or misstatement.

Although it is not uncommon for breach of fiduciary duty to be *pleaded* in lawyer's negligence cases, some judges prefer confining such a pleading to limited circumstances. Madam Justice Southin criticized a pleading of breach of fiduciary duty in *Girardet v. Crease & Co.* (1987), 11 B.C.L.R. (2d) 361 (S.C.), stating that an allegation of breach of fiduciary duty carries with it "the stench of dishonesty—if not of deceit, then of constructive fraud" (at 362). In *Shedwill v. Clark Wilson*, [1990] B.C.J. No. 2747 (B.C.S.C.), Hardinge J. stated: "I think it unseemly for lawyers to allege breach of fiduciary duty by other members of the profession when all they really seek to prove or the most they could hope to prove would be simple common law negligence." Hardinge J. went on to clarify those remarks in *Shedwill v. Clark*, 1991 CanLII 2395 (B.C.S.C.):

> It is true that in my reasons for judgment, I expressed disapproval of the tendency to couple allegations of breach of fiduciary duty with those of negligence and breach of contract whenever actions are brought against solicitors for damages based on their professional advice or lack thereof. However, my comments were not intended to suggest that any allegation of breach of fiduciary duty against a solicitor in respect of his professional responsibilities necessarily imports an allegation of intentional wrong doing. Indeed, as was held in *Nocton v. Lord Ashbury*, [1914] A.C. 932 it is not necessary to prove moral fraud in order to succeed in an action for breach of fiduciary duty.

1. Duty of Loyalty

The duty of loyalty is intertwined with the fiduciary nature of the lawyer-client relationship. According to the Supreme Court of Canada in *R. v. Neil*, 2002 SCC 70, there are three aspects to a lawyer's fiduciary duty of loyalty to a client:

(1) a duty to avoid conflicting interests;

(2) a duty of commitment to the client's cause; and

(3) a duty of candour on all matters relevant to the retainer.

A lawyer's fiduciary duty of loyalty was examined in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at paras. 34–36:

> When a lawyer is retained by a client, the scope of the retainer is governed by contract. […] The solicitor-client relationship thus created is, however, overlaid with certain fiduciary responsibilities, which are imposed as a matter of law. […] Not every breach of the contract of retainer is a breach of a fiduciary duty. [… F]iduciary duties provide a framework within which the lawyer performs the work and may include obligations that go beyond what the parties expressly bargained for. […] Fiduciary responsibilities include the duty of loyalty […]. Loyalty includes putting the client's business ahead of the lawyer's business.

The duty of loyalty was further examined in *Salomon v. Matte-Thompson*, 2019 SCC 14, in which the appellant lawyer introduced and endorsed his financial advisor and friend to his clients who in

turn suffered losses in fraud. The Supreme Court of Canada dismissed the appeal and found that the appellant lawyer's faults with respect to both his duty of loyalty and duty to advise were a true cause of the losses suffered by his clients.

2. Duty of Commitment

A duty of commitment is closely related to the duty to avoid conflicting interests. A lawyer must avoid conflicting interests precisely so that the lawyer can remain committed to the client. Duty of commitment to the client's cause, also referred to as "zealous representation," commences from the time counsel is retained. Zealous representation ensures that a divided loyalty does not cause the lawyer to "soft peddle" their defence of a client out of concern for another client: *R. v. Neil*, *supra*, at para. 19 and *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 at paras. 55-56.

3. Duty of Candour

A lawyer or law firm owes a duty of candour to a client. This duty requires disclosure of all matters relevant to the ability of the lawyer to represent the client. As Binnie J. stated in para. 55 of *Strother v. 3464920 Canada Inc.*, *supra:*

> The thing the lawyer must not do is to keep the client in the dark about matters he or she knows to be relevant to the retainer.

The duty of candour was discussed in *Nathanson, Schachter & Thompson v. Inmet Mining Corp.*, 2009 BCCA 385 at para. 49:

> The obligation of candour requires the solicitor to be candid with the client on all matters concerning the retainer, including ensuring that in any transaction between the two from which the solicitor receives a benefit, the client has been fully informed of the relevant facts and properly advised upon them: *R. v. Neil*, *supra*, at para. 19, *London Loan & Savings Co. of Canada v. Brickenden*, 1933 CanLII 7 (SCC).

[§4.07] Causation

As established in *Nelson (City) v. Marchi*, 2021 SCC 41, a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis requires two distinct inquiries. The plaintiff must establish:

(1) factual causation (the defendant's breach is the factual cause of the plaintiff's loss); and

(2) legal causation (the breach is the legal cause of the loss).

Factual causation is generally assessed using the "but for" test: *Clements v. Clements*, 2012 SCC 32 at paras. 8 and 13.

Legal causation means that the harm must not be too remote. This remoteness inquiry asks whether the actual injury was the reasonably foreseeable result of the defendant's negligent conduct.

As with any other negligence claim, there are defences even if the standard of care was not met. A lawyer's defences in a negligence claim include an absence of reliance (or, if there was reliance, that it was unreasonable), there was an intervening cause, the result was not foreseeable, or the damage was too remote. There are also defences specific to lawyer's negligence cases, such as the lawyer's scope of responsibility was reduced in keeping with a limited retainer, or the lawyer committed an error in judgment as opposed to negligence.

The defence of causation is frequently raised in negligence claims against lawyers. There are two aspects to the issue of causation in this context:

(1) Would the client have still acted as they did if there had been no negligence?

(2) Did the lawyer's negligence cause the client any loss? (Or, is there any causative link between the negligence and the loss?)

A causation defence will succeed if a court finds that the client would have completed the transaction in any event. Conversely, the client must prove the client "would not have undertaken the course of action [the client] did take if [the client] had been fully advised" (*R & L Contracting Ltd. v. A.* (1981), 28 B.C.L.R. 342 (C.A.)).

In *Tellini v. Bell Alliance*, 2022 BCCA 106, a lawyer successfully appealed a decision awarding $74,700 damages to a client for advice the lawyer gave about the foreign buyer's tax. The lawyer advised the client to pay the tax, then regulations were changed allowing for refunds. The British Columbia Court of Appeal found that the plaintiff's loss of opportunity to claim the refund was not foreseeable when she acted on the appellants' advice.

The defence will also succeed if the client cannot prove there was "a real and substantial chance that [the client] would have benefitted from a better bargain" but for the lawyer's negligence: *Fraser Park South Estates Ltd. v. Lang Michener Lawrence & Shaw*, 2001 BCCA 9.

Further, if the client would have suffered the same losses in any event, regardless of the lawyer's negligence, or if the client ended up better off as a result of the lawyer's negligence (for example, if the transaction failed but the client went on to make a greater profit), the defence will succeed: *Williamson Pacific Developments Inc. v. Johns, Southward, Glazier, Walton and Margetts*, 2000 BCCA 622.

[§4.08] Conclusion

The law continues to develop in the areas of tort, fiduciary duty and damages, and in the law surrounding the liability of lawyers. Lawyers should stay current.

A more detailed discussion of the principles reviewed in this chapter can be found in the following texts:

Campion, John, and Diana Dimmer, *Professional Liability in Canada* (Toronto: Carswell, loose-leaf).

Dodek, Adam (ed.), *Canadian Legal Practice* (Toronto: LexisNexis, loose-leaf).

Grant, Stephen, and Linda Rothstein, *Lawyers' Professional Liability*, 3rd ed. (Toronto: LexisNexis, 2013).

Chapter 5

BC Lawyers Compulsory Professional Liability Indemnification Policy[1]

[§5.01] The Lawyers Indemnity Fund

The Law Society of British Columbia (the "Law Society") requires that each of its members in private practice maintain professional liability indemnity coverage for negligence. In-house members have the option of paying the indemnity fee in order to receive this coverage.

The professional liability coverage is provided through Part A of the BC Lawyers Compulsory Professional Liability Indemnification Policy (the "Policy"). The British Columbia Lawyers Indemnity Association ("BCLIA"), a wholly owned subsidiary of the Law Society, is the indemnitor under the Policy. The Lawyers Indemnity Fund ("LIF"), a department of the Law Society, provides claims management services in respect of all claims and potential claims reported by the Law Society's members.

LIF has a Chief Operating Officer, two Claims Directors, an Underwriting and Claims Director, a Director of Risk Management, and a team of lawyers who act as Claims Counsel on claim files. Although claims and potential claims must be reported in writing in order to comply with the reporting requirements of the Policy, LIF encourages lawyers to contact them to discuss any coverage or claims concerns they may have. Claims Counsel have developed expertise in handling claims in specific practice areas. For a listing of all of LIF's professional staff and contact information by type of inquiry, see "Contact Us—by types of inquiries" on the LIF website at www.lif.ca.

On January 1 of each year, a new Policy is issued, and LIF publishes the *Lawyers Indemnity Fund: Program Report* and *Digital Annual Report* for the closing year, to highlight and explain any changes to the policy wording. Both present and historical reports are available online on the LIF website.

Please note that the information in this chapter relates solely to the indemnity coverage provided in the Policy under Part A: Professional Liability for Errors & Omissions. The Policy also provides coverage for Part B: Trust Protection for dishonest appropriation (theft of money or property by any BC lawyer relating to their practice of law) and Part C: Trust Shortage Liability (coverage for claims arising from social engineering fraud or reliance on fraudulent cheques). Privacy and cyber coverage from Coalition, Inc., including risk management services for qualifying BC law firms, was added June 1, 2021. For more information, please contact LIF.

[§5.02] Coverage

The following information on Part A of the Policy is not intended to be exhaustive or definitive, and is provided as a guide only. The Policy wording governs. Questions that lawyers may have about whether an activity or practice in certain circumstances is covered by Part A of the Policy are dealt with by LIF as "advance rulings." For contact information for advance ruling advisors, see "Contact us—by types of inquiries" on the LIF website.

1. Who Is Covered?

"Covered Party" is a defined term in the Policy, meaning either an "individual Covered Party" or "additional Covered Party." Each of these terms is also defined. In general, the Policy covers members or former members of the Law Society who had paid the annual insurance or indemnity fee at the time of the error. The Policy also covers the individual Covered Party's law firm, law corporation, law firm management corporation, partners, and support staff employees. The Policy does not cover the employer of an in-house lawyer.

Lawyers who have left the practice of law, or are now exempt from coverage, are all included as "individual Covered Parties" under the policy in place at the time the claim is made, as long as they had paid the insurance or indemnity fee at the time the services giving rise to the error were provided.

2. What Is Covered?

BCLIA has two primary duties: the first is to defend the Covered Party; the second is to provide indemnity to pay settlements or damages awarded against a Covered Party. With one exception, the duty to defend is triggered by the obligation to indemnify. In other words, if there is no obligation to indemnify, there is no obligation to provide a defence. The exception is a claim for a "personal injury error," which includes libel, slander and malicious prosecution. Even if coverage for a personal injury error claim is otherwise excluded, BCLIA is still obliged to provide a defence. BCLIA's obligation to indemnify is set out in Indemnity Agreement A of the Policy, and states:

> We shall pay on your behalf all sums which you become legally obligated to pay as **damages** because of any **claim** first made against you and reported to us during the **policy period** arising out of an **error** by the **individual Covered**

[1] Updated regularly by the Lawyers Indemnity Fund, Law Society of British Columbia. Last update effective September 2023.

Party in performing or failing to perform **professional services** for others.

"Damages" means any compensatory damages award or settlement, including any related pre-judgment or post-judgment interest or costs, or repair costs, relating to covered allegations. The following are not covered:

- the return or reimbursement of, or accounting for or disgorgement of, any property, benefit, legal fees or disbursements that the lawyer received;
- any order for punitive, exemplary or aggravated damages;
- any fine, sanction or penalty;
- any order for costs or indemnification for costs made against a lawyer in litigation in which the lawyer is the counsel of record;
- any order for special costs; and
- the cost of complying with declaratory, injunctive or other non-monetary relief.

"Error" means an actual or alleged negligent act, negligent error or negligent omission, including a "protocol error" or a "personal injury error." A "protocol error" under the Policy means "a building location defect that is not disclosed as a result of an opinion given in compliance with and pursuant to the terms and conditions of the Western Law Societies Conveyancing," and a "personal injury error" means "malicious prosecution, libel or slander, or a publication or utterance in violation of an individual's right of privacy."

"Professional services" include the practice of law as defined in the *Legal Profession Act*. "Professional services" also include acting as a custodian, arbitrator, mediator or parenting coordinator; a guardian, trustee or in any other similar fiduciary capacity; or a patent or trademark agent, provided those services and the related appointment or retainer are connected and incidental to the individual Covered Party's practice of law. *Pro bono* legal services and "sanctioned *pro bono* services" (as defined in the Policy) are also included, as are any other activities that the Law Society deems to be the practice of law. Mortgage brokering services are not "professional services" and are not covered by the Policy.

3. What Is Excluded?

(a) Exclusions

The Policy has a number of exclusions. For example, the Policy does not apply to acts made with actual or alleged dishonest, fraudulent, criminal or malicious purpose or intent.

Claims by family members (spouses, former spouses, children, parents or siblings), or by or in connection with any organization in which the lawyer, the lawyer's family or law firm partners, associates, or associate counsel own more than 10% or have effective management or control, are not covered.

Claims arising out of the lawyer's activities as an officer or director of a corporation or other entity other than a law corporation are also excluded from coverage.

Although lawyers are covered, *prima facie*, for the practice of any type of law, anywhere in the world, coverage will be excluded if the lawyer is a member of another law society outside of Canada, and the claim is connected to the lawyer's permanent practice in that other law society's jurisdiction.

Coverage is also excluded if the claim arises out of a lawyer's practice of law in contravention of the rules of any other law society or bar.

