The Law Society of Manitoba

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THE LEGAL PROFESSION

Professional Responsibilities

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Thank you to all the reviewers for this chapter:

Kelly Beattie
Noelia Bernardo
Ted Bock (now Justice Ted Bock)
Tana Christianson
Kris Dangerfield
Eileen Derksen
Leah Kosokowsky
Rocky Kravetsky
Kathy Levacque
Stacy Nagle
Richard Porcher
Alissa Schacter
Darcia Senft
David Skwark
Erin Wilcott, Manitoba Law Foundation

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A. THE LAW SOCIETY OF MANITOBA – AN OVERVIEW

1. Law Society Mandate – Protection of the Public

The Law Society of Manitoba was incorporated in 1877. The Society is given broad and comprehensive powers by the legislature of Manitoba under the provisions of *The Legal Profession Act, S.M. 2002, c.44*. The statutory regime establishes a governing body for the legal profession in Manitoba to ensure that members of the public are provided with competent, ethical and professional legal services. In short, the Society's primary mandate is to ensure the public is adequately protected concerning the provision of legal services in Manitoba.

The Law Society of Manitoba fulfils its basic mandate by performing two broad roles:

1. controlling who is admitted to the practice of law in Manitoba, and ensuring that only qualified individuals practise law in this jurisdiction; and
2. licensing, regulating and disciplining practising lawyers.

Thus, the Society:

- establishes and enforces standards of ethics through its *Code of Professional Conduct*, *The Law Society of Manitoba Rules*, *Practice Directions to the profession*, and so forth;
- enforces standards of competence for practitioners;
- deals with complaints from the public, and other practitioners, concerning the professional conduct or competence of lawyers;
- ensures that all practising lawyers are covered by professional liability insurance for errors and omissions;
- reimburses clients who have suffered a loss through misappropriation of trust funds;
- prevents the unauthorized practice of law.

2. The Governing Body - The Benchers

The policies and activities of The Law Society of Manitoba are determined by the governing body known as the benchers. There are currently 25 elected or appointed benchers:

- twelve elected benchers are chosen by an electorate consisting of the practising members of the society. Eight of those twelve benchers are chosen to represent the City of Winnipeg electoral district by the entire electorate; the other four benchers of the twelve are elected to represent four other districts outside Winnipeg. Elected benchers each serve two-year terms, and elections are held by ballot;
- four practising lawyers are appointed by the benchers for two-year terms;
- the immediate past-president of the Society is one of the 25 Benchers;
- six non-lawyer lay benchers are appointed for two-year terms by a special three-person committee chaired by the Chief Justice of Manitoba under *section 7* of *The Legal Profession Act*;
- one student bencher is elected annually to represent articling student members
- the Dean of the Faculty of Law, University of Manitoba is one of the 25 benchers.

The benchers meet seven times a year. The activities of the Society are carried on by benchers, staff and a variety of committees and subcommittees, some of which are described below in more detail. Committee activities and resolutions are reported to and considered for approval by the governing body at benchers' meetings. Some of the more important matters dealt with at the benchers' meetings are:

- approving proposed amendments to *The Legal Profession Act* to recommend to the legislature;

enacting amendments to the *Law Society of Manitoba Rules*; and

- approving all major policy initiatives or changes in policy having an impact on the operation of The Law Society.

3. Admission to Practice - Admissions and Membership Department

One of the primary functions of the Society is to determine who can be admitted to the practice of law in Manitoba by establishing the qualifications for such admission.

a) Admission of Articling Students

The Director of Admissions and Membership (as the CEO's delegate) makes decisions regarding the admission of articling students. The Admissions and Education Committee hears appeals from decisions concerning the admission of student members to the Society in the articling program.

b) Transfer Applications

Lawyers who have been called to the Bar in other Canadian jurisdictions and who have met the requirements set out in the *Law Society of Manitoba Rules* are entitled to transfer to Manitoba and become practising members of our Bar without articling and taking the *PREP program* here.

c) Resumption of Active Practice

Members who have voluntarily relinquished their practising certificates or have been suspended from practice must apply to resume active practice using the form *Application To Resume Active Practice* found on the Law Society website.

The Law Society may set conditions on a member's right to resume practice, and each application is dealt with on its own merits. Relevant factors include, but are not limited to, the length of time the member practised before changing to non-practising status, the length of time the member has been non-practising, and whether in the interim the member has been engaged in law-related activities or the practice of law in another jurisdiction.

4. Complaints Against Lawyers - Enforcement of Ethics and Standards

Please note that the *Code of Professional Conduct* was amended in December 2019 concerning technology and competence of a lawyer. See Commentaries [4A] and [4B] to *Code 3.1-2*.

Commentary

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

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

(a) the lawyer's or law firm's practice areas;

(b) the geographic locations of the lawyer's or firm's practice; and

(c) the requirements of clients.

a) Investigation of Complaints

Complaints against lawyers generally fall into one of two broad categories:

- complaints about the lawyer's professional conduct or ethics;
- complaints about the lawyer's competence, or standard of practice.

Matters which fall into either of these categories may be the subject of complaints investigated by the Law Society in its disciplinary process. However, it should be noted that complaints that raise allegations of professional negligence on the part of a lawyer but do not suggest concerns that the lawyer is incompetent or maintains a general standard of practice falling below an acceptable minimum are not generally treated as disciplinary matters.

Members of the public who allege their lawyer was negligent are generally advised to seek legal advice regarding civil remedies that may be available to them. If a negligence claim is successful, the client is afforded protection through the mandatory errors and omissions insurance coverage carried by all practicing members (see below).

It should also be noted that the Society receives many complaints which are essentially disputes between a lawyer and the client as to whether the fees charged were appropriate fees. A fee dispute may occasionally raise issues of ethics or professional misconduct, depending upon the particular allegations and those issues are appropriately directed to the Complaints department as potential disciplinary matters. However, in the majority of cases where there is simply a dispute as to the appropriate amount of the fees, those complaints are not dealt with as disciplinary matters (see the section on Fee Disputes below).

A complaint concerning the conduct or competence of a member must be put in writing before the Society will commence an investigation (*Rule 5-60*). However, the Society also has an early intervention program. Under this program, if concerns about a lawyer are expressed in the absence of a complaint and if the Society determines that it would be appropriate to intervene, staff will contact the lawyer to try to address the concerns expeditiously and on an informal basis.

Complaints are most often received from a lawyer's client or former clients; however, the Society also receives complaints against lawyers from other lawyers and from opposing clients. Occasionally members of the judiciary will file complaints relating to a member's conduct in court. Additionally, if in the course of an audit a Law Society auditor finds mishandled trust monies or serious breaches of the *accounting rules* in Part 5, the Audit Department will refer the matter to the Complaints Resolution Department for investigation.

When a written complaint is received, a staff lawyer reviews it to determine whether the concerns expressed are within the Law Society's jurisdiction and whether the concerns merit investigation. The Law Society cannot investigate complaints that do not meet either of these conditions (*Rule 5-62(1)*). A copy of a written complaint is sent to the lawyer in question even when the Law Society has decided not to investigate it. If a staff lawyer has determined that a complaint lacks merit and will not be investigated, the complainant will be advised in writing of the right to request that the decision be reviewed by the Law Society's Complaints Review Commissioner (*Rule 5-63*). The Complaints Review Commissioner is a layperson who has the mandate to conduct an independent review of the material submitted to the staff lawyer. The complainant's request for a review must be made within 60 days of the receipt of the decision not to investigate. The Complaints Review Commissioner must either confirm the staff lawyer's decision not to investigate, or direct that a complaint be investigated (*Rule 5-63(8)*).

There is no right of review from a decision that the complaint is outside of the department's jurisdiction.

When the Law Society investigates a complaint, a copy of the complaint is forwarded to the member against whom it is made. The member must then, within 14 days of receipt of that correspondence, provide a written response to the Society outlining the member's position (*Rule 5-64(4)*). The Law Society may require that the member must respond within a shorter time. Failure to respond within the required time limit may in itself constitute professional misconduct by the member, in the absence of a reasonable excuse (*Rule 5-64(5)*).

Generally speaking, a copy of the member's response is provided to the complainant and the complainant may then provide additional information or otherwise reply to the information in the member's response if the complainant so wishes.

Notwithstanding the above, many less serious complaints may be resolved through informal means. When a staff member determines it appropriate to attempt to resolve the complaint through informal means, the lawyer and complainant will be contacted (*Rule 5-65(1)*). The staff member may suggest a resolution of the matter which may be acceptable to both the lawyer and the complainant.

Informal resolution may be attempted at any time during the investigation of a complaint. If an informal resolution is unsuccessful, or more serious problems are disclosed, the complaint will be investigated or continue to be investigated.

Sometimes, the Society receives information that raises concerns about a member's conduct or competence, yet no formal complaint has been submitted. If there is jurisdiction and the information merits investigation, the Society will open a complaint file (LSM investigation) and investigate in the usual manner.

As well, if in the course of considering a complaint it determines that a particular concern merits investigation, the Complaints Investigation Committee (CIC) may commence an investigation on its own motion according to *Rule 5-71*.

After investigating a complaint, a staff lawyer may resolve the matter by taking no further action if:

- the staff lawyer is satisfied that the complaint is without substance or its substance cannot be proved;
- the member has provided a satisfactory explanation; or,
- the complaint has been resolved satisfactorily through informal means.

The staff lawyer may conclude a complaint with a remedial disposition such as a letter to the member reminding the member of professional obligations (under the *Act*, the *Rules*, or the *Code of Professional Conduct)* and/or recommending that a certain course of action be taken. A complainant can request that a review of the staff lawyer's

remedial disposition be conducted by the Complaints Review Commissioner who can either confirm the decision of the staff lawyer or refer it back to the Complaints Resolution Department for consideration by the Complaints Investigation Committee (*Rule 5-63(8)(c)*).

The Complaints Investigation Committee ("CIC") meets approximately once every six weeks, year-round. It should be noted that the CIC is essentially an investigative body and it does not determine the guilt or innocence of a lawyer who is the subject of a complaint. Aside from the power of the CIC to issue a formal caution (see below), the role of the CIC is to determine whether there has been a breach of the *Act*, *Code* or *Rules*, and, if so, to consider whether a formal charge of:

- professional misconduct;
- conduct unbecoming a barrister and solicitor; or,
- incompetence;

is warranted.

The CIC has investigative powers including the following:

- obtaining and reviewing client files;
- sending additional letters to members requesting further information;
- reviewing members' complaints history;
- meeting with members to further an investigation; and/or,
- sending auditors to review members' trust records.

In addition to conducting any further investigation it deems appropriate, the committee has several options open to it, including the following:

i. Take No Action, Recommend a Course of Action, or Send a Reminder Letter

If the CIC is of the view that the complaint is without substance or the allegations are unfounded, it may resolve to take no further action and advise the complainant and the member accordingly. In other cases, a complaint may be satisfactorily resolved by way of the lawyer providing the complainant-client with the information requested, or perhaps by way of the CIC reminding the lawyer to be more diligent in the processing of a legal matter.

ii. Hold Complaint In Abeyance

The CIC can hold its investigation of a complaint in abeyance until any related proceedings are concluded. For example, when a complaint relates to fees, the committee may hold its investigation in abeyance until the complainant applies for an assessment of the member's bill or proceeds to fee arbitration under the Society's *rules*.

iii. Order a Practice Review and Make Recommendations to Improve the Member's Practice of Law

If the CIC decides there are reasonable grounds to believe that a member is practising law in an incompetent manner, it may ask the member to consent to a practice review or it may order a practice review. Usually, two qualified members appointed by the chief executive officer (the CEO) of the Society, or designate, conduct the review which consists of a review of some or all of the files of the member, including, where appropriate, an examination of the procedures in place to reduce the risk of liability insurance claims. The practice reviewers deliver a written report of their findings and recommendations to both the CIC and the member. After considering the report, the CIC may take any of the steps it may normally take upon considering a complaint, including sending a reminder letter or accepting written undertakings from the member. For example, it may recommend that the member undertake not to practise a certain area of law, to satisfactorily complete a remedial education program, to implement measures to reduce the risk of liability insurance claims, to obtain a psychiatric or psychological assessment or counselling, to obtain medical assistance, or to undertake to practise in a setting approved by the CIC. If the member accepts the recommendations, the member must sign a written undertaking to the Society.

If the member refuses to accept the recommendations or fails to satisfactorily complete the recommended action plan, the CIC will proceed to dispose of the complaint and may exercise any of its various options, including authorizing charges against the member.

If the CIC determines that a member's difficulties stem from poor office management by the member, it may direct the member to meet with the Society's Practice Management Advisor and to follow any recommendations made. The Practice Management Advisor will assess the problems and will make recommendations to the member and will assist in implementing effective office management systems and policies. As well, the Practice Management Advisor will report back to CIC.

In considering a subsequent complaint against the member, the CIC may refer to all or part of a practice review report, a practice management report, a committee recommendation and a report on how the member carried out or followed any previous recommendations or failed or refused to do so. This information may also be received in evidence at an inquiry before the Discipline Committee.

iv. Formal Caution

The CIC has the power to make a final determination by issuing a formal caution (*Rule 5-77*). If the CIC is of the view that the allegations in the complaint are well-founded, it may offer the member the option of accepting a formal caution, which is a formal censure or disapproval of the member's conduct. A formal caution is offered instead of a formal charge, and if the member declines the offer of the formal caution, a formal charge must be laid and the matter will proceed to a formal inquiry before the Society's Discipline Committee. The issuance of a formal caution is confidential and will not be published, except to the complainant, to a member designated to receive such information by the firm, and to other governing bodies of which the member is a member. Although a formal caution does not form part of the member's formal disciplinary record it can be referred to in the future at the time of sentencing on a subsequent charge of which the member is found guilty. A formal caution may also be considered by the CIC when considering a subsequent complaint about the same member.

v. Formal Charge

If the CIC is satisfied that the allegations are well-founded and that the matter should not be resolved by issuing a formal caution, it will direct that an inquiry be held before the Discipline Committee (see below) and that a charge is formulated outlining the particulars of the alleged misconduct. Charges are forwarded to the Discipline Committee.

It should also be noted that all proceedings before the CIC are confidential (see *The Legal Profession Act, section 69(1)*), subject to limited exceptions *(section 69(2))*.

vi. Interim Suspension

The CIC also has the power, under *Rule 5-72(5)*, to deal with certain situations on an emergency basis and to require a member's appearance on an urgent basis. Although these urgent matters can arise from any type of complaint, they most frequently result from a spot audit of a member's trust account in which the mishandling of trust funds is discovered. On such occasions, the CIC might consider the exceptional option of interim suspending a member or imposing restrictions on practice, according to the provisions found in *section 68 of The Legal Profession Act*. In deciding to suspend or to impose restrictions on practice, the CIC will take the public interest into account. An example of such a situation would be where there has been a misappropriation of trust monies or where a lawyer has abandoned their practice. If the committee concludes that the public would be at risk if the lawyer were permitted to continue to practice law, it will direct that charges be laid to be heard by the

Discipline Committee. It will also direct that the member be suspended from practice pending that hearing.

b) Disciplinary Inquiries

If the CIC directs that a charge of professional misconduct, conduct unbecoming, or incompetence be laid against a member under *section 68(b) of The Legal Profession Act*, the matter is referred to the Discipline Committee for a hearing. The hearing is conducted following the procedures set out in *section 71* of the *Act* and *Rules 5-93 to 5-98*.

A hearing into the charge is held before a panel of the Discipline Committee consisting of three members selected by the chairperson. At the request of either party, the chairperson may issue a subpoena requiring the attendance of a witness or the production of documents or things.

Evidence may be taken, subject to the same rules of evidence that apply in a civil proceeding in the Court of Queen's Bench, or may be permitted by affidavit. Witnesses or deponents are subject to cross-examination. Counsel for the Society acts as prosecutor and the member may be represented by counsel.

If the member is found guilty of professional misconduct, conduct unbecoming a lawyer or student, or incompetence after a hearing, the Discipline Committee Panel has broad discretionary power as to consequences. Under *section 72* of the *Act*, the Discipline Panel may:

- disbar the member and order that the member's name be struck off the Rolls of the Law Society;
- permit the member to resign their membership from the Society;
- suspend the member from the practice of law for a specified period, or in the case of a finding of incompetence, indefinitely until the member demonstrates competence;
- in the case of a student member, expel the student from the Society;
- reprimand the member;
- order the member to pay a fine;
- place restrictions on the member's right to practice law;
- order costs under *Rule 5-96(8)* and *sections 72(1)(e) and 72(2)(e)* of *The Legal Profession Act;*
- make any other order the panel thinks is appropriate in the circumstances.

A member who has been found guilty and has had consequences imposed under *section 72* has a right of appeal to the Manitoba Court of Appeal within 30 days after service of the decision or order. The Society may appeal to the Court of Appeal from any decision of the Discipline Committee within 30 days of the making of the decision. (*section 76*).

Decisions of the Discipline Committee are posted on the Society's website and are published on CanLII (as long as the publication can be accomplished without infringing on solicitor-client privilege). The current practice is to also post a Digest of each discipline matter after the final decision is made. If the member is found not guilty the member is not identified in the Digest or published decision unless the member consents.

The *Rules* require publication to the profession, the complainant and to any other governing body of which the lawyer is a member when a lawyer has been found guilty of professional misconduct, conduct unbecoming or incompetence. The notice includes the member's name, the nature of the charges of which the member has been found guilty, the penalty imposed, and any costs awarded. When a member is disbarred, suspended from practice or permitted to resign, a notice to that effect is also required to be published in one issue of a newspaper that circulates in the area where the member has an office and practises.

Discipline Committee hearings are open to the public, subject to narrow exceptions provided for in *section 78 (1)* of the *Act*. Members of the public may be granted access to the Citation, the exhibits or transcript of the proceedings on request to the Society's Chief Executive Officer. Such access has generally been granted when there is a legitimate reason for the request and only after redactions or exclusions necessary to protect solicitor-client privilege and other information that is considered to be properly kept confidential.

Any lawyer who has been disbarred and struck off the Rolls of the Law Society or permitted to resign membership in the Society has the right to apply for reinstatement. A formal hearing into such an application is heard by a panel of the Discipline Committee according to the procedures under *Rules* 5-102 through 5-109.

A lawyer who was cautioned by the Complaints Investigation Committee or was found guilty of professional misconduct or conduct unbecoming or incompetence and received a reprimand or a fine may apply to the Discipline Committee for a pardon provided that a minimum of ten years has passed without another such disposition. A panel of the Discipline Committee may grant the pardon if it determines that the lawyer has met the criteria under *Rule 5-101.1(3)* and that under the circumstances a pardon is appropriate. A pardon does not expunge the caution or finding but is evidence of the fact that the Society no longer considers the censure or conviction to reflect adversely on the member's character.

5. Errors and Omissions Insurance - Professional Liability Claims Fund

The Law Society requires all practising lawyers in Manitoba to carry professional liability insurance for errors and omissions as part of its mandate to protect the public. *Section 45* of *The Legal Profession Act* establishes a Professional Liability Claims Fund.

The Law Society of Manitoba is a member of the Canadian Lawyers Insurance Association (CLIA), a reciprocal insurance exchange. Through CLIA, the Society enters into a group policy providing professional liability insurance for all practising members.

Certain classes of lawyers are exempt from insurance, including lawyers employed exclusively by the government of Manitoba (other than Legal Aid Manitoba), a municipality in Manitoba, certain departments of the federal government, and members of the Law Society of Manitoba who are licensed and resident in another province and who have insurance in that other jurisdiction.

It is a condition of practice that all members pay the annual insurance assessment unless you are in an exempt class.

The mandatory professional liability insurance policy provides coverage of up to $1 million per occurrence with a $2 million annual aggregate per insured. If you make a claim under the insurance, you will pay the deductible and the insurance will cover the rest of the costs. The deductible that you will have to pay will be $5,000 - $20,000, depending on your past claims experience.

It is both a condition of the policy and an ethical obligation (see *Rules 5-34 through to 5-36* and *Code of Professional Conduct* chapter 7.8-2) that you, as a member, advise the Law Society's CEO as soon as you become aware of an act or omission which may give rise to a professional liability claim. The CEO has delegated the duty of accepting notice of potential claims to the Director of Insurance and the Claims Fund staff lawyers, so those are the persons you must advise.

Failure to report a potential claim promptly and to cooperate with the insurer may result in denial of coverage and is also potentially a breach of the Society's *rules*.

If you want to increase your liability insurance coverage beyond the mandatory $1 million limit, speak to the managing partners in your law firm. Your law firm has the option of voluntarily purchasing coverage in excess of $1 million from CLIA provided that the law firm purchases that excess coverage for all lawyers in the firm.

REPORTING A CLAIM

You wake up in the night in a cold sweat when you realize you missed a limitation date, or you didn't include a crucial issue in the contract, or you messed up a registration, or you forgot about an important tax issue on a closed file. Just before you leave on vacation, your client calls and alleges you have made a serious mistake on their matter, but you disagree.

It doesn't always happen in the middle of the night or just before you leave on vacation, but when you think you might be faced with an insurance claim for a negligent error or omission, it is never a pleasant prospect, even if you think it has no merit.

