

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

JOSEPH PETER PAUL GROIA

**APPELLANT
(APPELLANT)**

and

THE LAW SOCIETY OF UPPER CANADA

**RESPONDENT
(RESPONDENT)**

and

**DIRECTOR OF PUBLIC PROSECUTIONS, ATTORNEY GENERAL OF
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SOCIETY, BARREAU DU QUÉBEC, ONTARIO TRIAL LAWYERS' ASSOCIATION,
CANADIAN BAR ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION,
FEDERATION OF LAW SOCIETIES OF CANADA, ONTARIO CROWN ATTORNEYS'
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(ONTARIO)**

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PART I: OVERVIEW

1. The Federation of Law Societies of Canada (the “Federation”) will make submissions on three issues:
 - a. The jurisdiction of the law societies in Canada to regulate and, in appropriate instances, take disciplinary action against a lawyer for the lawyer’s conduct which occurred before a court or tribunal.
 - b. The appropriate standard of review for a disciplinary decision of a law society.
 - c. The importance of civility as it relates to the maintenance and protection of the rule of law and the protection of the public interest.
2. In summary, the Federation’s position is:
 - a. That in order to protect the public interest, law societies do and must have broad jurisdiction to regulate, and where necessary to take disciplinary action in relation to a lawyer’s conduct, whether the conduct arose before a court or tribunal or elsewhere, and regardless of whether a presiding judge or adjudicator saw fit to address the conduct in any way.
 - b. This jurisdiction of the law societies is independent of, consistent with, and complementary to the jurisdiction that courts have to address the conduct of counsel before them.
 - c. That the expertise of law societies in relation to the regulation of the legal profession demands deference by a reviewing court and the standard of review for a disciplinary decision must be reasonableness.
 - d. That regulating and potentially taking disciplinary action in relation to incivility is a necessary aspect of the protection of the public interest.

PART II: QUESTIONS IN ISSUE

3. The Federation agrees with the parties’ articulation of the issues on the appeal and limits its own submissions to issues A and B.

PART III: STATEMENT OF ARGUMENT

A. The Federation and the Model Code of Professional Conduct

4. The Federation is the national coordinating body of the 14 law societies within Canada's provinces and territories. The law societies regulate all licenced lawyers, and notaries in Quebec with the goal of the protection of the public interest.
5. In this role, the Federation promotes the development of national standards, encourages the harmonization of law society rules and procedures and undertakes national initiatives as directed by the law societies.
6. As part of their mandate to protect the public, law societies hold members of the legal profession to high standards of professional conduct. Each of Canada's law societies enforces a code of conduct for members of the legal profession within their jurisdiction. With national mobility of the profession, law societies recognize the benefit of moving toward a harmonized national standard of rules of conduct so that the public can expect the same ethical requirements to apply wherever their legal advisor may practice law.
7. The Federation has developed the *Model Code of Professional Conduct* (the "**Model Code**") which serves as a national standard for the rules of professional conduct governing Canadian lawyers and Quebec notaries. The Model Code defines and illustrates the ethical duties and responsibilities that come with membership in the legal profession in terms of a lawyer's professional relationships with clients, the justice system and the profession.¹
8. As stated by the Court of Appeal in the present case, the Model Code reflects the "collective wisdom of the leadership of the bar in Canada...".²
9. The Model Code has been implemented by 12 of the 14 law societies in Canada and is an important source of reference and guidance for the others.³ As noted by the Court of Appeal majority, the *Rules of Professional Conduct* of the Law Society of Upper Canada at issue

¹ Model Code, preface [Appendix A]

² 2016 ONCA 471, para. 13

³ The Model Code was referred to by this Court in *R v. Davey*, 2012 SCC 75, para. 33

in these proceedings mirror requirements set out in the Model Code developed by the Federation.⁴

10. The Preface to the Model Code describes the role of members of the legal profession within society and the duties and responsibilities that come with self-regulation.

As participants in a justice system that advances the Rule of Law, lawyers hold a unique and privileged position in society. Self-regulatory powers have been granted to the legal profession 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... While lawyers are consulted for their knowledge and abilities, more is expected of them than forensic acumen. A special ethical responsibility comes with membership in the legal profession.

