
ETHICS, PROFESSIONALISM & REGULATION OF LAWYERS AN INTRODUCTION

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DISCLAIMER

The views expressed herein are those of the presenter and do not necessarily reflect those of IIROC or The University of Toronto.

OVERVIEW

- Ethics & Professionalism- Elements
 - Self-Regulation
 - Rules of Professional Conduct
 - Discipline
-
- Other: Model Code of Professional Conduct, LawPro

DEFINITIONS: BLACK'S LAW DICTIONARY

- Ethics: The term given to the code that is set up by the legal professionals that details their moral and professional duties to clients
- Professionalism: Quality of work, devotion and work ethics, comparable to a professional
- Professional: A person, who is a member of a professional body due to the education qualification and follows the prescribed moral and professional code of conduct

Note: Emphasis added throughout

ELEMENTS OF ETHICS AND PROFESSIONALISM

Specific*:

- Competence
- Honesty & Candour
- Confidentiality
- Avoid Conflict of interest
- Advocacy
- Respect for Administration of Justice
- Courtesy & Good Faith

General

- Honour
- Fairness
- Civility
- Integrity
- Independence
- Loyalty
- Collegiality

*Rules of Professional Conduct

SELF-REGULATION

Self Regulatory Organization [SRO]: An organization that has been authorized to enforce and develop the regulations for an industry.

SELF-REGULATION BY LAW SOCIETIES

- Control and direction of lawyers through rules and regulations made by lawyers acting collectively, through law societies
- Undertaken in the public interest to ensure legal services are provided to the public ethically and competently only by qualified persons
- Delegated by provincial and territorial legislatures, constituted and empowered for the purpose of regulating lawyers in the public interest

SRO PURPOSE

- Purpose – not primarily for punitive purposes but to protect the public by sanctioning the offending lawyer and to protect the profession’s reputation by demonstrating a collective commitment to and enforcement of standards of proper conduct
- Also to deter other lawyers from breaching professional standards
- Done through the definitions of “professional misconduct” or “conduct unbecoming a barrister and solicitor”

PRACTICAL APPLICATION

- U of T Clinics and programs offer early, practical opportunities
- Ongoing throughout practice of law
- With opportunities, come professional responsibilities
- Recognize professional issues
- Identify ethical problems



YOUR REPUTATION

- Precedes and follows you
- Every interaction & communication matters
- Ensure the reputation you build is that you are a competent, reliable, honest, reasonable and committed professional

