

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

Model Code of Professional Conduct

Consultation Report

January 30, 2016

INTRODUCTION

1. The Model Code of Professional Conduct (the “Model Code”) was developed by the Federation of Law Societies of Canada (the “Federation”) to synchronize as much as possible the ethical and professional conduct standards for the legal profession across Canada. First adopted by the Council of the Federation in 2009, the Model Code has now been adopted in 11 of the 14 provincial and territorial law societies, and is under active consideration in the remaining jurisdictions.
2. The Federation established the Standing Committee on the Model Code of Professional Conduct (the “Standing Committee”) to review the Model Code on an ongoing basis to ensure that it is both responsive to and reflective of current legal practice and ethics. The Standing Committee is mandated by the Federation to monitor changes in the law of professional responsibility and legal ethics, to receive and consider feedback from law societies and other interested parties regarding the rules of professional conduct, and to make recommendations for amendments to the Model Code.
3. In accordance with its mandate, the Standing Committee engages in an extensive process of review, analysis and deliberation before recommending amendments to the Model Code. Consultation with the law societies and other interested stakeholders is an essential component of this process.

REQUEST FOR FEEDBACK

4. The Standing Committee seeks the feedback of Canadian law societies, the Canadian Bar Association, individuals actively engaged in legal ethics issues, and interested members of the public on draft amendments to the Model Code.
5. The proposed amendments in this Consultation Report include revisions to the rules on competence, dishonesty/fraud, and incriminating physical evidence, and the creation of a new rule addressing responsibilities that arise when a lawyer leaves a law firm.
6. The Standing Committee will carefully consider the substantive feedback it receives, making further changes to the proposed draft amendments as appropriate. The deadline for providing feedback on the proposed amendments is **June 30, 2016**. Please send your feedback to kpaylor@flsc.ca.
7. The final amendments will be presented to the Council of the Federation for approval in March 2017 and then submitted to the law societies for adoption and implementation.



I. COMPETENCE

8. The Standing Committee is proposing amendments to paragraph [9] of the commentary to rule 3.1-2, to provide additional guidance on the provision of legal opinions. The draft amendments are shown in Appendix “A” to this consultation report.

Background

9. The final report of Canadian Bar Association (the “CBA”) Futures Initiative (the “Futures Report”) raised a number of issues relevant to the Standing Committee, including whether the Model Code provides adequate guidance on the independence of legal opinions. The Futures Report emphasized the importance of lawyer independence and raised concerns about the possibility of undue influence being exercised by powerful clients over lawyers’ legal opinions.

10. The Futures Report recommended adding language to the commentary to the rules in competence to specify a) that a lawyer should only express his or her opinion when it is genuinely held and reasonable in the circumstances, and b) that a lawyer should be wary of making unreasonable assurances to a client. The Standing Committee’s proposed revisions seek to address the concerns that gave rise to these recommendations.

Proposed Amendments

11. The Standing Committee began its review by considering whether the Code adequately addressed the CBA’s concerns. In considering the issue, the Standing Committee reviewed the Model Code and analogous provisions in the American Bar Association Model Rules of Professional Conduct (the “ABA Model Rules”). It also reviewed academic research on *Edgar Schmidt v. Department of Justice*, a whistleblower case currently before the courts.

12. The Standing Committee concluded that the Model Code adequately addresses the honesty and independence of a lawyer’s opinion through rules and commentary requiring a lawyer to provide honest and competent advice. The committee found, however, that the Model Code does not address the issue of a lawyer making unreasonable assurances to a client.

13. To address this gap, the Standing Committee is proposing the following amendment to paragraph [9] of the commentary to rule 3.1-2:

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

II. DISHONESTY, FRAUD BY CLIENT OR OTHERS

14. The Standing Committee is recommending amendments to the rule prohibiting lawyers from engaging in, or assisting clients to engage in, dishonesty, fraud, crime or illegal conduct (rule 3.2-7). The Standing Committee's proposed amendments are attached as Appendix "B" to this consultation report.

Background

15. In its current form Model Code rule 3.2-7 bars lawyers, when acting for a client, from knowingly assisting in or encouraging any dishonesty, fraud, crime or illegal conduct, or instructing the client on how to violate the law and avoid punishment. Paragraph [1] of commentary to the rule provides that a lawyer should be on guard against becoming the tool or dupe of an unscrupulous client or of others, but the rule is clearly focused on dishonest and criminal conduct in the context of a lawyer-client relationship.