But we are human. We all make mistakes. It is almost impossible to go through your entire professional career without making mistakes, so when you find yourself in this situation, here are some important things you should know about your insurance.

a) What should I do when I think I made a mistake?

When you think you have made a mistake or someone alleges you have done so, stop what you are doing and take no further steps without first consulting with and taking direction from the Law Society's Professional Liability Claims Fund (the Claims Fund) staff lawyers. You should report your claim to the Claims Fund staff lawyers immediately.

If you call the Claims Fund staff lawyers first, they can help you sort out whether this is really an error or omission, discuss what you can and cannot do to try to rectify the problem, tell you how to submit your written notice and what sort of information would be valuable to include in your written report of the claim, and help you determine what you say to your client about the error you have just discovered.

Please, do not take any steps on your own. If the steps you take on your own make the situation worse, your entitlement to insurance coverage could be jeopardized.

Don't wait to contact the Claims Fund staff lawyers. Delay can hurt you if you wait too long to report and the possibility of taking steps to remedy or repair the situation is lost to the Claims Fund. Then you may only be covered to the extent that the Claims Fund's position has not been prejudiced by your failure to give prompt notice.

b) Who do I call?

Call the Law Society's Claims Fund staff lawyers in the Insurance Department to talk to them about a claim before you do anything else. Here is where you can reach them:

Tana Christianson	204-926-2011
Kate Craton	204-926-2012
Jim Cox	204-926-2024

c) Must I give notice to the insurer?

Yes, you must give notice to the insurer. You give notice to the insurer by calling the Claims Fund staff lawyers. Ultimately, you must send in a written report to the Claims Fund staff lawyers at the Law Society.

The mandatory insurance policy that covers all lawyers in private practice in Manitoba has a provision that states:

> 4.3 Notice Requirements
>
> (a) *Written Notice.* An **Insured** shall, as soon as practicable after learning of a **Claim** or becoming aware of circumstances that might constitute an **Occurrence** or give rise to a Claim, however unmeritorious, give written notice to the **Insurer** at the local address for service shown in the Declarations. This is a condition precedent to the **Insurer's** liability for the **Claim** or **Occurrence** under this Policy.

Law Society Rule 5-34 and the *Code of Professional Conduct* section 7.8-2 say much the same thing.

> Rule 5-34 Duty to notify insurer
>
> 5-34 A member, as soon as practicable after becoming aware of any acts or omissions that may give rise to a professional liability claim, must give notice of the potential claim to the chief executive officer.

Subsection 12(3) of the *Legal Profession Act* permits the CEO of the Law Society to delegate any powers, duties or functions to one or more employees of the society. The CEO has delegated accepting notice of potential claims under *Rule 5-34* to the Claims Fund staff lawyers, so, although the Rule says you should give notice to the CEO, you must give notice to the Claims Fund Staff lawyers.

Code 7.8 Notice of Claim

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

Commentary

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

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

d) What should I tell my client?

First, call the Claims Fund staff lawyers and they will help you with what you must tell your client. After all, your insurance coverage ultimately protects your client. If you blow your coverage by reporting late or by making admissions of liability, your client also suffers. *The Apology Act* notwithstanding, do not tell your client that you were an idiot and that your insurer will take care of everything. It is a balancing exercise.

You have to meet your professional obligations under the *Code* to both promptly inform your client and promptly give notice to the insurer so the client's protection won't be prejudiced without breaching your contractual obligation as an insured person to give immediate notice to the insurer and not to make any admissions or take any actions that might prejudice the conduct of the defence without the Insurer's advance consent.

When you tell your client that you have made an error that potentially jeopardizes the client's position, the news can be frightening for your client. Claims Fund staff can help you to think through how the client should be informed of a potential problem and how that should be dealt with. They have lots of experience in these situations.

The Code of Professional Conduct section 7.8-2 requires you to give prompt notice to the insurer and the Commentary says you are contractually required to give the notice immediately after you become aware of any actual or alleged error or any circumstance that could give rise to a claim. The commentary goes on to say that your duty to report arises whether there is any merit to the claim or not.

Code section 7.8-1 requires that you tell a client if you discover an error. The *Code* also points out that you have to do so in such a manner that you do not prejudice your insurer or compromise your coverage under your insurance policy.

Note that the *Commentary to Code section 7.8-1* says you must report to the insurer even if you plan to try to rectify the mistake. But before you take any steps to rectify, remember that Provision 4.4(d) of the Policy of Insurance says that the Insured should not make any admissions or take any other actions that might reasonably be expected to prejudice the conduct of the defence unless the Insurer is aware of and consents to the admission or action in advance.

So if you think you have made a mistake, call the Claims Fund staff lawyers first; they can help you determine what you say to your client about the error you have just discovered and how to deliver that news and whether you can do anything to rectify the mistake. Then you promptly inform the client.

e) Who is the Insurer?

The Canadian Lawyers' Insurance Association (CLIA) is the Insurer under the Policy. CLIA is a reciprocal insurance exchange. All Canadian provinces and territories except Quebec, Ontario, Alberta and British Columbia are members of CLIA.

CLIA provides mandatory $1 million coverage to The Law Society of Manitoba and its members. The Law Society of Manitoba is CLIA's local administrative office.

The Claims Fund staff lawyers work for the Law Society's Professional Liability Claims Fund and they are authorized to accept notice of your claim. They can answer your questions if you call, and they can walk you through what you must submit to give the proper written notice as required by the insurance policy.

f) What is a potential Claim?

"Claim" means the allegation of an occurrence or a demand for money, property or services arising out of an occurrence, including the threat of or institution of a suit or legal proceeding.

So, if someone else alleges you have made a mistake, you must report that to the insurer (remember, the Claims Fund staff lawyers will accept your notice).

Even if the allegation is totally without merit, you still have an obligation to report it to the insurer, so contact the Claims Fund staff lawyers without delay.

If you are served with a Statement of Claim, call the Claims Fund staff lawyers immediately so the Claims Fund can appoint counsel to defend you. The Claims Fund will pay for defence fees and disbursements at no cost to you.

The Claims Fund staff lawyers are extremely experienced in responding to claims brought against lawyers. The Claims Fund staff lawyers need early notice to respond quickly on your behalf.

g) What is an Occurrence?

The Policy says you have to report if you become aware of circumstances which might constitute an Occurrence. The Policy says "Occurrence" means an error in the rendering of professional services for others. This means that if you might have made a mistake, whether an error or an omission, you should report it to the Claims Fund staff lawyers.

You should contact the Claims Fund staff lawyers as soon as you are aware that there may have been an occurrence. Don't wait until someone else notices the error or omission and puts you on notice by serving you with a demand letter or a Statement of Claim.

Waiting to report and worrying about your error or omission can interfere with your sleep. Waiting to report can also compromise your coverage if your delay in reporting prejudices the Insurer by causing a lost opportunity to repair the situation or mitigate damages.

Also, claims must be reported in the policy year in which they became known to you. Don't let a June 30 policy year-end pass without reviewing your files and reporting any occurrences in that policy year to the Claims Fund staff lawyers.

h) Where and how do I report?

The Policy requires that you submit a written report to the Insurer at The Law Society of Manitoba. You can mail a report, scan and email the report, or you may follow the instructions on the form and submit the online report form found in the *Member Portal*. Ultimately the Claims Fund staff lawyers will need your written report.

Here is the link to the *Member Portal* for the online claim report form.

If you want to look at the Policy of Insurance, it is also in the Member Portal.

Here are the contact details for the Claims Fund staff lawyers:

Professional Liability Claims Fund
Law Society of Manitoba
200 – 260 St. Mary Avenue
Winnipeg, MB R3C 0M6

Tana Christianson	*tchristianson@lawsociety.mb.ca*
Kate Craton	*kcraton@lawsociety.mb.ca*
Jim Cox	*jcox@lawsociety.mb.ca*

i) Who else at the Law Society will know about my report?

You must advise the Claims Fund staff lawyers directly at the address/phone numbers above.

You are not required to report a claim or potential claim to any other department of the Law Society. The fact that you have reported a claim to the Claims Fund staff lawyers will not be disclosed to other Law Society departments unless you authorize that disclosure in writing.

Your report is a confidential report to Claims Fund staff lawyers made in contemplation of litigation. Your report to the Claims Fund staff lawyers is not shared with Benchers or Law Society committees.

The Claims Fund does not share information with The Law Society of Manitoba Complaints Resolution Department or Discipline Department, or Audit Department, so if the claim is also the subject of a letter to discipline, the Claims Fund staff won't know about it and the other departments won't know that you have reported a claim.

j) Who knew a claim would make me feel so bad?

Don't beat yourself up. When good lawyers make mistakes, they feel terrible, so be reassured that feeling terrible is normal. Let the Claims Fund staff lawyers help you to feel not so terrible. Insurance is there to pay for the cost of mistakes, so don't be afraid that you have to use it.

Call the Claims Fund staff lawyers as soon as you are aware of a potential claim. They have taken a lot of Claim Reports over the years and they have lots of experience. They know that everybody makes mistakes, even very good lawyers. They will know what you have to do, and they will help you.

That is what insurance is for.

k) What if the claim or allegation has no merit?

Even if there is no merit to the claim against you, you must put the insurer on notice by calling the Claims Fund staff lawyers.

Sometimes, you have to report a claim, not because you made a mistake, but because you have been targeted by a difficult individual or brought into litigation as a party because you are the only one who has insurance.

Even claims without merit can be expensive to defend. Take advantage of your entitlement to a free defence under the Policy of Insurance.

Sometimes on these meritless claims, before that claim reaches the litigation stage, the Claims Fund staff lawyers can have more success in convincing a claimant or claimant's counsel that there is no merit to the claim. Call the Claims Fund staff lawyers and let them deal with it.

l) Once I've called the Claims Fund staff lawyers, what happens?

You will follow their advice in notifying your client. The Claims Fund staff lawyers will ask you to complete a Professional Liability Insurance Claim Report form and will either give you a hard copy or refer you to the online report in the *Member Portal* on the Law Society website. The Claim Report form asks for information about you, the person who is making the claim against you, the date the alleged error occurred, when you knew about it, etc. and asks for a narrative account of the potential claim and copies of relevant correspondence and other documents.

Your completed Claim Report and the documents you submit with it are reviewed by the Claims Fund staff lawyers. They will determine whether a claims file should be opened or whether the matter does not truly fit within the definition of Claim under the Policy and should be classified as a pre-claim or pending claim file. Some claims that go into the pre-claim or pending claim file never develop into full-blown claims. However, if they do, then the Claims Fund has a record of an early report and you will have no concerns about late reporting.

If a claims file is opened, the claim will be assigned to one of the Claims Fund staff lawyers. You will receive a letter explaining the Professional Liability Claims Fund program, what will happen with your claim, information about the scope of coverage, etc. The Claims Fund staff lawyer assigned to your file will contact you directly to obtain as much information as possible and to determine a strategy for dealing with the claim.

The majority of the professional liability claims are handled in-house by the Claims Fund staff lawyers. However, if outside defence counsel needs to be appointed, the Claims Fund staff lawyer will keep you informed throughout. The Claims Fund staff lawyer will involve you in the selection of the lawyer, but under the Policy of Insurance, it is the Claims Fund staff lawyer who controls the selection of outside counsel and gives the instructions on the conduct of the defence.

m) What if I have more questions?

If you have any questions about reporting claims, call, write or e-mail any of the Claims Fund staff lawyers. Lawyers with questions or concerns regarding the Professional Liability Claims Fund can contact the Director, Tana Christianson at *tchristianson@lawsociety.mb.ca* or her direct line 204-926-2011.

6. Reimbursement Fund

Established and continued under *section 46* of *The Legal Profession Act,* the Reimbursement Fund at the Law Society of Manitoba is a fund maintained by the Society to compensate members of the public who have suffered financial loss as a result of the misappropriation or wrongful conversion of client funds or property by a lawyer.

The Reimbursement Fund is often confused with the Professional Liability Claims Fund described above but the two funds have very different purposes.

The Reimbursement Fund compensates claimants for pecuniary losses caused by a dishonest lawyer, whereas the Professional Liability Claims Fund compensates claimants for pecuniary losses caused by a negligent lawyer.

The Professional Liability Claims Fund is insurance that protects all practicing lawyers. The Reimbursement Fund is controlled by the benchers of the Law Society and compensation to a claimant is discretionary.

A claimant to the Reimbursement Fund must provide satisfactory evidence that the following conditions have been met:

(a) money or other property was entrusted to or received by:

  i. a law corporation, or

  ii. a member in their capacity as a lawyer;

(b) the corporation or member misappropriated or wrongfully converted the money or other property; and

(c) the claimant sustained a pecuniary loss as a result of that misappropriation or wrongful conversion.

The section For the Public on the Law Society's website says this about the Reimbursement Fund:

> **Can I seek Compensation when my lawyer has stolen my money or Property?**
>
> The Law Society maintains a Reimbursement Claims Fund to repay people whose trust monies have been misappropriated by a lawyer. To be paid out of the Reimbursement Claim Fund, you must first make a complaint to the Complaints Resolution Department alleging that your lawyer has misappropriated money or property you entrusted to them in their capacity as a lawyer. That complaint will be investigated by the Complaints Resolution Department. If your lawyer is convicted of misappropriation, your complaint will be referred to the Reimbursement Claims Fund which reimburses clients by paying back the funds that were misappropriated. You do not have to sue the lawyer or law firm. Some limitations apply.
>
> For general information about the Reimbursement Claim process contact Tana Christianson by email at *tchristianson@lawsociety.mb.ca* or by phone at (204) 926 - 2011.

An application form and payment guidelines have been developed to assist claimants in submitting claims and to provide guidance in the administration of claims.

All practicing members pay an assessment for the Reimbursement Fund as part of their practising fees. The assessment amount is set annually, taking into account claims paid during the past year, anticipated claims during the coming year, and the cost of insuring the Reimbursement Fund.

7. Prevention of Unauthorized Practice

As indicated earlier, the *Law Society of Manitoba* has the power to determine who will be admitted to the practice of law in this province and to license and regulate those individuals. As a corollary to that power, the Society is also empowered to prevent the unauthorized practice of law in this jurisdiction by any person who is not properly qualified and licensed.

The definition of "carrying on the practice of law" is set out in *sections 20(2) and 20(3)* of *The Legal Profession Act.* The latter subsection outlines several actions that are deemed to be carrying on the practice of law. Note that the definition is broad. For example, any person who gives legal advice for or in the expectation of a fee or reward, directly or indirectly, is deemed to be carrying on the practice of law. To determine whether a person is engaged in the unauthorized practice of law, first consider whether the person is permitted to practice law under one of the exceptions to the general prohibition against non-lawyers carrying on the practice of law.

Articling students are the most common non-lawyers who are permitted to carry on the practice of law. This exception is authorized by *section 21* of the *Act* that permits the benchers to make rules permitting and regulating the practice of law by students and *Rules 5-7.1 and 5-7.2* that provide that "*An articling student may practise law in accordance with the terms of the Education Plan and Articling Agreement entered into between the articling student and [their] principal*" and "*The principal of an articling student must comply with the terms of the Articling Agreement*."

Sections 40-42 of the Legal Profession Act set out the details of a further exception to the general prohibition. *Section 40(1)* provides that a person who is not otherwise authorized to practise law in Manitoba may act as an agent on behalf of, or provide legal advice to, another person concerning certain offences under *The Highway Traffic Act* or *The Drivers and Vehicles Act* in the Provincial Court, in limited circumstances and subject to certain insurance, bonding, and licensing requirements.

The Crown Attorneys Act section 3(3) and *The Legal Aid Manitoba Act section15.1(1)* also permit persons who are not lawyers or students to provide legal services in certain circumstances, provided that the non-lawyer is acting under the general direction and supervision of a lawyer.

When information is received by the Law Society about unauthorized practice, typically an investigation is undertaken. Where it appears there is sufficient evidence that a non-lawyer or an inactive/non-practising lawyer is carrying on the practice of law and that person refuses to cease the activities upon the request of the Society, the Society may initiate court proceedings to seek an injunction under *section 29(1)* of the *Act* restraining an unauthorized person from practising law. Alternatively, the Society may seek to prosecute the person summarily under *section 28* of the *Act*.

8. Fee Disputes

Many of the complaints the Society receives can be characterized as purely *fee disputes* between clients and lawyers, and do not otherwise raise any concerns as to a lawyer's professional practice or ethical conduct. These complaints are generally not dealt with as disciplinary matters. Rather, the client is advised of the fee arbitration service *(application form*) offered free of charge by the Law Society (under *Rule 5-59*) and, as an alternative, of the right to have the lawyer's account *assessed in the Court of Queen's Bench*. Inquiries are made as to whether the lawyer and client will both consent to submit the lawyer's account to arbitration. Note that legal fees that are subject to a tariff (e.g., in estate matters or mortgage foreclosure matters), or are imposed under a contingency agreement, may not be reviewed through arbitration or assessment.

The Society has a list of practising lawyers who have volunteered to act as arbitrators. The fee arbitration service is provided free of charge by the Law Society, and the members of the profession who place their names on the list of potential arbitrators do so as a service to the profession and the public.

In the Society's discretion, either a sole arbitrator or a panel of three arbitrators will be appointed. In the case of a three-person arbitration, each party is presented with a list of names of lawyers (from the list of arbitrators) who are experienced in the area of practice for which the fee dispute has arisen. The client selects one person as the client's nominee on the arbitration panel and the lawyer whose fee is in dispute also selects a nominee. The Law Society subsequently appoints a third person to act as chairperson of the board of arbitration. Both the client and the lawyer must sign a written consent agreeing to be bound by the decision of the arbitrator(s) and acknowledging that the arbitrator(s)' decision is legally enforceable in the same manner as an arbitration under *The Arbitration Act*.

The arbitrator(s) then convene an informal hearing, hear representations from both parties, and subsequently issue(s) a written decision either upholding the lawyer's account or ordering the lawyer to reduce the account and/or reimburse the client accordingly if the account has been paid. It should be noted that the failure of the lawyer to comply with the decision of an arbitration panel, without reasonable excuse, may be reviewed by the Society as a concern about the lawyer's professional conduct.

Where either party refuses to submit the fee dispute for resolution through the Society's fee arbitration process, the client is reminded of their right to have the lawyer's account assessed at the Court of Queen's Bench under *Queen's Bench Rule 71*. The client must apply for an assessment within six months of receiving a final bill from the lawyer. If this option is chosen, the parties are left to resolve their dispute through the courts.

9. Rules Regarding General Professional Obligations

Certain *Rules of the Law Society of Manitoba* impose specific professional obligations on Manitoba lawyers. The following are some of the more important obligations of which members should be aware:

a) Change of Address or Firm (*Rule 2-75*)

When a member commences practice with a firm following their Call to the Bar, or changes firms and becomes a partner or associate in a new law firm, under the *Rules*, that member must notify the Law Society and keep the Society advised of their current address and place of employment at all times.

b) Designated Persons (*Rule 2-77*)

Under the *Rules*, every law firm must register with the Law Society and must designate up to two lawyers in the firm to receive and respond to all communications from the Society and to receive information from The Law Society concerning complaints, charges and discipline, professional liability insurance claims, and the failure to pay monies to the Society in respect of members of the firm. Most large firms appoint two senior partners as the designated members for the other lawyers in the firm.

c) Bankruptcy (*Rule 2-78*)

Under the *Rules*, a lawyer is required to notify the CEO immediately upon making a proposal, a voluntary assignment in bankruptcy, or upon being petitioned into bankruptcy, under the *Bankruptcy and Insolvency Act.* The member must also provide the CEO with copies of all material filed in connection with the proceeding and with a written undertaking to the Law Society that the member will not sign cheques drawn on any trust account. Where the member is the sole signatory on any trust bank account, the CEO may approve another member as a signatory for the account. A member may ask that the requirement to provide an undertaking be waived and the CEO may waive the undertaking if the CEO concludes that its imposition would create an undue hardship for the member.

The Complaints Investigation Committee has the discretion to require the member to appear before it to answer any questions concerning the bankruptcy, although the bankrupt member is not usually required to appear. Where inquiries are made, the concerns of the Society are generally:

- whether the bankruptcy will in any way impede the member's ability to continue to practice law and to serve clients conscientiously and diligently;
- whether any clients are creditors in the bankruptcy; and,
- whether there has been a failure to make employee remittances if Canada Revenue Agency is a creditor.

d) Judgment Against a Lawyer (*Rule 2-79*)

Under the *Rules*, members are required to notify the Society immediately of any judgment entered against them and remaining unsatisfied for 30 days or more, whether or not an appeal has been filed.

The Complaints Investigation Committee has the discretion to request that the judgment debtor appear before the committee to discuss the judgment, the financial resources and ability of the member or law corporation to satisfy the judgment, and such other matters as the committee considers appropriate. Failure to appear without reasonable excuse may constitute professional misconduct.

e) Notice of Charges (*Rule 2-80*)

A member, articling student, applicant for admission, resumption or reinstatement, law corporation or visiting lawyer who is charged with an offence under a federal statute must give written notice to the CEO of the particulars of the charge and the disposition or any agreement arising out of the charge.