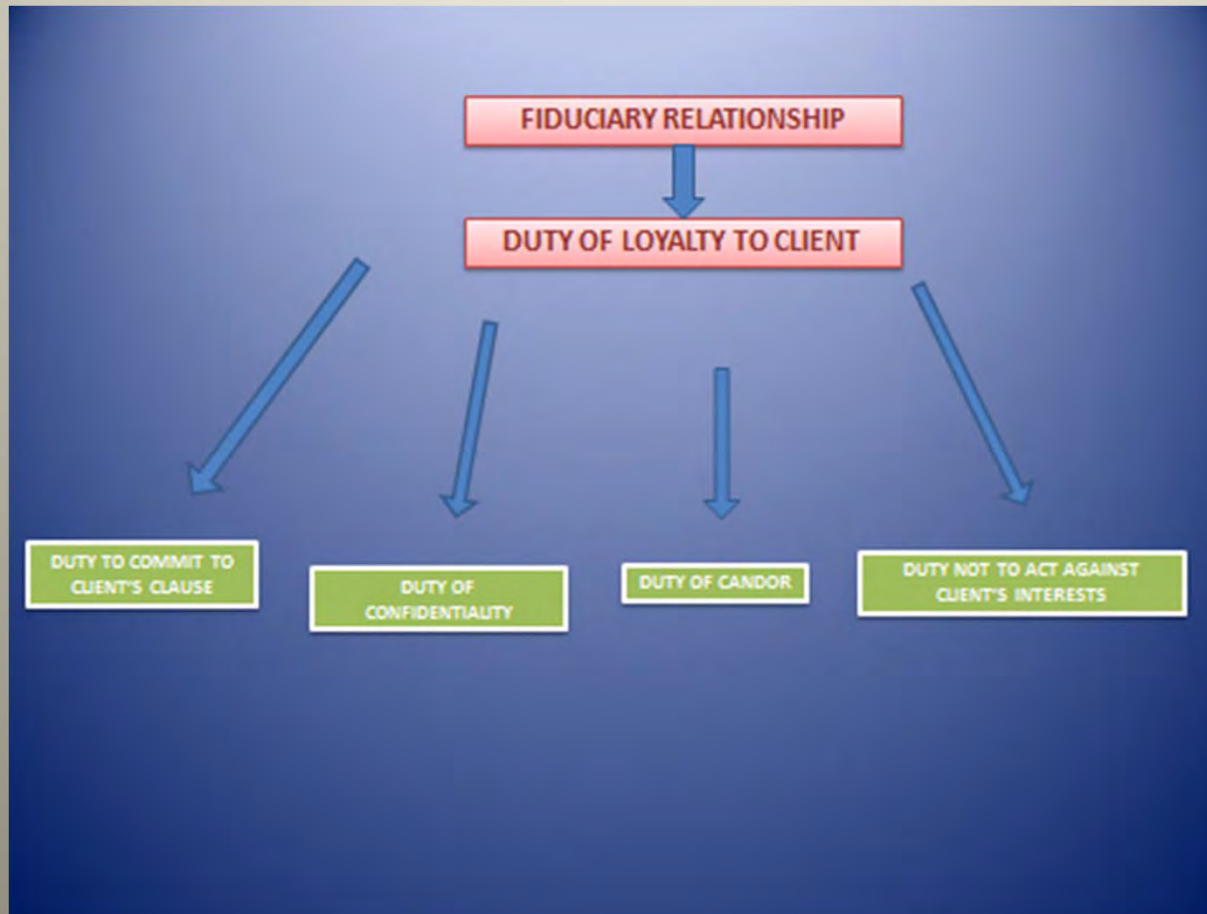
WHAT KIND OF LAWYER DO YOU WANT TO BE?



RELATIONSHIP WITH CLIENTS

- Fiduciary relationship--Latin “fiducia” meaning “trust”
- Essence of relationship: one person (the client) places complete confidence and trust in another (the lawyer, who has special knowledge and expertise) for a particular purpose
- Fiduciary is held to a higher standard of conduct than a stranger or casual business contact
- Nature of the relationship creates specific ethical responsibilities for the lawyer

FIDUCIARY RELATIONSHIP



RULES OF PROFESSIONAL CONDUCT

November 2014 as amended

1. Definitions
2. Integrity
3. Relationship with Clients-competence, honesty and candour, confidentiality, conflicts
4. Practice of Law
5. Relationship to Administration of Justice- advocacy, encourage respect for administration of justice, disclosure of error or omission
6. Relationship to Students, Employees and Others
7. Relationship to Law Society and Other Lawyers- courtesy and good faith, unrepresented persons, professional misconduct / conduct unbecoming

INTEGRITY

LSUC 2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

COMPETENCE

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

The Law Society Act provides that a lawyer fails to meet standards of professional competence if there are deficiencies in:

- (a) the lawyer's knowledge, skill, or judgment
- (b) the lawyer's attention to the interests of clients
- (c) the records, systems, or procedures of the lawyer's professional business, or
- (d) other aspects of the lawyer's professional business, and the deficiencies give rise to a reasonable apprehension that the quality of service to clients may be adversely affected

COMPETENCE: MEANING

- Knowing legal principles
- Investigation of facts, identify issues, confirm client objectives, consider options, advise client
- Apply skills (research, analysis, drafting, advocacy)
- Communicate timely effective manner
- Apply judgement
- Recognize limitations in ability (retain expert)

HONESTY & CANDOUR

LSUC 3.2-2 When advising clients, a lawyer shall be honest and candid.