11. The Model Code also recognizes the different roles that courts and law societies play in respect of the regulation of lawyers. Commentary 12 to Chapter 3.4 (Conflicts) of the Model Code states:

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

12. Numerous provisions in the Model Code emphasize the link between the conduct of legal counsel and public confidence in the administration of justice and in the legal profession. Lawyers are required to encourage respect for the administration of justice,⁵ and are cautioned that a lawyer's conduct may erode that confidence.⁶ Other provisions require counsel to treat tribunals with candour, fairness, courtesy and respect,⁷ and to discharge

⁴ *Groia v. The Law Society of Upper Canada*, 2016 ONCA 471, para. 13

⁵ Model Code, Rule 5.6-1 [Appendix A]

⁶ Model Code, Rule 2.1-1 See Commentary 2 in particular [Appendix A]

⁷ Model Code, Rule 5.1-1 [Appendix A]

their duties as an advocate “by fair and honourable means”.⁸ The Model Code also notes that a “lawyer’s responsibilities are greater than those of the average citizen.”⁹

13. The following provisions from the Model Code are specifically relevant to the Federation’s submissions on this intervention.

- a. “A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice.”¹⁰
- b. “Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.”¹¹
- c. “Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.”¹²

B. The jurisdiction of a law society to regulate and, in appropriate instances, take disciplinary action against a lawyer for the lawyer’s conduct which occurred before a court or tribunal.

14. Canada’s law societies are charged with regulating the legal profession in the public interest and do so through a complex set of rules and regulations to which members of the profession must adhere. The primacy and breadth of the jurisdiction of the law societies in governing the conduct of lawyers has been recognized by this court.¹³

15. A core function of Canada’s law societies is to set rules of professional conduct and to ensure through a complaints and discipline process that they are respected.¹⁴ This

⁸ Model Code, Rule 5.1-1, Commentary 1 [Appendix A]

⁹ Model Code, Rule 5.6-1, Commentary 1 [Appendix A]

¹⁰ Model Code, Rule 7.2-1 [Appendix A]

¹¹ Model Code, Rule 5.1-1, Commentary 1 [Appendix A]

¹² Model Code, Rule 7.2, Commentary 2 [Appendix A]

¹³ See for example, *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 (CanLII), and *Green v. Law Society of Manitoba*, 2017 SCC 20 (CanLII).

¹⁴ Model Code, preface [Appendix A]

jurisdiction necessarily includes restricting or revoking a license to practice law where appropriate.

16. As is well recognized, the practice of law is a privilege and not a right¹⁵ and a special responsibility comes with membership in the profession.¹⁶ In becoming licensed to practice law, members of the legal profession agree to be bound by the rigorous rules and standards of conduct which the profession has developed over many years.
17. In order to protect the public interest, it is the duty and prerogative of the licensing bodies to create and enforce rules and standards of conduct which are different, and potentially more restrictive than the conventions that non-lawyers are encouraged to abide by.
18. To fully and effectively protect the public interest, law societies must govern the conduct of lawyers wherever they may be providing their professional services. This necessarily includes the right to investigate and potentially discipline a lawyer for conduct that occurs in a courtroom, in the context of court proceedings, and before a judge.
19. The jurisdiction of the courts to control proceedings and by extension the conduct of counsel does not limit the jurisdiction of the law societies. The broad jurisdiction of law societies over the conduct of their members is concurrent with, and does not in any way interfere with the independence of the courts. Each has a role to play in enforcing civility “both inside and outside the courtroom”.¹⁷
20. The respective jurisdiction of the courts and law societies was recently considered in *Quebec (Criminal and Penal Prosecutions) v. Jodoin*,¹⁸ in which the majority judgment found that the role of the law societies is “different from, but sometimes complementary to, that of the courts.” The primary purpose of a law society is the protection of the public whereas the courts are concerned with trial fairness and the administration of justice.¹⁹