(b) Breaches of Policy Terms

A lawyer's entitlement to coverage may be jeopardized if certain conditions are not met. The two most critical conditions relate to the obligation to report claims and potential claims, and the obligation to cooperate with BCLIA in the investigation and defence of a claim, in the investigation of coverage, or in the repair of an error.

The reporting obligation is dealt with in more detail later.

An example of a breach of the obligation to co-operate is a failure to provide documents or information for BCLIA to assess the claim, or a failure to refer the client out for independent legal advice in an effort to repair or mitigate the loss. LIF has ongoing relationships with experienced repair counsel, and will assist in choosing one with the appropriate expertise to act for the client on the repair. As a result, LIF is able to repair approximately 20% of all matters reported. However, repair efforts can be prejudiced through the non-cooperation of the individual Covered Party, resulting in a loss that could have been avoided.

4. What Are the Limits of Coverage?

The Policy provides each individual Covered Party with $1 million of coverage per error, up to an annual maximum of $2 million for all errors reported during the year by the individual Covered Party. The per error limit is BCLIA's maximum liability for all damages, claims expenses and repair costs arising out of a single error or numerous related er-

rors and regardless of, for instance, the number of claims, claimants or firm lawyers involved.

[§5.03] Exempt Lawyers and Part-Time Practice

1. Exempt Lawyers

All members of the Law Society are required to maintain indemnity coverage unless they apply and are approved for an exemption. Those who may be eligible for an exemption include the following:

- lawyers who are not engaged in the practice of law;
- lawyers who reside outside BC and are not engaged in the practice of BC law;
- lawyers who are members of another law society or bar, and have professional liability indemnity coverage or insurance in that other jurisdiction that will cover them for their practice in BC; and
- lawyers providing only *pro bono* services.

Lawyers providing "sanctioned *pro bono* services" will be covered for those services even if they claim an exemption from paying the indemnity fee. "Sanctioned *pro bono* services" is a defined term in the Policy, and includes the requirement that the services be delivered through an approved services provider.

If an in-house lawyer chooses to pay the indemnity fee, they will have the same coverage as private practice lawyers except that claims made by their employer, or a related organization, will not be covered.

Lawyers whose practice is limited solely to providing research and opinion services to other lawyers may choose to be exempt if they provide their work product solely to individual Covered Parties and have no contact with clients. Legal research is limited to preparing summaries or conclusions about the state of the law for the benefit of the individual Covered Party and incorporation into the individual Covered Party's work.

Exempt lawyers may still face liability for their activities. Accordingly, each lawyer who claims an exemption must first carefully assess their risk of a claim by third party.

2. Part-Time Practice

Lawyers who work a limited number of hours per week (on average) receive a 50% discount on their indemnity fee. To be eligible, private practice lawyers must practise law 25 hours per week or less (on average), and must not have had a paid claim within the past five years. In-house lawyers must assess the portion of their practice for which they are exposed to a negligence claim by a third party, have that portion be 25 hours per week or less (on average), and must not have had a paid claim within the past five years.

Because the average is calculated over a six-month period, lawyers may work 40 hours a week for a month, so long as the average hours over the six-month period work out to 25. All activities directly or indirectly related to the lawyer's practice must be included in calculating the time.

Time spent on sanctioned *pro bono* services does not count in the calculation of hours.

[§5.04] Excess and Other Commercial Insurance Products

Although the compulsory policy's $1 million limit offers generous financial protection for the majority of claims lawyers face, this may not be enough to protect a lawyer and that lawyer's firm in some cases. If a mistake in a lawyer's practice might lead to a claim that will cost more than $1 million total (in legal fees and indemnity payments), both lawyer and firm are at risk. For instance, a lawyer might miss a limitation period for a client suffering a significant brain injury from a car accident, or might prepare a tax plan that results in a client being reassessed by the CRA, or might draft a contract that fails to give a client full value for a company the client has purchased. Without excess insurance, the lawyer, and potentially the firm partners, will start paying for that claim out of their own pockets as soon as the compulsory limits are exhausted.

In contrast to the compulsory indemnity policy which attaches to each individual lawyer, excess insurance is purchased for the firm and covers all employed lawyers. A broker can help lawyers decide how much excess insurance may be appropriate for their firm. Besides the financial consequences of just one mistake, other factors that will be considered include the frequency of large transactions and the potential liability for the mistakes of former partners. In addition, because professional liability insurance is triggered when a claim is made (as opposed to when the error was made), lawyers will also want advice on how long to carry excess insurance, or extend the reporting period, so that the lawyer and firm will be protected if a claim is made long after the work was completed.

Excess insurance can also "drop down" and respond to risks that the compulsory policy does not cover (usually subject to a deductible or self-insured retention).

Lawyers can also buy other insurance policies that have been developed by commercial insurers to protect the firm and its members against risks that the compulsory policy does not cover. There are different insurance options available and the terms of coverage, including deductible amounts, may vary between insurers.

For more information about the risks that you will face in private practice, and either the indemnity coverage that is provided through the compulsory policy or insurance that is available on the private market, read "Risks and insurance for the private practitioner: A closer view," attached as Appendix 1. It can also be found on the LIF website.

[§5.05] Reporting a Claim or Potential Claim

1. When to Report

Condition 4.1 of the Policy requires that if a lawyer becomes aware of an error or any circumstance that could reasonably be expected to be the basis of a claim, however unmeritorious, the lawyer must immediately give written notice to LIF, along with the fullest information obtainable. It is no excuse for a lawyer filing a late report to say that a claim seemed unlikely. LIF will look at what the reasonable person in the lawyer's position would have anticipated.

Early notice puts LIF in the best position to defend and resolve anticipated litigation. It may allow LIF to fix a problem or take steps to minimize the financial consequences of a mistake, thereby avoiding losses and saving money. It may also prevent a loss to the lawyer's client, and prevent the stress to both the lawyer and client that results from a malpractice claim. Therefore, the rule is: when in doubt, report. For example, a lawyer should report to LIF in the following circumstances:

(a) the lawyer may have made an error, even if the lawyer's client has assured the lawyer that they will not sue;

(b) the lawyer becomes aware of a new case or law or clarification of the law that suggests that advice the lawyer has given in the past is erroneous;

(c) the lawyer's client has suggested that the lawyer gave inappropriate advice, was negligent, or caused the client to suffer loss;

(d) another party to the transaction in which the lawyer was involved (on behalf of a client) alleges the lawyer caused the party loss or damage (even where the lawyer believes the lawyer did not represent this party or offer advice); or

(e) the lawyer's client has given the client's file to a new lawyer for review, and the new lawyer has suggested that the original lawyer acted improperly or gave inappropriate advice.

Although a report must be in writing, LIF encourages lawyers to call if the matter is urgent, the lawyer needs immediate assistance, or the lawyer is uncertain whether or not a report is necessary. For contact information for Claims Counsel, see "Contact us—by types of inquiries" on the LIF website.

In addition to the Policy's reporting requirements, rules 7.8-2 and 7.8-3 of the *BC Code* impose ethical obligations on lawyers to give notice of claims and to co-operate with BCLIA, and Law Society Rule 3-39 obligates lawyers to comply with the Policy's terms. These provisions reduce the risk to the public from coverage being denied.

2. How to Report and Other Reporting Information

All claims or potential claims must be reported in writing—telephone notice is not sufficient and will not trigger coverage under the Policy. A written report containing the fullest information available must be mailed, faxed, or emailed to LIF as follows:

Lawyers Indemnity Fund
5th Floor, 845 Cambie Street
Vancouver, BC V6B 4Z9
Attention: Director of Claims
Fax: 604.682.5842
Email: LIFclaims@lif.ca

Reporting guidelines for lawyers are available on the LIF website.

Any lawyer reporting a claim or potential claim should review the reporting guidelines for additional information, including what to include in a written report. For answers to questions that are asked frequently, see "My Claim: Questions and Answers" on the LIF website.

3. Obligations to the Client

Rule 7.8-1 of the *BC Code* imposes an ethical obligation on a lawyer to inform the client promptly of the facts of certain errors or omissions, without admitting liability, and to recommend that the client obtain independent legal advice.

Condition 5.3 of the Policy prohibits a lawyer from admitting liability and places further restrictions on a lawyer's ability to compromise their legal position without BCLIA's prior written consent. The restrictions include a prohibition against a lawyer entering into a settlement agreement.

As noted earlier, lawyers are both contractually and ethically obliged to report to LIF any error or any circumstance that could reasonably be expected to be the basis of a claim, however unmeritorious. Accordingly, the Claims Counsel handling the report will assist the lawyer in meeting their ethical obligations, without prejudicing their indemnity coverage through a breach of Condition 5.3 of the Policy.

4. Confidentiality

LIF is a part of the Law Society, but maintains confidentiality over claims information, except on a "no name" or statistical basis, from other departments or committees of the Law Society. The only exception to this policy is if the claims information contains evidence of dishonest appropriation, fraud or criminal activity by a lawyer.

5. After a Report

New reports of claims and potential claims are reviewed by one of the Claims Directors and, depending on the area of law, assigned to one of LIF's experienced, knowledgeable Claims Counsel.

Claims Counsel works to determine the most appropriate strategy to manage the matter. The strategy will depend on a number of factors. Is the lawyer reporting an actual claim or the lawyer's discovery of a mistake that might lead to a claim? Can steps be taken to fix the mistake or minimize the loss? Is a vigorous defence required or should there be work towards a resolution? Is it best simply to "let sleeping dogs lie" and wait for further developments or to take immediate steps?

Generally, the lawyer can expect an email or phone call from Claims Counsel soon after the lawyer reports. The lawyer will also receive a formal file opening letter. Claims Counsel may need more information and will want to discuss next steps with the lawyer. Claims Counsel can also answer any questions the lawyer may have, including what to say to their client.

[§5.06] Consequences of a Paid Indemnity Claim

If a report results in a claim where an amount is paid to indemnify the lawyer, there are deductible and surcharge consequences for the lawyer. A deductible is that portion of the damages that must be contributed by the Covered Party.

(a) the lawyer must pay a deductible of $5,000 for the first paid indemnity claim and $10,000 for any subsequent claims reported within three years of the first paid claim;

(b) the lawyer must pay a surcharge of $1,000 per annum on the indemnity fee for each of the following five years in which the lawyer is in practice; and

(c) the lawyer loses eligibility for the part-time discount for the next five years.

Defence costs and other expenses paid on a claim do not attract any of these consequences.

[§5.07] Additional Resources

The LIF website at www.lif.ca is an excellent resource for information about the indemnity and privacy/cyber programs.

It also has general information about LIF's services, including preventative action to avoid specific practice risks. For instance, the "Risk Management" section of the website offers publications such as the "Limitations and Deadlines Quick Reference List." This list was updated in 2019, and it remains a useful guide to common limitation periods. A copy is attached as Appendix 2.

Risks and Insurance for the Private Practitioner

Here's a closer look at the indemnity coverage available through the Law Society (pink) and insurance on the commercial market (grey).

		Limits/deductibles	Risks
LSBC PROFESSIONAL LIABILITY POLICY	**Part A** Professional Liability	» $1 million per error/$2 million annual aggregate » $5,000 or $10,000 deductible	Negligence claims for compensatory damages, or associated repair costs or claims expenses.
	Part B Trust Protection	» $300,000 per error/$17.5 million annual profession-wide aggregate » No deductible	Client coverage for lawyer theft (dishonest appropriation), but you must repay if your own theft.
	Part C Trust Shortage Liability	» $300,000 per claim, and per lawyer and firm annually, and profession-wide annual aggregate of $2 million. » 15% or 35% deductible	Loss of trust funds caused by either social engineering fraud (the intentional misleading of a lawyer into sending or paying trust money based on false information that is provided to the lawyer), or relying on a bad cheque.
COALITION POLICY	**Privacy & cyber coverage**	» Up to $250,000 per claim, depending on the specific coverage triggered » $15,000 deductible	The policy contains coverage for third-party liability and first-party losses. Details can be accessed on the Member Portal by the firm's Designated Representative.
COMMERCIAL	**Excess to the Part A professional liability limit**	Limits up to $50 million are available.	Negligence claims that result in claims expenses and/or indemnity payments that exceed the Part A limits. May provide "drop down" coverage for risks that Part A does not cover such as: fraud claim defence costs, crime, employment practices liability or others.
	Crime (may be endorsed with Social Engineering)	Limits are generally $1 to $5 million; social engineering fraud coverage sublimit is often $250,000 or less. Higher limits may be available.	Theft of trust funds or securities by a law firm employee or other third party. Includes coverage for other types of criminal losses typically excluded under property, such as employee forgery and alteration, computer fraud, loss of money and securities. Social engineering fraud will respond if you are defrauded through the intentional misrepresentation of some material fact.
	Commercial General Liability (CGL)	Limits are generally $2 to $5 million.	Bodily injury and property damage to third parties arising from your operations and premises, including injuries to clients and other visitors. Advertising liability, tenants' liability, defamation and other personal injury claims.
	Property	Limit depends on the value of the firm's assets.	Loss of physical assets including buildings (if owned), office contents, equipment and valuable papers/records, and business income/interruption as a result of perils including fire, theft, vandalism, flood and earthquake. May include a small sublimit for social engineering fraud.
	Employment Practices Liability (EPL)	EPL and D&O are often purchased as a combined policy. Limit $1 million or higher.	Employment related risks. Responds to a wide range of allegations related to wrongful employment practices, including wrongful dismissal claims, breach of contract, sexual harassment and discrimination.
	Directors & Officers Liability (D&O)	D&O and EPL are often purchased as a combined policy. Limit $1 million or higher.	Management related risks. Protects the law firm and its individual directors and officers in their capacity as such from risks such as mismanagement of the firm. Protects the personal assets of those individuals in the event of a bankruptcy.
	NOTE	Property, Crime, and CGL coverage is often purchased as a convenient package. D&O and EPL are also often purchased together.	