Arises out of the rules and the lawyer's fiduciary obligations to the client.

CONFIDENTIALITY

LSUC 3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless:

- (a) expressly or impliedly authorized by the client
- (b) required by law or by order of a tribunal of competent jurisdiction to do so
- (c) required to provide the information to the Law Society; or
- (d) otherwise permitted by rules

DISCUSSION Q. #1

Six months ago a woman consulted me with respect to her personal injury matter. I told her that if she wished to retain me, she would have to provide me with a money retainer within two weeks. She did not do so and, accordingly, I assumed she did not want to retain me. I heard nothing from her again until this morning. She called and left a message with my receptionist looking for her trial date. What are my obligations to her and what steps could I have taken to avoid the misunderstanding?

CONFIDENTIALITY V. PRIVILEGE

Issue	Confidentiality	Privilege
Type of Duty	Ethical duty owed to client	Legal Duty owed to client
Applicable	To all information from a client	Is limited to private communications between lawyer and client, information regarding legal advice
Concept	Is much broader than privilege	Relates primarily to evidence issues referring to the legal right of an individual to withhold information from an opposing party, court, tribunal, and investigations, including law enforcement officials
When it ends	It is unending even if the information becomes know, unless – authorized by the client, required by law or a court, required by the law society, otherwise permitted by the rule	If the privileged information must be communicated, then the legal duty ends
Confidential communications includes privilege	Any communication to a lawyer is confidential--all privileged information is also confidential information	Not all communications are privileged – must be for the purpose of providing legal advice

EXCEPTIONS RE CONFIDENTIALITY

- Crime/Fraud or Criminal Communications – Descoteaux v. Mierzwinski
- Public Safety – Smith v. Jones
- Innocence at Stake – R. v. McClure
- Legislative exemptions:
 - Access to Information Act - Goodis v. Ontario (Ministry of Correctional Services)
 - Law Society demands – Law Society of Saskatchewan v. E.F.A. Merchant
 - AML legislation – Federation of Law Societies v. Canada (AG)

LSUC E-BULLETIN JANUARY 2015

• **Disclosure of Confidential Information to Prevent Death or Harm**

The duty of confidentiality requires lawyers to, at all times, hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship. [[Rules of Professional Conduct](#) (the "[Rules](#)"), rule. 3.3-1]. Lawyers must not divulge any such information unless such disclosure is expressly or impliedly authorized by the client; required by law or by order of a tribunal of competent jurisdiction; required to provide the information to the Law Society; or otherwise permitted by rules 3.3-3 to 3.3-6 of the [Rules](#)].

In some very limited circumstances, disclosure of confidential information without the client's consent may be permitted where the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm and that the disclosure is necessary to prevent the death or harm [r. 3.3-3 of the [Rules](#)]. These situations will, however, be extremely rare.

The Supreme Court of Canada has considered the meaning of the words "serious bodily harm" in certain contexts, which may inform a lawyer's assessment of whether disclosure of confidential information is permissible. In *Smith v. Jones*ⁱ, the court observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

In assessing whether disclosure of confidential information is permitted to prevent death or serious bodily harm, a lawyer should consider a number of factors, including:

- the likelihood that the potential injury will occur and its imminence;
 - the apparent absence of any other feasible way to prevent the potential injury; and
 - the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action.
- It is important to note that this rule is permissive and not mandatory. In other words, if the lawyer concludes that he or she is permitted to disclose confidential information under r. 3.3-3 of the [Rules](#), the lawyer should determine if he or she wishes to disclose the confidential information. Depending on the circumstances, a lawyer who believes that disclosure may be warranted should seek legal advice. When practicable, a judicial order may be sought for disclosure.