¹⁵ *Law Society of British Columbia v. Mangat*, [2001] 3 S.C.R. 113; Model Code, preface [Appendix A]

¹⁶ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at pp.187-188

¹⁷ *Doré v. Barreau du Québec*, 2012 SCC 12, para. 61

¹⁸ 2017 SCC 26

¹⁹ 2017 SCC 26, para.22. See also para. 26

21. While these purposes overlap, the different functions of the courts and the regulators and the different processes and remedies available to them might well lead to different approaches to addressing the conduct of counsel.
22. It would undermine the ability of law societies to protect the public interest if the doors of a courtroom were to act as barrier to the regulator's jurisdiction over a lawyer. Such a limitation would also be arbitrary as, even in the context of litigation, conduct of concern to a regulator might occur before a judge or outside of court.
23. The interests and jurisdiction of a law society over the conduct of counsel, as that relates to the protection of the public interest, cannot depend on whether the conduct occurs inside or outside of a courtroom, or on whether a judge has made a finding about a lawyer's conduct, or imposed sanctions in relation to that conduct. The mandate of law societies to regulate the legal profession in the public interest imposes a duty to investigate potential unprofessional conduct whether or not a judge has taken any action for the same conduct. While a law society may take notice of the response of a judge to the conduct of a lawyer, including any findings or sanctions, the determinations of the court are not dispositive and even relevance must be decided by the law society on the facts of the particular case.
24. Through the many years that law societies have exercised their jurisdiction and regulated the legal profession in Canada, law societies have developed a particular expertise in respect of the conduct of members of the profession as that relates to the protection of the public interest.
25. The decisions that law societies make as licensing bodies in relation to the conduct of their members are based upon their expertise and are entitled to deference²⁰, and review on a standard of reasonableness.²¹

²⁰ *Dunsmuir v. New Brunswick*, 2008 SCC 9, para. 48, 49-50

²¹ *Green v. Law Society of Manitoba*, 2017 SCC 20, para. 20; *Doré v. Barreau du Québec*, 2012 SCC 12

C. Civility and Advocacy

26. The Federation recognizes the duty that advocates owe to fearlessly and resolutely advance the interests of their clients.²² This duty must, however, be understood in the context of the broader duties of courtesy and civility and the requirement for legal counsel to promote the fair and proper administration of justice.
27. While acting as an advocate, counsel's submissions may be direct, forceful and passionate. There can be no doubt that "a strong and independent defence bar [is] essential in an adversarial system of justice."²³
28. But while the role of counsel is often stressful and difficult, and passions will, at times run high, that is not justification or license for incivility. As this court recognized in *Doré* legal counsel are subject to pressures daily and "are expected by the public, on whose behalf they serve, to endure them with civility and dignity."²⁴
29. As noted by the majority in the Court of Appeal decision under appeal: "The often misused adage that "a hard fought trial is not a tea party" does not license abusive and unprofessional behaviour towards opposing counsel."²⁵
30. Incivility erodes public respect for and confidence in the legal profession, it can undermine the appearance of justice, and it can undermine the processes that are in place to ensure that courts arrive at just results.
31. Further, the requirement of civility is fully consistent with a lawyer's loyalty and commitment to his or her client and a prohibition upon incivility does not require a lawyer to "soft peddle" his or her representation of the client.²⁶
32. Defining the standard of "civility" and the application of that standard to particular circumstances falls squarely within the expertise and jurisdiction of the law societies.

²² Model Code, Rule 5.1-1 [Appendix A]

²³ *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26, para. 32

²⁴ *Doré*, supra, para. 68

²⁵ *Groia v. The Law Society of Upper Canada*, 2016 ONCA 471 para. 138

²⁶ *Canada (Attorney General) v. Federation of Law Societies*, 2015 SCC 7, para.103

While the Federation urges this Court to recognize and affirm the importance of civility within the legal profession, it is not necessary for this Court on this appeal to attempt to provide a full definition of this professional standard of conduct.