Chapter 6

Ethical Duties in Practice[1]

[§6.01] Making Legal Services Available

Various authorities discuss making legal services available to the public, including courts and the Law Society. What follows are some excerpts from the *BC Code*, case law, and commentary, then a survey of services available from Access Pro Bono and Legal Aid BC.

1. Principles in the *BC Code*, Case Law and Commentary

(a) The *BC Code*, Rule 2.1-3(f):

> It is a lawyer's right to undertake the defence of a person accused of crime, regardless of the lawyer's own personal opinion as to the guilt of the accused. Having undertaken such defence, the lawyer is bound to present, by all fair and honourable means and in a manner consistent with the client's instructions, every defence that the law of the land permits, to the end that no person will be convicted except by due process of law.

(b) The decision of the House of Lords, in *Rondel v. Worsley* [1969], 1 A.C. 191:

> It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter. And that would be the inevitable result of allowing barristers to pick and choose their clients. It not infrequently happens that the unpleasant, the unreasonable, the disreputable and those who have apparently hopeless cases turn out after a full and fair hearing to be in the right. And it is a judge's (or jury's) solemn duty to find that out by a careful and unbiased investigation. This they simply cannot do if counsel do not (as at present) take on the less attractive task of advising and representing such persons however small their apparent merits.

(c) The article "Representation of the Unpopular" by H.H.A. Cooper (1974), 22 Chitty L.J. 333:

> Our system cannot survive if there is to be one standard for those who have fallen from grace. Neither can it survive if there is to be one standard of justice for the accused who draw public sympathy and a different standard for those who are held in public contempt. Particularly disquieting is the growing tendency of members of the Bar to shun the acceptance of representation on the side that meets with public disfavor. When the lawyer takes his oath he is not entering a popularity contest. He is assuming solemn obligations, not to be taken lightly at any time during this professional career. [Leon Jaworski, Special Watergate Prosecutor]

2. Law Society Initiatives

(a) Access to Justice

Improving access to justice in British Columbia is a key priority for the Law Society. Currently the Law Society is exploring "Legal Professions Regulatory Modernization" with the Ministry of the Attorney General. The Law Society responded to the AG's proposal for a single legal regulator in November 2022. The single legal regulator would regulate lawyers, paralegals and notaries in BC. Both the AG and the Law Society identify access to justice as a key factor in rethinking the delivery of legal services.

The Law Society has been making regulatory changes to expand the services that non-lawyers may provide. The Legal Services Regulatory Task Force proposed in 2014 that, with proper training, non-lawyers could be permitted to practice in specific areas of law, including family, employment, collections, and advocacy in Provincial Court and before administrative tribunals.

In September 2018, the Alternate Legal Service Providers Working Group prepared a consultation paper discussing family law legal service providers. The proposal is that these non-lawyers be trained and regulated, and allowed to provide some limited legal services. Discussion around licensing paralegals to provide limited legal services followed.

In September 2020, the Benchers approved the Licensed Paralegal Task Force's proposal to advance the licensed paralegal initiative within an "Innovation Sandbox." The Innovation Sandbox permits alternate legal service providers to apply to the Law Society. The Law Society assesses if it is in the public interest to permit the services to be provided by the applicant, and if so, issues no-action agreements setting out terms and conditions for the limited scope of legal services the applicant can perform. Over 25 service providers have been approved to provide limited legal services as part of the Innovation Sandbox.

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[1] Regularly updated by staff lawyers of the Law Society of BC, most recently in February–March 2024. Nils Preshaw of Kornfeld LLP kindly provided edits in September 2022. Previously reviewed by Thelma O'Grady in November 2012.

(b) Lawyer Licensing

The Law Society's priorities include other ethics-related initiatives, such as exploring a competency framework for licensing lawyers in British Columbia. The Lawyer Development Task Force recommended developing a "Competence Based System for Lawyer Licensing" and their recommendation was approved by the Benchers in September 2022.

(c) Reconciliation and Cultural Competence

One of the Law Society's key priorities in recent years has been advancing the cultural competence of lawyers in response to the Truth and Reconciliation Commission's 2015 Calls to Action. The Law Society developed a wide-ranging course available online and in January 2022 completing that course became mandatory for all practising lawyers. The course is part of the Law Society's commitment to reconciliation and recognition of Indigenous laws, as described on the Law Society's webpage "Why Reconciliation Matters":

> To contribute to, and be ready for, changes in law that reflect Indigenous laws, their potential relevance and applicability within the Canadian legal system, lawyers need to know the context and history of those laws and our legal system.

For more about Law Society initiatives in making legal services available, visit the website: www.lawsociety.bc.ca.

3. Access Pro Bono Society of BC[2]

The Access Pro Bono Society of British Columbia ("APB") is an independent charitable organization promoting access to justice in BC by providing and fostering quality *pro bono* (free) legal services for people and non-profit organizations of limited means. APB is funded mainly by the Law Foundation of BC and the Law Society of BC.

Below is a description of APB's main activities and initiatives, core services, and volunteer opportunities. To volunteer with APB, register online at www.accessprobono.ca/lawyer-registration.

(a) Activities and Initiatives

Pro Bono Legal Services

- Intake & Referrals—a first point of contact for people and non-profit organizations of limited means seeking legal help, and for lawyers seeking to provide legal services;
- Legal Advice—over 120 legal advice clinics operating in communities throughout BC, including access via Skype and telephone;
- Legal Assistance & Representation—the BC-wide Roster Program, as well as the Vancouver-based Civil Chambers Program, Paralegal Program, and Wills Clinic Project.

Pro Bono Engagement

- National Projects—co-administration of national *pro bono* conferences and projects with sister *pro bono* organizations across Canada;
- Training & Education—legal training and materials for *pro bono* lawyers through Continuing Legal Education courses, publications and web links;
- Support Services—full insurance coverage for *pro bono* lawyers when providing approved legal services, and disbursement coverage for registered *pro bono* cases;
- Policy & Program Development—advice for law firms developing *pro bono* policies and programs, and for partnerships between law firms and community organizations.

Legal Advocacy & Outreach

- Events—hosting annual events including the Advice-a-thon and Ride for Justice to raise awareness of legal needs in BC;
- Litigation—conducting test-case litigation on issues concerning access to justice for low- and middle-income BC residents;
- Outreach—providing media information on the gaps in legal services for low- and middle-income British Columbians.

APB's programs and projects offer a full range of *pro bono* legal services to several thousand British Columbians each year. These services benefit individual clients, but also contribute to the general well-being of BC communities.

Pro bono legal services often prevent social problems from escalating. For example, they often mean the difference between people staying in their homes or becoming homeless, or receiving social assistance payments or becoming destitute.

(b) Core Services

While APB engages in a wide variety of service and advocacy endeavours outlined above, the following programs and projects comprise APB's core legal services:

[2] Contributed by Jamie Maclaren KC, Executive Director, Access Pro Bono Society of BC.

Summary Advice Program

APB operates over 120 clinics in community centres, social service agencies, churches and courthouses throughout BC. Some civil (non-family) law clinics are operated in conjunction with the Justice Access Centre at the Vancouver Courthouse. Low- and modest-income individuals make appointments with APB volunteer lawyers for up to a half-hour of free legal advice on a wide range of criminal, family, civil and immigration law matters.

Lawyer Referral Service

APB's Lawyer Referral Service helps British Columbians of any income find a lawyer to serve their legal needs, starting with a free half-hour legal consultation. Any British Columbian may access APB's Lawyer Referral Service by calling 1-800-663-1919 or (604) 687-3221 (in Metro Vancouver). They may also email lawyer-referral@accessprobono.ca.

Civil Chambers Program

The Civil Chambers Program provides legal assistance and representation to low- and modest-income individuals engaged in civil (non-family) chambers litigation before the Supreme Court and the Court of Appeal in Vancouver. The Civil Chambers Program operates in partnership with the Justice Access Centre at the Vancouver Courthouse.

Roster Program

The Roster Program provides representation for particular case types to qualifying individuals and non-profit organizations. Client applications are screened by APB then sent to lawyers for their consideration. Roster lawyers qualify for full insurance coverage and disbursement coverage of up to $2,500 per case for the following case types:

- family law;
- barrister services (for judicial review, Court of Appeal and Federal Court, but not BC Supreme Court or Provincial Court);
- wills and estates (simple and non-litigious matters only);
- refugee sponsors seeking advice; and
- corporate matters for non-profit organizations (through the Solicitors' Program).

Employment Standards Program

Volunteer lawyers and law students provide free representation to employees and former employees who meet the income threshold and are appearing before the Employment Standards Branch. Legal advice covers topics such as vacation pay, overtime and termination pay.

Mental Health Program Telephone Clinic

APB volunteer lawyers provide free advice over the telephone to persons detained under the *Mental Health Act* or their families. Legal advice covers topics such as applying for a review and preparing for a review hearing.

Residential Tenancy Program

Volunteer lawyers and law students provide free representation to landlords and tenants who meet the income threshold and are appearing before the Residential Tenancy Branch. Legal advice covers topics such as eviction, rent increases, repairs or security deposits.

Solicitors Program

The Solicitors Program provides free legal help to BC-based charities and non-profit organizations of limited means. APB staff take requests from these organizations then match the requests to volunteer lawyers.

Virtual Family Mediation Project

In 2021 APB partnered with the BC Ministry of the Attorney General to launch a pilot project offering online family mediations for low- and modest-income families engaged in the Provincial Court's Early Resolution Process.

Wills Clinic Project

APB, in partnership with the federal Department of Justice and the provincial Ministry of Justice, operates a will preparation clinic at the Vancouver Justice Access Centre at the Vancouver Courthouse. Lawyers and articling students draft and execute simple wills and representation agreements for low-income seniors (ages 55+) and people with terminal illnesses.

Everyone Legal Clinic

In May 2022 APB started training articled students in a new pilot project providing experiential learning to law students who then provide affordable legal services to underserved communities across BC. In its two-year pilot phase the Clinic will engage dozens of volunteer mentors and employ four full-time lawyers to train and mentor two cohorts of at least 25 articling students over four six-month semesters.

(c) Volunteer Opportunities

APB offers a wide and flexible range of *pro bono* legal services for lawyers practicing in communities throughout BC. APB's programs and projects are structured to suit lawyers'

schedules, interests and needs. From providing legal advice for a few hours each month to selecting one or two *pro bono* representation cases each year, litigators and solicitors may volunteer with APB in any number of ways.

4. Legal Aid BC

Legal Aid BC ("LABC," also known as the Legal Services Society) is an independent, non-profit organization that provides legal help to people in BC who have limited income. LABC provides legal aid to eligible people in the form of services, information and referrals. Staff lawyers provide some services, while lawyers in private practice provide other services on a roster and referral basis.

LABC pays legal fees and disbursements for financially eligible people in certain matters.

Eligible family matters include the following:

- serious matters involving child protection, or the safety or security of a spouse or child; or
- high-conflict situations where one spouse is obstructing the other from carrying out lawful parenting or guardianship responsibilities.

Eligible criminal matters are those where the accused, if convicted, could:

- go to jail;
- serve a conditional sentence that would severely limit liberty; or
- lose the ability to earn a living.

Legal aid is also available to Indigenous persons in less serious criminal matters who cannot represent themselves due to illness or disability, where the case affects the person's ability to follow a traditional livelihood of hunting and fishing.

LABC operates a call centre and provides online information in plain language and in videos. To keep current about issues and services funded by LABC, see: legalaid.bc.ca.

[§6.02] Civil Disobedience and the Legal Profession[3]

Occasionally, members of the legal profession are involved in civil disobedience either by personally engaging in unlawful acts or by advising clients to do so. In "The Rule of Law and Civil Disobedience" in *Benchers' Bulletin* (2018: No. 4, Winter) the Law Society's Rule of Law and Lawyer Independence Advisory Committee said that "justified civil disobedience must be viewed as a very narrow exception to the rule of law." Portions of the article are extracted below:

> The rule of law is central to our freedoms. In Canada, all people (including government) are bound by the law, and those in government do not ultimately interpret the law. It is not a perfect system—not all laws are equally just—but a society adhering to the rule of law benefits from a legal process that permits laws to be challenged or re-interpreted before a group of arbiters (judges) whose independence from the executive and legislative branches of government is assured. This system allows Canadians to enjoy both the freedoms and the stability to society that the law provides, but also to use the justice system to challenge any efforts under law, whether private or state sponsored, to limit or infringe on their legal rights and freedoms.
>
> […]
>
> Manifesting our personal dislike of validly enacted laws through civil disobedience may be justified in rare circumstances, where illegitimate exercises of state power or fundamentally unjust laws nevertheless find support under the prevailing social opinions of the times.
>
> […]
>
> Civil disobedience has a narrow place in civil society, but it presents its dangers too. Where citizens conclude that it is acceptable to act contrary to laws they disagree with because their conscience compels them to do so, the rule of law is diminished.

When we consider lawyers disobeying laws in order to further what they believe to be a higher duty or an ethical imperative, we raise not one but several questions. One question involves holding such lawyers liable for their acts, either criminally or civilly. Another involves holding such lawyers to account in disciplinary action by the Law Society. It is important to recognize that these are distinct questions.

1. The Legal Problem

Sometimes the only way a private citizen can challenge a law is by deliberately disobeying it and inviting prosecution. However, those who defy the law do so at their own risk. If a statute is held to be *intra vires* for example, their conduct will be regarded as unlawful, regardless of the sincerity or reasonableness of their belief that it was not.

The common law maxim that ignorance of the law is no excuse, now embodied in s. 19 of the *Criminal Code*, has been held to apply even where a lawyer gave the accused an opinion that the conduct would be lawful before the accused acted. Even acts done in reliance on a statute that is later ruled unconstitutional may be penalized. There are exceptions to this rule, including for acts in these situations:

(a) without guilty intent, where it is required by statute;

(b) based on an officially induced error; and

[3] Prepared originally by Dale Gibson; revised by PLTC and staff lawyers of the Law Society.