The Complaints Investigation Committee may request that the member appear to discuss the charge or its disposition, and such other matters as the committee

considers appropriate. Failure to appear without reasonable excuse may constitute professional misconduct.

f) Annual Fees and Assessments (*Rules 2-82 to 2-99*)

The Law Society gives all practising lawyers and non-practising members written notice of the amount of the annual practising and non-practising fees and the amount of the contributions payable to the Reimbursement Fund and the education fund on or before March 1st of each year.

Practising fees and the contributions to the Reimbursement Fund and the Education Fund are due on or before April 1st of each year or in installments as determined by the Society.

The renewal fee for a law corporation permit is also due on or before April 1st each year.

The Law Society gives all practising lawyers written notice of the amount of the contribution due to the Professional Liability Claims Fund and the due dates for payment in full and by installments on or before June 1st of each year.

The contribution to the Professional Liability Claims Fund is due on or before July 1st of each year.

The CEO may allow fees and contributions to be paid in installments.

Special provisions for practising fees and contributions apply for newly called lawyers and for those who resume practice during the year under *Rule 2-84*.

Note: Whether the lawyer's fees are paid directly by the lawyer or by the firm is a matter to be determined between the lawyer and the firm; however, **each member has a professional obligation** to ensure that their practising fee and contributions are paid and received by the Society before the deadlines.

Members should be aware that they are subject to **late payment penalties** of $10 per day, up to a maximum of $300 (*Rule 2-87(1)*) for failure to pay fees and contributions on time. Members should note that when payment on account of fees and contributions is received late, but within 30 days of the original due date, even if payment is made in full, failure to also pay the assessed late penalty within 30 days of that payment being made, will result in an automatic suspension.

Caution:

A member who **fails to pay** the practising fee and contributions within 30 days of the due date **is automatically suspended** from practising law and must pay an additional fee of $100 to be reinstated (*Rules 2-88 and 2-89)*.

Payments are considered received by the Society on the date the funds are **received** at the Law Society office, not the date on which they were placed in the mail.

g) Opening a New Pooled Trust Account (*Rule 5-42.1*)

Under the *Rules* a new trust account CANNOT be opened without first applying to the Law Society for permission to operate a trust account AND once approved, completing a required online education component. See the Society's website regarding the *trust safety program* for more information.

Additionally, under the *Act*, a member must direct the financial institution to remit the interest on the member's pooled trust account to the Manitoba Law Foundation. A Letter of Direction must be provided to the financial institution and also must be sent to both the Law Society and the Manitoba Law Foundation. (See information about the Manitoba Law Foundation below).

h) Spot Audit/Investigations

Investigation of Accounts and Records (*Rule 5-51(1)*)

The benchers, the complaints investigation committee, or the CEO may, at any time, require an investigator to investigate the accounts and records of a member or a firm of members to ascertain whether there has been compliance with the *Act*, *Rules*, and provisions of the *Code*.

Production of Records (*Rule 5-52(1)*)

Subject to Rule 5-52(2), a member must co-operate with an investigator and must produce on-demand and answer questions about all records, books, files and any other document, in any form, kept by or for the member that may be reasonably required by the investigator to conduct the inspection or investigation.

Production of General Records (*Rule 5-52(2)*)

An investigator may only demand the production of a member's general records and accounts when they are required by the investigator to trace trust funds or determine if trust funds have been deposited into the member's general account.

i) Duty to Reply to Society (Rule 2-81 and Code 7.1-1)

Rule 2-81 specifies that where the Law Society requests a response from a member within 14 days, the member must respond in writing providing the information or explanation requested within 14 days after receipt of the request. This rule is similar to the provisions under the complaints investigation rules requiring the member to respond within 14 days to a letter of complaint.

In the absence of a reasonable excuse, failure to file a written answer with the Society within the prescribed time may constitute professional misconduct under the *Rule*s.

See also *Code of Professional Conduct 7.1-1 A lawyer must reply promptly and completely to any communication from the Society.*

j) Duty to File Annual Member Report & MCPD Report (Rules 2-81.1(3) and 2-81.2(1))

The Annual Member Report (*AMR*) and the CPD Tracker are both found in the *Member Portal*. The deadline for filing these reports is **April 1** each year.

Rules 2-81.1(3) (Report on CPD) and 2-81.2(1) (AMR) require that all members who had practising status at any time in the prior calendar year file with the Law Society both an Annual Member Report and a Report on their CPD activities in the preceding calendar year by no later than April 1.

Failure to complete and file the Annual Member Report and the report on CPD without reasonable excuse may constitute professional misconduct under the *Rules*.

k) Obligations regarding Anti-Money Laundering (Rules Part 5 Divisions 4 and 12)

There have been a few significant changes in the *Law Society Rules.*

Canadian law societies have tightened rules on the receipt of cash by lawyers as well as client identification and verification. Rule amendments effective January 1, 2020, bring the rules applicable to lawyers in line with those that apply to other Canadian businesses that handle funds and are subject to the Financial Transactions and Reports Analysis Centre (FINTRAC).

Please review Part 5 Division 12 – Client and Identification and Verification *Rules 5-116 to 5-131* and review Part 5 Division 4 – Financial Accountability *Rules 5-41 to 5-56* for the amendments enacted in December 2019.

The Law Society has prepared a series of *detailed worksheets and some more simplified checklists*, annotated to the new rules, which will assist you in determining how the rules apply to each file. Check out Lawyer Resources on the website for the *materials on Anti-Money Laundering.*

l) Mandatory Continuing Professional Development (Rule 2-81.1(8))

Mandatory CPD Requirements

Under Part 2 *Rule 2-81.1(8)*, if you have practising status for any portion of a calendar year you are required to complete one hour of eligible CPD for each month that you have practising status in that year. If you have practising status for three or more months in a calendar year, then 1.5 hours of your total CPD activity for the year must be related to ethics, practice management or professional responsibility (EPPM).

So, for example, if you have practising status for the whole calendar year, then you are required to have completed 12 hours of professional development activities in that calendar year and 1.5 hours of those 12 hours must have been related to ethics, practice management, or professional responsibility.

In exceptional circumstances, (e. g. pursuing a Masters of Law Degree or completing the Federation of Law Societies' Criminal Law or Family Law Program) under Part 2 *Rule 2-81.1(9)* the Chief Executive Officer may permit you to carry over no more than 12 hours of CPD to the following year.

MCPD Reporting Requirements

Under Part 2 *Rule 2-81.1(3)* the Continuing Professional Development Tracking report is **due on April 1st each year**.

You are required to track your CPD activities and record them in CPD Tracking for the calendar year. CPD Tracking is found in your *Member Portal*.

If you register and attend a CPD program offered by The Law Society of Manitoba during the year, that CPD activity will be automatically recorded in your Member Portal CPD Tracking by the Law Society. For all other CPD activity you will be asked to report:

- The Name of the Activity
- The start date of the Activity
- The Name of the provider
- The Subject matter (area of substantive law; ethics, practice management, professional responsibility)
- Primary audience (lawyer, law students, support staff)
- The participation format (in person; on-line; written materials)

- Your role (presenter; learner; author)
- Number of hours dedicated to the educational activity (exclude social aspects and lunch hours)
- The portion of the content related to Ethics, Practice Management or Professional Responsibility

When requested by the Law Society, you will be required to produce all documents to substantiate the completion of your CPD activities (Part 2 *Rule 2-81.1(11)*).

Non-Compliance

Failure to complete and report the required annual mandatory continuing professional development hours will result in the issuance of a 60-day notice that you comply. (Part 2 *Rule 2.81.1(12))*

Caution:

If you fail to comply within 60 days, you will be automatically suspended from practice until you have satisfied the MCPD requirements and have paid a reinstatement fee. (See *Law Society Rule 2-81.1(12)*)

Failure to comply may also result in a referral to the complaints investigation committee for its consideration (Part 2 *Rule 2-81.1(13)*).

For more information, please refer to the *MCPD webpage* or these *FAQs*.

10. Equity Officer (Law Society Rule 5-115)

a) Equity & Diversity

The Law Society of Manitoba believes that the public is best served by a legal profession that reflects our diverse community. We are committed to all individuals participating in the legal profession regardless of their age, disability, race, religion, sexual orientation, gender identity, marital or family status.

b) Equity Officer – Support Services

If you are experiencing discrimination or harassment, the Law Society's Equity Officer is available, free of charge, to provide confidential assistance to Manitoba lawyers, support staff, articling students and clients of lawyers.

Support services include:

Informal & Confidential Resolutions

Assisting with informal resolutions, including coaching on how to effectively address issues and mediating issues or concerns. A call to the Equity Officer is not the same thing as a complaint to the Law Society. Your matter will be kept confidential – including from other Law Society staff - unless you authorize the Equity Officer to disclose it. The Equity Officer does not take any action without your permission.

The Equity Officer does not provide legal advice and maintains a neutral position.

Education

Speaking at your legal work-place to raise awareness about discrimination and harassment, diversity and inclusion and civility and respect. The Equity Officer can also meet with you one-on-one to discuss issues or concerns you may have.

Resources & Referrals

Advising on other options for recourse available, such as filing a formal complaint with the Law Society or the Human Rights Commission or starting a civil action. The Equity Officer can also assist you in identifying available resources, such as counselling services or other materials on equity-related issues.

Parental Support

Providing confidential coaching and assistance for lawyers and their spouses or life partners in planning for maternity and/or parental leave and meeting the challenges of becoming new parents.

Additional support is available through *Blue Cross Manitoba*.

c) Reporting

The Equity Officer maintains data and reports on incidents of harassment and discrimination on an anonymous basis. This data is also used to identify proactive steps that the Law Society can take to prevent harassment and discrimination in Manitoba's legal profession.

For *additional equity-related resources*, check out the *Law Society Education Centre*, where you can locate informational guides and model policies such as the Model Policy on Alternative Work Schedules, Best Practices for Employment Interviews as well as more information on maternity and parental leaves, sickness benefits and child care services.

d) Equity Committee

The Equity Officer provides support to the Equity Committee which is comprised of benchers and other members of the profession with unique perspectives on equity issues. The Committee considers and provides strategic advice and recommendations to Law Society benchers and/or staff, as appropriate, on a variety of policy issues and program initiatives aimed at advancing equity, diversity and inclusion in both the regulation of the legal profession and the delivery of legal services. The scope of work undertaken by the Equity Committee aligns with the Law Society's current Strategic Plan.

B. THE FEDERATION OF LAW SOCIETIES

The Law Society of Manitoba has jurisdiction over its own members only but has the power to license and regulate the practice of law in Manitoba by anyone, including lawyers from other provinces practising temporarily in Manitoba under a national mobility agreement. Similar statutory regimes exist in all other Canadian provinces and territories. In the province of Quebec, there are two professional associations, one for barristers and one for notaries. A 2013 agreement to permit Canadian lawyers to transfer between Quebec and other common law provinces will come into effect once implemented by all jurisdictions.

The various provincial and territorial law societies across Canada have formed a national organization called the Federation of Law Societies of Canada. Representatives of the 14 professional associations meet periodically during the year.

While the Federation does not have any formal statutory authority to license or govern lawyers in Canada, the 14 member societies have recognized the wisdom and benefit of attempting to deal with certain issues that are of common concern to all law societies. Thus, while policy decisions made at the national level by the Federation are not binding on the provincial and territorial societies, they are persuasive and give the local societies some guidance in attempting to deal with issues of common concern in a logical and coordinated fashion. One such example is the Federation of Law Societies' National Mobility Initiative, which facilitates transfer between provinces and cross-border practice by lawyers.

Another area where the Federation has been involved is that of virtual law libraries. CanLII stands for the Canadian Legal Information Institute and has been developed by the Federation. The *CanLII website* was launched, officially, in August 2000.

CanLII is funded by The Law Society of Manitoba and by other law societies across Canada. Its purpose is to create a virtual law library that will provide free internet access to primary sources of Canadian law, for the benefit of the legal profession and the public at large. Its contents include judgments, legislation, and decisions from administrative tribunals.

CanLII started by publishing current cases that courts and tribunals sent as they were written starting in the early 2000s. In February 2001, the Manitoba courts began to contribute their electronic judgments to the CanLII project. Since that time CanLII has completed several projects to add historical cases. See *this page* to learn about more recent additions of historical cases. To see more detail about what CanLII databases contain, please see *this page*. The search engine is sophisticated but easy to use.

A more recent development on CanLII is *CanLII Connects*, a companion website that hosts a database of case commentary and case summaries by the legal community. This commentary is linked to and from the case law on CanLII.org. A growing number of books, law journals, articles, reports, and other resources are available electronically in CanLII.org's Commentary section. Click *here* to browse this content.

C. THE CANADIAN AND MANITOBA BAR ASSOCIATIONS

While the Law Society may be said to represent the lawyers of Manitoba, it does so only to the extent necessary to carry out its mandate to ensure that the public is adequately protected concerning the provision of legal services in Manitoba. When the Law Society communicates with the public, it represents the opinion of the whole legal profession. As is pointed out by R. B. Cantlie in his article "A General Account of The Law Society's Structure, Powers and Duties" in Cameron Harvey, ed., *The Law Society of Manitoba 1877 - 1977* (Winnipeg: Pequis, 1971), *"This makes it an inappropriate body to promote changes in the law, except in those few areas which directly affect the way in which lawyers carry on their profession …"* Also, as Cantlie points out in his article, the Society is not a club for lawyers and does not concern itself with the social interests of its members.

Those roles of representing the views of lawyers on issues of public interest and of providing a forum for professional and social interactions are filled both in Manitoba and elsewhere in Canada by the Canadian Bar Association (CBA), and locally, the Manitoba Bar Association (MBA).

The mandate of the CBA/MBA is to:

- improve the law;
- improve the administration of justice;
- improve and promote access to justice;
- promote equality in the legal profession and the justice system;
- improve and promote the knowledge, skills, ethical standards and well-being of members of the legal profession;
- represent the legal profession nationally and internationally; and
- promote the interests of the members of The Canadian Bar Association.

Through the work of its sections, committees and task forces at both the national and branch levels, the CBA is seen as an important and objective voice on issues of significance to both the legal profession and the public.

The CBA has branches in each of the provinces and territories. As indicated above, the MBA is the Manitoba branch of the CBA. The MBA is active in providing numerous opportunities for members to interact both professionally and socially.

The benefits of membership include:

Sections

Members can register, at no additional cost, in any MBA sections (local registration automatically registers you with the national section). MBA sections include aboriginal law, administrative law, alternative dispute resolution (ADR), animal law, business law, child and youth law, civil litigation, constitutional/human rights, construction & infrastructure law, Corporate Counsel (CCCA), criminal justice, elder law, entertainment, media and communications law, environmental, energy and resources law, equality issues, family law, French-speaking common law members, health law, immigration law, insolvency law, international law, labour and employment law, law practice management, legal research, municipal law, public sector lawyers, real property, securities law, sexual orientation and gender identity, small, solo and general practice, tax law, technology, privacy and intellectual property, transportation law, wills, estates and trusts, young lawyers and women lawyers.

Manitoba Committees

Branch members serve on numerous committees formed by the MBA to implement programs or to serve the interests of the profession and the public. MBA representatives are also appointed to serve on many boards and committees of the Government, the Law Society and other agencies. Members who are particularly interested in participating as MBA representatives on committees can contact the Executive Director at the branch office to express their interest.

Government Relations

Through the initiation of the section(s) and/or special committees, the MBA works on behalf of the profession and the public for well-developed, practical laws. It provides a focus through which the membership of the branch may assist the government of Manitoba in ensuring that legislation is as comprehensible, workable and unambiguous as possible and that it does not violate the rule of law.

National Representatives

The MBA is seen and heard at the national level, with members actively participating on the CBA board of directors and CBA committees.

Continuing Professional Development (CPD)

Annually at the MBA Mid-Winter conference members have the opportunity to give insight into today's issues via continuing professional development (CPD) seminars. CPDs are also offered throughout the year by the various sections.

Publications

Members receive *Headnotes & Footnotes*, the Association's newsletter, which is published 10 times per year. The primary purpose of this newsletter is to promote MBA events and programs, but it also provides notices to the profession from the courts and government and summaries of important court decisions.

Networking Opportunities

Many social activities hosted by the MBA throughout the year provide excellent opportunities for members to network within the profession.

For further information or to become a member of the CBA and its branch in Manitoba, the MBA, contact Stacy Nagle, Executive Director, at 204-927-1213 or the MBA general office at 204-927-1210 (email: *admin@cba-mb.ca*). To join, call the national office at 1-800-267-8860 or through the CBA website at *www.cba.org/membership*.

D. HEALTH & WELLNESS

Well-being is critical to optimize professional competence. The Law Society encourages lawyers to explore these *resources and services* that are available to support their well-being.

E. THE MANITOBA LAW FOUNDATION

1. Introduction

The *Manitoba Law Foundation* was established by the legislature through amendments to *The Law Society Act* (now *The Legal Profession Act)* which came into effect on October 23, 1986. Financial institutions must pay to the Foundation interest on general and restricted trust accounts maintained by lawyers practising in Manitoba. This does not include the interest paid on specific trust investments held for individual clients. General and restricted trust account deposits are usually held by lawyers in circumstances where the administrative cost of segregating the funds would exceed the interest payable to individual clients.

2. Objectives

The legislation establishing the Foundation spells out the purposes for which its money can be used. The objects of the Foundation are to encourage and promote legal education, legal research, legal aid services, law reform and the development and maintenance of law libraries.

3. Administration

The Foundation's affairs are administered by a board of directors consisting of ten members. Five members are appointed by the Minister of Justice; three are appointed by the Benchers of The Law Society of Manitoba; one is appointed by the president of the Manitoba Bar Association; one is the Dean of the Faculty of Law, University of Manitoba or a member of the faculty appointed by the Dean. The Minister of Justice designates one of the directors as chairperson and another as vice-chairperson. The board meets regularly to decide on grant applications and policy matters, including the collection and investment of revenues. A small staff is employed to take care of administrative matters, to negotiate and communicate with financial institutions, to make policy and grant recommendations to the Board and to advise prospective applicants for funding.

4. Assistance to Lawyers

The Legal Profession Act provides that lawyers maintaining general trust accounts shall direct the financial institution to remit interest to The Manitoba Law Foundation. In practical terms, this means completing *a standard-form letter of direction* approved by the benchers of The Law Society (available from either *the Foundation* or *the Law Society*). A copy of this letter provided to the financial institution must be sent to both the Foundation and the Law Society. Negotiation with financial institutions to establish general terms and conditions and verification of remittance is, in ordinary circumstances, handled entirely by Foundation staff. Some financial institutions are more generous than others in the payment of interest on trust accounts. Foundation staff can advise lawyers of the arrangements in place with financial institutions where they may be considering opening accounts.

Copies of *the annual reports* of the Manitoba Law Foundation are available on the *Foundation's website*.

5. Examples of Funding

The legislation establishing the Foundation requires annual grants, calculated based on a statutory formula, to be paid to the Legal Aid Services Society of Manitoba for general purposes and to the Law Society of Manitoba for educational programs and to offset their expenses in ensuring that their members comply with *trust account rules - see Part 5 of the Rules*. Under this formula, in years where revenue from the interest on lawyers' trust accounts (IOLTA) exceeds $2 million, 50% of that revenue is to be paid to Legal Aid Manitoba as a grant in the following year. The formula also specifies that a further 16.67% is payable annually to the Law Society of Manitoba for the purposes outlined above. If IOLTA revenues are less than $2 million for the year, lesser amounts apply under the formula. The remaining revenue, together with investment earnings, is available for distribution in the form of discretionary grants which are determined by the Foundation's board of directors.

Discretionary grant funding is available to organizations or for programs that fall within the Foundation's statutory funding mandate, and in recent years discretionary grants have been made to the Public Interest Law Centre, the University Law Clinic, Community Legal Education Association, Community Unemployed Help Centre, Legal Help Centre, the Manitoba Law Reform Commission and E. K. Williams Law Library, among others.

6. Funding Guidelines

Summaries of the Foundation's granting policy, application deadline dates, and application process are available from the Foundation office and can be found on the *Foundation's website*. In general, projects must fall within the stated objectives as interpreted by the board of directors. There are no limits on the number of grants, but all grants are subject to the availability of funds. The grants mandated by legislation have a prior claim.

The Foundation may be willing to fund projects that are creative and innovative as long as they fit its objectives and benefit the public interest.

7. Application Procedures

For information about the Foundation and to request application forms, contact the Foundation's Executive Director at:

THE MANITOBA LAW FOUNDATION
701-177 Lombard Avenue
Winnipeg MB R3B 0W5
Telephone: (204) 947-3142
E-mail: *info@manitobalawfoundation.org*

F. RELATIONS WITHIN THE PROFESSION

1. The Privileges

Practising law is a privilege. Your status as a lawyer confers certain benefits and privileges upon you. Generally, your word is accepted as reliable because you are a lawyer. Joining the ranks of the profession may give you power because of public perception.

The public generally assumes that lawyers are intelligent and contributing members of society. As a result, you may now be asked to sit on various boards of management or to become involved with local community activities. Further, the practice of law can provide you with an income that is comparable to that of other professionals.