16. Following a decision of a Law Society of Upper Canada hearing panel striking out an allegation of misconduct under the Ontario version of the rule, concerns were raised about the scope of the provision. The defendant in the Ontario case successfully argued that his alleged misconduct was not caught by the rule as it involved dealings with a conveyancing company that was not a client. The hearing panel agreed that the prohibitions in the rule applied only within the lawyer-client relationship.

17. In response to this decision, the law societies in British Columbia and Ontario amended the rule in their respective codes of conduct to expand the scope of the provision beyond the lawyer-client context. The Law Society of British Columbia (the "LSBC") suggested that the Model Code be similarly amended.

Proposed Amendments

18. The Standing Committee reviewed and considered evidence of the rule's inapplicability outside of the solicitor-client relationship, and associated concerns. It analysed the amendments made in both jurisdictions, along with analogous provisions in the ABA Model Rules.

19. The Standing Committee's review focused on the principle that lawyers should be subject to sanction not only when they encourage or assist in a client's dishonesty, but also where they encourage or assist with such conduct outside the bounds of the solicitor-client relationship.

20. The proposed revisions to rule 3.2-7 and paragraphs [2] and [3] of the accompanying commentary make it clear that it is a lawyer's ethical duty not to assist, participate or engage in

conduct he or she knows, *or ought to know*, would lead to dishonest, fraudulent criminal or illegal acts by a client *or others*. These revisions not only expand the relationships to which the rule can apply, but also increases the level of knowledge expected of a lawyer.

III. WITHDRAWAL FROM REPRESENTATION - LEAVING A LAW FIRM

21. The Standing Committee is proposing the addition of a new rule to address the situation that arises when a lawyer leaves a law firm. The proposed rule is set out in Appendix “C” to this consultation report.

Background

22. The issue of whether rule 3.7-1, Withdrawal from Representation, provides adequate guidance on the issues arising when a lawyer leaves a law firm was brought to the Standing Committee by the Law Society of Alberta. The Standing Committee confirmed that the concern was shared by the law societies in Manitoba and British Columbia. The law societies expressed concern that the existing rule and commentary do not sufficiently address issues of client choice of counsel, how a lawyer and law firm should interact when a lawyer departs, or how lawyers should provide notice of their departure to clients.

Proposed Amendments

23. In addressing the concern, the Standing Committee considered draft rules and other materials from the law societies of Alberta, Manitoba and British Columbia. The committee concluded that the draft rules contained a level of detail not consistent with the approach of the Model Code, but agreed with the conclusion that the existing rule should be clarified.

24. The Standing Committee is proposing the addition of a new rule (3.7-9A) that outlines the responsibilities of lawyers who are departing from their law firms. It requires lawyers to provide reasonable notice of their departure to all affected clients. In addition, it requires lawyers to provide affected clients with clear options for retaining counsel, and also requires lawyers to obtain clear instructions of their clients’ decision.

25. Proposed commentary to the new rule reinforces the principle that the interests of the clients must be protected when a lawyer leaves a law firm and must be provided with adequate information to make informed decisions about their representation. The commentary also makes clear that lawyers have a duty to work cooperatively and professionally with their law firms to safeguard against negative impacts to clients.

IV. INCRIMINATING PHYSICAL EVIDENCE

26. The Standing Committee is proposing an amendment to paragraph [5] of the commentary to rule 5.1-2A. The proposed amendments are attached as Appendix “D” to this consultation report.

Background

27. In October 2014, the Council of the Federation adopted an amendment package that included a new rule on incriminating physical evidence. Following its adoption, the Nova Scotia Barristers’ Society raised concerns that paragraph [5] of the commentary to rule 5.1-2A does not adequately address the tension between the lawyer’s duties to the client and the administration of justice in these circumstances.

Proposed Amendments

28. The Standing Committee reviewed and considered a memorandum prepared by the Nova Scotia Barristers’ Society outlining concerns about the new rule and concluded that the commentary to the rule could go further in its explanation of a lawyer’s role and responsibility.

29. The Standing Committee is proposing to add a second sentence to commentary paragraph [5] that reads, “[T]he lawyer’s advice to a client that he or she has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation.”