(c) grounded in a mistake of fact.

If a lawyer actively participates in some act of civil disobedience—a pipeline protest or refusing to wear a mask when required to do so, for example—the lawyer obviously cannot expect to be treated differently than any other participant. If the others are liable, so is the lawyer. But what if the lawyer does no more than to advise clients that a road block would be in their best interests? Is the lawyer legally liable for advising a client to break the law?

It might be argued that a lawyer who does so is a party to an offence, or that they counselled the offence. Liability on these grounds seems to vary according to whether the act counselled was a crime, a breach of contract, or a tort. If the lawyer recommends breach of a criminal law, then the lawyer risks liability. Section 22 of the *Criminal Code* states that anyone who counsels someone else to commit a crime is a party to any crime committed as a result, and s. 464 provides that even if the offence counselled is not committed, the person counselling or procuring is criminally liable. Does a lawyer's advice to break the law amount to "counselling" within the meaning of the *Code*? The American case of *Goodenough v. Spencer*, 46 How. Prac. (N.Y.) 347 at 350 states that it does:

> No attorney or counsel has the right, in the discharge of professional duties, to involve his client by his advice in a violation of the laws of the state; and when he does so, he becomes implicated in the client's guilt, when, by following the advice, a crime against the laws of the state is committed.

It appears that a lawyer who recommends a violation of criminal law could be liable as a party to an offence or because they counselled someone to commit an offence.

Lawyers who advise clients to break contracts are unlikely to be held personally civilly liable. Counselling someone to break a contract does not make the counsellor a party to the act—you cannot be liable for breach of a contract unless you are one of the contracting parties. Instead, counselling is treated as a tort—the tort of inducing breach of contract, to which there are several defences. For one thing, "mere advice … does not amount to an inducement." For another, the lawyer can escape liability by showing "justification" for the inducement.

2. Justification

The limits of justification have never been clearly defined. It seems to be a question for the discretion of the court in the light of all the circumstances of the case. Mr. Justice Gale, of the Ontario High Court, described some of the situations in which justification is likely to be found in *Posluns v. Toronto Stock Exchange* (1964), 46 D.L.R. (2d) 210:

> In several instances the Courts have sanctioned interference, particularly where it has been promoted by impersonal or disinterested motives. For example, in some of the early cases it was intimated that a defendant might be excused from the consequences of his otherwise illegal act if he was under the influence of some great moral or religious force, reference being made to a father who might induce his impressionable daughter to break a contract for the promise of marriage with a scoundrel. And I suppose if a doctor were to cause a patient to end a contract of service for health reasons, he would likewise be protected.

It is probable that a lawyer advising a client to break a contract for morally justifiable reasons would be regarded in the same light as this hypothetical doctor. Certainly this would be so if the lawyer held a *bona fide* and reasonable belief that the statute in question was unconstitutional.

What if the act counselled is a tort, rather than a crime or breach of contract? Unless the courts are prepared to recognize inducement of a tort as a separate tort, subject to the same defences as the tort of inducing breach of contract, the lawyer who advises commission of a tort can expect to be made personally liable.

3. The Problem of Professional Discipline

While moral choice is a matter of private judgment, the Canon of Legal Ethics in rule 2.1-1(a) of the *BC Code* expressly prohibits disobeying the law:

> A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.

In addition, rule 2.2-1 of the *BC Code* and the commentary to that rule state as follows:

> A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.
>
> […]
>
> [2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.
>
> [3] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

> [4] Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

There are obviously circumstances where a lawyer's breach of rule 2.2-1 could amount to professional misconduct, even though the lawyer honestly believed the conduct was justifiable. Considering the totality of the circumstances, the issue would be whether the conduct amounts to a marked departure from the conduct expected by the Law Society. Whether the lawyer's or profession's integrity was called into question would depend on the nature of the unlawful conduct. If a lawyer in their private life participates in civil disobedience, then the issue is whether their specific conduct amounts to conduct unbecoming a lawyer; if it does, they may be subject to professional discipline.

[§6.03] The Authority of a Lawyer

1. Authority to Act on a Client's Behalf

Lawyers who act without proper authority from their clients do so at their peril. Regardless of good faith and honesty in so acting, they are liable for any harm caused to persons misled by their conduct.

The orderly conduct of litigation requires that the courts, litigants and their counsel can assume that any lawyers involved in the judicial process are acting with authority.

While a lawyer's authority to act is normally assumed, when challenged, the onus is on the lawyer to prove that authority exists: *Sasko Wainwright Oil & Gas Ltd. v. Old Settlers Oils Ltd.* (1957), 20 W.W.R. 613 (Alta. S.C.–A.D.).

A lawyer acting without authority may be liable for the costs involved in setting aside an unauthorized action. For example, see *Kennedy v. Kennedy* (1959), 27 W.W.R. 295 (B.C.S.C.), in which a lawyer filed a petition on behalf of a minor without the authority of a litigation guardian.

When acting for a corporate client, a lawyer must be very careful to ensure that the lawyer has instructions from a person or persons properly authorized by an existing company: *Standard Construction Co. Ltd. v. Crabb* (1914), 30 W.L.R. 151 (Sask. S.C.). However, the case of *Marley-King Line Const. v. Marly*, [1962] O.W.N. 253 (H.C.) held that a lawyer need not examine the internal workings of a company to show that the resolution authorizing the lawyer to proceed was in accordance with company bylaws.

2. Authority to Settle

Note that under the *BC Code* "a lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings" (*BC Code* rule 3.2-4).

A solicitor acting under a general retainer has, in the absence of any restriction contained in the retainer, whole charge of the conduct of the action and of all things incidental to the action. This authority includes the right to do all things that may be necessary in the action, provided the solicitor does so with the honest belief that the solicitor is acting in the best interests of the client, informs the client of proposals of settlement and explains them properly, and provided further that the solicitor obtains the express consent of the client when necessary (for example, before agreeing to a final settlement). As set out in rule 3.2-2 of the *BC Code* "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."

A lawyer acting for a client stands to the client in the relationship of agent and principal. The lawyer is the general agent of the client in all matters that may reasonably be expected to arise for decision in the cause. The client must expect that a cause may not be carried to its natural conclusion, and that it is proper, usual and often necessary to compromise. The lawyer has power to compromise the action in a fair and reasonable manner.

However, consider the following:

(a) In many cases, a lawyer has express limitations placed on this general authority.

(b) If a lawyer purports to make an offer that is outside of the lawyer's authority, and the offer is accepted, the lawyer may be exposed to an action by the client if the settlement is enforced, or to an action for breach of warranty of authority by the opposing party if it is unenforceable (*Yannacopoulos v. Maple Leaf Milling Co. Ltd.* (1962), 37 D.L.R. (2d) 562 (B.C.S.C)).

(c) As a matter of ethics, the client and not the lawyer should always make the important decisions in negotiation, including the decision of whether or not to accept a settlement offer. That is, negotiators should base their authority to settle on a full prior review of the options with the client, and abide by the client's decisions concerning the objectives of the negotiations and the means by which the objectives will be pursued. Further, to avoid

the ethical problem of agreeing to an option not previously discussed with the client, negotiators may need to adjourn to discuss a new proposal immediately with the client by phone.

(d) As a matter of practice, lawyers in British Columbia should not settle actions without obtaining specific instructions from the client. When lawyers say "I will recommend this to my client," they usually mean that they expect to obtain the client's agreement.

(e) As a matter of law, a lawyer who purports to settle an action without obtaining instructions from the client runs the risk of a negligence action for any resulting loss (*Yannacopoulos*, *supra*).

Problems can arise when a limitation on the solicitor's authority is not apparent to the other parties in an action, who agree to a compromise to settle the matter. In such cases the court might interfere when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand (3 *Hals*. (4th ed.) p. 650).

In *Hawitt v. Campbell & Cameron* (1983), 46 B.C.L.R. 260, the Court of Appeal stated that it would not recognize a settlement and refuse to grant a stay of proceedings if there was:

(a) a limitation of the instructions of the solicitor known to the opposite party and the settlement was not within the limited instructions;

(b) a misapprehension by the solicitor making the settlement of the instructions of the client or of the facts of a type that would result in injustice or make it unreasonable or unfair to enforce the settlement;

(c) fraud or collusion; or

(d) an issue to be tried as to whether there was such a limitation, misapprehension, fraud or collusion in relation to the settlement.

Claims to set aside settlements on the basis of a "misapprehension of instructions" appear to be very restricted. In *Mandzuik v. Cheshire Cheese Inn Ltd.* (16 August 1991), Vancouver No. B891827 (S.C.), the plaintiff instructed her solicitor to settle "for what he could get." When the solicitor received an all-inclusive offer of $30,000, he communicated the offer to the plaintiff and she accepted. Later she asserted she was not bound by the settlement because she had understood that it was for $30,000 plus costs. Her application was denied; the court held that a lawyer's misapprehension of the instructions is not a ground for setting aside a settlement where, as here, the settlement did not require a court order to implement it. In any event, any misapprehension of the instructions in this case was on the part of the plaintiff, not the solicitor.

In *Adamoski & Adamoski v. Mercer* (1984), 54 B.C.L.R. 117 (S.C.), the plaintiff brought an action for damages suffered in a motor vehicle accident. The defendant's solicitor took instructions from his client's insurer respecting a settlement of $130,600 and dictated a letter to the plaintiff's solicitor outlining this offer. Before the letter was mailed, the defendant's insurer instructed the defendant's solicitor to offer only $90,000. The defendant's solicitor inadvertently sent out the letter embodying the settlement offer of $130,600, and after the plaintiff accepted the offer, sought to withdraw it. The court held that the defendant was bound by the offer, because there was no misapprehension of the client's instructions that would result in injustice or make it unreasonable or unfair to enforce the settlement. There was no misapprehension of instructions in the sense that they were not understood; they were merely forgotten. Accordingly, the defendant's insurer was left with a remedy against his solicitor.

In *McCaskie v. McCaskie* (1990), 25 R.F.L. (3d) 291 (B.C.C.A.), the solicitors for each side reached what they thought was a settlement over the telephone. However, before the wife's solicitors could mail the confirming letter they had prepared, the wife terminated their retainer. At trial there was evidence that the articling student for the wife's solicitors was to have sent a draft letter to the wife "as one last check." The Court of Appeal held that it was open to the trial judge to conclude, after reviewing the circumstances, that a final settlement had not been reached and that the settlement in the case had to be in writing and approved by the parties before it could be binding.

[§6.04] Without Prejudice Communications[4]

The words "without prejudice" have both a generalized and a particular meaning. In *Maracle v. Travellers Indemnity Co. of Canada* (1991), 80 D.L.R. (4th) 652 (S.C.C.), an insured attempted to rely on a "without prejudice" letter to estop an insurer from asserting a limitation period defence. Sopinka J. stated:

> [T]he letter … was made without prejudice to the liability of the insurer. The use of this expression is commonly understood to mean that if there is no settlement, the party making the offer is free to assert all its rights unaffected by anything stated or done in the negotiations.

Sopinka J.'s definition of "without prejudice" may be described as its generalized meaning, i.e., that a "without

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[4] This section is based on material prepared by Paul Perell for his articles, "The Problems of Without Prejudice" (June 1992), 71(2) *Canadian Bar Review* 223; revised for PLTC.

prejudice" communication is not intended to affect rights or liabilities.

When lawyers and others use the generalized meaning, often they do not view the communication as privileged, and they do not anticipate that the communication will be excluded from evidence. Generally, this view is correct, but it leads to the major source of mistakes in using "without prejudice" communications.

The problem is that in its particular meaning, "without prejudice" means that a communication is privileged. Under the particular meaning, the communication will not be admitted as evidence unless both parties waive the privilege. There is a fundamental practical difference between "without prejudice" communications that are evidence and those that are privileged, and lawyers must keep in mind that the rules for the exclusion of evidence in this area are very complex.

Paul Perell's article "The Problems of Without Prejudice" (June 1992), 71:2 *Canadian Bar Review* 223, reviews the case law and concludes with a number of practical suggestions, including the following:

(a) if you wish to exclude the communication from evidence, there must be a dispute present or pending, and you must make it clear that the communication is for the purposes of settlement and not for any other purpose. The communication must not be prejudicial or made in bad faith. You must be aware that there are exceptions to the privilege;

(b) although it is probably too late to abandon the short form of expressly describing the communication as "without prejudice," if you wish to assert the privilege you should not rely on this language. The language is neither necessary nor sufficient. You should articulate your intent. This will be helpful not only because the court may have to adjudicate on the issue of intent, but because, even if the communication fails to qualify as privileged, you may still argue that the communication had minimal probative value;

(c) if the purpose of the communication is to communicate in a way that does not affect rights and liabilities while preserving the communication as evidence, then once again it is helpful to articulate this precise intent.

[§6.05] Conflicts of Interest[5]

1. Duty of Undivided Loyalty

Solicitors owe their clients a duty of undivided loyalty. A conflict of interest arises if the lawyer has an interest that conflicts with that duty. The duty of loyalty is meant to ensure that lawyers exercise independent professional judgment in assisting their clients. If the lawyer's judgment is potentially affected by some other interest, such as a conflicting duty to a related client or a financial interest that could be affected by the client's transaction, the client does not obtain the full benefit of the lawyer's independent judgment and undivided loyalty.

Conflicts of interest can give rise to problems for lawyers both in terms of liability in court actions and in disciplinary proceedings. Avoiding conflicts of interest is desirable both from the standpoint of the adequate representation of clients and for the self-protection of lawyers. Appendix 3 at the end of this chapter is a sample non-engagement letter a lawyer might send where the lawyer determines there is a conflict in acting for a potential client.