Roscoe Pound defined a profession as "a group pursuing a learned art as a common calling in the spirit of public service". Historically and presently lawyers have been, and are considered by society to be, professional people. Entering the legal profession entitles you to certain privileges and it also places certain duties and responsibilities on you. As members of a profession, lawyers have formulated standards of conduct for themselves that set out these obligations and duties in a *Code of Professional Conduct*.

2. The Duties

As a lawyer, you owe duties to your clients, to your profession, to your colleagues, to the public, and to the court. The duties that you owe to your clients are those of honesty, integrity, trustworthiness, respect, loyalty and confidence. Your duty to the profession includes a duty to assist in maintaining the integrity of the profession and you are encouraged to participate in its activities. You owe the court the duty of candour, fairness, courtesy and respect. You also owe the court, and the profession at large, an obligation to uphold the administration of justice and to try to improve it. Your duty to your colleagues is the duty of professional collegiality. Section 7.2-1 of the *Code of Professional Conduct* states 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 practice. The duty to act in good faith is discussed in more detail below.

3. The Duties to Other Lawyers

Conducting yourself with courtesy and good faith seems simple, yet the Complaints Investigation Committee of the Law Society of Manitoba continues to receive complaints about the breach of this obligation. The *Code* speaks of the practical reason for the obligation and provides that fair and courteous dealings on the part of each lawyer will contribute to matters being dealt with effectively and expeditiously, which is in the public interest.

Courtesy means that you should be polite, respectful and considerate in all your dealings with other lawyers. You should ensure that the animosity between clients does not influence

your conduct and demeanour. Commentary [2] to section 7.2-1 of the *Code* notes that the presence of personal animosity between lawyers may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. You should be honest and forthright in your dealings with other lawyers and agree to reasonable requests which do not unreasonably prejudice your client. Further, you should deal with all matters as effectively and expeditiously as possible.

a) Courteous Conduct

i. Phone Calls

As much as you may wish to avoid a lawyer who is nagging you about doing something that you have not yet done, do not ignore phone messages. This will only serve to make matters worse. As well, such conduct will violate section 7.2-5 of the *Code* that requires lawyers to answer all professional letters and communications from other lawyers that require a response with reasonable promptness and to be punctual in fulfilling all commitments.

Return all phone calls. If you are unable to speak with the other lawyer directly, leave a message either with the lawyer's assistant or on a voice mail system. In your message, leave your telephone number as well as a time when you can be reached. If you know why the other lawyer is calling, answer the unasked question. If possible, indicate when you expect to be able to provide a fuller answer. Record the time that you left your message on your file. Try again later.

If for some reason you are not able to leave a message, you should send the lawyer a short letter or email message acknowledging the phone message and advising of your unsuccessful attempts to return it. In your letter or email, you should also request that the lawyer try to reach you again or at least leave a fuller message.

When you get to speak to the other lawyer, that lawyer is supposed to treat you with the same respect. If you are behind in your work, be honest and try to work out an agreement on a reasonable deadline for completion. You might also want to discuss whether the other lawyer can assist you in meeting a deadline (e.g., doing the first draft of documents). Of course, if your delay is going to prejudice the other lawyer's client, the other lawyer must take the necessary steps to protect that client.

If you have made a commitment you find you cannot fulfill, tell the other lawyer sooner rather than later. If you ignore that lawyer's calls, you will make it difficult for the lawyer to ask for instructions from their client to possibly give you an extension of time because the lawyer doesn't know why you are not returning calls. Remember, the other lawyer is also required to answer to the demands of a client and the demands of a busy practice. Not answering

another lawyer's phone calls may put that other lawyer in an uncomfortable situation with their client (i.e., in not being able to respond to the client's inquiries). Further, if the other lawyer is forced to advise their client that they cannot get a response from you, that information can only serve to tarnish the reputation of the profession as a whole.

ii. Correspondence

Respond to all letters and e-mails within a reasonable time frame. However, in practice, everything is relative to the work you are doing at the given time. If you are unable to respond (for example, if you are about to leave for a month-long vacation) don't just ignore the communication and expect that you will deal with it on your return. Contact the lawyer to indicate that you are leaving for vacation and will not have time to consider the request until you return. Diarize the file for a response within a short time after you return from vacation. Your obligation of courtesy is then met and the other lawyer can advise their client of the timeline adjustment and the reason. This proactive step should serve to prevent the other lawyer and client from becoming annoyed because you appeared to ignore their request when you did not respond at all.

Manitoba has a small community of lawyers, and your reputation can be made or tarnished very quickly by a failure to return phone calls, letters and e-mails. As well, if the court finds that you delayed matters or ran up costs by failing to respond promptly, you or your client could be penalized by having costs awarded against you. And finally, there is always the possibility of a complaint being made against you to the Law Society. In following the above suggestions, you may avoid having to deal with any of these unpleasant consequences.

iii. Rude Behaviour or Language

Rude behaviour or language is inappropriate.

Section 7.2-4 of the *Code* provides that in the course of professional practice, the lawyer must not send correspondence or communicate to a client, another lawyer or any person in a manner that is abusive, offensive or otherwise inconsistent with the proper tone of professional communication from a lawyer. Commentary [2] to section 7.2-1 also suggests that personal remarks interfere with the orderly administration of justice and have no place in our legal system. Even if the other side takes an unreasonable position or your client is pressuring you, it is not appropriate to respond with rude behaviour such as yelling, speaking in a condescending manner or swearing. It is never acceptable to insult the other lawyer or client, in any form.

If you are angry, annoyed, irritated, or plain exasperated by the other lawyer's position or behaviour, say "Excuse me, I can't talk to you right now. I will call you tomorrow about this." Then you should leave if you are face to face or if you are on the phone, say goodbye. If you are writing a letter or email when you are feeling angry, annoyed or irritated, don't mail it or hit send until you have reread it the next day or once you have cooled down. If it must go out right away, have another lawyer who is not directly involved in the case read it first. Draft your email reply but do not fill in the address line before you have given yourself time to cool off to prevent accidentally sending it out too soon.

iv. Gossip

Don't do it. It will be repeated and will come back to haunt you.

If your client asks you what you think about the lawyer on the other side (e.g., "Is the lawyer on the other side any good?") and you don't think highly of the lawyer, refrain from offering an opinion. Even if you believe that what you want to say might be true ("That lawyer is notorious for delaying"), don't say it. You don't have personal knowledge of all of the lawyer's files and making such a comment is pure gossip and is offensive. (See Commentary [3] to *Code* section 7.2-1 which provides that a lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers.) If you insult a colleague and it is discovered, you will have alienated that lawyer forever. You may also have to respond to a 14-day letter from the Law Society if that lawyer makes a legitimate complaint about your comment.

v. Conduct of the File

Be reasonable. Treat the other lawyer who makes requests regarding the file as you would want to be treated if you were making such requests. Control your client's unreasonable requests regarding the conduct of the file by advising your client of your professional obligations to colleagues. Commentary [4] to *Code* 7.2-1 provides that 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. You can advocate for your client's interests without being adversarial.

vi. Adjournments

When a court matter has just started or a lawyer has just received a file so that the file is new to the lawyer, an adjournment to permit the lawyer time to prepare or respond is reasonable and generally required. If the request is reasonable, then give the other side enough time in the adjournment to respond so that further adjournments will not be necessary. Of course, if your client's rights will be severely impaired by an adjournment, consider working out terms of the adjournment to protect your client while permitting the other

lawyer time to prepare. In the long run, the matter will likely proceed more quickly with cooperation on adjournments. This guideline applies equally to remands, and requests for extensions of time on rule-imposed deadlines. If the other lawyer abuses your reasonable behaviour by failing to meet deadlines on which you had agreed or failing to be reasonable about your requests for reasonable adjournments, then you can point that out in a polite letter. If the lawyer continues to be unreasonable, then resort to the legal remedies open to you.

vii. Scheduling Meetings/Discoveries/Court Motions and Other Matter

Try to arrange a mutually acceptable date with other counsel taking into account the legal needs of your client. Call ahead and compare diaries before selecting a date, if possible.

If the other lawyer is tied up in a trial for two weeks and can meet at 5:00 p.m. if forced, but your matter can wait for two weeks, then try to schedule the meeting for after the trial. That kind of accommodation to colleagues will be appreciated and remembered when you need consideration (and you will). You, as the lawyer, should control the decisions relating to the scheduling of the various matters on a file. Don't let your client force you into being unreasonable about the process.

Sharp Practice

The *Code* in Rule 7.2-2 specifically prohibits sharp practice and states that the lawyer "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 the client's rights."..

Middleton, J. in *Re Arthur and Town of Meaford* (1915), 34 O.L.R. 231 at 233 (Ont. H.C.) stated, "[T]o build up a client's case on the slips of an opponent is not the duty of a professional man [sic]... Solicitors do not do their duty to their clients by insisting upon the strict letter of their rights. That is the sort of thing which, if permitted, brings the administration of justice into odium."

Although the above comments seem trite, it is not always obvious as to whether sharp practice is involved and the Discipline Case Digests contain examples of lawyers who have violated this rule.

Circumventing the other side's lawyer to communicate with their client directly without the lawyer's prior permission is not permitted.

Under *Code Rule 7.2-6* you may not deal directly with a party who is represented by other counsel, except through or with the consent of that counsel. An exception may exist when the other side is represented by a lawyer on a limited scope retainer unless the scope of the limited retainer requires that all communication with them be conducted through their lawyer. The lawyer acting on the limited scope retainer should give you written notice of the nature of the limited scope retainer and advise you whether your communication with their client directly is permitted because it falls outside the scope of their retainer. Another exception to the rule against dealing directly with a person who is represented by a lawyer is *Rule 7.2-7* which permits a lawyer who is not involved in a matter to provide a second opinion to someone who is represented by another lawyer.

b) Good Faith

We count on our colleagues to be honest and forthright in all our dealings with them. Your career in law in Manitoba will hopefully be long and profitable. If you get a reputation as a person who cannot be trusted, your career as a lawyer in Manitoba may be tough. Lawyers cooperate and can be flexible if necessary, with others whom they trust, but stick to the strict enforcement of the rules and their rights if they learn that the other side is not trustworthy.

"Act in good faith" means that you should only make promises that you can keep, meet all deadlines or negotiate new ones before the old ones expire, don't overbook yourself with clients or meetings or court appearances so that you end up being caught having to be in two places at once, impose only reasonable trust conditions you would accept yourself, and give undertakings only if the performance of the undertaking is completely under your control and you can personally complete it. Honesty is an essential component of good faith. Integrity comes from within, and you will have to decide how to handle situations, keeping that requirement in mind.

4. The Code of Professional Conduct

Nobody but you can control your behaviour in practice, but both you and your clients will benefit if you follow the rules in Chapter 7 of the *Code*. For more assistance, refer to the commentary following these rules. If questions come up in your practice, discuss the issues raised with experienced lawyers in your firm or with staff at the Law Society. Be quick to apologize if you have stepped over the line or lost your temper with someone. Trust your instincts and bear in mind that you should "treat others as you want to be treated by them" whenever you deal with other lawyers.

G. PROFESSIONALISM REVISITED *

By The Honourable Madam Justice Rosalie Silberman Abella

This speech is about values. My thesis is that there are three basic values which merge in a good lawyer: a commitment to competence, which is about skills; a commitment to ethics, which is about decency; and a commitment to professionalism, which transfuses the public interest into the two other values. My sense is that while there is a crisis neither of competence nor of ethics, most lawyers having both in laudable abundance, the same cannot be said of the spirit of professionalism.

I speak to you as someone with an idealized and romantic view of the power of law and of lawyers. I think the rumours of the death of legal professionalism have been greatly exaggerated. I graduated from law school in 1970 and have been proud every day since of being a member of this profession. But I am not unaware that there are many out there who are watching the justice parade with growing concern for the quality of the floats.

Justice may be being done, but it is not necessarily being seen to be done, and justice must be seen to be believed. Law is central to democracy. The public thinks that law and democracy are about justice, that justice is about fairness, and that lawyers should be, as people who live in the house of justice, the fairest of them all. Can we as lawyers look in the mirror and say we truly are?

There is nothing new about the public's skepticism about our profession. Sir Thomas More's Utopia had no lawyers in it; Chaucer's The Canterbury Tales had the odious Sergeant of Law; and Kafka's Trial had no discernible law at all. Margaret Atwood once observed that when Sidney Carton, the heroic lawyer in A Tale of Two Cities, was about to be guillotined and said "Tis a far far better thing I do than I have ever done", he was "putting the practice of law into its proper perspective."

It was the same Margaret Atwood who, after noting wryly that in the Old Testament there is a Book of Judges but no Book of Lawyers, offers the deflationary insight that "In the Judeo-Christian tradition, God is, among other things, a judge; an equation that some judges … are inclined to reverse."

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* Reprinted with the permission of the Honourable Madam Justice Rosalie Silberman Abella. This article was part of her address to a Law Society of Upper Canada Bencher Planning Session on October 14, 1999. It was first printed in the Law Society of Upper Canada's publication *Ontario Lawyers Gazette*. [See R. Abella, "Professionalism Revisited" *Ontario Lawyers Gazette* 3:6 (November/December 1999) 20.]

But although historically we in the legal system have never been able to declare a clear victory over the public's affections, I would argue that the intensity of the public's disaffection is now so palpable that it has started to affect the profession's own perception of its professionalism.

When I graduated from law school, no one taught ethics or professionalism. In the bar admission course, the then Chief Justice of the province gave a one-hour lecture on how lawyers should behave. He told the over 500 students never to wear brown suits and white socks, a largely irrelevant observation for the 10 women in the room who nonetheless shared the Chief Justice's view of brown suits.

Yet despite the fact that the only lecture on being a lawyer in four-and-a-half years of my legal education was about what a lawyer should look like, there was a tacit consensus about what it meant to be a lawyer. It meant being a professional, which meant all of those romantic notions about decency, civility, trustworthiness, and fairness, to name a few. The lawyers who had good reputations were the lawyers who practice law with these adjectives as conduct guides. Some of them made a lot of money, which no one begrudged them or presumed. And quite a few of them were very smart. But they were also overwhelmingly white, male, able-bodied, and socially advantaged. Diversity was a word we used to describe the variety of cases we handled, not our consumer or collegial environments.

We have come a long way. When I was appointed to the bench in 1976 there were fewer than a dozen women judges in Canada. I was the first pregnant woman to be made a judge. That pregnancy offered me my first close-up of stereotyping. I was home on maternity leave two months after my appointment with our three-year-old son, Jacob, having given birth to his brother, Zachary, two months earlier. I was reading to him what he obviously found to be a tantalizing book called If I Were a Bus Driver. When I finished the book he said, "When I grow up, I want to be a bus driver." "Don't you want to be a judge?", I gently pressured. He looked up at me, confused, and replied assertively, "Only girls are judges."

That three-year-old is now articling, and his younger brother has just started law school, but they are graduating into a very different professional environment from mine three decades ago. It is bursting with diversity, far better educated about ethics, far better paid, and far more stressful. But it is also a professional environment where the consensus about what it means to be a professional has broken down, as has the consensus about what the criteria should be for awarding good reputations.

What worries me about this is not so much the absence of a consensus, although this is undoubtedly an unsettling reality, it is the threat I fear to the very legitimacy of the profession, and to the professionals and institutions in it. Although I quickly concede that this is not a new issue, it has a feel of urgency to me in this ideologically polarized, intellectually sclerotic, and frenetically fluid era.

There is undoubtedly a crisis of professionalism generally, and that crisis in turn is having a supply-side impact on everyone, including lawyers. It should surprise no one that lawyers are affected by the spirit of the times, but neither should it surprise lawyers that the public expects them to rise above it.

The fact that the public is so nervous should at least give us pause. It is certainly true that we cannot expect to be popular with the public all the time. The independence of the bench and bar means we have to be prepared to be unpopular with the public from time to time, and even on occasion controversial; but our independence does not absolve us from the responsibility of listening and being open to the possibility that the public's suggestions and criticisms are relevant. We cannot, of course, accede to every request for a response just because it comes from the public, but neither should we decry every criticism as irrelevant just because it had never occurred to us before, or came from an unfamiliar source, or met with no support from our colleagues.

Justice may be blind, but the public is not.

The public is our audience, the people for whom we perform the justice play. They do not direct us, but they are very interested in what is going on. If they stop clapping, we are in deep trouble. We have to figure out if it is because of the script, the props, the cast, or all of them. We know we will always have an audience, because the play is called the Rule of Law, and the public's attendance is mandatory. Since we give the public no choice about whether or not they are subject to the rule of law, we have to care about whether they like the performance. They may not always be right, but they always have a right to be heard.

This is how, in large part, we discharge our accountability to the public without compromising our independence: through an empathetic hearing of its concerns, being open to the possibility that its concerns may be valid, and responding as effectively and quickly as possible when they are.

To me, the Law Society got it right when it said in its 1994 Role Statement that the legal profession exists in the public interest to advance the cause of justice and the rule of law. So did the American Bar Association's 1996 Professionalism Report on Teaching and Learning Professionalism, when it said that professionalism was about "dedication to justice and the public good."

High-sounding and high-minded ideals, but they are for me not mere rhetorical flourishes – they are bedrock aspirations. They are how we should be seeing ourselves, how we should be seen by others, and how we should continually strive to be seen. Professionalism is more than about being a lawyer – it is about why we are lawyers.

But in my view, two headwinds are polluting, or at least threatening to pollute, the ideal professional environment, and therefore the centrality of our relationship with the public: economic pressures and a misplaced preoccupation with process. These Zeitgeist forces create a kind of turbulence in our pursuit to narrow the gap between our professional ideals and the competing realities.

Economic Pressures

Lawyers, like everyone else, relished the boom economy of the 80s, and raised their financial aspirations and expectations accordingly. Many people got rich in the 80s, including many lawyers, and, understandably, no one was eager to give any of it up. When it looked as if they might have to, fear of loss took over. It was, I think, this intense fear of losing the economic benefits so intensely accumulated in the 80s that largely sedated people's impulse for generosity.

The fear of economic loss played out in different ways for different groups, but among lawyers it played out in rigid billing requirements, increased competition, and a restricted willingness to acknowledge requests for lifestyles that included living a life.

But to me, the most worrying repercussion of the economic Darwinism at work in the legal profession was the extent to which its impact was a perception by the public that the profession had adopted many of the practices not of a profession, but of a trade. When the public starts thinking of the practice of law as a trade like any other trade, it may well start asking itself why the practice of law should not be treated like a trade. Why, for instance, if lawyers are going to behave like a trade, should they be self-governing? Or why is a lawyer needed at all if lawyering is simply a matter of skill and not professionalism.

The economic amenities lawyers pursue must be seen as the earned rewards of the primary pursuit of serving the public. If they are, no one will begrudge their fair, and even generous, accumulation. If, on the other hand, they are seen as the object of the exercise, we risk ultimately being judged unworthy of the presumption of professional independence.

On the other hand, sometimes the economic pressures lawyers face, especially lawyers in small or sole practitioner firms, arise from not being able to keep up with the extraordinary costs technological and otherwise – of doing business today. Pressure from clients to do more faster and for less, competition from non-lawyers, the relentless pace and face of change, reduced legal aid work at staggeringly stagnant tariffs – all these and more impose enormous tensions which should be acknowledged.

But in my view economic pressures, while generating inevitable stress for lawyers which may require responsive policy measures from a governing body, cannot be seen as a legitimate excuse to avoid practicing in a professional way. Nothing justifies the absence of professionalism for a lawyer, at either end of the economic continuum.

Process Preoccupation

We have moved from being a society governed by the rule of law to being a society governed by the law of rules. We have become so completely seduced by the notion, borrowed from criminal law, that process ensures justice that we have come to believe that process is justice. Yet to members of the public who find themselves mired for years in the civil justice system's process, process may be the obstacle to justice. It may be time – again – to rethink how civil disputes are resolved.

For a start, we need to sever the philosophies of dispute resolution in the civil and criminal justice systems. The dispute in criminal law is between an individual and the state. Process protects that individual's presumption of innocence from the overwhelming power of the state, and necessarily so. But civil justice is usually a dispute between two private parties. Can we honestly say that the fair resolution of such a dispute requires several years and resort to hundreds of rules? It would be worth asking a client who has just lost a lengthy trial how good he or she feels about having had the benefit of an elaborate procedural journey. Would it really surprise anyone if we learned from such a client that the result was of more interest than the process, and that all he or she wanted was a fair chance to be heard? People want their day in court, not their years.

Even alternate dispute resolution mechanisms, hailed at first as the expeditious alternatives to cumbersome court procedures, are themselves turning into procedural mimics of the court system. Arbitrations all too often end up being almost as lengthy, complex, or expensive as a court case.

In 1906, the then Dean of Harvard Law School, Roscoe Pound, made a speech to the American Bar Association entitled "The Causes of Popular Dissatisfaction with the Administration of Justice." And what was the main cause of dissatisfaction in 1906 according to Pound?

> *Uncertainty, delay and expense … [are] direct results of the … backwardness of our procedure. The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law.*

Let's put Pound's almost 100-year-old observation in historical context. The horse and buggy of 1906 have been replaced by cars and planes; morphine for medical surgery has been replaced by anesthetics, and the surgical knife by the laser; caveat emptor has been replaced by consumer law; child labour has been replaced, period; a whole network of social services and systems is in place to replace the luck of the draw that used to characterize employment relationships; the phonograph has been replaced by the compact disc player; the hegemony of the majority has been replaced by the assertive diversity of minorities; and adoring wives have been replaced by exhausted ones.