33. Whether the standard has been breached in a particular case will depend on the context and circumstances in which the conduct arose. The Model Code and the rules of professional conduct enforced by the individual law societies do, however, provide clear guidance on the conduct that is expected of advocates. Those rules make it clear that counsel must conduct themselves with courtesy and civility, must act in good faith with everyone with whom they have dealings and must not make personal remarks or engage in personally abusive tactics. As the majority of the Court of Appeal held in this case, comment or criticism by an advocate of other participants in the justice system must not be unfounded or made in bad faith.²⁷

34. While incivility may undermine the proceedings, sanction for uncivil conduct cannot depend on a finding that the proceedings have been compromised. The Federation agrees with the conclusion of the majority of the Court of Appeal on this point.²⁸ Issues related to public respect for the legal profession and confidence in the administration of justice may arise regardless of the effect of conduct on the fairness of the proceedings.

PART IV: SUBMISSIONS ON COSTS

35. The Federation does not seek costs and submits that no order of costs should be made against it.

PART V: ORDER REQUESTED

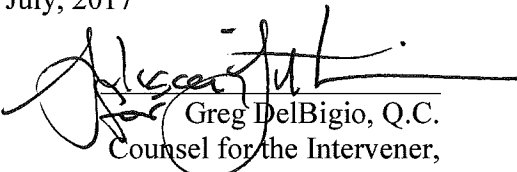
36. The Federation makes no submissions upon the merits or the appropriate outcome of the appeal as between the Appellant and Respondent.

²⁷ 2016 ONCA 471 para. 173-175

²⁸ 2016 ONCA 471, para. 173-175

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, British Columbia this 28th day of July, 2017


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PART VI: TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
<i>Andrews v. Law Society of British Columbia</i>, [1989] 1 S.C.R. 143	16
<i>Canada (Attorney General) v. Federation of Law Societies</i>, 2015 SCC 7	31
<i>Canadian National Railway Co. v. McKercher LLP</i>, 2013 SCC 39	14
<i>Doré v. Barreau du Québec</i>, 2012 SCC 12	19, 25, 28
<i>Dunsmuir v. New Brunswick</i>, 2008 SCC 9	25
<i>Green v. Law Society of Manitoba</i>, 2017 SCC 20	14, 25
<i>Groia v. The Law Society of Upper Canada</i>, 2016 ONCA 471	8, 9, 29, 33, 34
<i>Law Society of British Columbia v. Mangat</i>, [2001] 3 S.C.R. 113	16
<i>Law Society of New Brunswick v. Ryan</i>, 2003 SCC 20	14
<i>Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin</i>, 2017 SCC 26	20, 24, 27
<i>R. v. Davey</i>, 2012 SCC 75	9
 <u>Secondary Authority</u>	
<i>Federation of Law Societies of Canada, Model Code of Professional Conduct (2016)</i>, online: <http://flsc.ca/wp-content/uploads/2014/ 12/Model-Code-as-amended-march-2016-FINAL.pdf>	en passim

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

Model Code of Professional Conduct

As amended March 10, 2016

PREFACE

One of the hallmarks of a free and democratic society is the Rule of Law. Its importance is manifested in every legal activity in which citizens engage, from the sale of real property to the prosecution of murder to international trade. As participants in a justice system that advances the Rule of Law, lawyers hold a unique and privileged position in society. Self-regulatory powers have been granted to the legal profession 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 the robust legal system in Canada. 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 is expected of them than forensic acumen. A special ethical responsibility comes with membership in the legal profession. This Code attempts to define and illustrate that responsibility in terms of a lawyer's professional relationships with clients, the Justice system and the profession.

The Code sets out statements of principle followed by exemplary rules and commentaries, which contextualize the principles enunciated. The principles are important statements of the expected standards of ethical conduct for lawyers and inform the more specific guidance in the rules and commentaries. The Code assists in defining ethical practice and in identifying what is questionable ethically. Some sections of the Code are of more general application, and some sections, in addition to providing ethical guidance, may be read as aspirational. The Code in its entirety should be considered a reliable and instructive guide for lawyers that establishes only the minimum standards of professional conduct expected of members of the profession. Some circumstances that raise ethical considerations may be sufficiently unique that the guidance in a rule or commentary may not answer the issue or provide the required direction. In such cases, lawyers should consult with the Law Society, senior practitioners or the courts for guidance.