This section examines conflicts in a general way:

(a) types of conflict of interest that can arise for lawyers;

(b) sources of law that define a solicitor's obligation to avoid conflicts of interest; and

(c) areas where conflicts of interest commonly arise.

The following discussion is primarily directed at commercial transactions rather than litigation situations. Clearly there are professional obligations to avoid conflicts of interest in both types of work, and in many respects the considerations are similar. However, the discussion does not fully fit the litigation context. For example, while the consent of parties to having a solicitor act for both of them may be sufficient in a commercial transaction, it may often be insufficient in litigation.

Note as well that the *BC Code* contains special conflicts rules for the provision of "short-term summary legal services," that is, pro bono or not-for-profit legal services provided with the expectation that the lawyer will not provide continuing legal services in the matter. See *BC Code* rules 3.4-11.2 to 3.4-11.4.

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[5] Based on material prepared by Bryan F. Ralph for the CLE, *Solicitors' Liability - Criminal, Civil & Professional* (January 1990); revised and updated by PLTC. Refer also to Appendices 3–4, at the end of this chapter, for more guidance in the area of conflicts of interest.

For guidance on firm procedures for detecting conflicts of interest, see *Professionalism: Practice Management*, Chapter 3, §3.03.

2. Categories of Conflict of Interest

Most definitions of conflict of interest have similar features. The phrase is defined in section 1.1 of the *BC Code*:

> "conflict of interest" means the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

In a general way, these definitions embrace a number of categories where conflicts of interest may arise. The following are the most common types of situations:

(a) a lawyer is asked to represent both sides of a transaction, e.g. acting for a mortgagee and mortgagor, a vendor and purchaser, a lessor and lessee;

(b) the lawyer acts for multiple clients who may not be on the "opposite side" of a transaction, e.g. a number of partners entering a partnership, co-defendants in a civil or criminal action;

(c) the adverse party is a former client; and

(d) there may be a conflict between the lawyer's personal interest in a matter and the interest of the client, either as a result of the financial interest of the lawyer in the transaction or as a result of some other relationship the lawyer may have with a third party (e.g. being a co-investor with the client, borrowing from the client or having a family member as a party to the transaction).

3. Sources of "Law" on Conflicts of Interest

(a) Where the "Law" is Found

One source of law is the decisions of the courts arising out of the exercise of their inherent jurisdiction to supervise lawyers as officers of the court. A number of decisions exist in this area where the court was asked to rule on the conduct of a lawyer and to make an appropriate order in a given situation. For example, the court may be called upon to "disqualify" a lawyer from continuing to act in a matter because the opposing party is a former client: *Aldrich v. Struk* (1986), 1 B.C.L.R. (2d) 71 (B.C.S.C.), and *MacDonald Estate v. Martin*, [1991] 1 W.W.R. 705 (discussed later). See also the review of conflicts cases by Brian Evans and Claire Marchant in the *Annual Review of Law & Practice* (Vancouver: CLE).

A second source is to be found in the decisions of the courts where lawyers are parties to actions and have been sued for damages as a result of their negligence or breach of fiduciary duty in failing to fully represent a client by reason of the lawyer's conflict of interest.

A third source is found in the rules of the *BC Code*, and specifically in section 3.4. In particular, see rule 3.4-1 which states as follows:

> 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.

The commentary to rule 3.4-1 reflects the "bright line rule" articulated in *R. v. Neil*, 2002 SCC 70 and reaffirmed and expanded in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39: a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client, unless the clients consent. This duty arises even if the matters are unrelated.

The lawyer-client relationship may be irreparably damaged where the lawyer's representation of one client is directly adverse to another client's immediate interests. One client may fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may feel betrayed by the lawyer's representation of another client having adverse legal interests. The prohibition on acting in such circumstances except with the consent of the clients guards against such outcomes and protects the lawyer–client relationship.

Commentary [2] to rule 3.4-1 further says that if the "bright line" rule does not apply, the lawyer must then consider if representing 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 interest, or their duties to another client or former client, or their duties to a third person.

Commentary [10] to rule 3.4-1 lists factors the lawyer should consider in determining whether a conflict of interest exists (not just at the outset, but throughout the retainer):

- whether the legal interests are directly adverse;
- whether the issue is substantive or procedural;

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

Commentary [11] to rule 3.4-1 provides a number of examples of situations where conflicts may arise. These examples include: acting as an advocate for a client on one matter and against the client on another matter; acting for a client in commercial transactions and against a client in employment matters; having a sexual or close personal relationship with a client; sole practitioners practising together, or acting as a director and lawyer for a corporate client.

(b) Who Decides on Matters of Conflict

The Supreme Court of British Columbia exercises its inherent jurisdiction to supervise lawyers in making some decisions, as indicated above. In addition, it is the most likely court to make decisions on liability for negligence or breaches of fiduciary duty, although it does not have an exclusive jurisdiction in this area.

The Benchers of the Law Society exercising their disciplinary authority is usually the body which makes decisions with respect to breaches of the Rules of the Law Society. However, this jurisdiction cannot be said to be exclusive in light of the supervisory role which the Supreme Court occasionally exercises.

4. Acting Against a Former Client

Rule 3.4-1 of the *BC Code* is a general prohibition on acting where there is a conflict. The Commentary makes clear that it applies to all situations, including current clients. Note that the definition of conflict includes specific reference to the duty of loyalty.

Rule 3.4-2 of the *BC Code* states as follows:

> 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 clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other 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.

Rule 3.4-10 of the *BC Code* outlines the conditions that a lawyer must fulfill in order to act against a former client. See also Rule 3.4-11 for guidance on when another lawyer in the lawyer's firm may act against a former client of the lawyer.

In *MacDonald Estate v. Martin*, [1991] 1 W.W.R. 705, the Supreme Court of Canada addressed a difficult professional issue—the conflict of interest that can arise when a lawyer transfers between two large law firms which are acting for opposing parties in litigation. The court ordered a law firm to withdraw from its representation of the plaintiff in protracted litigation because one of the firm's associates, who was not involved in the litigation, had previously done legal work for the defendant in the same matter, and there was a need to protect confidential information of the client. The court stated that the test to determine whether the firm could continue to act was whether "the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur."

MacDonald Estate left many unanswered questions. For example, what happens if the transferring lawyer, while in the former law firm, had no involvement in the litigation? What happens if such a lawyer satisfies the court that the lawyer acquired no confidential information? What types of measures, such as a physical or procedural barrier that will prohibit the tainted lawyer from communicating with the other lawyers working on the matter and "cones of silence" (a declaration by the tainted lawyer that under no circumstances will the lawyer divulge to anyone in the firm information that the lawyer possesses) must law firms take to ensure that no disclosure will occur?

Several cases in British Columbia have held that the lawyers in the circumstances should not be disqualified on the basis of receiving confidential information, including:

- *Manville Canada Inc. v. Ladner Downs* (1992), 63 B.C.L.R. (2d) 102 (S.C.);
- *Kaiser Resources Ltd. v. Western Canada Beverage Corp.* (1992), 71 B.C.L.R. (2d) 236 (S.C.): application to disqualify the plaintiff's

counsel because the law firm had acted for minority directors of the defendant corporation;

- *Pielak v. Crown Forest Industries* (5 June 1991), Vancouver No. C885874 (S.C.); and
- *R.T.B. Investments Ltd. v. Zanic Holdings Ltd.* (13 December 1991), Victoria Doc. 91/160 (S.C. Master).

In *Arends v. Arends*, [1995] B.C.W.L.D. 2752 (B.C.S.C.), where the solicitor for the petitioner/wife was a shareholder in the family corporation, which the solicitor also acted for, the court held that there was no conflict. Davies J. held that there may be a conflict if the family corporation were declared a family asset; however, the respondent had never had a solicitor-client relationship with the firm nor had the firm obtained any confidential information from communications with him.

For a decision in which the solicitor was removed, see *Clouthier v. Milljour*, [1995] B.C.W.L.D. 2505 (B.C.S.C.).

Also, in *Rosin v. MacPhail* (1997), B.C.L.R. (3d) 279 (B.C.C.A.), the Court of Appeal determined that the lawyer had not met the heavy burden of satisfying the court that no confidential information was imparted in the course of the first retainer that could be relevant to the action in question. Moreover, "the points of connection between the two retainers were sufficient to establish a realistic possibility of mischief."

See also Rodney Massel, "Case Comment *MacDonald Estate v. Martin* and Subsequent Decisions in British Columbia Courts" in (March 1992) *Advocate* 50:2.

Although the "appearance of impropriety" test of *MacDonald Estate*, *supra*, appears to be under some attack, it was acknowledged to be an important issue in *Manville*, and the test has been used in other cases to disqualify lawyers and others from representation: *United States Mineral Products Co. v. Pinchin Harris Holland Associates Ltd.* (1992), 70 B.C.L.R. (2d) 171 (B.C.S.C., in chambers).

In *Manville*, three law firms in Canada had formed an international partnership with centres outside Canada. An application to disqualify the Vancouver firm from a number of actions was taken by the petitioner, who had consulted with the Toronto firm on several matters including the defence of the present actions. Chief Justice Esson dismissed the application, holding that the firms remained separate entities and that there was no realistic possibility that confidential information given one firm would be communicated to the other as a result of the affiliation. The Chief Justice pointed out that applications to disqualify law firms were increasing, and in some cases appeared to be used as a tactical weapon against the opposing party, resulting in delay in litigation and increase in cost. He stated:

> [The remedy of disqualifying a firm] necessarily imposes hardship and, given that the party deprived of its representative is an innocent bystander in an issue between its lawyer and the opposite party, some degree of injustice on the innocent party. The imposition of such hardship and injustice can only be justified if it is inflicted to prevent the imposition of a more serious injustice on a party applying. It follows that the injunction should be granted only to relieve the applicant of the risk of "real mischief," not a mere perception.

An expert witness who had previously testified for a company in an American action cannot subsequently testify against the same company in British Columbia: *Hunt v. Hunt*, [1992] B.C.W.L.D No. 1672 (S.C.). A member of the public would reasonably conclude that lawyers in a small firm would discuss their cases with one another, although the lawyer swore that he could not recall ever discussing the petitioner's case with anyone in his former firm several years ago.

[§6.06] Confidentiality

1. Privilege and Disclosure

Confidentiality must be distinguished from two related concepts—the solicitor-client privilege and the litigation privilege. Confidentiality is a doctrine that prohibits persons (especially lawyers) who receive information in confidence from breaching that confidence and disclosing the information. The principle of confidentiality is subject to some exceptions, most significantly, the duty to disclose information during judicial proceedings (either at discovery or trial), unless a privilege such as the solicitor-client privilege can be invoked.

Solicitor-client privilege is a rule that prohibits enforced disclosure of communications passing between a solicitor and client.

Litigation privilege protects material prepared in anticipation of litigation.

2. *BC Code* Duties

Rule 3.3-1 of the *BC Code* restates the duty of lawyers to hold clients' communications in confidence:

> A lawyer at all time must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:
>
> (a) expressly or impliedly authorized by the client;
>
> (b) required by law or a court to do so;

(c) required to deliver the information to the Law Society; or

(d) otherwise permitted by this rule.

In a number of cases, solicitor-client privilege has been lost by a privileged document falling into the hands of someone other than the solicitor or client, such as the opposing party; the law is not settled on the circumstances in which the privilege is lost. Lawyers should take all reasonable steps to ensure the privacy and safekeeping of the client's confidential information. Lawyers must avoid indiscreet conversations or gossip, particularly about a client's affairs, even if the client is not named or otherwise identified. If a lawyer has access to or comes into possession of a document which the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, the lawyer must (under rule 7.2-10):

(a) return the document, unread and uncopied to the party to whom it belongs; or

(b) if the lawyer reads part or all of the document before realizing that it was not intended for the lawyer, cease reading the document and promptly return it, uncopied, to the party to whom it belongs, advising that party:

  (i) of the extent to which the lawyer is aware of the contents; and

  (ii) what use the lawyer intends to make of the contents of the document.

A lawyer may disclose the client's affairs to partners, associates and articled students and, to the extent necessary, to other employees of the firm, unless the client directs otherwise.

A lawyer *may* (not "must") disclose confidential information when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm and disclosure is necessary to prevent the death or harm, but must not disclose more information than is necessary: rule 3.3-3 of the *BC Code*. Remember that solicitor-client communications are not privileged when they are made to further a fraud or crime, whether the lawyer is party to the illegality or is completely innocent: see e.g. *Re Church of Scientology and R. (No. 3)* (1984), 47 O.R. (2d) 90 (H.C.J.).

In considering solicitor-client privilege, lawyers should note the Supreme Court of Canada decisions that establish solicitor-client privilege as a principle of fundamental justice protected under s. 7 of the *Charter* and as part of the right to privacy under s. 8. In *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White v. Ottenheimer & Baker v. Canada (Attorney General)*, 2002 SCC 61, the Court held that the privilege is protected under s. 8 as a right to privacy, and struck down a section of the *Criminal Code* (s. 488.1) that allowed the client to lose the privilege without knowing or consenting. In *R. v. McClure*, [2001] 1 S.C.R. 445, paras. 41-42, the Court declared the privilege is a principle of fundamental justice under s. 7 such that an individual's privilege should yield to an accused's right to make full answer and defence to a criminal charge, but the privilege could only be infringed when "core issues going to the guilt of the accused are involved and there is a genuine risk of wrongful conviction."

Arbour J. summarized the status of solicitor-client privilege in *Lavallee* at para. 49:

> Solicitor-client privilege is a rule of evidence, an important civil and legal right and a principle of fundamental justice in Canadian law. While the public has an interest in effective criminal investigation, it has no less an interest in maintaining the integrity of the solicitor-client relationship. Confidential communications to a lawyer represent an important exercise of the right to privacy, and they are central to the administration of justice in an adversarial system. Unjustified, or even accidental infringements of the privilege erode the public's confidence in the fairness of the criminal justice system. This is why all efforts must be made to protect such confidences.

