

## Law Society of Upper Canada

### Implementation of the Model Code of Professional Conduct

#### *Changes to the Current Rules and Commentary*

*October 2013*

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**Definition of “Client”, Rule 1.02.** The definition of client has been expanded to include a person on whose behalf the lawyer renders or agrees to render legal services or who reasonably concludes that the lawyer has agreed to render legal services on their behalf.

**Integrity Rule 2.1-1.** A lawyer’s obligation to act with integrity, previously referred to in two separate rules, has been incorporated into a discrete new Rule 2.1-1 and Commentary. The Commentary contains references to French language rights and the special responsibility of a lawyer to recognize diversity of the Ontario community.

**Integrity Rule 2.1-2.** A lawyer is required to uphold the standards and reputation of the legal professional and to assist in the advancement of its goals, organizations and institutions. New Commentary to Rule 2.1-2 has been added to encourage lawyers to become involved in community and other activities to enhance the profession. When participating in activities outside the practise of law, lawyers should be mindful of the perception that the lawyer is providing legal advice and that a lawyer-client relationship has been created. Refer also to new Commentary to **Rule 7.3-1** regarding outside interests and the practice of law.

**Competence Rule, Rules 3.1-1, 3.1-2.** Minor changes have been made to the definition of a “competent lawyer” (Rule 3.1-1). New Commentary sets out factors for a lawyer to consider in deciding whether the lawyer has the requisite degree of knowledge and skill in a particular matter, as well as steps to take if a lawyer is asked to undertake a task for which the lawyer is not competent. The Commentary also provides guidance on competent communication with clients.

**Quality of Service, Rule 3.2-1.** There is a new and more detailed definition of quality of service in Rule 3.2-1, as well as new Commentary. Rule 3.2-1 requires a lawyer to provide courteous, thorough and prompt service to clients, of a quality that is “competent, timely, conscientious, diligent, efficient and civil”.

**Honesty and Candour Rule, Rule 3.2-2.** New Commentary has been added about the duty of candour, and the circumstances in which it may be appropriate to withhold information from a client.

**Threatening Criminal Proceedings, Rule 3.2-5.** The new Rule expands the prohibition against threatening or advising a client to threaten criminal or quasi-criminal proceedings to include a complaint to a regulatory authority. The prohibition does not apply to an application made in good faith to a regulatory authority for a benefit to which a client may be legally entitled.

**Confidentiality, Section 3.3.** Rule 3.3-1 provides new exceptions to the prohibition on the disclosure of confidential information, which would permit a lawyer to disclose required information to the Law Society or upon Court order. Rule 3.3-3 and 3.3-4 and Commentary speak to the circumstances in which disclosure of confidential information is justified or permitted. Rule 3.3-6 is a new rule permitting disclosure to seek legal advice about a proposed course of conduct.

#### **Conflicts of Interest, Section 3.4**

The current Rules and Commentary governing conflicts of interest has been significantly changed. The new Rules and Commentary should be reviewed in their entirety. The following are the highlights of the changes:

- New definition of the term “conflict of interest” in Rule 1.1-1, plus Commentary, which refers to a “substantial risk” that a lawyer’s loyalty to or representation of a client would be materially and adversely affected.
- A new general rule that prohibits acting where there is a conflict of interest (Rule 3.4-1)
- New Commentary that refers to the fiduciary relationship, the duty of loyalty and conflicting interests, arising from the common law foundation of “conflict of interest” (Commentary to Rule 3.4-1)
- New Commentary that provides examples of situations in which conflicts of interest commonly arise requiring a lawyer to take particular care to determine whether a conflict of interest exists (Commentary to Rule 3.4-1)

- New Rule requiring client consent to act in a conflict of interest and new Commentary providing guidance on disclosure and consent (Rule 3.4-2)
- New Commentary regarding retainers for separate clients competing for the same opportunity with protection of confidential client information (distinguishable from joint retainers) (Commentary to Rule 3.4-5)
- New Rules and Commentary regarding acting against former clients and the circumstances in which this may be permissible (Rule 3.4-10, 3.4-11)

**Transfer Between Law Firms, (Rules 3.4-17 – 3.4-26).** The Federation of Law Societies' Model Rule on conflicts from transfer between law firms currently reflects the content of Rule 2.05 of the *Rules of Professional Conduct* (slightly modified by references to new Rule numbers).