Where a lawyer has disclosed confidential information under this rule, the lawyer should prepare a written note as soon as possible that includes the following:

- the date and time when the lawyer made the disclosure;
 - the grounds in support of the lawyer's decision to disclose the information;
 - the harm the lawyer intend to prevent with the disclosure;
 - the identity of the person who prompted the lawyer to disclose the information;
 - the identity of the person or group of persons exposed to the harm;
 - the content of the communication in which disclosure was made;
 - the method of the communication used; and
 - the identity of the person to whom the lawyer communicated the information to prevent the harm.
- In cases where the lawyer intends to disclose confidential information under rule 3.3-3 of the [Rules](#), the lawyer must not disclose more confidential information than is required.

ⁱ[1999] 1 S.C.R. 455.

SMITH V. JONES

Smith v. Jones, [1999] 1 S.C.R. 455

- Psychiatrist received specific information regarding accused's future plans to harm prostitutes
- Defence counsel didn't want to inform court of report
- Psychiatrist brought application to disclose
- Test—
 - Is there a clear risk to an identifiable person or group of persons?
 - Is there a risk of serious bodily harm or death?
 - Is the danger imminent?

SMITH V. JONES

- The judge ruled that the public safety exception to the solicitor-client privilege and doctor-patient confidentiality released the psychiatrist from his duties of confidentiality and that he was under a duty to disclose to the police and the crown the statements made by the accused and his opinions on them.

SOLICITOR-CLIENT V. LITIGATION PRIVILEGE

Solicitor-client privilege	Litigation privilege
Protects confidential communications between a solicitor and her client made in the course of seeking legal advice—it is the client's, does not end but can be waived by client	Is not directed at or restricted to communications between solicitor and client. Litigation privilege attaches to documents created for the dominant purpose of litigation. It extends to non-confidential communications between a solicitor and third parties, and protects even non-communicative material. The goal of this privilege is to create a "zone of privacy" for parties and counsel to prepare a case—ends when litigation is over
It is not dependent on litigation, nor does it expire when litigation concludes Does not include physical evidence, but does include the communication that led to having the evidence	Expires with the end of the litigation that gave rise to the privilege and attaches to those documents prepared for the dominant purpose of litigation

DISCUSSION Q. #2

I'm having a conversation at a cocktail party and someone asks me a 'hypothetical' question, which I answer. A few weeks later, a conflicts memo makes me realize that the cocktail party discussion was no hypothetical. Is there anything I should do?

AVOID CONFLICT OF INTEREST

LSUC 3.4-1 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.

A conflict of interest exists when there is a substantial risk that a lawyer's judgment on behalf of, or loyalty to, or representation of, a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.

DISCUSSION Q. #3

A woman called me for legal advice regarding her ongoing matter. She already has a lawyer. I told her that I would need her lawyer's permission to speak with her but she doesn't want him to know that she is consulting with me about the matter. I can't meet or even speak to this potential client because she already has a legal representative, right?

WHAT IS A CONFLICT OF INTEREST

- Acting for more than one person on a single matter

or

- Acting for a client on a matter where the lawyer has a personal interest other than reasonable professional fees
- Unless consent / full disclosure

DISCUSSION Q.#4

I have been acting for a client on a disability claim. She has been unable to work since her injury. She has applied for social assistance but this hasn't come through yet. She is now facing serious financial difficulties and may not be able to make her next rent payment. I would like to help her out. Can I loan her some money to get her through this rough patch?

COURTESY & GOOD FAITH

LSUC 5.1-5 [Relationship to Administration of Justice] A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings.

Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative, or disruptive conduct by the lawyer, even though unpunished as contempt, may constitute professional misconduct.

COURTESY & GOOD FAITH

LSUC 7.2-1 [Relationship to the Law Society and Other Lawyers] A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice.

Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward other legal practitioners or the parties. The presence of personal animosity between legal practitioners involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter.