The Supreme Court of Canada applied the *Lavallee* principles in *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7. It affirmed that "solicitor-client privilege "must remain as close to absolute as possible if it is to retain relevance" (at para. 44) and "the reasonable expectation of privacy in relation to communications subject to solicitor-client privilege is invariably high, regardless of the context" (at para. 38). See also the discussion of the nature of the privilege in *Canada (National Revenue) v. Thompson*, 2016 SCC 21 and *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53.

3. *Criminal Code* Sections 487.011 to 487.0199

Lawyers should be alert to *Criminal Code* ss. 487.011 to 487.0199. Section 487.014 allows a judge or justice to make a production order compelling someone who is not under investigation to produce data or documents relevant to the commission of a crime.

Certain conditions must exist before a judge can make an order. The judge must be satisfied by sworn information that there are reasonable grounds to believe that an offence has been or will be committed, that the person who is the subject of the order has possession or control of the documents or data, and that the documents or data will afford evidence respecting the commission of the offence.

A production order could be made compelling a lawyer to produce documents that are subject to solicitor-client privilege. In such cases, pursuant to rule 3.3-2.1 of the *BC Code*, the lawyer must claim solicitor-privilege over any documents that are or may be privileged, unless the client consents to their release. The judge is empowered to include conditions to protect a privileged communication between lawyer and client.

A person named in a production order may apply for an exemption from the requirement to produce the information referred to in the order, and a judge may grant the exemption if satisfied that the information is privileged or otherwise protected from disclosure by law. A lawyer named in a production order is responsible for applying for an exemption, and must give notice of intention to apply within 30 days after the production order is made. Failure to apply could result in the disclosure of information subject to solicitor-client privilege. Alternatively, a lawyer who does not comply with a production order could be subject to a fine not exceeding $250,000 or imprisonment of not more than six months, or both.

If a lawyer receives such a production order, the lawyer must act quickly to either gain consent of the client to release the documents or apply for an exemption order, claiming privilege over any documents that might be privileged.

Given that the onus to comply with the production order is on the privilege keeper (the lawyer) instead of the privilege holder (the client), there is some reason to believe that this section of the *Code* might be constitutionally challenged in the future; see *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209 where the Court struck down s. 488.1 of the *Criminal Code* partly because of the danger that privilege under that section could have been lost through the inaction of counsel.

Counsel who receive a production order for documents or data that may be subject to privilege should contact the Law Society for guidance.

[§6.07] Transactions Between Lawyers and Clients

Generally speaking, lawyers must, if they have a financial interest in a matter they are conducting for a client, adopt the position of saying "I can be your business partner or I can be your lawyer but I cannot be both."

The following principles of law from 36 *Halsbury* (3d) at 86 and 89–90 are instructive:

> There is no absolute rule that a solicitor cannot sell property to, or buy property from, a client, but, in order that the transaction may be upheld if it is challenged, the solicitor should preserve evidence to enable [the solicitor] to show that the client was advised in the transaction as diligently as [the client] would have been if contracting with a stranger, and that the transaction was as advantageous to the client as it would have been if [the client] had been contracting on reasonable and equal terms with a stranger. For practical purposes the position may be stated thus: a transaction of sale or purchase between a solicitor and client will be upheld if the solicitor can prove: (1) that [the solicitor] made full disclosure to the client of all relevant information known to the solicitor; (2) that the price was fair; and (3) that the client was advised by an independent solicitor to whom all circumstances were disclosed. . . The requirement of independent advice may not strictly be justifiable in law as a necessary requirement, [in order that a transaction of sale should be upheld] but in practice it is certainly expedient . . . The giving to the client of competent independent advice is . . . probably the best means of ensuring that the client is emancipated from any possible influence from the solicitor.

The foregoing principles may apply even where the relationship of solicitor and client, in the strict sense, has ended before the impugned transaction: *Allison v. Clayhills* (1907), 97 L.T. 709 at 712. See also *McMaster v. Byrne*, [1952] 3 D.L.R. 337 (P.C.); *Milligan v. Gemini Mercury Sales Ltd.* (1977), 1 B.L.R. 63 (Ont. H.C.).

In British Columbia, clients frequently have taken lawyers to court after discovering a lawyer-client conflict. A lawyer's failure to advise the client to seek independent legal advice where there is a conflict can result in claims that go beyond the limits of the BC Lawyers Compulsory Professional Liability Indemnification Policy. In *Cavallin v. King* (1984), 51 B.C.L.R. 149 (S.C.), the defendant solicitor, after having acted for the plaintiff in several real estate transactions, approached the plaintiff to participate in a joint venture to develop property. The plaintiff was to provide financing, and the solicitor was to be both a director of the joint venture and a participant who provided legal and other services. The plaintiff was not advised to obtain independent legal advice. In the ensuing joint venture, the solicitor was negligent in carrying out his duties, which resulted in financial loss to the plaintiff. The court held that the defendant breached his fiduciary duty to advise the plaintiff to seek independent legal advice on the question of the plaintiff's involvement. As a result, the defendant had to reimburse the plaintiff for the considerable losses sustained and restore the plaintiff to the position he would have been in had he been properly advised.

Lawyers who act when they have personal business interests in transactions may not be indemnified because of the business exclusion in the BC Lawyers Compulsory Professional Liability Indemnification Policy. The Policy does not apply to claims by family members (spouses, former spouses, children, parents or siblings), or by or in connection with any organization in which the lawyer, the lawyer's family or law firm partners, associates, or associate counsel own more than 10% or have effective management or control.

[§6.08] Testamentary Instruments and Gifts to Solicitors

BC Code rule 3.4-39 prohibits a lawyer from accepting a gift "that is more than nominal" from a client, unless that client has received independent legal advice.

Rule 3.4-37 prohibits a lawyer from including a term in a client's will directing the executor to retain the lawyer to administer the client's estate.

Rule 3.4-38 prohibits a lawyer from preparing an instrument (such as a will) giving the lawyer or an associate "a gift or benefit from the client, including a testamentary gift," unless the client is a family member of the lawyer or the lawyer's partner or associate.

The annotations to rule 3.4-38 note that this rule does not prevent a lawyer from including a charging clause in the client's will, at the client's request, if the client wishes the lawyer to act as executor of the will.

[§6.09] Giving Independent Legal Advice

Claims arising from lawyers giving independent legal advice ("ILA") occur every year. In a relatively recent example, a lawyer received a call from another lawyer in the area, and was told that one of the parties to a commercial transaction closing that day needed independent legal advice. The lawyer agreed to help, and met with the party a short while later. During their 45-minute meeting, the lawyer reviewed a number of commercial documents and talked with the client about the transaction, in which the client was loaning money to a company. The lawyer recommended investigating title to the assets, but the client did not want to spend the time. At the end of the conference the lawyer charged the client a nominal fee. Fortunately the lawyer made comprehensive notes of the conference with the client.

When the company failed to repay the loan, and the company's title to the security proved to be deficient, the client alleged that the lawyer failed to warn the client to investigate title to the company's security. Our insurers were able to effectively deal with this million-dollar claim because the member had comprehensive notes about the meeting with the client.

The claims cases suggest, "Take notes, take notes, take notes." A review of ILA claims suggests a few precautions all lawyers can take.

1. If you are asked to provide ILA services, consider whether you are competent to give advice in the particular area and whether you have enough time to do a proper job.
2. Parties needing ILA services are often under time pressures and do not want to spend a lot of time or money on advice. If the client does not allow you reasonable time to review the documents, or does not want to pay for searches or enquiries, document what you did and what you advised, and why you did not take other steps.
3. When you provide ILA services, spell out for the client exactly what you are doing and not doing. For example, if you are independently advising a client on a bank guarantee for a loan to a small business, tell your client that you are only advising on the guarantee, not on the loan between the bank and the borrower.
4. Similarly, after you've reviewed a document with an ILA client, the client may ask, "Do you think I should sign it?" Remember that your role is to give legal advice, not business advice. Explain that your job is to explain the legal consequences and risks of signing the document, so the client can make an informed decision about whether to proceed.

The best practice is for lawyers to advise ILA clients to make all necessary enquiries. You should also warn clients of the dangers of not investigating relevant matters.

At a conference of the County of Carleton Law Association (Upper Canada), Philip Epstein, a family practitioner and bencher, had some useful comments regarding ILA. Cristin Schmitz summarized these comments in an article for *The Lawyers Weekly* 14:28 (November 25, 1994) as follows:

- [Philip Epstein] criticized the common but dangerous practice of sending clients "down the hall" for ILA. Clients should instead be given a short list of lawyers in the area.
- A typical ILA scenario involves a client signing a loan guarantee after spending 20 minutes with a lawyer the client has never met before. When the lawyer is later asked about the ILA (because the client has been sued on the guarantee), the lawyer can't remember the client; has no notes or reporting letter; and charged very little and the bill doesn't detail the work.
- Philip Epstein said most lawyers probably do an adequate job of warning their clients when giving ILA. But too often they can't prove it. To help solve this problem, use an ILA checklist. After a lawyer reviews the checklist with the client, the checklist should be signed by the client and placed in the file.
- Lawyers should also make notes, and write a brief reporting letter covering the matters canvassed in the meeting.
- When giving ILA, it is important to go much further than simply asking whether the client understands the document. The lawyer must spend enough time to ensure that the client also understands the document's consequences.

The Law Society has developed an ILA checklist. It is available as Appendix 4 following this chapter or on the Law Society's website: www.lawsociety.bc.ca/Website/media/Shared/docs/practice/resources/checklist-ila.pdf.

[§6.10] Duties Relating to Court Processes

1. Duty to the Court

Rule 2.1-2(a) of the *BC Code* states:

> A lawyer's conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.

The lawyer's duty of candour and respect to the courts must be balanced with the duty of tenacious representation owed to clients. The object of the legal system is to determine truth and achieve justice. As a result, there must be limits placed on the adversarial nature of the litigation process. The effectiveness of the system relies heavily on the credibility of the courts as independent and competent arbitrators. Therefore, the conduct of counsel before the courts is governed by rules which assure that the courts are treated with proper respect and that there is no appearance of impropriety.

Especially where counsel is proceeding without notice to the other party, counsel owes the court a duty to make full and frank disclosure of the material facts: *Evans v. Umbrella Capital LLC*, 2004 BCCA 149.

2. Accuracy in Pleadings[6]

It is clearly improper for a lawyer to deliver a pleading that asserts a cause of action having no foundation in law.

It is improper not only to disguise a cause of action that is not maintainable, but also to advance a claim that clearly has no basis in law. This is not to say that it is improper to deliver a pleading which puts forward a claim relying on what, in the advocate's opinion, is an erroneous view of the law. But the border is crossed into the area of misconduct if the law is sufficiently clear that the lack of legal foundation would not be the subject of reasonable dispute among reasonably competent lawyers.

Another clear rule is that a lawyer must not deliver any pleadings containing allegations of fact that the lawyer knows to be false.

However, with respect to knowledge of the facts, a lawyer is subject to severe limitations in that the lawyer generally receives information from the client and sources available through the client. To the extent that documentation exists, the lawyer must rely on the client and the available witnesses for identification and clarification. The definition of the lawyer's obligation with respect to pleadings must take account of the limited availability of unbiased sources of information.

3. Abuse of Process

Lawyers have a duty not to use the litigation process to delay unfairly or cause the other party unnecessary cost. It is also improper to use the process to harm the other party maliciously, which may subject the lawyer to professional discipline as well as to court sanctions. One example of the latter occurred in *Sonntag v. Sonntag* (1979), 24 O.R. (2d) 473 (S.C.), where an unnecessarily repetitious solicitor unduly interfered with the conduct of discovery by examining counsel. The court found his conduct constituted an obstruction of the process of the court, resulting in costs being incurred unnecessarily or wasted by the opposing party. The solicitor was ordered to pay the costs of the opposing party of the aborted discovery.

Improperly instigating a criminal prosecution may constitute the tort of malicious prosecution. Compromising a criminal liability, by taking money to drop a prosecution, for example, can constitute extortion in many circumstances, creating civil and even criminal liability. Levying civil execution, such as seizure or garnishment, for improper purposes or for excessive amounts or by using methods not authorized by law, is a tort.

Rule 3.2-6 of the *BC Code* states as follows:

> 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 or offer to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority's conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or 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.

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[6] Originally extracted from B. Finlay, "The Conduct of Lawyer in the Litigious Process: Some Thoughts" in Eric Gertner, ed., *Studies in Civil Procedure* (Toronto: Butterworths, 1979).

4. Duties in Presenting Evidence[7]

In contested proceedings, the lawyer has a limited affirmative duty to ensure that all relevant evidence is presented to the court. The lawyer is concerned with establishing the *prima facie* case, with destroying it and with its restoration.

Notwithstanding the partisan nature of an advocate, lawyers owe duties to the court, including the duty not to engage in the following:

(a) a lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either in argument to the judge or in address to the jury, assert a personal belief in an accused's guilt or innocence, in the justice or merits of the client's cause or in the evidence tendered before the court (rule 2.1-2(c) of the *BC Code*);

(b) a lawyer should never seek privately to influence a court or tribunal, directly or indirectly, in the lawyer's or a client's favour, nor should the lawyer attempt to curry favour with juries by fawning, flattery or pretended solicitude for their personal comfort (rule 2.1-2(d) of the *BC Code*);

(c) when acting for a client, a lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud (rule 3.2-7 of the *BC Code*); and

(d) a lawyer must not participate in offering or making an agreement in which a restriction on any lawyer's right to practise is part of the settlement of a client lawsuit or controversy (rule 3.2-10 of the *BC Code*).

Rule 5.1-2.1 deals with incriminating physical evidence, and states:

> A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence so as to obstruct or attempt to obstruct the course of justice.