And yet, with all these profound changes in how we travel, live, govern, and think, none of which would have been possible without fundamental experimentation and reform, we still conduct civil trials almost exactly the same way as we did in 1906. Any good litigator from 1906 could, with a few hours of coaching, feel perfectly at home in today's courtrooms. Could a doctor from 1906 feel the same way in an operating room?

If the medical profession has not been afraid over the century to experiment with life in order to find better ways to save it, can the legal profession in conscience resist experimenting with old systems of justice in order to find better ways to deliver it? How many lawyers could themselves afford the cost of litigating a civil claim from start to finish?

We cannot keep telling the public that this increasingly incomprehensible, complicated process is in their interests and for their benefit, because they are not buying it anymore. If our defensive arguments make no sense to the public, how much sense can they be said

to make period?

The public does not believe it should take years to decide where their children should live, whether their employer should have fired them, or whether their accident was compensable. Maybe for a constitutional case, but decidedly not for the resolution of a dispute between two private parties.

We cannot talk seriously about access to justice without getting serious about how inaccessible the result, not the system, is for most people. The public knows we are the only group who can change the process. They are very interested in, but less understanding of, our explanations as to why we resist streamlining the system from the inside. When we say, "It can't be done," and the public asks "Why not?" they want a better reason than "Because we've always done it this way."

Our monopoly puts us in a fiduciary relationship with the public. We are the gatekeepers and groundskeepers of the fields of the law. As such, we should be on the front line for reform, taking on outmoded systems, and being seen to be putting the public before our pockets or our prestige. Process is the map, lawyers are the drivers, law is the highway, and justice is the destination. Lawyers are supposed to be experienced about the best, safest, and fastest way to get there. If, much of the time, they are unable to get there because the maps are too complicated, then, as Gertrude Stein said, "There's no there, there." And if there's no "there, there," there's no point in having a whole system to get to where almost no one can afford to go.

I know this has been a difficult time for the legal profession. Through it all, most lawyers carry on with pride and professionalism, and with more than a touch of frustration at their seeming inability to synchronize their professional reputations with fluctuating public expectations.

There remains, however, one public expectation that does not fluctuate. It is the expectation that the profession will always, no matter the times or their permutations, behave professionally. It is an expectation to which the profession has always expressed a deep commitment, and it is an expectation to which most lawyers remain deeply committed.

The legal system represents the ideals of the public, and because as lawyers we are the interpreters and translators of those ideals, it is therefore a system that deserves our idealism, courageously and optimistically.

Proposals for Institutional Reform

Having set the cluttered stage, what can be done to reinstate a commitment to professionalism as the lawyer's – and the public's perception of the lawyer's – transcendent vision? And, more particularly, what can be done by the Law Society?

The Law Society has two constituencies: lawyers and the public. These are utterly compatible and indispensably linked. The Law Society should be seen to be the profession's best professional voice and the public's best ear. Unfortunately, it is not seen at all, or, when it is seen, it is seen by lawyers when it announces a restrictive or expensive measure, and it is seen by the public when it announces the consequences of professional misconduct. These sightings may be unavoidable and, at times, even salutary, but they are not happy messages. Not that the Law Society needs to keep everyone happy. It can't. But if these anxiety-producing pronouncements are all we see, can we be faulted for wondering if there isn't a more positive message the Law Society could be seen to feel responsible for.

According to the Earnscliffe Report, the Law Society's Nielsen ratings ranged from "never watch" through "hardly watch" to "hate to watch." In other words, somewhere between irrelevant and obstructive. This is troubling to someone like me who sees the Law Society theoretically as crucially relevant as the guardians both of our independence and of the public's confidence in our right to be independent.

I see the report, therefore, as a wakeup call and a wonderful millennial opportunity for the Law Society to reformulate its relationship to its professional and general publics, and to redefine its functions accordingly. It will undoubtedly be a difficult task, but as Isaiah Berlin observed, there's no pearl without some irritation to the oyster.

If you do decide to embark on an institutional adventure in search not only of relevance but of perceived relevance, here are some thoughts:

1. *The Law Society cannot solve all the problems lawyers face in the practice of law. Not every market force is surmountable and not every contingency is preventable. It may be time to stop the hand-wringing over how many lawyers should be allowed to practice on the head of a pin, and more on how many are doing it as professionally as possible. Establish your priorities in a way that facilitates as many ethical options for as many lawyers as possible, but don't try to be all things to all lawyers.*

2. *On the other hand, a lot of lawyers are hurting. It is worth knowing why, and which are the most vulnerable. What services could they use from the Law Society, besides a Code of Conduct, to help them navigate the breathless rates of change in law, information, and technology? In other words, how much more of the Law Society's energy and resources could or should be spent on facilitating access to what small firms, sole practitioners, and non-Toronto lawyers need to practice law as effectively and professionally as possible?*

3. *Having welcomed women into the profession in droves, we wallowed in smugness at our generosity, then forgot to pay attention to the droves who were leaving. To what extent are we acknowledging that life in a law firm may be no life? I appreciate that the environment is hotly competitive and that fear inspires desperate measures, like 2,000 hours of billings a year. But not only are we ignoring the reality that the gender that historically made and cared for babies still wants to, but we are also forgetting that we spent the 60s and 70s telling the other gender that they too are important to children. So not only will female lawyers be either depressed, torn or childless, so will the males. Life matters – movies, books, friends, and family keep us humane, and if we are not humane we cannot deliver a humane justice system to the public. We should take as much pride in how diverse and accommodating our law firms are – for both men and women – as in how big their billings are.*

   How many minorities and women run major law firms? How many are partners, or bar leaders? It's no good talking about the merit system anymore because the curtain's been pulled and, like Dorothy, we know that the wizards who make promotions and appointments are just real people. The "merit system" always operated idiosyncratically, and words like "qualified" tended to mean "who'll fit in best." So we should stop pretending about why the profession is still so top-heavy with able-bodied members of only one of this country's official genders and colours and get on aggressively with making it possible for the public to see itself reflected at all layers in the lawyers who serve it.

4. *In his masterful 1991 diagnostic study on how we teach lawyers to be professionals, Professor Brent Cotter reactivated the haunting and persistent refrain sung by decades of young lawyers – why do we have articling and bar admission courses. Whose interests does this pedagogical gauntlet really serve? It has for too long survived the establishment of the university law schools whose absence was the original rationale for its existence. Is there really an evidentiary foundation for concluding that this is the most reasonable way for the Law Society to ensure that people entering the profession have the requisite educational arsenal of knowledge and skill? Has anyone taken a survey to gauge the utility of or consumer satisfaction with the humiliating beauty pageant that is the gatekeeper to articling, or with the Bar Ad's income-delaying months which either repeat the job the law schools were doing, or teach the courses few graduates will ever need. How positively can a newly emerging lawyer be expected to feel about a Law Society which imposes either the frenzy of the match programme or the irrelevance of an accounting exam? Are the gains really worthy of the financial burdens these educational enhancements impose on students?*

5. *I applaud Bob Armstrong's initiative in meeting with Ontario's law school deans. A sense of professionalism may well start before law school, but there is no doubt that it can take full flight in those three formative years. A good legal education teaches not just technical proficiency with laws and rules, but an ability to exercise judgment empathetically and wisely by blending that proficiency with the particular client or conflict. This is a lifelong career requirement that starts in law school and continues until retirement.*

   But that good education will atrophy if the professional culture in which it is applied shrinks the idealism most students graduate from law school with. This professional culture is in the Law Society's jurisdiction, and it could do worse than spending time thinking about how to keep that idealistic sense of professionalism vibrant. Cultures are generated by shared values and expectations. It's time to concentrate on how to make those of professionalism culturally transcendent. It may in fact be useful to revisit the excellent 1986 CBAO Committee Report chaired by Ron Manes and think about a Law Society-sponsored variation of the proposal that there be a centre to study the ongoing professional concerns of lawyers and clients.

6. *Which brings me to leadership. We learn by watching and we teach by example. Who are the profession's designated role models and what are they saying? Are they talking about how many people find the legal system too cumbersome, costly and inaccessible, or are they talking about the opportunities*

globalization offers? Are they generals in the war against disadvantage, or are they on the front lines of the battle to protect the honour of the status quo? Do they promote taking risks on behalf of social justice or do they promote complacency on behalf of a collegial life? Who we venerate today determines who we are served by tomorrow.

Is the Law Society prepared to take a leadership role, or will it hide behind the impossibility of a consensus from its almost 30,000 members before it confronts the public's cynicism? Will it continue to jerk from agitating crisis to critical agitation, or will it undertake to prevent the legal system's ambush at Credibility Gap by a public who got tired of waiting for us to understand that their confidence was a sacred trust? Will its misconduct preoccupations remain fixated on the sanctity of the trust fund or will it rebuke professional incivility and discourtesy? The gratuitously insulting crankiness which has now replaced critical analysis with depressing frequency, is a hole in our profession's ozone layer and requires the Law Society's protective public response, not only to remind the public and the profession that professional discourse is different from schoolyard discourse, but to maintain a professional culture lawyers should be proud to be a part of and clients should be proud to be served by.

It is not just a question of what the Law Society stands for, it is also a question of what the Law Society stands up for.

7. *And finally, how will we define success in this profession? By money? By partnership? By hard work? Of course. But also by integrity, by decency, by compassion, by wisdom, by courage, by vision, by innovation, and by idealism.*

If we venerate these qualities and reward those who have them with our respect, we send signals to the profession that our shared values and expectations exceed the tangible economic consequences of the expertise we enjoy. Lawyers have many contributions to make in many different ways. And they should feel pride, despite the reality of their fears and tensions and challenges, in what they do, who they do it for, and how they do it.

And this the Law Society can do best – promote that sense of pride, repair it when it suffers injury, and satisfy the public that we have earned the right to have them share in that sense of pride.

H. TRUST CONDITIONS AND UNDERTAKINGS

1. Introduction

Mark Orkin, in his book *Legal Ethics* (Toronto: Cartwright & Sons, 1957), introduces his commentary on lawyers' undertakings as follows:

> *The custom of solicitors carrying on business by means of undertakings and understandings is strongly deprecated and it has been said that if misunderstandings result practitioners may be left to suffer the consequences. "It is much better," said Allan, C.J. in Knox v. Gregory, "that they should carry on their business according to the established rules of practice than by understandings which generally lead to disputes."*

It is nevertheless the practice of lawyers in Manitoba to impose and accept trust conditions and give undertakings as an integral part of their practices.

The courts will enforce the undertakings you give in your capacity as a lawyer. Because the judicial enforcement of trust conditions accepted by a lawyer is equivalent to the judicial enforcement of a lawyer's undertakings (see *Witten, Vogel, Binder & Lyons v. Leung, 1983 CanLII 1028 (ABQB)*, 148 DLR (3d) 418 [*Witten*] the terms *trust conditions* and *undertakings* are used here interchangeably and without distinction.

2. Definitions of Undertakings and Trust Conditions

Trust conditions accepted and undertakings given are simply promises. But a promise that is a lawyer's undertaking has been elevated to a position above that of a simple promise by the courts and by the codes of professional conduct that govern the practice of law in Canada.

Lawyers' undertakings are considered to be matters which are *uberrimae fidei* (of the utmost good faith). If the lawyer's undertaking is not fulfilled it will affect and possibly cause damage to the client's matter or the position of the other lawyer or the other lawyer's client.

Beverley G. Smith in her book *Professional Conduct for Lawyers and Judges* (Fredericton: Maritime Law Books, 1998) suggests the following definition (which she notes is a very broad one) for a lawyer's undertaking:

> *An undertaking is the promise given by a solicitor through a written statement, a verbal communication or inferred from his acts, or any combination thereof, in reliance on which promise the recipient of the undertakings gives up to the solicitor, or to another party, a document or right, or performs an act which that recipient would not have done were it not for the receipt of the promise from that solicitor.*

The case law and other textual material add a specific limitation to the definition of lawyers' undertakings. The special treatment given to lawyers' undertakings is limited to those given by the lawyer, as a lawyer.

Cordery on Solicitors, 9th ed., looseleaf (London: Butterworths, 1999) suggests the following definition:

> *To be enforceable by the court the undertaking must be a personal undertaking, given by the solicitor professionally, i.e., as a solicitor, it must be clear in its terms, the whole of the undertaking must be before the court, and the undertaking must be one which is capable of being performed ab initio.*

In *Thomas Gold Pettingill LLP v. Ani-Wall Concrete Forming Inc. and Cassels Brock & Blackwell LLP ("Cassels Brock") 2012 ONSC 2182,* Perell J. describes two types of solicitor's undertakings at paragraphs 45 and 46 of the decision:

> ***45*** *Lawyer's undertakings are of two types. The first type of undertaking is an undertaking given by the lawyer acting as an agent of his or her client; the lawyer makes it clear that the principal, i.e. the client, is the party responsible for the satisfaction of the undertaking. This type of undertaking does not expose the lawyer to liability: Re Jost and Solicitors (1978), 7 C.P.C. 303 (N.S.S.C.); Wakefield v. Duckworth & Co., [1915] 1 K.B. 218. The second type of undertaking, which does expose the lawyer to liability, is the personal undertaking of the lawyer acting in his or her professional capacity as a lawyer.*
>
> ***46*** *In the case at bar, I conclude that Mr. Thomas made the second type of undertaking, a personal undertaking, not an undertaking made as agent for his client Ani-Wall.*
>
> *This classification deals with who will assume liability for the undertaking; in the lawyer's professional undertaking the lawyer accepts personal liability and where the lawyer specifically seeks to avoid personal liability, the lawyer must be very clear that it is the undertaking of the client only, despite it being articulated by the lawyer.*

By giving your professional undertaking, you accept personal liability for the fulfillment of the undertaking. Your undertaking must be something that you are capable of performing.

A client's undertaking should be communicated directly by the client in writing to the other person. Generally, you should avoid being the one to communicate the undertaking of a client to another to prevent the risk that the person who accepts that undertaking does so because you are a lawyer and they will rely on you, as the lawyer, to personally fulfil it. If you must communicate the client's undertaking, you must be clear that it is the client who is

giving the undertaking and will be liable to fulfill it and that you are not assuming any personal liability as a lawyer.

Just as you should not give an undertaking on behalf of the client, you should not accept an undertaking from another lawyer that purports to be made on behalf of their client if what you want is the lawyer's professional undertaking.

If a lawyer undertakes only to use "best efforts" to fulfill a promise presumably the lawyer is trying to avoid being held personally responsible to fulfill the promise. The words "best efforts" may be highly ambiguous in certain contexts so do not accept or give this type of undertaking. Clarify exactly what will be done and who will take personal liability for the fulfillment of the undertaking.

Remember, you must not give an undertaking that you cannot fulfill, you must fulfill every undertaking you give and you must honour every trust condition once you accept it. Don't be ambiguous when you are giving or accepting an undertaking. Insist on clarifying what exactly is being promised rather than accept or give an ambiguous undertaking. Once you have given the undertaking, you cannot amend it. Only the person who imposed the undertaking on you can do that.

The courts have taken a broad view of what will be held to be an undertaking given personally by the lawyer (not as an agent) and enforceable against that lawyer. In *Re McPhillips, An Attorney, 1888 CanLII 89 (MB QB)*, 6 Man R 109, an undertaking of a lawyer to indemnify the sheriff against all loss, damages and expenses to be incurred in seizing certain goods was held to be a personal undertaking of the lawyer and not simply an undertaking made by the lawyer as an agent for his client. The court did not find it significant that the lawyer's brother was the attorney of record. In *Re Solicitors, 1916 CanLII 408 (BC CA)*, [1917] 1 WWR 529, although the court was divided on whether to exercise its summary jurisdiction to compel the lawyer to pay $4500 which was the purchase price of the land, as damages, the court unanimously held the following undertaking was a personal undertaking of the lawyer:

> *On behalf of our client Gunn. we undertake to have the agreement arranged between us executed by Skeffington. or some third person acceptable to you and to pay you forthwith the cash payment of $300 as arranged.*

The court indicated that an undertaking of this sort is to be construed by reference to the intention of the parties. The client, Gunn., was known to all parties to be a man of no means. The court found that, because the undertaking was of no value to the other party unless it was enforceable against the lawyer articulating and not just the client, the parties intended that the undertaking was the lawyer's personal undertaking.

Giving an undertaking in your "capacity as a solicitor" is central to the definition of a lawyer's undertaking. Your capacity as a solicitor is generously interpreted to include any of the services you give to or on behalf of your client in a matter, including the guarantee of a payment of money, or conducting complicated business negotiations. A widely quoted judicial commentary on the meaning of the phrase originates from a Court of King's Bench decision in the United Kingdom in 1910, *United Mining and Finance Corporation* v. *Becher*, [1910] 2 KB 296. At 307 Hamilton J. indicates:

> *Whatever that expression (in his capacity as solicitor) may mean, I think it must go as far as this, that when a solicitor, in the course of business which he is conducting for clients with third parties in the way of his profession, gives an undertaking to those third parties incidental to those negotiations, that undertaking is one which is given in his capacity as solicitor and not as a mere layman undertaking the office of a stakeholder or guaranteeing the payment of money. It seems to me that the part which solicitors are nowadays well known to play in elaborate negotiations, which constantly have to be embodied at various stages in legal forms of a highly technical character, constantly involves for the purpose of facilitating the business, the giving of subsidiary undertakings for the payment of money and of a similar character, and those undertakings are given in their capacity as solicitors, and money is entrusted to them under those undertakings largely because they are solicitors and deemed therefore to be found especially worthy of trust.*

That judicial pronouncement emphasizes that by giving the undertaking you have inextricably involved yourself in the affairs of the client. The successful solution of your client's matter depends upon you honouring the undertakings and fulfilling the trust conditions you have given or accepted. You are trusted to honour your promises because you are a lawyer and the undertakings you give while working for your client are generally held to be undertakings given in your capacity as a lawyer. Unless you expressly state in writing that the undertaking is your client's and is <u>not</u> your professional undertaking, the person to whom the undertaking is given is entitled to expect that you will honour it personally. The use of such words as "on behalf of my client" or "on behalf of the vendor" alone does not relieve you of personal responsibility.

However, you cannot be compelled against your will to accept a trust condition or give an undertaking. If you find the request is one that you do not want to accept, you can always ask the other side to agree to change the condition or you can refuse to accept it. If you refuse to accept a condition and cannot work out an acceptable change with the other side, you must not use any documents which are subject to the trust condition and you should return such documents immediately. You are not permitted to send the documents back subject to some cross-condition that you prefer. Your choices are only to accept the condition, negotiate an agreed change with the other side or reject the condition.

Once you have accepted a trust condition or given your undertaking, you are bound by it even in the face of subsequent contrary instructions by your client. The court will enforce the undertaking against you as an officer of the court. In the case of *Witten*, the court canvassed the case law that defined lawyers' undertakings and their enforcement by the courts. There the defendant firm of lawyers had accepted trust conditions that within ten days they would obtain the execution of documents by their client and return all copies of two of the documents and further, in the event of the lawyers' inability or failure to comply with the condition within ten days, they would return certain documents unused. The time expired but the plaintiff (another law firm) granted extensions. The last extension expired and the plaintiff law firm demanded the return of the documents, unused according to the accepted trust condition. This demand was resisted. One of the defendants stated by affidavit: "I was constrained by my client's instructions and that these instructions might include a direction to send the documents to a third party". (at page 419)

The excuse that the client had instructed otherwise was not accepted. MacDonald J. ordered the immediate return of the documents and in so doing concluded:

> *In the present case the receiving solicitor, pinioned, as he thought, between competing claims for the documents by his own client and the forwarding solicitors, asked an official of the Law Society for advice the day before this action was commenced. The advice received was that his firm should launch a motion for interpleader relief....*
>
> *The advice obtained from the Law Society was wrong.... (at p. 424)*
>
> *The obligation of the recipient solicitors to respect and observe trust conditions upon which documents are received from other solicitors cannot be shackled by instructions given to the recipient solicitors by their client. (at p. 421)*
>
> *(emphasis added)*

The court's enforcement of the trust condition was not based on the weighing of the merits of the competing clients' cases but rather was a conclusion based on the court enforcing the obligations of one of its officers who accepted the obligation as a solicitor and officer of the court. MacDonald J. wrote further:

> *The rationale of the judicial enforcement of solicitors' undertakings was stated in Re Hilliard (1845), 14 L.J.Q.B. 225, 2 Dow. & L. 919, 67 Rev. R. 880, and United Mining & Finance Corp. Ltd. v. Becher, [1910] 2 K.B. 296.*
>
> *In Re Hilliard, at 225-6 L.J.Q.B., 882 Rev. R., Coleridge J. stated:*
>
> *...the Court does not interfere against one of its own officers merely with a view of enforcing in a more speedy and less expensive mode contracts in which actions*

might be brought, but does so with a view of securing honesty in the conduct of its officers in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers. This principle applies equally whether the undertaking be to appear, to accept declaration, or other proceeding in the course of the cause, or to pay the debt and costs. The interference is not so much between party and party to settle disputed rights, as criminally to punish misconduct or disobedience in its officers. In this view the objection relied on does not apply. I have no desire to restrain the jurisdiction of the Court as to the undertakings of its officers on any such ground as the present; they are very often most beneficially made for both parties in a cause, and there would be great injustice in allowing the attorney to get free from them, after the party has foregone the advantage, or paid the price which was the consideration of the undertaking; while on the other hand, there is no hardship on the attorney in enforcing them, for he is never compelled to enter into them; if he does, he should secure himself by an arrangement with his client, and he must be taken to know the legal consequences of his own act.