LSUC V. GROIA

- The society maintains Mr. Groia misbehaved to such an extent in defending Bre-X vice-president John Felderhof that he warranted a two-month suspension and ordered him to pay \$247,000 in costs — reduced on initial appeal in March 2014 to one month and \$200,000.
- Among other things, the panel faulted the Toronto lawyer for repeatedly slagging the prosecution. It also cited critical comments made by several judges involved in the labyrinthine hearings against Mr. Felderhof, a geologist, who was ultimately acquitted of fraud. One judge said Groia was “prone to rhetorical excess and sarcasm” and “petulant invective,” while another said he was engaged in “guerilla theatre.”
- July 2014 Groia “Shades of Mediocrity: The Perils of Civility “

ADVOCACY

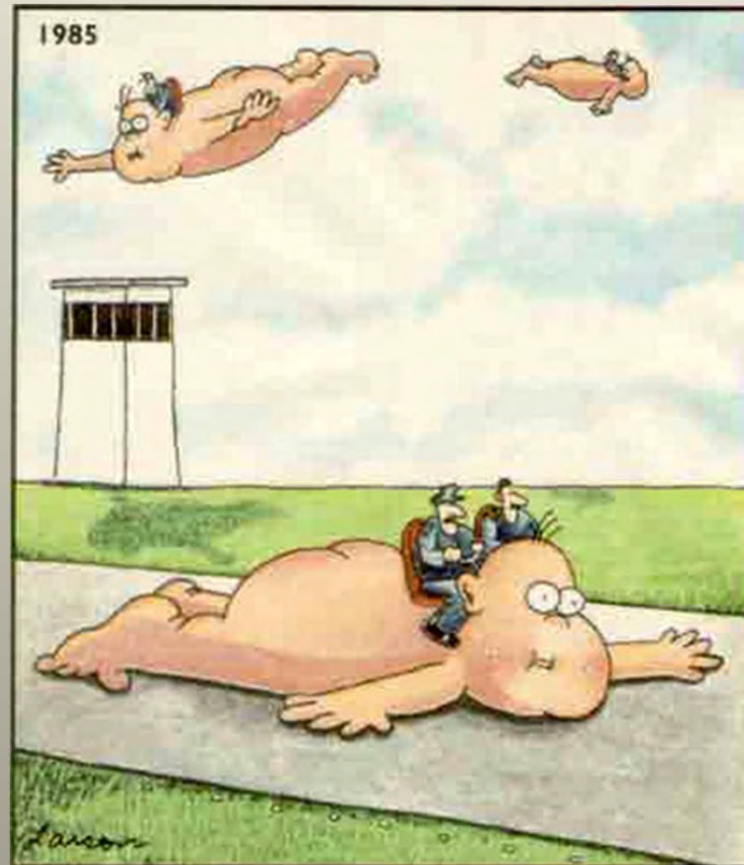
LSUC 5.1-1 When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law treating the tribunal with candour, fairness, courtesy, and respect.

ENCOURAGING RESPECT FOR THE ADMINISTRATION OF JUSTICE

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

A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements.

COMMUNICATIONS



"Fuel ... check. Lights ... check. Oil pressure ... check. We've got clearance. OK, Jack—let's get this baby off the ground."

DISCLOSURE E&O

LSUC 5.1-4 A lawyer who has unknowingly done or failed to do something that if done or omitted knowingly would have been in breach of the rules in Section 5.1 and who discovers it, shall, subject to the rules in Section 3.3 (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

UNREPRESENTED PERSON

LSUC 7.2-9 When a lawyer deals on a client's behalf with an unrepresented person, the lawyer shall:

(a) [FLSC - not in use]

(b) take care to see that the unrepresented person is not proceeding under the impression that their interests will be protected by the lawyer;

and

(c) take care to see that the unrepresented person understands that the lawyer is acting exclusively in the interests of the client and accordingly their comments may be partisan.

DISCUSSION Q.#5

There is a lot of ill will between my client and the other side. My client has instructed me to bring numerous motions and to take other steps solely to try to devastate the other side financially. I've tried to persuade him to change his mind but he won't listen to my advice. What should I do?