See also the commentary to rule 5.1-2.1.

Rule 5.1-2 of the *BC Code* states that, when acting as an advocate, a lawyer must not:

(a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

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

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;

(g) knowingly assert as fact that which cannot reasonably be supported by the evidence or taken on judicial notice by the tribunal;

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

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

(j) improperly dissuade a witness from giving evidence or advise a witness to be absent;

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

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

(m) abuse, heckle or harass a witness;

(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge;

(o) needlessly inconvenience a witness; or

(p) appear before a tribunal while under the influence of alcohol or a drug.

Many of these examples are supported by case law which reflects that breach of a duty will be visited with the severest penalties imposed by the court.

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[7] Based on Finlay, *supra*, pp. 22–30; revised by PLTC.

For instance, it is a contempt of court to do anything to keep a potential witness "out of the way," such as suggesting that the witness might take a short trip, even where the witness has not been subpoenaed. Any of the conduct set out in the last four items in the above list constitutes a contempt of court if the purpose is to deter or influence the witness from or in giving testimony.

The failure to disclose adverse but relevant evidence may be improper. The crown in criminal matters has a duty to disclose all relevant evidence. In civil matters, especially in proceeding without notice, there is an obligation to present the court with all the facts that would influence the court's decision: *McKnight v. Hutchison*, 2009 BCSC 343 at para. 31.

To what extent does a lawyer have a duty to expose to the court evidence that is adverse to the client? There is a fine line between conscientious advocacy for one's client, which includes not conceding anything unnecessarily to the opposition, and the unethical concealing of information that ought to be disclosed: *Harper v. Harper* (1979), 98 D.L.R. (3d) 600 (S.C.C.).

In *Harper v. Harper*, lawyers for both parties were unaware that the husband had repaid a loan on the matrimonial home prior to trial; the change in title had not been registered. The husband's lawyer learned of this matter confidentially while preparing the husband's appeal of the husband's entitlement to a share of the property. The issue of the husband's entitlement had not been dealt with at trial, and the appeal was argued on the record created at trial.

In a subsequent discipline hearing against the husband's lawyer, the Benchers found that the lawyer had a duty to his client not to disclose the confidential information to anyone. However, his duty to the client did not require him to institute an appeal on a new issue, the factual basis for which was known to him to be untrue.

Even if there was no fraud in the creation of the record, the conduct of the lawyer in this case was "contrary to the best interests of the public" in that the court was invited to accept a factual premise not in issue at trial, not adequately dealt with at trial, and known to be untrue to the appellate counsel. The lawyer's conduct in the pursuit of the appeal was found to be conduct unbecoming a member of the profession.

5. False Evidence[8]

Where the lawyer adduces evidence, the lawyer is not the one judging its credibility, which may create ethical difficulties in certain situations:

(a) deciding whether to call a witness of doubtful veracity;

(b) hearing a client lie for the first time while giving evidence; and

(c) being told by a client after a trial that the client had committed fraud.

The lawyer may not know or have reason to believe that the evidence is false. Mere inconsistency between what a person says at one time and another is insufficient to conclude that the person will offer or has offered false testimony. If inconsistency appears in a client's or witness' statements or testimony, the lawyer has a duty to the court to explore the inconsistency at the first opportunity. If the lawyer, based on that enquiry, is certain that the client or witness intends to offer false evidence, then the lawyer's other duties to the court with respect to false evidence arise (discussed later); otherwise, the lawyer is entitled to proceed and leave it to the court to assess the truth of the statements or testimony.

For a lawyer to put forward false evidence knowingly is "at the very least, a gross neglect of duty" and very likely a criminal offence. In *Re Ontario Crime Commission*, 1962 CanLII 140 (Ont. C.A.) the Court of Appeal found that counsel had inserted "scurrilous and shoddy statements" in an affidavit, which the court concluded could only have been inserted for the purpose of attracting publicity and undermining public confidence in the Commissioner. The court concluded this aspect of the case with the following comments:

> It is no answer for counsel to say that he was merely carrying out his client's instructions. If the instructions are to do that which is wrong, counsel is abetting the wrong if he carries out the instructions. If he knows that his client is making false statements under oath and does nothing to correct it his silence indicates, at the very least, a gross neglect of duty. Regardless of any other sanctions which may be imposed upon him, there will be an order that counsel for the applicant personally pay the costs of all other parties appearing on this motion.

While the lawyer must not adduce false evidence knowingly, the lawyer should not be considered as "vouching" for the credibility of a witness. This would place an obligation on the lawyer that the lawyer is not particularly well equipped to discharge. In addition, it may be necessary to call a

[8] Based on Finlay, *supra*, pp. 22–30; revised by PLTC.

witness of doubtful veracity to establish a purely formal matter, such as to identify a document or to bring in a single, but essential, fact. That the witness may be a notorious liar with respect to other matters should not deprive counsel of the means of proving other facts. At the same time, lawyers must not call witnesses who have advised the lawyer that they intend to offer false testimony: see the *BC Code,* rule 5.1-2(e) generally.

Nowhere are the problems of conduct more acute than in the case of evidence, known by the lawyer to be false, given by the client without warning at the trial. The lawyer's duty to preserve confidences and the duty not to mislead the court or further a fraud seem to collide unavoidably. There is no doubt that if the client advises counsel before the hearing of the client's intention to perjure themselves, counsel must convince the client not to, or counsel must withdraw: see the *BC Code*, rule 3.7-7(b) generally.

A lawyer must not disclose the fact that a withdrawal was caused by a client's insistence on giving false testimony: see the *BC Code*, rule 3.7-9.1 generally.

Lawyers must be cautious not to manufacture evidence or suggest to clients ways they could create evidence. In *Dicks v. Dicks*, [1949] 2 W.W.R. 866 (B.C.S.C.), Farris C.J.S.C. made the following oral remarks:

> The facts would indicate that the solicitor for the respondent had apparently advised the respondent of the steps necessary to enable the parties to be divorced. In so doing he must have advised the respondent to commit the act of adultery, and not only that, but himself undertook to obtain a detective and did instruct a detective to be present so that the evidence for the divorce could be obtained . . . On the face of it, it would seem that the solicitor, in apparently advising and taking the steps which he did, would have been acting in a manner which would be most highly reprehensible.

6. Contempt of Court

The only common law offence for which a person may now be convicted is the offence of criminal contempt of court; see the *Criminal Code*, ss. 9 and 10.

In *Re Duncan*, [1958] S.C.R. 41, the Supreme Court of Canada stated:

> There is no doubt that a counsel owes a duty to his client, but he also has an obligation to conduct himself properly before any court in Canada. . . It has been stated by Lord Russell of Killowen C.J. in *Regina v. Gray*, that judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could, or would, treat that as contempt of Court. However, Lord Russell had already pointed out that any act done calculated to bring a Court into contempt or to lower its authority is a contempt of Court and belongs to that category, which Lord Chancellor Hardwicke had as early as 1742 characterized as "scandalizing a Court or a judge."

The matter is put succinctly in the 3rd edition of *Halsbury*, vol. 8 (1954) at p. 5:

> The power to fine and imprison for a contempt committed in the face of the court is a necessary incident to every court of justice. It is a contempt of any court of justice to disturb and obstruct the court by insulting it in its presence and at a time when it is actually sitting. . . It is not from any exaggerated notion of the dignity of individuals that insults to judges are not allowed, but because there is imposed upon the court the duty of preventing *brevi manu* any attempt to interfere with the administration of justice.

The following passages illustrate two types of situations in which a lawyer can be convicted of criminal contempt of court.

(a) Failure to Appear in Court

In *R. v. Jones* (1978), 42 C.C.C. (2d) 192 (Ont. C.A.), counsel explained his failure to represent his client at a preliminary hearing on the basis of inadvertence arising from a breakdown of a system which ordinarily worked for the counsel in question. The Ontario Court of Appeal set aside a conviction for contempt, noting that the conduct of the lawyer in question was neither deliberate nor indifferent. At the most, his conduct was an isolated and inadvertent lapse, which under the circumstances would not constitute contemptuous conduct. See also *R. v. Kopyto* (1981), 122 D.L.R. (3d) 260 (Ont. C.A.).

(b) Withdrawal During Trial

In *R. v. Swartz*, [1977] 2 W.W.R. 751 (Man. C.A.), the lawyer asked the court for a two-week adjournment so that expert reports which he had requested but were unfinished could be introduced. The judge refused the motion, and on hearing the lawyer state he would have to withdraw from the case, ordered him not to leave the courtroom, threatened to report him to the Law Society, had the constable arrest him, and charged him with contempt. The lawyer was convicted and appealed.

The appeal was allowed. The Court of Appeal stated:

> In contempt proceedings the attitude or intent of the actor is all important. The lawyer who deliberately and of set purpose frustrates the due carrying on of court proceedings by a

> willful act of non-attendance is surely on a different footing from the lawyer who, like Mr. Swartz here, impulsively reacts to an adverse and rather shattering ruling of the court by attempting to withdraw. The first is a case of willful and contumacious conduct. The second is at worst an error of judgment.

The Court of Appeal referred to a quotation from Shimon Shetreet in *Judges on Trial*:

> A better course of action for counsel [except in extraordinary circumstances is] to continue to take part in the trial and raise his complaints against the conduct of the judge on appeal. . .
>
> Sometimes counsel cannot divert the judge from a course of conduct, which makes it very difficult for him to discharge his duties, and renders it impossible for his client to have a fair trial. In those cases courageous counsel have sometimes withdrawn from the case and walked out of court in protest. The traditions of the Bar do not exclude such an extreme measure. The Bar Council gave the following ruling in 1933:
>
> . . . if counsel is unfairly interfered with to such extent as to defeat the course of justice it may be necessary for counsel to withdraw from the case or to leave the matter to be dealt with on appeal. Counsel should always remember that his paramount duty is to protect the interest of his client.
>
> Naturally, this measure has been taken by counsel only in exceptional cases.

In most cases where withdrawal from the record is based on matters relating to the conduct of the case or disagreements with the client about the conduct of the case or otherwise, it is appropriate for counsel merely to announce that counsel does not propose to carry on. However, counsel do not have an unfettered right to withdraw.

The *BC Code* addresses withdrawal from representation in section 3.7. Further guidance on the lawyer's right to withdraw appears in the commentary to the rules in section 3.7.

Rule 3.7-1 states: "A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client." For guidance as to what constitutes "reasonable notice," see commentary [2] to rule 3.7-1.

Rule 3.7-2 states: "If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw."

Other rules in section 3.7 address withdrawal for nonpayment of fees (rule 3.7-3), withdrawal from criminal proceedings (rule 3.7-4), obligatory withdrawal (rule 3.7-7), manner of withdrawal (rule 3.7-8), withdrawal when the reason for withdrawal results from confidential solicitor-client communications (rule 3.7-9.1), and the duty of the successor lawyer (rule 3.7-10).

See also the *Practice Material: Criminal Procedure,* §3.23 (Withdrawal as Counsel), on the court's jurisdiction to refuse to permit counsel to withdraw from a criminal case in certain circumstances.

Note also that a lawyer must comply with Supreme Court Civil Rule 22-5 before being relieved of duties as the "solicitor acting for the party."

7. Costs Against Lawyers

Costs may be ordered against a lawyer personally where the lawyer's conduct constitutes "abuse of process, frivolous proceedings, misconduct or dishonesty, or actions taken for ulterior motives, where the effect is to seriously undermine the authority of the courts or to seriously interfere with the administration of justice": *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 at para. 26.

A superior court has the power to award costs as part of its inherent jurisdiction. In *Jodoin*, Chief Justice McLachlin (as she then was) said the courts must be cautious in awarding costs personally against a lawyer.

Courts have ordered solicitors to pay costs in the following kinds of situations:

(a) a lawyer assumed a case would come on for trial later than it did;

(b) a lawyer underestimated the length of the trial;

(c) a lawyer improperly acted for both sides;

(d) a lawyer attempted to intimidate witnesses to prevent them from testifying, resulting in special costs (*O.E.X. Electromagnetic Inc. v. Coopers & Lybrand*, [1992] B.C.W.L.D. 2449 (S.C.));

(e) a lawyer irregularly issued a subpoena;

(f) the subject matter of the suit was important to the lawyer but not to the client; and

(g) a lawyer acted without proper authority.

In *O'Neil v. Pacific Great Eastern Railway* (1971), 24 D.L.R. (3d) 628 (B.C.C.A.), counsel, in his examination-in-chief of a witness in a jury trial, disregarding objections by opposing counsel, asked the witness questions on a matter that had become irrelevant as a result of earlier evidence. In so doing, he elicited answers that were most prejudicial to the

defence and might well have led to an improper verdict. The Court of Appeal found that the trial judge had correctly exercised his discretion in discharging the jury and ordering the solicitor personally to pay the costs of the abortive trial. The Court of Appeal said:

> A trial judge has the inherent power to prevent either party being prejudiced by references which might lead to an improper verdict, and the discretion of the trial judge is only interfered with in exceptional circumstances; and no such exceptional circumstances, in my view, exist here. . . It is clear, I think, that in appropriate circumstances an order to pay costs thrown away may be made against a solicitor.

See also *Re Bisyk* (No. 2) (1980), 32 O.R. (2d) 281 (H.C.), affirmed March 12, 1981 (C.A.), where the validity of a will was attacked. Allegations of undue influence were pursued to the conclusion of the case. The court found the allegations were unfounded and had been pursued without justification. In dealing with the question of costs, the court noted that the lawyer was:

> . . . .in control of the litigation and in any event [had] joined himself to the proceedings as attorney and in that capacity . . . participated in the proceedings. [The lawyer] must assume responsibility for the allegations advanced and should bear the risk of costs where allegations are made irresponsibly and without foundation. An order will go for costs on a solicitor and client basis against [the lawyer] personally.