In the United Mining case, Hamilton J. stated, at 305:

…although Coleridge, J. places the jurisdiction in terms upon the ground that it is exercised with the view of securing honesty in the conduct of its officers, honesty in that regard is not meant by him to be purely a moral quality, but is … a term applicable to the proper and professional observation of undertakings professionally given. The conduct which is required of solicitors is to the extent perhaps raised to a higher standard than the conduct required of ordinary men, in that it is subject to the special control which a court exercises over officers so that in certain cases they may be called upon summarily to perform their undertakings, even where the contention that they are not liable to perform them is entirely free from any taint of moral misconduct. (at pp. 421-422)

Once you give your undertaking/accept a trust condition in your capacity as a lawyer it will be enforced against you as an officer of the court by the court even where you genuinely believe, "free from any taint of moral misconduct", that you should not be held to perform it.

Your professional undertaking should not be given lightly because you cannot be released from it or change it except by agreement of the person who imposed it. Your client's change in instructions is ineffective to change the condition accepted and the court can order you to fulfill it.

3. Lawyers' Undertakings as Defined by the Code of Conduct

The *Code of Professional Conduct* adopted by the Manitoba Law Society in 2011, sets out detailed rules and commentary about undertakings and trust conditions in *Chapter 7 "Relationship to the Society and Other Lawyers"*.

Undertakings and Trust Conditions

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

Commentary:

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

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

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

[4] If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to

the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis.

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

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

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

Guard against giving undertakings that are not within your ability to complete. If you receive a request for a particular undertaking or you review a trust condition and determine that to fulfill it you must rely on another person (including a client) to do something before you can fulfill it, remember that you cannot control the actions of a third party and don't accept the trust condition. Simply stated: before you accept a trust condition/give an undertaking be sure that there is no ambiguity, that you can completely control the fulfillment of it and that there is no risk that you will not be able to fulfill it.

Special considerations apply if you, as a lawyer want to permit a person under your supervision who is not a lawyer to give or accept undertakings or trust conditions. There is a separate ethical obligation relating to any contemplated delegation to students, employees and others in Chapter 6 of the *Code*.

Chapter 6 "Relationship to Students, Employees and Others" states in *section 6.1-3*(c):

Delegation

***6.1-3** Subject to any statutory exception, a lawyer must not permit a non-lawyer to:*

. . .

(c) give or accept undertakings or accept trust conditions, except at the direction of, and under the supervision of a lawyer responsible for the legal matter, providing that in any communications the fact that the person giving or accepting the undertaking or accepting the trust condition is a non-lawyer is disclosed, the capacity of the person is indicated, and the lawyer who is responsible for the legal matter is identified;

You are responsible for supervising any law student, articling student, paralegal or legal assistant and if they give undertakings or accept trust conditions, they must make it clear to the other person that they are not a lawyer and that you are the lawyer responsible. Fulfillment of the undertakings/trust conditions that they give is still your obligation.

There is also a separate rule about undertakings that are given in the course of litigation in *Chapter 5 "The Lawyer as Advocate", section 5.1-6* which is discussed in more detail below.

4. Professional Obligations Versus Business Considerations

Are there circumstances in which the strictest reading of the *Code* may be relaxed in favour of other considerations, namely the day-to-day pressures of practice, the demands of clients or other business considerations of the lawyer? The short answer is, "No." Even where there are compelling business considerations (*e.g.,* the cost to the client will increase by waiting for a necessary document and the lawyer may help facilitate by giving an undertaking or accepting a trust condition which the lawyer knows cannot be fulfilled *ab initio*), the lawyer must not succumb to that pressure.

Beware of accepting any trust conditions or giving any undertakings that might interfere with your ability to comply with your professional obligations as set out in the *Code*. Remember that strict enforcement of lawyers' undertakings is essential to maintain the trust that permits you to rely on another lawyer's undertaking and the other lawyer or person to rely on you. If lawyers were permitted to breach trust conditions just to meet a client's demand or to move a matter along, no one could depend upon the undertaking. The trust condition or undertaking you give as a lawyer has to be reliable or an element of risk that did not exist when the parties negotiated the transaction becomes inserted into it. Your reliable undertaking patches over that risk to the client only where it is entirely enforceable against you. As a result, you should not accept trust conditions that are unreasonable or cannot be fulfilled personally. When you accept property subject to trust conditions, you must fully comply with the conditions, even if the conditions later appear unreasonable.

5. Who Bears the Risk?

By definition, a lawyer who fails to fulfill an undertaking or trust condition bears personal liability for the failure. The lawyer's undertaking may be enforced notwithstanding that the circumstances under which it is given might give rise to defences if the undertaking was considered to merely amount to a contract. Thus, an undertaking that is given gratuitously, or an undertaking that might otherwise be unenforceable under the law, will still be enforced by the courts.

But the Court of Appeal in Ontario and the Privy Council in Great Britain have held that in certain circumstances, such as when the lawyer who is giving the undertaking is known to be unreliable, the risk that the lawyer may not fulfill a trust condition might fall on the lawyer

who imposed the trust condition without warning their client of the risk. If the risk is foreseeable and a lawyer who imposes trust conditions in those circumstances without obtaining clear instructions from the client to accept that risk will be held negligent and responsible to the client to pay damages.

In *Polischuk v. Hagarty, 1983 CanLII 3067 (ON SC),* 42 OR (2d) 417 (*Hagarty* appeal decision discussed below) Henry J. summarized the facts at p. 418:

> *In this case, the plaintiffs claim damages for breach of contract against the defendant, whom they retained as their solicitor, to close a transaction of purchase and sale, on their behalf as purchasers. On the day of closing, the defendant solicitor paid the balance due to the vendor and accepted an undertaking by the vendor's solicitor that he would obtain and register a discharge of a mortgage on the lands, as well as all other existing encumbrances. The vendor's solicitor failed to carry out his undertaking or to account for the funds. The mortgage was not discharged, the plaintiffs thereby suffered damages which they seek to recover from their solicitor, the defendant.*

The vendor's lawyer died and the vendors left the country.

Henry J. found on the evidence that although it was common practice for real estate transactions to be closed in exactly the manner that Hagarty, the defendant lawyer, closed this transaction, there was risk involved when Hagarty accepted the vendor's lawyer's undertaking to procure a discharge of the mortgage rather than insisting that the lawyer confirm possession of a signed discharge of the mortgage. Hagarty knew the day before closing that the discharge of the mortgage would not be available but he did not tell his clients that fact. Henry J. quotes a lawyer who testified about the risk involved in the area's real estate practice of using trust conditions in place of a signed discharge of mortgage: *"the risk varies with the amount required to discharge the mortgage and the reliability of the solicitor tendering the undertaking*."

In *Hagarty*, the purchasers' lawyer accepted an undertaking from the vendor's solicitor to use the proceeds of the sale to discharge a mortgage encumbering the property being purchased. In accepting the undertaking, the lawyer was following the long-standing practice of reasonably competent lawyers in his community. The vendor's lawyer, however, failed to honour his undertaking, and the purchasers' lawyer was found liable for his clients' resulting damages. The trial court concluded that the purchaser's lawyer was liable either because he failed to close the transaction according to its terms or because the lawyer had a responsibility to competently explain the risks to the clients and allow them to make a decision.

The judge concluded that Hagarty breached his contract with his purchaser clients when he failed to inform them of the risk of accepting an undertaking from the other lawyer and failed to get their approval and instruction to accept an undertaking in place of a discharge of the mortgage as required by the transaction. Although the trial judge also concluded the clients

would have likely proceeded in the same way even if they had been informed so they were entitled to recover only nominal damages, the trial award of nominal damages was overturned on appeal.

On appeal, the Ontario Court of Appeal affirmed the decision of the trial court concerning the liability of Hagarty (See *Polischuk et al. v. Hagarty, 1984 CanLII 2076 (ON CA)) [Hagarty appeal]* and the appeal court, relying on the Privy Council decision of *Edward Wong Finance Co. Ltd. v. Johnston Stokes & Master (A Firm) [1983] UKPC 32*; [1984], A.C. 296 (P.C.), concluded that performance following the standard of the reasonably competent solicitor did not suffice in these circumstances.

The Court of Appeal found that there was a foreseeable risk in the procedure adopted by Hagarty (the purchaser's lawyer) which was to pay all the money to the vendor's lawyer in trust that he obtain the discharge rather than provide the discharge in trade for the money. This risk could have been avoided by choosing a different procedure at closing. Hagarty could have closed the transaction subject to a hold-back of the funds required to discharge the mortgage or drawn a cheque payable to the mortgagee instead of the vendor's lawyer, either of which alternatives would have permitted the closing of the transaction without risk to the client. The purchaser-plaintiffs should have had a chance to decide on their options and Hagarty should not have taken that route with their money without specific instructions.

There is always a risk that a person who promises to do something will fail to do it. However, when you are relying on promises made by another lawyer to do what the lawyer is supposed to do, the risk that the lawyer will fail to fulfill the undertaking is small because of the status of the lawyer, the fact that the court will help enforce the fulfillment of the undertaking and the penalties the law society will impose on a lawyer who does not fulfill undertakings given.

Hagarty is a reminder that it is wise to also consider if there is a different method of getting what your client needs instead of agreeing to accept the last minute trust condition to cover a missing document. When you choose to rely on the other lawyer's undertakings rather than the required documentation to complete a transaction, the risk of the procedure must be communicated to and accepted by the client if you want to protect yourself from potential liability if the trust condition is later breached and no longer capable of being fulfilled. That is not to say that the Manitoba cooperative method of closing a real estate transaction using trust conditions is not appropriate; just be aware that there is still a risk when you are closing a transaction based on undertakings and trust conditions, even if it is standard practice, and it is prudent to explain the process and the risk to your client and get your client's consent to assume the risk in advance.

Trust conditions accepted can alter the agreement between the parties. See the Manitoba decision, *Milburn v. Dueck, 1992 CanLII 8534 (MB CA),* [1992] 6 W.W.R. 497, [*Milburn*] purchasers agreed to purchase a vendor's residential property. It was a term of the agreement between the parties that all structures on the land complied with the applicable building and zoning restrictions and did not encroach beyond the limits of the land. On the closing date, the purchasers' lawyer forwarded a cheque to the vendor's lawyer upon the trust condition that

if the purchasers' lawyer was unable to obtain a certificate of the property's compliance with the applicable building and zoning regulation, the vendor would be responsible for resolving the defects. Two weeks later a surveyor's certificate revealed that the house and garage encroached significantly on the adjacent property. The vendor then proceeded to arrange for the purchase of sufficient land from the adjoining owner to cure the encroachment and ultimately obtained subdivision approval to consolidate the title for the newly acquired land with the title to his former residence. These developments were in place, to the knowledge of the purchasers, six months after the closing date. However, they then vacated the residence, announced their repudiation of the contract and demanded the return of the cash payment. The repudiation was not accepted by the vendor. The purchasers brought an action for damages, alleging that the vendor was in breach of the contractual term relating to zoning and encroachments. The vendor counterclaimed for the balance owing by the purchasers with interest. The Court of Appeal dismissed the purchasers' claim and allowed the vendor's counterclaim.

In construing the effect of the trust condition, the Court of Appeal disagreed with the trial judge and held that:

> *Where…funds are forwarded subject to a condition that involves, not the mechanics of closing, but a change in those obligations between the parties which would otherwise exist following unqualified acceptance of title and possession, the condition is in truth a proposal to vary the existing agreement. If accepted, such condition alters the obligations between the parties; its breach entitles the injured party to recover his consequential loss (paragraph 20)*
>
> *. . . the trust conditions imposed a new obligation upon the defendant which he accepted. It was a new condition, one, which, in the circumstances of the case, effected a fundamental change in the rights and obligations of the parties. (paragraph 21)*

The Court of Appeal ultimately held that the defendant vendor fulfilled this new obligation and thereby complied with his obligations under the entire contract. On this basis, the defendant succeeded in his counterclaim.

The *Milburn* case does not deal with or assess any liability which may be borne by the lawyers involved in the transaction. It is reasonable to assume, however, that if a trust condition imposed by one lawyer and accepted by another is capable of changing the agreement between their respective clients, the lawyers involved may well bear the risk of some liability for such a change to the contract between the parties if it has not been authorized in advance by the clients.

6. Trust Conditions in Real Estate Transactions

The system of closing real estate transactions in the Province of Manitoba has been described as a "cooperative conveyancing system." Rather than tendering all documents and funds required to close on the date of closing, the lawyers for the vendor and purchaser exchange documents and funds on trust conditions that certain incomplete matters (the registration of title documents, discharge of prior mortgages and so on) are to be completed by the respective lawyers following the date of closing. The lawyers' undertakings temporarily take the place of the required documents or actions so that the sale and purchase of the property can proceed while those things are being completed. Each undertaking given by the lawyer is the lawyer's personal undertaking.

The efficiency of this cooperative system benefits vendors and purchasers as well as the lawyers involved. It avoids the necessity for the historical practice of in-person closing meetings, the arrangement of interim financing pending confirmation of successful registrations and other matters as at the date of closing which would significantly add to the costs of closing conveyancing transactions. The Alberta Court of Appeal, in *Carling Development Inc. v. Aurora River Tower Inc., 2005 ABCA 267* [*Carling*] described this cooperative system as

> *"... a handsome high bridge quickly crossed every day by thousands of clients with valuable transactions. To remove any struts from the structure now would wreck the bridge, flinging down into the deep valley all the clients now crossing. It would also condemn all future clients to a long descent down one side of the valley and a laborious climb up the other." (paragraph 64)*

Likewise, the use of lawyers' undertakings and trust conditions is critical to Manitoba's conveyancing practitioners. See *Guay v. Dennehy, 1994 CanLII 16669 (MB QB),* [*Guay*] a decision where one of the issues was the alleged breach of trust conditions. Beard, J (as she then was) sets out a detailed list of the law on trust conditions starting at paragraph 37.

Lawyers conducting a real estate practice in Manitoba must take great care in the settlement and fulfillment of trust conditions between them. You, as the lawyer, must understand why the undertaking is being given or requested before you give or accept the trust condition being imposed. You must be aware of the crucial role that your undertakings play in protecting the rights and interests of purchasers and vendors of real property and maintaining the cooperative nature of the conveyancing practice between lawyers in Manitoba. This efficient and economic manner of conveyancing using trust conditions cannot be maintained unless all lawyers comply with their ethical obligations in both practice and spirit.

7. Lawyers' Undertakings in Commercial Transactions

Lawyers' undertakings are sometimes used in commercial transactions. The complexities of an asset purchase transaction or a share purchase transaction make the careful consideration of appropriate lawyers' undertakings imperative.

To facilitate the closing of commercial transactions, the delivery of documents and funds on closing, and the fulfillment of certain matters after the closing of the transaction, lawyers often undertake to do certain things and/or act as escrow agents in respect of certain documents and/or funds pending completion of certain matters. The lawyers' undertakings in this regard must be carefully considered in the context of the general rules regarding lawyers' undertakings and must be reduced to writing.

If a lawyer is agreeing to act as an escrow agent, an escrow agreement should be entered into by all parties (including the lawyers and clients). The clients are parties to the agreement for purposes of confirming their respective instructions to their lawyers regarding the escrow period. Also, by executing the agreement each party acknowledges the involvement of the other party's lawyer as a party to the escrow agreement. Besides, to the extent that the undertakings of the lawyers result in a variation of the contract between the parties, by executing the agreement the parties are acknowledging and agreeing to such a variation.

8. Lawyers' Undertakings in Litigation

Simply stated, an undertaking is a promise made by a lawyer to do or to refrain from doing something. Undertakings rise in all areas of practice. In litigation, undertakings are requested and given in many circumstances, including:

- during negotiations;
- in concluding settlement agreements;
- in implementing settlement agreements;
- during examinations for discovery;
- during out-of-court cross-examinations;
- to administrative tribunals; and
- to the court.

Remember, an undertaking given by a lawyer is a promise made by that lawyer. Before you give an undertaking, you must be sure that it is something within your control and with which you can comply. Examples of undertakings that a lawyer can comply with include:

- an undertaking to deliver a document in your possession by a certain time;
- an undertaking to postpone noting an adverse party in default or to postpone entering a default judgment against them for a set time;

- an undertaking to deliver funds in your possession by a specified date;
- an undertaking to admit certain facts to an administrative tribunal or court without the need for the other side to call evidence;
- an undertaking to the court to deliver documents in your possession to it or a third party;
- an undertaking to the court that you will not take steps to execute on a judgment pending an appeal;
- an undertaking to the court that you will not act on a signed order or judgment for a certain period;
- an undertaking to an adverse party, lawyer, tribunal or the court that you will attempt to do something or attempt to contact someone within a set time.

The common theme in the examples is that you are in control of fulfilling the promise and if the undertaking is not fulfilled, you will be held accountable for your actions or inactions.

Examples of undertakings that lawyers should not give because they are not in control include:

- an undertaking that your client will or will not do something;
- an undertaking that a third party will or will not do something;
- an undertaking to produce a document or a thing that is not in your possession;
- an undertaking to obtain an expert's report by a specified date.

There is one occasion where lawyers often give undertakings that they cannot personally fulfill and that is undertakings given in the course of an examination for discovery.

Often a lawyer will undertake to produce a document, for example, that has not been produced at the examination or undertake to speak to a third party to obtain the information requested at the examination. The client should be giving the undertaking but the lawyer giving the undertaking in an oral examination for discovery can rely on Queen's Bench rule 31.08 which provides:

> *Questions on an oral examination for discovery shall be answered by the person being examined but, where there is no objection, the question may be answered by the person's counsel and the answer shall be deemed to be the answer of the person being examined unless, before the conclusion of the examination, the person repudiates, contradicts or qualifies the answer.*

To prevent any misunderstandings, it would be good practice to have the client give those undertakings personally on the record rather than have to rely on the rule.

If you ever give someone else or a court or tribunal an undertaking that your client will or will not do something, you must advise the recipient of the undertaking that it is the client's undertaking and not your undertaking or you will be under an obligation to fulfill it or face the consequences of breaching the undertaking.

There is also a deemed undertaking in litigation, under *Queen's Bench Rule 30.1*, where parties and their lawyers are deemed to undertake not to use evidence or information to which the Rule applies for any purposes other than those of the proceeding in which the evidence was obtained. Review the deemed undertaking Rule 30.1 for details. Although the deemed undertaking is based on the common law principle of implied undertaking, Rule 30.1 has certain specific applications that are different from the common law principle.

There are consequences to a lawyer's failure to comply with an undertaking. These include potential prejudice to a client, damage to the lawyer's reputation in the profession and before the court and possible professional discipline. Depending upon the circumstances, exposure to civil liability is also a risk.

9. Enforcement of Lawyers' Undertakings

When you give an undertaking as a lawyer, it can be enforced against you. The steps taken to enforce a lawyer's undertakings are the choice of the enforcing person and depend upon the nature of the undertaking and sometimes on whether the enforcing person believes the undertaking lawyer is acting in good faith. Some options for enforcement include:

- a cooperative discussion between the undertaking lawyer and the enforcing lawyer to resolve any impediment to fulfilling the undertaking;
- a demand letter with a short final deadline for the undertaking lawyer to complete it and a reminder of the lawyer's professional obligations under the *Code*
- reporting the breach to the Law Society by complaint seeking disciplinary action
- an application to the court to find the undertaking lawyer in contempt
- an action for damages

The cases cited in this chapter demonstrate that the courts are prepared to and will stringently enforce a lawyer's undertakings as personal obligations of the lawyer. The jurisdiction of the court to enforce is derived from its inherent jurisdiction to supervise and regulate the practice of its officers (*Witten*).

In enforcing lawyers' undertakings the court is not guided purely by considerations of contract. The court aims to secure the honesty of conduct in its officers. See the references above to *Re Hilliard (1845),* 14 L.J.Q.B. 225, 2 Dow. & L. 919, 67 Rev. R. 880, and *United Mining & Finance Corp. Ltd. v. Becher,* [1910] 2 K.B. 296.