A breach of the provisions of the Code may or may not be sanctionable. The decision to address a lawyer's conduct through disciplinary action based on a breach of the Code will be made on a case-by-case basis after an assessment of all relevant information. The rules and commentaries are intended to encapsulate the ethical standard for the practice of law in Canada. A failure to meet this standard may result in a finding that the lawyer has engaged in conduct unbecoming or professional misconduct.

The Code of Conduct was drafted as a national code for Canadian lawyers. It is recognized, however, that regional differences will exist in respect of certain applications of the ethical standards. Lawyers who practise outside their home jurisdiction should find the Code useful in identifying these differences.

The practice of law continues to evolve. Advances in technology, changes in the culture of those accessing legal services and the economics associated with practising law will continue to present challenges to lawyers. The ethical guidance provided to lawyers by their regulators should be responsive to this evolution. Rules of conduct should assist, not hinder, lawyers in providing legal services to the public in a way that ensures the public interest is protected. This calls for a framework based on ethical principles that, at the highest level, are immutable, and a profession that dedicates itself to practise according to the standards of competence, honesty and loyalty. The Law Society intends and hopes that this Code will be of assistance in achieving these goals.

2.1 INTEGRITY

2.1-1 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.

Commentary

[1] Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer's trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer's usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.

[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.

3.4 CONFLICTS

Duty to Avoid Conflicts of Interest

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

Commentary

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

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

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

[4] *[deleted]*

The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests

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

are other duties, such as a duty to commit to the client's cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests.

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

Other Duties Arising from the Duty of Loyalty

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

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

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

Identifying Conflicts

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

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

Examples of areas where conflicts of interest may occur

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

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

D. disqualify the lawyer or the law firm from acting for the organization.

- (f) Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute.
 - i. The fact or the appearance of such a conflict may depend on the extent to which the lawyers' practices are integrated, physically and administratively, in the association.

The Role of the Court and Law Societies

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

Consent

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

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

Commentary

Disclosure and consent

[1] Disclosure is an essential requirement to obtaining a client's consent and arises from the duty of candour owed to the client. Where it is not possible to

5.1 THE LAWYER AS ADVOCATE

Advocacy

5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.

Commentary

[1] Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

[2] This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.

[3] The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.

[4] In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client.

[5] A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal.

[6] When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must

take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

[7] The lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent.

[8] In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

[9] Duty as Defence Counsel – When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.

[10] Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

5.1-2 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;

5.6 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

5.6-1 A lawyer must encourage public respect for and try to improve the administration of justice.

Commentary

[1] The obligation outlined in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.

[2] Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice for all within an open, ordered and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and, because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby, to maintain public respect for it.

[3] Criticizing Tribunals - Proceedings and decisions of courts and tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, but judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit, since, in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system.

[4] A lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Seeking Legislative or Administrative Changes

5.6-2 A lawyer who seeks legislative or administrative changes must disclose the interest being advanced, whether the lawyer's interest, the client's interest or the public interest.

Commentary

[1] The lawyer may advocate legislative or administrative changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes that the lawyer conscientiously believes to be in the public interest.

Security of Court Facilities

5.6-3 A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility must inform the persons having responsibility for security at the facility and give particulars.

Commentary

[1] If possible, the lawyer should suggest solutions to the anticipated problem such as:

- (a) further security, or
- (b) reserving judgment.

[2] If possible, the lawyer should also notify other lawyers who are known to be involved in proceedings at the court facility where the dangerous situation is likely to develop. Beyond providing a warning of danger, this notice is desirable because it may allow them to suggest security measures that do not interfere with an accused's or a party's right to a fair trial.

[3] If client information is involved in those situations, the lawyer should be guided by the provisions of section 3.3 (Confidentiality).

7.2 RESPONSIBILITY TO LAWYERS AND OTHERS

Courtesy and Good Faith

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

Commentary

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

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

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

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

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

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