30. The proposed amendment is intended to reflect the constitutionally protected right against self-incrimination and emphasize that the lawyer’s advice to this effect does not place the lawyer outside the rule (i.e. obstructing justice).



3.1 COMPETENCE

Competence

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

Commentary

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

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

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

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

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

[5] A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client. The lawyer who proceeds on any other basis is not being honest with the client. This is an ethical

consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

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

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

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

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

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

[8] A lawyer should clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications.

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

[10] In addition to opinions on legal questions, a lawyer may be asked for or may be expected

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

[11] In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the rules/by-laws/regulations governing multi-discipline practices.

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

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

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

[15] Incompetence, Negligence and Mistakes - This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure, regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

DRAFT AMENDMENTS TO SECTION 3.2

DISHONESTY, FRAUD BY CLIENT

3.2 QUALITY OF SERVICE

Dishonesty, Fraud by Client or Others

~~3.2-7 When acting for a client, a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment. A lawyer must never~~

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

Commentary

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

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

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

[4] A bona fide test case is not necessarily precluded by this rule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in

good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

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3.7 WITHDRAWAL FROM REPRESENTATION

Leaving a Law Firm

3.7-9A When a lawyer leaves a law firm,

(a) all affected clients must be given reasonable notice that the lawyer is departing, and must be advised of their options for retaining counsel, and

(b) reasonable steps must be taken to obtain the instructions of each affected client about who they will retain.

Commentary

[1] Rule 3.7-9A(b) also applies to the dissolution of a law firm.

[2] The client's interests are paramount. Accordingly, clients must be free to decide who to retain as counsel without undue influence or pressure by either the lawyer or the firm. The client should be provided with sufficient information to make an informed decision about whether to continue with the departing lawyer, remain with the firm where that is possible, or retain new counsel.

[3] The lawyer and the law firm should cooperate to ensure that the client receives the necessary information on the available options, and should consider preparing a joint communication to the client. Factors to consider in determining who should provide notice to the client will depend on the circumstances, including the extent of the lawyer's work for the client, the client's relationship with other lawyers in the law firm and access to client contact information. In the absence of agreement between the departing lawyer and the law firm as to who will notify the clients, both the departing lawyer and the law firm should provide the notification.

[4] Where a client decides to remain with the departing lawyer, the instructions referred to in the rule should include written authorizations for the transfer of files and client property. In all cases, the situation should be managed in a way that minimizes expense and avoids prejudice to the client.

[5] In advance of providing notice to clients of his or her intended departure the lawyer should provide such notice to the firm as is reasonable in the circumstances.

[6] See also rules 3.7-8 to 3.7-10 and related commentary regarding enforcement of a solicitor's lien and the duties of former and successor counsel.

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DRAFT AMENDMENTS TO SECTION 5.1

INCRIMINATING PHYSICAL EVIDENCE

5.1 THE LAWYER AS ADVOCATE

Incriminating Physical Evidence

5.1-2A A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence or otherwise act so as to obstruct or attempt to obstruct the course of justice.

Commentary

[1] In this rule, "evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

[2] This rule does not apply where a lawyer is in possession of evidence tending to establish the innocence of a client, such as evidence relevant to an alibi. However, a lawyer must exercise prudent judgment in determining whether such evidence is wholly exculpatory, and therefore falls outside of the application of this rule. For example, if the evidence is both incriminating and exculpatory, improperly dealing with it may result in a breach of the rule and also expose a lawyer to criminal charges.

[3] A lawyer is never required to take or keep possession of incriminating physical evidence or to disclose its mere existence. Possession of illegal things could constitute an offense. A lawyer in possession of incriminating physical evidence should carefully consider his or her options. These options include, as soon as reasonably possible:

- (a) delivering the evidence to law enforcement authorities or the prosecution, either directly or anonymously;
- (b) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or
- (c) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

[4] A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the evidence.

[5] A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. [The lawyer's advice to a client that he or she has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation.](#) A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

[6] A lawyer may determine that non-destructive testing, examination or copying of documentary or electronic information is needed. A lawyer should ensure that there is no concealment, destruction or any alteration of the evidence and should exercise caution in this area. For example, opening or copying an electronic document may alter it. A lawyer who has decided to copy, test or examine evidence before delivery or disclosure should do so without delay.