In the Manitoba decision of *Guay* (discussed earlier), Beard, J. (as she was then) sets out a list of the relevant considerations about the law of trust conditions in paragraph 39 reproduced below:

> *39. Other considerations relevant to the law as it relates to trust conditions are as follows:*
>
> *1. In proceedings to enforce a trust condition, the applicant is not relying on the law of contract, or tort, but rather on the special relationship between lawyers (see Hoffman & Dorchik v. Agnew, Nykyforuk, Purdy & Davis, [1985] 1 W.W.R. 656 (Sask. Q.B.), at p. 662). [Hoffman v. Agnew, 1984 CanLII 2224 (SK QB)]*
>
> *2. An undertaking given gratuitously will be enforced even though the lack of consideration may be a defence if considered under the law of contract (see McCarthy Tetrault v. Lawson, Lundell, Lawson & McIntosh (1991), 58 B.C.L.R. (2d) 310 (S.C.), at p. 314) [Tetrault v. Lawson, Lundell, Lawson & McIntosh, 1990 CanLII 963 (BC SC)]*
>
> *3. The court has an inherent jurisdiction to enforce undertakings or trust conditions as part of its responsibility to secure the proper conduct of its officers (see Witten, at p. 423). [reported on CanLII as Witten]*
>
> *4. In dealings between law firms under trust conditions, the rights and wrongs of the parties are irrelevant (see Minsos, McLeod & Edwards v. Foster Wedekind (May 10, 1988), (Alta. C.A.) [unreported], at p. 2). [since reported at 1988 ABCA 166 (CanLII)]*
>
> *5. The solicitor's obligation to observe trust conditions cannot be shackled by instructions given to the solicitor by the client (see Witten, at p. 421). [Witten]*
>
> *6. The possibility of claims being made in the future by a stranger to the transaction, even where arising out of the transaction, is not a matter which a court is entitled to take into consideration as a ground for ordering payment into court instead of to the vendor (see Damodaran slo Raman v. Choe Kuan Him, [1980] A.C. 497 (P.C.), at p. 502).*
>
> *7. The court may, depending on the facts of a particular case, consider evidence extrinsic to the trust conditions themselves to arrive at the correct meaning or interpretation of what the parties understood the undertaking to be (see Eddy Group Ltd. v. Brookes (1991), 102 N.S.R. (2d)122 (T.D.), at p. 134). [reported on CanLII as Eddy Group Ltd. et al. v. Brookes, 1991 CanLII 4370 (NS SC)]*
>
> *8. A trust condition can be one of two types:*
>
> *(i) One concerning the mechanics of completing or closing a transaction;*

(ii) The other effecting a fundamental change in the obligations between the parties (see Milburn v. Dueck (1992), 81 Man. R. (2d) 266, [1992] 6 W.W.R. 497] (C.A.), at p. 269). [reported on CanLII as Milburn discussed above]

9. The law is clear that a solicitor's undertaking may be enforced against him personally, depending on the facts of the case. However, the undertaking must be his personally qua solicitor and must be clear on its terms (see Bank of British Columbia v. M. (1981), 120 D.L.R. (3d) 177,[1981] 2 W.W.R. 351] (B.C.C.A.), at pp. 180-81). [reported on CanLII as Bank of British Columbia v. Mutrie, 1981 CanLII 405 (BC CA)]

10. If a lawyer accepts documents under certain trust conditions and then uses the documents, he impliedly undertakes to comply with those trust conditions (see Witten, (supra), at p. 421). [(Witten)]

[citation links added]

When you are facing a situation where you must take steps to enforce another lawyer's undertaking, first review the rule in Chapter 7.2 of the *Code*:

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 practice.

Consider whether it is appropriate to speak to the lawyer to determine why the undertaking has not been fulfilled. Sometimes, a courteous discussion and a brief extension of time for fulfillment are the only actions required to resolve the matter. This, of course, depends largely on your perception of "the reliability of the solicitor tendering the undertaking."(see *Hagarty* above)

The *Witten* case referenced earlier affirms the court's jurisdiction to deal summarily with an application for an order requiring fulfillment of a lawyer's undertaking and to address any contempt proceedings if an order is not followed.

An action for damages could be filed in circumstances where trust conditions are no longer capable of being fulfilled directly and the only remedy available to the aggrieved party is the payment of damages. The solicitor's own client may have a cause of action for damages against the solicitor if the failure to comply with an undertaking causes some loss to the client as was the case in *Hagarty*.

The *Carling* decision suggests that remedies in trust may also be available upon breach of trust conditions. The Alberta Court of Appeal, in that case, found that a trust condition creates more than just a promise or contract between the lawyer imposing the condition and the lawyer accepting the condition; it creates a trust. The court stated that where a trust is created, *"[m]any remedies might be possible (apart from the court's summary powers over*

solicitors): disgorgement of profits, or possibly damages in lieu of specific performance or in lieu of injunction or in lieu of other equitable remedy…"

In Manitoba, it will seldom be necessary to enlist the aid of the courts to recover losses to the clients caused by a lawyer's breach of trust conditions. Our Law Society exists for the express statutory purpose of upholding and protecting the public interest in the delivery of legal services with competence, integrity and independence. As an important component of fulfilling that mandate, the Law Society requires compulsory liability insurance for all practising lawyers in the province so that the policy will pay damages that an insured lawyer becomes legally obligated to pay if it arises from an error in the rendering of professional services to others.

A breach of trust condition has obvious potential to cause loss to a member of the public, sometimes very substantial loss. Where there has been a failure to fulfill an undertaking and that causes damage, both the defaulting lawyer and the lawyer who imposed the condition may be liable for losses flowing from the default. The lawyer must resist the temptation to attempt to repair the situation independently. The *Code* and the policy of insurance require that lawyers give prompt notice to the Law Society's Insurance Department of any circumstances which might give rise to a claim.

In the case of a failure or inability to comply with a trust condition, the immediate reporting of the matter can be critical to the insurer's ability to repair the situation or to minimize the loss. The late reporting of a claim – particularly if it causes prejudice to the insurer – can result in a denial of coverage under the policy. By immediately referring the matter to the lawyers in the Insurance Department, the lawyer can cooperate and assist with the possible repair, while ensuring that the client's own - and perhaps by then divergent – interests are protected with the benefit of independent legal advice where appropriate.

Reporting a potential claim to the Insurance department of the Law Society does not preclude anyone from filing a complaint about the breach of a trust condition or undertaking. In addition to requiring insurance coverage, as the regulator of the legal profession, the Law Society also operates to secure the honesty and integrity of the conduct of its members. In all that it does the Law Society seeks to preserve the public's confidence in the legal profession. For example, if a lawyer has failed to fulfil an undertaking or comply with a trust condition, contact may be made to the Complaint Resolution Department of the Law Society to relay those concerns. If a matter cannot be resolved informally, a formal complaint may be made and the concerns may be investigated. Ultimately, charges of professional misconduct may be authorized by the Complaints Investigation Committee and the lawyer may be prosecuted before the Discipline Committee of the Law Society. The lawyer may be disciplined but sanctioning the lawyer does not compensate a client who has sustained a pecuniary loss.

The Law Society's function and jurisdiction regarding discipline are independent of the civil remedies referred to above so a lawyer could face both civil liability for negligence (which would be dealt with by insurance) and discipline.

However, the processing of an insurance claim, or an application to the court for an order requiring fulfillment of the undertaking, or a suit for damages resulting from the failure of a lawyer to fulfill an undertaking, all have the usual disadvantage of a time delay in receiving the benefit of the remedy, even if the court proceeds on a summary basis. By the time the situation is repaired or the court has ordered the fulfillment of the condition or payment of damages in lieu, the aggrieved party may have had to find alternate means of rectifying the situation. For example, if the trust condition breached was the payment and discharge of a mortgage, the purchaser who was to benefit from the discharge may have been forced to delay the acquisition of the property or to arrange further financing in respect of the property pending the conclusion of the enforcement remedy.

Lawyers have sometimes operated on the misconception that the enforcement of lawyers' trust conditions through the court or the Law Society will entirely solve their clients' problems resulting from lawyers' defaults. Be mindful of the interests of the clients when completing transactions on trust conditions. Cooperation and courtesy between lawyers in imposing and accepting and amending trust conditions where necessary is in the clients' best interests.

10. Conclusion

A lawyer's undertaking is a serious commitment that creates serious obligations. You, as a lawyer, must ensure that you can complete the undertaking before you give it. Get all undertakings and amendments in writing. If the undertaking is the client's, have the client give it directly to prevent confusion with your undertaking as a lawyer. Do not rely on or use trust conditions to change the terms of a transaction without your client's instructions and consent. Remember that civil and regulatory liability may arise not only for the lawyer giving the undertaking but also for the recipient of the undertaking.

I. CONFLICTS OF INTEREST

1. Introduction

You are a lawyer.

Members of the public know and expect that those words mean that you must keep your clients' confidences and you have an equal duty to be loyal to your clients' interests. These duties of confidentiality and loyalty are hallmarks of the profession of law in the minds of your clients and are codified for our profession in Rule 3.4 of the *Code of Professional Conduct*.

Your duty of loyalty to your client is a fiduciary duty. Fiduciary duties include the duty of confidentiality, the duty of commitment to your client's cause, the duty of candour to your client and the duty to avoid conflicts of interest.

In Chapter 3 of the *Code*, section 3.4 contains the rules and definitions about Avoiding Conflicting Interests. Rule 3.4-1 sets out the basic duty not to act or continue to act for a client where there is a conflict of interest, except as permitted under the *Code*.

What does this mean to you in practice? It means that sometimes you will have a professional obligation to decline a retainer or withdraw from representation and other times, after full disclosure to and consent from the client (usually in writing), you can do something that otherwise would be improper. The conflict rules are designed to help you avoid getting into a situation where your duty of loyalty to your client competes with other interests that you or another client might have. The rules can be complicated to apply in practice, and it is always good practice to seek advice and direction from the Law Society's *Director of Policy & Ethics* if you have questions.

Conflict of interest situations sometimes sneak up on you, even if you have been doing your best to avoid them.

2. Avoiding Conflicts under the Code, in Brief

To avoid conflicts under the *Code*, Section 3.4 may be summarized as follows:

a) Do not advise or represent both sides of a dispute;

b) Do not act when there is or is likely to be a conflicting interest between clients;

c) Do not represent a client whose interests are directly adverse to the immediate legal interests of a current client;

d) Do not act against former clients in the same or any related matter;

e) Do not act for borrower and lender in a mortgage or loan transaction except in the limited circumstances described in 3.4-14 to 3.4-16;

f) Do not act if your interests might conflict with the client's interests;

g) Do not enter into any business transaction with your client unless the transaction is fair and reasonable to the client, your client has independent legal advice or representation as appropriate and you follow the section starting at 3.4-28 ;

h) Do not borrow money from your client except in the limited circumstances described in 3.4-31;

i) Do not lend money to your client unless, before making the loan, you follow 3.4-33

j) Do not personally guarantee or otherwise provide security for any indebtedness involving your client except as permitted under 3.4-35

k) Do not prepare any document which gives you or your associates a gift or benefit from the client except in the limited circumstances described in 3.4 - 39;

l) Do not accept a gift of more than nominal value from your client unless the client has received independent legal advice (3.4-37);

m) Do not act as a surety for any accused represented by you or your law firm unless the accused is in a family relationship with you as set out in 3.4-41

These prohibitions may seem obvious, but remember that sometimes they may not be so apparent in practice.

3. Sample Problems Illustrating Some Conflicts of Interest

The following scenarios are common practice situations where conflicts may arise. The relevant section(s) are identified and commentary and case law are discussed.

(a) Do Not Advise or Represent Both Sides of a Dispute

You articled in a large law firm in Winnipeg. One of the main litigation lawyers in the firm had a major lawsuit going at the time which is still ongoing. During the articling rotation in the large firm, you did some research on the file on an evidentiary point and provided the litigation lawyer with a legal memo on the point. You were not hired by the firm after your articles. You applied and were about to be accepted at another large law firm when the interviewing lawyers asked you if you were involved in that big piece of litigation at your former firm. One of the litigation lawyers in the new firm represents the other side of the same case.

COMMENTARY

A conflict problem is created because you did represent one side by being part of the former firm and actually working on the file (albeit in a minor way). It is a conflict for you to now work for the new firm which represents the party on the opposite side of the dispute. The new firm risks the loss of their client if they hire you in the wake of the rule in the case of *Martin* v. *Gray* reported as *MacDonald Estate v. Martin* (1990), 77 DLR (4th) 249 (S.C.C.). Your former firm, acting for their client, could bring a motion to the court seeking the disqualification of the new firm on the grounds they are in a position of conflict and there is a risk of disclosure of confidential client information from you to the new firm's client.

The two main ethical obligations of a lawyer (to keep client information confidential and to maintain client loyalty) are at risk in all cases where lawyers transfer between law firms. See the commentary following 3.4-1. The duty of confidentiality formed the basis of the Supreme Court of Canada's decision in the *Martin* case.

In *Martin* the court outlined a two-fold test for determining whether a disqualifying conflict exists:

- Did the lawyer receive, during the former representation, confidential information attributable to a solicitor-client relationship that was relevant to the current representation? The court will infer that confidential information was imparted unless a reasonable member of the public would be satisfied that no information was imparted which could be relevant;
- If confidential information was imparted, is there a risk that it will be used to the prejudice of the former client? Since lawyers who work together will be assumed to share confidences, the court will draw an inference that confidential information

which a transferring lawyer brings will be shared, unless satisfied based on clear and convincing evidence that reasonable measures have been taken to ensure that no disclosure will occur. The majority suggested that institutional mechanisms might be adequate to prevent disclosure. (Institutional mechanisms might be, for example, stamping the file "Sensitive Material" or "Confidential - To Be Viewed by Named Lawyer Only" and locking it in a file cabinet (or securing it in a password protected electronic file) which is separate from the main filing of the office and to which only certain persons have access, and keeping the lawyers on a separate floor or separated area to which there is restricted access.)

There are a variety of situations in which the risk of disclosure arises, including the following:

- **sequential conflicts**: a lawyer acts for client A against client B, and later acts for client C against client A;
- **government service**: lawyers moving in and out of government service;
- **law firm mergers**: two or more firms, acting for opposing parties, merge;
- **transferring lawyer takes the file**, and the former law firm then acts for an opposing party;
- **co-accused**: defence counsel acts for three co-accused at the preliminary inquiry, but before trial withdraws from representing two of the co-accused and continues to represent the third; and,
- **cross-examination**: a lawyer acting for a client in litigation must cross-examine a former client.

The Federation of Law Societies formed a committee to consider these matters and the committee concluded that any rule should apply to lawyers and articled law students and that members of governing bodies (i.e., lawyers) should have a "duty to exercise due diligence in supervising their other employees, to ensure that they comply with professional standards aimed at preserving and protecting client confidences."

Both the Canadian Bar Association and the Federation of Law Societies looked at the question of whether institutional screening methods can be effective in reducing the risk of confidential information possessed by a moving lawyer being used to the prejudice of a former client and, if so, what uniform standards for the use of such methods should apply. 3.4-17 to 3.4-23 of the *Code* (and the ensuing commentary) contain guidelines to address the various issues that arise when a member transfers from one law firm to another. 3.4-20

commentary 3 confirms that the guidelines are intended as a checklist of relevant factors to be considered and even adoption of all the guidelines may not be sufficient in some cases.

The Supreme Court of Canada addressed the duty of loyalty in *R. v. Neil,* 2002 SCC 70 (CanLII) and again in *Canadian National Railway Co. v. McKercher LLP*, 2013 SCC 39 (Can LII). In *Neil,* the court unequivocally rejected any implication that a law firm may simultaneously act for clients whose interests are adverse to each other, even in unrelated matters, even if no confidential information is disclosed. The fiduciary relationship that exists between a lawyer and the client imposes duties on the fiduciary beyond the duty not to disclose confidential information. It includes a duty of loyalty and good faith and a duty not to act against the interest of the client. The court established the "bright line" rule that says a lawyer may not represent a client in one matter while representing the client's adversary in another matter unless both clients provide their informed consent.

In *McKercher,* the court confirmed the "bright light' rule from *Neil* but clarified the scope of the rule to mean that the rule applies only where the *immediate* interests of clients are *directly* adverse and only when clients are adverse in *legal* (as opposed to strategic or commercial) interest. The court also expanded upon the notion of the duty of loyalty, advising that the duty to avoid conflicting interests, the duty of commitment to the client's cause and the duty of candour flow from that duty of loyalty. *Code* sections 3.4-1 and 3.4-2 along with the commentaries address the duty of loyalty.

(b) Do Not Act When There is or is Likely to be a Conflicting Interest Between Clients

EXAMPLE #1:

You have acted for a particular family for years, doing their house deals, their wills, their parents' estates, their accident claims and their impaired driving charges. Now both spouses call you for advice because they seem headed for separation and they both insist that they want it to be "friendly." They want you to help them draw up the necessary papers. There are no disputes about custody as the children are now all adults and independent of the spouses, the spouses are both employed and earning comparable incomes and they do seem to agree about what they want to do with all of their property. Can you act for both of them?

EXAMPLE #2:

You represent the five adult children of their deceased parent in litigation against the executor of the parent's will and in the middle of the trial, the executor's lawyer makes an offer of settlement that you think is good, but only two of the five adult children want to accept the offer and end the trial. The other three want to continue with the trial. What do you do?

EXAMPLE #3:

Best friends come in to retain you to represent them in the setting up of their small business. One of the friends has most of the money for the startup of the business and the other one has most of the expertise. Can you advise them both?

COMMENTARY

The general rule is that you should not represent more than one person in a legal matter. In the situations described above, you aren't required to avoid acting for both or all parties who want you provided you ensure you are retained on a joint retainer as set out in *Code* sections 3.4-5. The joint retainer is the only way you might be able to represent more than one person in a legal matter. A joint retainer will ensure that all parties understand up front that they will have no secrets from one another and you will have to stop acting for them if a conflict arises. Before they decide about whether they want to retain you on a joint retainer, you must alert them to the potential for an ethical conflict to arise and that potential should influence your own decision about whether to even accept a joint retainer in the first place.

Whenever more than one person wants to retain you to represent all of them in one legal matter, depending upon the facts and the likelihood of a conflict of interest arising, you may be able to act for them on a joint retainer. You should review the *Code sections 3.4-5 to 3.4-16* dealing with the issues that can arise and the steps you must take before you can accept a joint retainer. Ensure all persons understand the rules, and make sure you get everyone's consent in writing. Even then, it is good practice to have them all sign a joint retainer recording all the rules that will bind them.

If you have advised them as provided in *Code sections 3.4-5 and 3.4-6* including that no information received from one client can be treated as confidential so far as the other clients are concerned, and all persons consent in writing to you acting or continuing to act (*Code 3.4-*

7), and you advise them that in a joint retainer if a conflict develops between or among them that cannot be resolved by them alone, you must withdraw from the joint representation (See *Code sections 3.4-8 to 3.4-10* for other considerations), then entering into a joint retainer may be the solution for the persons who want you to act for more than one of them on one legal matter.

In each of the three scenarios described above, you should have considered the potential and likelihood of a conflict of interest arising among or between the persons before you agreed to represent them. Because the likelihood of a conflict arising is high, these are examples of situations where the prudent lawyer would choose to act for only one of the persons and would recommend that the other or others seek their own representation.

In the example one scenario, the potential for an ethical conflict arising is high when you consider the area of law. The facts shared with you might disclose a possible compensatory spousal support claim; the parties might not realize the full value of one party's pension when saying they are prepared to release a claim to it; there may be tax consequences that will be better for one party than the other depending upon how you draft the agreement; there may be a homestead release required meaning that party needs to have independent legal advice before consenting.

If you are considering a joint retainer because they say they want one, remember that you will still need to send at least one away for independent legal advice before signing a final agreement and if any of the facts disclose an issue where the parties' interests are in direct conflict, you will not be able to continue to act for them on the joint retainer. Acting for both of them is not likely a prudent decision in the long run.

In the example two scenario, the potential for an ethical conflict arising may not seem to be as high as in example one because it is possible that all the clients will take the same position throughout. Their interests may seem aligned, but whenever there is litigation involved and more than one client giving instructions, be aware that the unified position they take may change as the litigation progresses and the costs in time, energy and money increase. Then, what one might accept as a reasonable offer may not be seen as reasonable by another.

Once the interests of one do not align with the interests of the others, if you have been acting for them on a joint retainer and they are not able to resolve their different instructions on their own and give you one common instruction, you have an ethical obligation to withdraw from joint representation. If the clients all agree to let you continue to represent only some of them while the others get their own representation, you might be able to stay involved, but delay and increased cost is inevitable when clients must change lawyers mid-trial. Likely you may have to withdraw from representing any of them.

Before deciding that you will accept a joint retainer in such a situation, be sure to discuss the possibility that offers may come in for settlement so that you have an idea whether all the potential joint clients are of the same mind up front. If it seems that they might not be, it

would be prudent to decline a joint retainer. Nothing prevents you from acting for only one of them from the beginning, of course.

In the example three scenario, the parties are creating a business together and it seems reasonable to assume that they have the same plan in mind for the business. However, whenever there is a possible power imbalance between potential joint clients, there is always the risk that their interests will diverge and any joint retainer will have to end.

Before accepting a joint retainer in this situation, ask yourself some questions to remind yourself of the risks inherent in acting for more than one person in a legal matter. Consider if it will be in both parties' interests that the profits from the business are shared equally from the start. Should the person with the money get a larger portion for a period of time to compensate them for taking all the financial risk up front? Is it in both parties' interests that all the operating decisions are made by the partner with the expertise? Would you be advising them differently if you were acting for only one of the two?