**Doing Business with a Client, (Rules 3.4-27 – 3.4-36).** New Rule 3.4-28 and Commentary provides a general rule and guidance respecting a lawyer's transactions with clients. Rules 2.4-29 – 36 and Commentary provide guidance about specific transactions with clients into which a lawyer may enter.

**Testamentary Instruments and Gifts, (Rules 3.4-37 – 3.4-38).** New Rule 3.4-37 requires a lawyer who drafts a will containing a clause that the lawyer will be retained to provide services in the administration of the estate, to provide the trustees with written advice that the clause is a non-binding direction. Rule 3.4-38 generally prohibits a lawyer from preparing an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift. Exceptions are provided for clients who are family members of the lawyer or the lawyer's partner or associate.

**Judicial Interim Release (Rules 3.4-40 – 3.4-41).** New Rules restrict a lawyer from taking certain steps when acting for an accused person, including acting as surety, using the lawyer's own funds or security to secure the release of the accused, or acting in a supervisory capacity to the accused. Exemptions are provided in certain circumstances. (Rules 3.4-40 – 3.4-41)

### **Fees and Disbursements, Section 3.6.**

- New Commentary to Rule 3.6-1 expands the factors regarding what is a reasonable fee and what information about fees and disbursements should be provided to the client in writing.
- New Commentary to Rule 3.6-7 provides examples of situations which are not caught by the prohibition against fee-splitting with non-licensees.
- New Commentary to Rule 3.6-10 elaborates on the rule prohibiting appropriation of funds except in accordance with the by-laws that govern trust funds.
- New Rule 3.6-11 requires a lawyer to repay to the client fees or disbursements reduced on assessment as soon as is practicable.

**Withdrawal from Representation, Section 3.7.** The Rules and Commentary regarding withdrawal from representation have been modified. New Rule 3.7-1 requires reasonable notice to the client as a condition for withdrawal. Rule 3.7-9 requires a lawyer to notify the client in writing upon discharge or withdrawal.

**Lawyer as Advocate, Section 5.1.** New Rules expand the list of prohibitions on a lawyer who is acting as an advocate, including a prohibition on appearing before a court or tribunal while under the influence of alcohol or drug (Rule 5.1-2). Rule 5.1-6 requires a lawyer to fulfill undertakings and honour trust conditions accepted in the course of litigation.

**Students, Section 6.2.** New Commentary to Rule 6.2-2 refers to the responsibility of a principal or supervising lawyer for the actions of students acting under his or her direction.

**Communications from the Society, Rule 7.1-1.** Rule 7.1-1 requires a lawyer to reply promptly and completely to any communication from the Society in which a response is requested.

**Duty to Report Misconduct, Rule 7.1-3.** Rule 7.1-3 requires a lawyer to report to the Law Society in certain circumstances, including the mental instability of a licensee. The instability must be of such a serious nature that the licensee's clients are likely to be materially prejudiced.

**Dealing with an unrepresented person, Rule 7.2-9.** Rule 7.2-9 requires a lawyer to clarify his or her role in dealing with an unrepresented person. The requirement to urge the unrepresented person to obtain independent legal representation has been removed.

**Inadvertent communications, Rule 7.2-10.** New Rule 7.2-10 requires a lawyer who receives an inadvertent communication to notify the sender.

**Undertakings and Trust Conditions, Rule 7.2-11.** Rule 7.2-11 requires a lawyer to fulfill undertakings and honour trust conditions. New Commentary provides guidance on the issue of trust conditions.

**The Lawyer in Public Office, Section 7.4.** Rule 7.4-1 requires a lawyer who holds public office to adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law.

**Retired Judges Returning to Practice, Section 7.7.** The cooling-off period for retired judges appearing in court as counsel or advocate is now three years instead of two. Retired appellate judges continue to require the approval of a committee of Convocation.