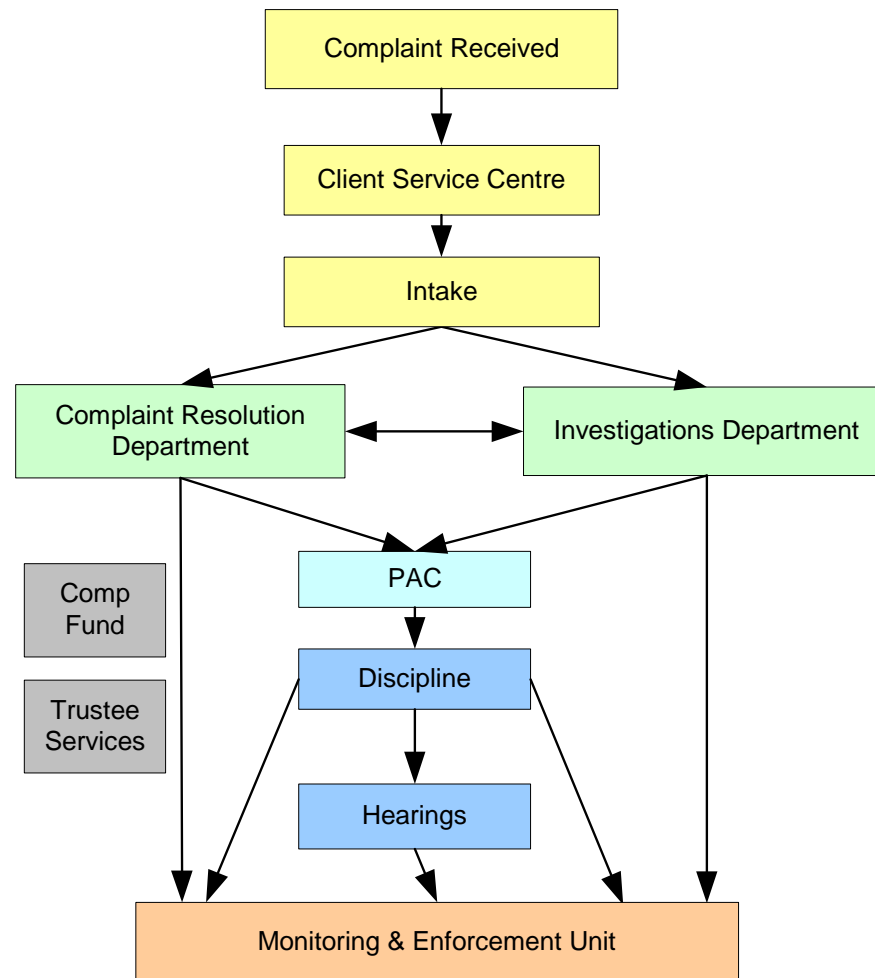
DUTIES TO ASSERTIVE CLIENT

- Raise every reasonable argument BUT remember duty to be respectful, honourable, fair
- Maintain dignity, decorum, courtesy
- Discourage frivolous, vexatious argument, or advantages from slips or oversights not going to merits
- Avoid tactics that delay or harass

DISCUSSION #6

In the course of acrimonious litigation, my client has given me advance instructions to refuse to grant the other side any extensions of deadlines or "any breaks" at all. Can I accept those instructions?