You must be cautious and exercise good judgement before agreeing to act on a joint retainer. Once you are acting on a joint retainer, if a conflict arises, you must remind the clients of *Code sections 3.4-8 and 3.4-9* and follow the process for dealing with it which may require that you withdraw from the joint representation. Such an ending may not be in any party's best interests, so tread carefully and take time to consider the risks before acting for more than one person in a legal matter.

In situations where the potential for a conflict to arise is high, it is both prudent and generally more economical in the long run if everyone involved has independent legal representation to protect their interests from the start of the matter.

(c) Do Not Act Against Former Clients in the Same or Any Related Matter

EXAMPLE #1:

You practice law in a two lawyer law firm in a small town. You are retained by the local credit union to sue a person on an outstanding loan. You acted for that person 2 years ago to incorporate her business, create some employment contracts and, at that time, you had access to all details of her personal financial information. Can you act for the credit union here?

EXAMPLE #2:

You are acting on a joint retainer for two co-accused who tell the same version of events about the crime and do not appear to have opposing interests. After the preliminary hearing, one of them fires you. The other wants your representation to continue for the trial. Can you act for the co-accused who still wants your representation at trial?

COMMENTARY

Code section 3.4-10 says you must not act against a former client in the same or any related matter. You must not act against a former client in any new matter if you have relevant confidential information that you obtained from the other retainer unless the former client consents to you acting against them.

In example 1 above, this retainer from the credit union seems to be wholly unrelated to the former retainer until you consider that you have confidential information about all of the former client's finances.

You may act against a former client in a fresh and independent matter wholly unrelated to any work that you previously did for that person provided that you do not have any confidential information from the former retainer that is relevant to the new retainer.

The information is still fairly current and it may be relevant to collecting on the outstanding loan. However, *Code section 3.4-11* sets out specific conditions that, if met, will permit another lawyer in your same firm to act against your former client on a new matter. The conditions are based on the screening guidelines discussed in *Code sections 3.4-17 to 3.4-23* regarding conflicts from transfers between law firms.

The goal is to ensure that there will not be any disclosure of the former client's confidential information by you to the other lawyer in your law firm. Do you need her consent to act against her to avoid breaching the conflict rules?

In example 2 above, you might have to cross-examine your former client if the one who fired you testifies against the co-accused who wants your representation. This fits squarely into *Code section 3.4-10* and unless the former client consents, you must not act against your former client in the same matter.

(d) Do Not Act if your Interests Might be in Conflict with the Client's Interest

EXAMPLE #1:

You want to lend money by way of a mortgage at a preferred rate to your good client who wants to purchase a house. You have acted for this client on several small business matters. The client is sophisticated. The client is desperate for the mortgage money and does not object to you acting for the client as well as representing yourself as the mortgagee.

EXAMPLE #2:

You are short of cash and work. You act for a client with an injury case where liability is contested and you are to be paid on a contingency basis for fees. There is a chance of success. Your signed and filed contingency agreement says you will be paid a certain percentage of the award if the matter settles or you win at trial, but you will be paid nothing but your disbursements if you lose. An offer to settle is made by the other side which is on the low side but is not outrageous. Your client is uncertain about what to do and asks for your advice.

EXAMPLE #3:

Your sister has a small business that is doing well and she wants to expand. She is looking for a person willing to invest some money in her business. You have a long-term client who just inherited a substantial sum of money and wants to invest it in a small business. Can you recommend your sister's business to the client? Can you draft up the investment agreement? Must you tell the client that the business owner is your sister?

COMMENTARY

In the first problem, you can lend the money, provided the mortgage transaction is fair and reasonable to the client, and the client consents to the transaction and the client has independent legal representation (*Code section 3.4-33*). You cannot act for the client in the transaction because your interest as the mortgagee conflicts with the client's interests as the mortgagor.

In the second problem, your integrity is on the line because your interest in getting paid right away will be met if the client accepts the offer of settlement immediately, but it is arguably better for the client to get as much as reasonably possible for the claim. The client might be able to get more money by continuing to trial or pushing for more before settling but that will mean a delay in payment for you. Your interests may be conflicting with the client's interests.

If you tell the client that the choice the client makes may affect whether and when you get paid and you recommend that the client get advice from another lawyer in the field about whether to accept the offer, those are steps that will help to avoid even the perception of conflict should the client accept the low offer.

If you are satisfied that your advice to accept the low settlement offer is in the client's best interests and is not being influenced by your interests, then, if the client decides to settle based on your advice to do so, you should record your advice and the reasons the client is accepting the low offer in writing and get your client's written instructions signed by the client before you go ahead. Those latter steps may be important should the client come back alleging that you improperly gave advice that put your interests first.

In the third problem, you are squarely in the *Code of Professional Conduct* relating to Doing Business with a Client and Transactions with Clients under *Code sections 3.4-27 to 3.4-29*. Note that the definition of "lawyer" is expanded for *Code sections 3.4-27 to 3.4-41* to include "an associate or partner of the lawyer, related persons as defined by the *Income Tax Act* (Canada) . . . " In section 251(2)(a) of the *Income Tax Act* (Canada), related persons include "individuals connected by blood relationship, marriage or common-law partnership or adoption".

Where a transaction involves recommending an investment, full disclosure about any conflict or how a conflict might develop is required, independent legal advice for the client may be required and the client must still consent to the transaction even after the disclosure and the legal advice. You would have to disclose that it is your sister who owns the business if you recommend the investment and you would avoid the conflicting interest by referring your client to another independent lawyer to do the transaction.

4. Remedy for Conflict

The remedy in a case where the lawyer or law firm acting for the other side is in a conflict of interest which will negatively affect your client is that you ought to seek your client's instructions to move to have the lawyer or law firm in conflict disqualified from acting for their client by the court.

If you file a complaint with the Law Society instead, the Society can discipline a lawyer who breaches the *Code* but remember that the Law Society does not have the jurisdiction to disqualify a lawyer from acting for a client in a conflict situation. That remedy rests with a court.

The general rule is that if you find yourself in a conflict situation, the remedy is you must withdraw from representing the client according to the *Code in Chapter 3.7* about withdrawing from representation. You must get out quickly and completely. Even if you are scrupulous about avoiding conflict of interest situations, there will be files where you started without any conflicting interests and something out of your control creates a conflict mid- stream. Sometimes recognizing a conflict issue when you are in the middle of a file can be difficult. Sorting out whether there is a remedy short of withdrawing can be complicated.

Whenever you have a question about whether or not a conflict of interest issue exists in a situation or what options you have for dealing with a conflict of interest, please call the Law Society's *Director of Policy & Ethics* who will help you figure out whether there is an issue and exactly what to do. There is no charge for this support.

J. AVOIDING AND DEALING WITH COMPLAINTS

1. Avoiding Complaints

The Law Society receives approximately 350 to 400 formal written complaints each year about the conduct of members (lawyers and articling students). It also receives 1000 to 2000 contacts (primarily telephone calls and emails) from people who do not wish to make a complaint but would like informal assistance or advice regarding their concerns about their lawyer.

The most common concerns reported are about the quality of service to the client (i.e. responding to communication, keeping the client reasonably informed, doing the work undertaken on a timely basis) and about excessive fees.

We all dread receiving personal and confidential mail from The Law Society indicating that someone has complained about us. You will be less likely to receive complaints from clients if you run your practice using good practice management skills, and follow this advice:

a) Listen to Your "Gut Feelings

That little nagging voice in the back of your mind (your conscience?) is usually correct. If you feel at all uneasy about instructions you are getting, or how a file is proceeding talk about it with other more experienced lawyers. They have dealt with many of the same problems in their own careers and it is part of the culture of the profession in Manitoba that experienced lawyers are generally very willing to give back to other less experienced lawyers who ask for help with a problem if it doesn't create a conflict for either of them. Most will freely share their knowledge and experience even if they do not know the lawyer who is asking for help.

b) Be aware of yourself and seek help early

You can find confidential help that is specific to lawyers and the issues we face. Well-being is critical to optimize professional competence. The Law Society encourages lawyers to explore these *resources and services* that are available to support their well-being.

c) Communicate Effectively with your Client

It is not enough to do a good job for your clients - they must know you have done a good job for them throughout the process. We sometimes forget that our role as a lawyer in communicating and resolving our clients' problems includes ensuring that our clients are always kept informed so that they understand what is happening, how long it will take and what it will cost. Good client/lawyer communication is essential. Ask the *Practice Management Advisor* for some tips on improving and keeping good communication habits.

d) Do Not Lie and Keep your Commitments

Whatever your views about commitments in your personal life, it is critical to ensure that you don't make professional commitments you can't keep.

Educate your client about realistic expectations for how long a matter may take to complete and set realistic deadlines for the work you undertake to do. If you know you cannot get to something for a few days, or weeks, or months because of other matters, tell your client upfront. The client is entitled to know and make an informed decision about whether to wait for you or find a different lawyer. If you don't keep the client informed, even about bad news or long delays, you are inviting a complaint by that client to the Law Society and negative publicity on social media which may affect your reputation and cost you future clients.

If a client calls for an update on the file, and you have not even started any work on the file, do not panic and tell a lie like "I'm working on a draft". That lie is unprofessional conduct that could be the subject of a complaint and disciplinary action if it is discovered. Even if you get away with it once, lies can beget more lies and they are usually discovered.

Being tempted to lie about what you are doing for a client is either a sign of poor time management or evidence that you have been accepting more work than you can realistically handle. Get practice management advice early in your career to set you up with good work habits. Your clients will be far happier with you if you deliver work early or on time. Common complaints from clients are that their lawyer is late for appointments, promises but fails to return emails or phone calls, does not get their work done by the dates promised and doesn't explain any delay. Of course, it is essential to maintain your good reputation for a long and successful professional career. Lying and failing to meet your commitments to other lawyers, to your clients, to third parties is a sure-fire way to bring on the complaints and face disciplinary action.

e) Set Up Efficient Systems

Whether your system is hands-on or totally computerized or somewhere in between, you must build in a habit to regularly let your clients know what you are doing on their behalf. You will not be in business for long if you do not complete work promptly and on time. You want satisfied clients who will refer other clients to you.

Some examples of simple systems and habits that may help you include:

- a bring forward system to follow up on work you are to do or something you are waiting for
- a master list of limitation of action dates and hard deadlines – include all hard deadlines for all files and built-in early reminders of the hard deadlines to ensure you meet them

- a daily short to-do list – focus on completing one thing before moving on to another – block off time in your day for each to-do items on the daily list – you may find your list is reduced to one item!
- If you have an assistant, consider setting up a method where the assistant will triage all your incoming email/text/phone messages so that urgent and/or important messages are brought to your attention first. With most email software, you can program it to sort your mail by priorities you set.
- commit to a system to promptly acknowledge receipt of all incoming messages (either personally or by your assistant) and immediately set a reasonable deadline for you to send a meaningful response and tell the sender when you will respond, *("Your message arrived today. I will review it and get back to you with a response no later than . . . (insert the date and/or time)"* -- urgent messages may have to have a response within the hour or day; other messages may have requests that won't need a meaningful response for several days or a week; still others may be satisfied with a longer deadline for a meaningful response – enter all your promised deadlines in your hard deadline list and enter advance reminders to book a time to craft your response in your bring-forward system and get it on a daily to-do list)
- educate your clients about your system of response so that they know your guidelines and that the difference between an acknowledgement of receipt and a meaningful response will be a few days or longer unless the matter is urgent
- set up a system or practice to automatically send your clients copies of all correspondence you receive or send on their matter to help keep them informed;
- if possible, set up a client portal on your website so your client can check in on their matter at any time – ensure it is secure and that you keep their matter updated
- have detailed email autoreply messages and voicemail greetings advising all callers
    - ✓ when you are and are not available for direct contact,
    - ✓ when you expect to be able to respond to their message and
    - ✓ the contact information for someone else they can reach if their matter is urgent and you are not immediately available;
- get into the habit of changing your email autoreply and voicemail greetings daily, for the weekend, for any holiday or vacation time and whenever you will be away from the office for an extended time.

f) Call the Practice Management Advisor for free help

If you want advice on practice management, the Law Society's *Practice Management Advisor,* Bjorn (Barney) Christianson, Q.C. is a valuable resource. Barney has been retained by the Law Society of Manitoba to be a Practice Management Advisor for all members. Barney's practice advisory services are free of charge to members and he is knowledgeable about a broad range of practice management areas.

Barney is a past Law Society president and is the managing partner of the Christianson TDS offices in Portage la Prairie, MacGregor and Gladstone, offices which have operated with the Christianson name since 1970. He has decades of real-life experience running a law practice and has amassed much useful practice management information over the years. Barney knows how to use modern technology to make practice management easier, but he is also helpful for those who want to run a less tech-savvy practice. He is available to help you with any practice management issues you want to discuss. Barney can be reached by phone in Portage la Prairie at 1-204-857-7851 or by e-mail at *barney.christianson@gmail.com*.

2. Dealing with Complaints

If despite your best efforts, a complaint is made about you that the Law Society staff lawyers have determined is within the Law Society's jurisdiction (see below under Process), a staff lawyer will send you a copy of the client's complaint and ask for your written response within 14 days. It is important to meet the deadline.

Here are some tips to help you prepare your response.

a) Put Things in Perspective

It is easy to overreact to a written complaint by your current or former client. To ensure you do not lose perspective, speak with a later-career lawyer you respect who is experienced in Law Society matters about the complaint letter before drafting your response. That more experienced lawyer can give you some guidance about the seriousness of the complaint and what must be addressed in your response. If the complaint could have very serious consequences for your career, you can always hire your own lawyer for advice and representation.

b) Respond Promptly

Law Society Rule 2-81(1) requires a member to respond in writing within 14 days where the Society makes a written request for a response within 14 days.

You need to respond within the time limit. If there are circumstances that make it impossible for you to meet the deadline, contact the Law Society staff lawyer who has forwarded the letter to you as soon as possible before the deadline to explain the situation and ask for an extension of time to respond.

Keep in mind that unreasonable delay in responding to the Law Society may reinforce a client's complaint about your poor service, and charges of professional misconduct may be laid against you if you do not meet the deadlines as requested by the Law Society. Respond promptly.

c) Your Response Letter

Deal with the Issues

Don't send a rambling lengthy response. Relevant facts that might be a defence to the complaint may get lost in the shuffle. Address the specific issue raised by the complaint directly and succinctly.

Provide Copies of Supporting Documentation

If your client complains that you failed to communicate with them and your response to the complaint is that you did send the client a letter/email, include a copy of the letter in your response to the Law Society.

d) No Personal Attacks – take time to be as objective as you can

You want to ensure that your response is rational and not full of anger. A calm more objective response can often assist in resolving the complaint. Remember that a copy of your response may be sent to the client who submitted the complaint, and the client has an opportunity to reply.

Do not attack your clients for exercising their rights. The Law Society is not investigating the client's character or conduct.

Be sure you give yourself time to draft your response, and then wait until the next day to review it one more time before you send it. If you are feeling especially emotional about the matter, you might want to ask another lawyer in your office to review your response before you send it.

See the details under the section on Process, below.

e) Be Honest about your shortfalls

If your conduct falls short in terms of quality of service, admit it, apologize and outline your plan to fix it and prevent this from happening again in the future. For example: *"I didn't respond to the client's many emails for over a month, as the complaint states. I understand that failure to keep my client informed is not providing the quality of service my client is entitled to expect from me. I just sent an updated report to the client today, after receiving this letter of complaint. I am sorry that I did not respond promptly or at all to the client's emails. I apologize to Client A for the distress my delay and failure to respond caused them. I have called the Law Society's Practice Management Advisor to get some help to improve how I manage my emails and prevent this from happening again."*

Apologies can also go a long way in resolving minor complaints.

f) The Law Society Processing of Complaints

All complaints are initially reviewed by a Law Society staff lawyer, who determines whether the concerns expressed are within the Law Society's jurisdiction and, if so, whether the complaint merits investigation. An example of a complaint that does not fall within the Law Society's jurisdiction would be one where a complainant is not happy with a court decision. In such a case, the staff lawyer would respond to the complainant and recommend that the complainant seek legal advice about appealing that decision within the court system. The staff lawyer would explain to the complainant that the Law Society does not have the power to change or affect court rulings.

A complainant may request a review of a staff lawyer's decision that a complaint lacks merit so it will not be investigated further. The review is conducted by the Complaints Review Commissioner, a non-lawyer, who may either uphold the decision or direct an investigation of the complaint. Members of the public often have the misperception that, as a self-governing body, the Law Society is interested in protecting lawyers even though the Law Society's mandate is to protect the public. The use of a non-lawyer as a Complaints Review Commissioner helps to dispel that misperception.

Those complaints that are determined to merit investigation are forwarded to the lawyer who is the subject of the complaint. The lawyer is required to provide a written response to the complaint and return it to the Law Society - usually within 14 days. A copy of the response is then sent to the complainant who often provides a reply.

Follow up questions or requests for information may be made by the staff lawyer who is investigating the complaint. Once all information is gathered, the complaint is then assessed and often dealt with by the staff lawyer – either with a determination that no further action is needed or with a remedial disposition. A very small percentage of complaints investigated are referred to the Complaints Investigation Committee for consideration of charges of professional misconduct or other action.

Complaints may be resolved by staff lawyers through informal means any time it is deemed to be appropriate. A staff member may suggest a resolution and if it is acceptable to both the lawyer and the complainant, the matter is resolved in that way.

If the attempt to resolve the complaint informally is unsuccessful, the usual investigation will continue and the complaint will either be dealt with by a staff lawyer or will be referred to the Complaints Investigation Committee.

If a complaint is investigated and disposed of by a staff lawyer, the complainant can request that the decision be reviewed by the Complaints Review Commissioner who may uphold the decision or direct that the matter be considered by the Complaints Investigation Committee.

The Complaints Investigation Committee reviews those matters referred to it and examines a lawyer's conduct for possible professional misconduct, conduct

unbecoming a lawyer or incompetence. The Committee has many options for dealing with a complaint before it. For example, the committee may investigate further, direct a practice review, issue a formal caution to the member, authorize charges, or take no further action.

The complaint process does take time. A typical complaint that is resolved at the staff level will likely be concluded within four to six months from the time of receipt of the complaint. Some less complicated complaints may be resolved in a shorter time frame while more complicated complaints can take longer to conclude.

Information for the Public on the *Complaint process* can also be helpful for you to review.

g) The Law Society Staff

If at any time during the process you are wondering how to handle things or where a matter is at, feel free to call the *Director of Complaints Resolution*, or one of the legal counsel in the Complaints Resolution Department at **204-942-5571** or Toll-free: **1-855-942-5571**. Their job is to ensure that the appropriate information is before the Complaints Resolution Department or the Complaints Investigation Committee. If you have a 14-day letter and are not sure what points you should address, their assistance may help you frame an effective response.

h) The Complainant

Many clients who have filed complaints about their lawyers want the lawyer to continue to represent them provided the lawyer is prepared to change or stop the actions which prompted the complaint in the first place.

You may call the complainant upon receipt of the complaint; however, any resolution between you and the complainant does not terminate the Law Society's jurisdiction or your requirement to submit a written response to the Law Society in the time frame requested.

3. Preventive Practice

Articling students and lawyers at any stage in their careers can find themselves uncertain, from time to time, about the interpretation of the ethical obligations set out in the *Code of Professional Conduct* or *The Legal Profession Act* or *The Law Society of Manitoba Rules*. For example, conflicts of interest often baffle even the most experienced lawyers. The *Code* is amended as practice evolves and lawyers are expected to stay up-to-date on all their ethical obligations.

You need to know where you can turn for ethical advice to avoid breaching your ethical obligations. The following list is not intended to be exhaustive, but simply to be an overview of a number of the available options should you have a question about your professional obligations:

a) Review the Law Society regulations in the *Code*, the *Rules,* the *Act* and the *Practice Directions* to see if you can find a particular rule or provision that deals with the situation you are facing.

b) Speak to an experienced lawyer within your firm who may have encountered a similar ethical dilemma.

c) Contact the Law Society (Reception: 204-942-5571) and ask for the *Director of Policy and Ethics* who will provide free advice and direction to lawyers on all matters of an ethical nature.

d) If you are involved in opening a new firm, you must ensure that appropriate measures are in place to fulfill the Society's requirements for accounting records and practices. For example, the firm must have a *Trust Account Supervisor* before the firm can have a trust account.

The *Law Society's Audit Department* will provide help to new law firms to ensure the firm sets up proper accounting systems. As well, at any time in your legal career, if you want some assistance or have questions regarding the Trust Safety program or how to become a trust account supervisor or even if you just want some trust account requirements clarified, contact the Audit Department. The auditors have a wealth of experience and welcome inquiries, especially if they can help you avoid mistakes. The Audit Department can be reached through the Law Society at 204-942-5571 or by email at *audit@lawsociety.mb.ca*.

K. CONCLUDING COMMENT

There are many privileges associated with being a lawyer in Manitoba whether you practice law or not. There are also many professional duties and obligations owed by every lawyer to clients, other lawyers, the judiciary, the general public and the regulatory body. Compliance with the Code of Professional Conduct, *The Legal Profession Act*, the Law Society Rules and Practice Directions as those may be amended from time to time and an unwavering commitment to personal integrity in all that you do are essential to meet the professional expectations of you as a lawyer and life-long member of the Law Society of Manitoba.