If an order is sought under the court's inherent jurisdiction against a lawyer to pay costs personally, the lawyer must be given an opportunity to meet the complaint. If no such opportunity is given before the order is made, the order will be set aside on appeal: *Abraham v. Jutsun*, [1963] 2 All E.R. 402 (C.A.).

In upholding the decision of the British Columbia Court of Appeal to reverse an award of solicitor-client costs against counsel personally, the Supreme Court of Canada in *Young v. Young* (1993), 84 B.C.L.R. (2d) 1 made some general statements as to the availability of that extraordinary measure. At p. 29, McLachlin, J. (as she then was) said,

> The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court . . . Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where [the lawyer's] fear of an adverse order of costs may conflict with these fundamental duties of [the lawyer's] calling.

In *Interstate Investments Ltd. v. Pacific International Securities* (14 August 1995), Vancouver Registry, C941054 (B.C.S.C.), the defendant filed with the court an argument that the plaintiff's solicitor was guilty of "outrageous conduct" tainted by serious misconduct. The nature of the "serious misconduct" was that the plaintiff and the plaintiff's solicitor (acting on instructions from the plaintiff) knew about and agreed to the transaction for which they subsequently accused and then commenced action against the defendant for breach of trust. Moreover, at the time of oral argument, the defendant argued that "…if not directly, then by necessary implication that the plaintiff's solicitor had sworn an affidavit which was false, possibly knowingly."

Madam Justice Koenigsberg, in rendering her decision stated as follows:

> It is, in my view, improper practice to suggest even indirectly that a professional colleague has acted improperly, without strong evidence, carefully tested, that such an allegation is merited.
>
> Both the defendant's written material and in part its argument before the court, fell short of the standard of professional conduct and courtesy required before this court. The defendant's solicitor disregarded the professional reputation of a colleague and officer of this court, and made insufficient effort to ensure that any allegations, publicly made, of unprofessional and unethical conduct, were well-founded . . .
>
> The plaintiff's solicitor had no direct interest in this litigation other than to represent her client's interests in the transactions. She was and is a professional person, engaged in carrying out her professional duties both in communicating with the defendant and in swearing the affidavit she did. As is the case with any legal practitioner, her reputation for integrity is the most valuable asset she has. Each professional owes all others reasonable even vigilant care in assessing actions undertaken and words said, before allegations or imputations are made which can have the effect of undermining another practitioner's reputation for integrity. Defendant's counsel failed to exercise that care. The allegation of serious misconduct in the context in which it was made and relied on in this proceeding by the defendant was not well-founded and the obvious steps were not taken to determine whether such an allegation did have any foundation.

> Such conduct on the part of the defendant is deserving of "chastisement."
>
> In the circumstances I award special costs to be paid to the plaintiff to be applied to all matters in the proceeding from and following the filing of the defendant's chambers brief . . .

[§6.11] Self-represented Persons

1. Who Are Self-represented Persons

Lawyers might be providing a limited scope of legal services to clients who are otherwise representing themselves. In that situation the retainer should clarify what services the lawyer provides (and does not provide), to avoid misunderstanding. If the lawyer is only providing limited legal services, the lawyer should make that clear in making appearances before the court, where the judge or other counsel might expect that the lawyer is representing the client for the entire matter. For more on unbundled legal services, see "Scope of the Retainer" in *Professionalism: Practice Management*, §5.05(4).

The rest of this discussion addresses the situation where a lawyer is representing one party whose interests differ from those of a self-represented person. Self-represented litigants are also sometimes called lay litigants.

The National Self-Represented Litigants Project (see http://representingyourselfcanada.com) received support from the Law Foundation and Legal Aid BC (formerly the Legal Services Society) to create a report in 2013. The report is available on the National Self-Represented Litigants Project website. The report canvassed reasons why people were representing themselves: some people were unable to afford lawyers, some people had had lawyers but were unsatisfied with the services, and some people just felt they could do it themselves. The report also provided statistics on how many people were representing themselves in different courts: it was described in 2013 as an "explosion" and at that time 32% of people going to BC courts were self-represented. Incidence of self-representation was highest in family matters, where 60% of people were self-represented.

The report also canvassed where self-represented litigants were going for assistance. Often these litigants sought the help of staff at the court registries or at the Justice Access Centres at BC courthouses. They also relied on online resources, such as guidebooks created by the Justice Education Centre or videos available on the BC courts' websites. The 2013 report included a listing of General resources, which was updated in 2017 and is available on the website of the National Self-Represented Litigants Project, and also from a link on the Law Society of BC website (see under "Self-Representation and Unbundled Services").

Since 2013 there has only been widespread increase in self-represented persons performing their own legal services.

2. What Is the Lawyer's Role

A lawyer should, from the outset, make it clear whose interests the lawyer represents and whose interests the lawyer does not represent. Be clear in your own mind who is your client, which might need clarification if the client has brought other people to your office or is a director of a corporate party. Then make your understanding clear to your client and to the others. The lawyer should advise a self-represented party to seek independent representation.

The lawyer should make a note that they advised the self-represented person to seek representation, and should take careful notes throughout the matter. The lawyer should also encourage the self-represented party to communicate in writing. For phone calls, follow up with a written summary of the substance of the call, setting out what was agreed.

Throughout the matter and generally, lawyers must treat all persons courteously. Lawyers deal with people who are in conflict, and who might turn their anger on the lawyer. Lawyers deal with people who are suffering, sometimes even suffering from trauma or mental health challenges. Lawyers must, of course, treat their clients with courtesy, but it can sometimes be difficult to treat an adverse self-represented party with comparable courtesy if their behaviour is challenging to deal with.

As a rule, separate the people from the problem, and set boundaries around the behaviour where possible. For example, if a self-represented person is calling repeatedly and using rude language, do not respond in kind, and do not take it personally. Inform them that you appreciate the importance of the matter, and how upsetting it must be to them; then tell them how and when you will respond.

In the course of the matter, whether it is a transaction or litigation, lawyers should not attempt to take paltry advantage of slips by the self-represented party, and should endeavour to be reasonable. The lawyer might have occasion to send legal information or links to resources to the self-represented party:

- BC courts have web pages for self-represented litigants with links to guidebooks and further information (www.bccourts.ca/supreme_court/self-represented_litigants/).

- Clicklaw (http://wiki.clicklaw.bc.ca/) has self-help resources, such as J.P. Boyd's wikibook on family law and guidebooks from the People's Law School.
- Justice Education Society provides online resources including "Law Coach" (http:/ /justice education.ca/index.php/law-coach-bc) to assist people with family divorce and separation matters by phone and email.

In some cases the lawyer might anticipate being able to draft an agreement that could settle the matter between the parties, but should certainly recommend that the adverse party seek independent legal advice to review the agreement before signing.

In making an offer to settle to a self-represented party, make sure the self-represented party understands the potential costs consequences of failing to accept the offer (*Mac v. Mak*, 2016 BCSC 1804 at para. 53).

Finally, remember that a self-represented party is still a party, and afford them at least as much courtesy as you would offer a lawyer. For example, give them notice before taking default judgment. In *Albo v. Haines*, 2021 BCSC 2200, a lawyer advised a self-represented party to seek representation at the start of their involvement, but after the self-represented party failed to file a response in time, the lawyer did not advise the self-represented party that they would be holding them to strict compliance with the time lines in the court rules and would be seeking default judgment. The court set aside the default judgment and ordered special costs against the lawyer.

3. What Is the Court's Role

In 2006 the Canadian Judicial Council created a "Statement of Principles on Self-Represented Litigants and Accused Persons" (the "Statement"). The Statement says that judges must apply the law in an even-handed way, regardless of representation, and should ensure that procedural and evidentiary rules do not unjustly hinder self-represented parties.

(a) Criminal Context

The BC Court of Appeal in *R. v. Leno*, 2021 BCCA 200 affirmed the principles set out in the Canadian Judicial Council's "Statement" for application to a criminal case. The Court found that the judge had a duty to assist a self-represented accused, but not to the point where the court became their counsel. In *R. v. Leno* the court had assisted the accused by, among other things, providing the accused with a booklet called "Notes for a "Self-Represented Accused." The Court of Appeal endorsed its earlier decision *R. v. Neidig*, 2018 BCCA 485 on the duty of the judge to assist self-represented accused:

> The duty of the judge to assist a self-represented accused in a criminal case was thoroughly summarized by Justice Frankel in *R. v. Neidig*, 2018 BCCA 485:
>
> > [91] The *Statement of Principles on Self-Represented Litigants and Accused Persons* issued by the Canadian Judicial Council in 2006 provides advice to judges on how to meet their obligations to self-represented litigants in the courtroom. The following appears under the heading "For the Judiciary":
> >
> > 1. Judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may explain the relevant law in the case and its implications, before the self-represented person makes critical choices.
> > 2. In appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.
> > 3. Judges should ensure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented persons.
> >
> > […].
> >
> > [92] When assisting an unrepresented accused, a trial judge must exercise caution to avoid becoming an advocate for, or legal advisor to, the accused.

(b) Civil Context

The Statement has been endorsed by the Supreme Court of Canada in *Pintea v. Jones*, 2017 SCC 23 and *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50 at para. 39.

The BC Court of Appeal applied the Canadian Judicial Council's "Statement" in *Code v. BC Nurses Union*, 2014 BCCA 2. The Court of Appeal found that the self-represented party had delayed unreasonably, and not out of inadvertence or inexperience but as a matter of strategy and stubbornness. The Court of Appeal said that, while it is right for a court to assist a self-represented litigant in matters of evidence and procedure, the petitioner's self-represented status was not the determining factor in failing to proceed. The Court of Appeal described the judge's role as ensuring that procedural rules do not hinder self-represented litigants. The Court also said that courts must maintain control over their procedures as part of promoting fair access

to justice, and quoted (at para. 37) from the Statement:

> Self-represented persons, like all other litigants, are subject to the provisions whereby courts maintain control of their proceedings and procedures. In the same manner as with other litigants, self-represented persons may be treated as vexatious or abusive litigants where the administration of justice requires it. The ability of judges to promote access may be affected by the actions of self-represented litigants themselves.

4. Relevant Rules

When dealing with self-represented persons, it is especially important to bear in mind rule 7.2-1 of the *BC Code*, which provides that 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 the lawyer's practice.

When there is a self-represented person in a matter, the *BC Code* requires lawyers to do as follows:

> 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 [the unrepresented person's] 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.

Note that when you witness the signature of someone who is not well known to you, you would be wise to follow the client identification steps set out in Law Society Rules 3-98 to 3-110.

Lawyers' general duties as set out in the Canons of Legal Ethics (s 2.1 of the *BC Code*) require lawyers to treat adverse witnesses and litigants with fairness and courtesy, and caution lawyers to follow their professional duties without being affected by a client's personal prejudices:

> 2.1-3(d) A lawyer should treat adverse witnesses, litigants and counsel with fairness and courtesy, refraining from all offensive personalities. The lawyer must not allow a client's personal feelings and prejudices to detract from the lawyer's professional duties. At the same time, the lawyer should represent the client's interests resolutely and without fear of judicial disfavour or public unpopularity.

In acting as an advocate, a lawyer has a duty to be courteous and civil and act in good faith (*BC Code*, Rule 5.1-5).

> 5.1-5 A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.

The Commentary to that rule says that lawyers who are persistently rude might be committing professional misconduct:

> [1] Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by a lawyer, even though unpunished as contempt, may constitute professional misconduct.

5. Complaints Against Lawyers by Self-represented Persons

Lawyers are sometimes sued by people the lawyer did not think were clients. Self-represented parties may allege that a lawyer caused them to act to their detriment by misleading them in some manner.

Be wary of two situations in particular:

(a) Watch for requests that you explain to adverse self-represented parties the nature of documents they are to sign or accept. Making a casual statement that a document is "in the usual form" or "just a mortgage to secure the balance" may well be misunderstood.

(b) Watch for situations where you are consulted but never get instructions to proceed. People often want to think about a problem and leave your office without committing to next steps or even to hiring you. If they later want to proceed, they may forget you had warned them that limitation periods might apply. Remember to send a non-engagement letter if you believe you have not been retained.

To help lawyers avoid complaints being made against them by self-represented persons, the Law Society provides tips on its website:

> While it is not always possible to avoid a complaint, you do have some control in mitigating the outcome of a complaint. Here are some tips:
>
> 1. Record, record, record. Keep a written record of all communications. This includes adding a note to file following a phone call with the opposing party.
> 2. Follow-up. Send a follow up communication of what was discussed and what was agreed upon or not.
> 3. Don't respond emotionally and always think before you hit send. If possible, review your draft response the next day, and, if you still feel triggered, have a colleague review it.
> 4. Think about your professional and ethical responsibilities. What would the Law Society think if they saw this communication? What would I think if my own client received this communication from another lawyer?
> 5. Do you have to respond? Think: if another lawyer asked me this question, would I be required to respond? If the answer is yes, respond. Be

concise and to the point. Do not include any unnecessary personal opinion about the tone of the request, etc.

6. What is your role? Remind the litigant what your role is and that you cannot provide them with legal advice.
7. Think resolution. Understand your responsibilities to encourage resolution of disputes and reflect on this responsibility throughout the course of a file.
8. Wait before you pick up the phone. If you receive a message from someone who is at the height of frustration, think about the timing of your call back. The last thing you want to do is react to their frustration. Make a few notes of what you believe the underlying issue is and focus on these when you call them back. You may have a more productive conversation.
9. Be firm and consistent. If you believe that their communication is abusive to you or your staff, tell them and document it. For example, if phone calls are not productive or misinterpreted, let the person know that you will only correspond in writing.
10. Know your own boundaries. Know when it is appropriate to withdraw from a file (Review rule 3.7 of the Code). Speak with a practice advisor or a trusted colleague about how you are managing a high conflict file. Your own mental health is important.