LSUC COMPLAINTS PROCESS



PROFESSIONAL MISCONDUCT

“Professional misconduct” means conduct in a lawyer’s professional capacity that tends to bring discredit upon the legal profession including:

- (a) violating or attempting to violate one of these rules, a requirement of the Law Society Act or its regulations or by-laws
- (b) knowingly assisting or inducing another legal practitioner to violate or attempt to violate the rules in these rules, the Paralegal Rules of Conduct or a requirement of the Law Society Act or its regulations or by-laws
- (c) knowingly assisting or inducing a non-licensure partner or associate of a multidiscipline practice to violate or attempt to violate the rules in rules or a requirement of the Law Society Act or its regulations or by-laws
- (d) misappropriating or otherwise dealing dishonestly with a client’s or a third party’s money or property
- (e) engaging in conduct that is prejudicial to the administration of justice,
- (f) stating or implying an ability to influence improperly a government agency or official, or
- (g) knowingly assisting a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law

CONDUCT UNBECOMING

“Conduct unbecoming a barrister or solicitor” means conduct, including conduct in a lawyer’s personal or private capacity, that tends to bring discredit upon the legal profession including, for example:

- (a) committing a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer
- (b) taking improper advantage of the youth, inexperience, lack of education, unsophistication, ill health, or unbusinesslike habits of another, or
- (c) engaging in conduct involving dishonesty or conduct which undermines the administration of justice

FEDERATION OF LAW SOCIETIES OF CANADA

Canada's 14 provincial and territorial law societies govern over 100,000 lawyers and 4,000 Quebec notaries in the public interest. The Federation of Law Societies of Canada is their national coordinating body. The Federation leads the development of high national standards of regulation to ensure that all Canadians are served by a competent, honourable and independent legal profession.

FLSC MODEL CODE

October 2014 as amended

Each of Canada's law societies enforces a code of conduct for members of the legal profession in their jurisdiction. With national mobility of the profession, the law societies recognize the benefit of moving toward a harmonized national standard of rules of conduct so that the public can expect the same ethical requirements to apply wherever their legal advisor may practice law.

The Federation has approved a Model Code of Professional Conduct that has been implemented in a number of law societies and is under review by others. Over time, it is expected that any significant differences in rules of conduct across Canada will be eliminated.

INSURANCE

The Law Society of Upper Canada mandates that all LAWYERS of the Law Society of Upper Canada who are providing "professional services" purchase standard liability insurance coverage through LAWPRO, in accordance with By-Law 6 of Section 2(1) of the Law Society Act. Specifically, the By-Law states:

"Unless otherwise exempted, every LAWYER of the Society who is eligible for coverage under the Society's insurance plan and who engages in the practice of law during the course of any year shall pay insurance premium levies for that year..."

LAWPRO

Lawyers' Professional Indemnity Company [LAWPRO] is a wholly Canadian owned insurance company that provides professional liability [E&O] insurance to lawyers in Ontario and TitlePLUS title insurance for residential purchase and mortgage-only/refinance transactions .

Incorporated in 1990 by the Law Society of Upper Canada, LAWPRO has operated independently since 1995.

- Practice Aids
- Checklists
- Difficult clients
- Legal technologies
- Job market
- Practice pitfalls
- Social networking
- Base premium \$3350

REQUIREMENT TO REPORT CLAIM

- Requirements of the LAWPRO Policy: Through the provisions of the LAWPRO insurance policy, you have a contractual obligation to report any incident that has resulted in or could give rise to a claim. The policy also requires you to report any such incident promptly, and to not take steps on your own. These steps may make the situation worse, and could jeopardize your insurance coverage.
- A claim is broadly defined as any written or oral demand for money or services; or any written or oral allegation of a breach in rendering or failure to render professional services by the lawyer.
- Requirements of the Law Society: Rule 7.8-2 of the Rules of Professional Conduct of the Law Society of Upper Canada oblige lawyers to report any circumstance that may reasonably be expected to give rise to a claim.

CLAIMS

Claims as of February 2014

- Client communications -701
- Time management -528
- Inadequate investigation -424
- Know/apply law -334
- Conflict of interest -103
- Fraud -53

PRACTICE PRO

LAWPRO's PracticePRO initiative provides risk management, claims prevention and law practice management information to Ontario lawyers. Resources, precedents and checklists help lawyers to take proactive steps to avoid a legal malpractice claim, and help to grow a successful law practice.

QUESTIONS

- Thank you.