Law Society
of Saskatchewan

# Sidebar Social

## Ethics in Everyday Practice – Dealing With Your Client

**May 7th, 2019**
North Battleford

# LAW SOCIETY OF SASKATCHEWAN



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Law Society of Saskatchewan
Continuing Professional Development

# PROGRAM:

**3:45** **Registration**

**4:00** **Refreshments & Networking**

**4:30** **Introduction**

**4:35** **Discussion of Ethics in Everyday Practice**

- Who can you represent?
- Getting cash From Your Client
- Can You Breach Privilege?
- The Lying Client
- Possession of Evidence
- In Business with Your Client
- Advertising
- Dealing with Complaints
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**6:30** **Adjournment**

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# ABOUT THE PRESENTERS:

The professionals who are presenting at this Law Society of Saskatchewan seminar are all volunteers who have donated their valuable time to contribute to continuing professional development.

## The Honorable Justice N.W. Caldwell, *Court of Appeal for Saskatchewan, Regina*

Justice Caldwell holds a Bachelor of Laws (with distinction) from the College of Law at the University of Saskatchewan obtained in 1995 and a Bachelor of Arts from that same university completed in 1992. He was called to the Saskatchewan Bar in 1996 and the British Columbia Bar in 1997.

Prior to his appointment to the Court of Appeal for Saskatchewan in April 2010, Justice Caldwell was a partner at McDougall Gauley LLP, based at the Saskatoon office. Before that, he practised law in Vancouver with Clark Wilson LLP.

Justice Caldwell is published in corporate law, personal property security, electronic commerce, privacy, and regulatory compliance and was a registered trade-mark agent. He has taught courses at the University of Saskatchewan's College of Law and acted as a facilitator for the Saskatchewan bar admissions course. Justice Caldwell proudly hails from Meadow Lake, in northern Saskatchewan.

## The Honorable Justice M.T. Megaw, *Court of Queen's Bench for Saskatchewan, Regina*

Justice Megaw obtained his Bachelor of Administration in 1983 from the University of Regina and his Bachelor of Laws in 1984 from the University of Saskatchewan. He was called to the Saskatchewan Bar in 1985 and his practice largely focused on family law, civil litigation and criminal law. Justice Megaw was awarded Queen's Counsel in 2006 before being appointed to the Saskatchewan Court of Queen's Bench Family Law Division in March 2014.

Previous to this appointment, he was in-house counsel for Saskatchewan Government Insurance from 1989 to 1990, an Associate at Robertson Stromberg from 1990 to 1992, a partner at Shirkey, Ulmer, Willner & Megaw from 1992 to 2001 and most recently a partner at Gerrand Rath Johnson

LLP from 2001 to 2014. Throughout his practice, Justice Megaw appeared before all levels of Court, including the Supreme Court of Canada.

Justice Megaw has been an active member of the Law Society and has held many positions within the organisation. He was a Bencher from 2010 to 2014, has Chaired various committees, and has been a frequent presenter and facilitator at numerous continuing legal education events.

## The Honorable Judge H.M. Harradence, *Provincial Court of Saskatchewan, Prince Albert*

Judge Harradence gained his Bachelor of Laws from the University of Saskatchewan in 1985 and his Master of Laws from Osgoode Hall in 2011. He was appointed to the Provincial Court of Saskatchewan in 2006 and is Chairperson of the Saskatchewan Review Board.

Prior to his appointment Judge Harradence practised primarily criminal defense throughout Saskatchewan, he has also participated in variety of legal education seminars both as a presenter and a participant throughout his career.

He has served in a number of capacities with the Canadian Bar Association, where he was President of the Saskatchewan branch from 1999 to 2000, the Law Society of Saskatchewan where he was a Bencher from 2004 to 2006. Hugh was also Chairman of the Saskatchewan Legal Aid Commission in 2006, was Inquest Coroner in 2001, and served as a Commissioner with the Saskatchewan Commission on First Nations, Metis people and Justice Reform from 2002 to 2004.

## Aaron Fox, Q.C., *McDougall Gauley LLP, Regina*

Aaron received a B.A. (English) in 1974 and an L.L.B. in 1977 from the University of Saskatchewan. He was called to the Bar in Saskatchewan in 1978. He was appointed Queen's Counsel in 1997 and inducted as a Fellow of the American College of Trial Lawyers in 2001. He has been noted by "Best Lawyers" in the area of Criminal Defence since 2006. Aaron's primary areas of practice are criminal law, civil litigation and professional discipline. He is a partner with McDougall Gauley LLP and Chair of the Criminal Law/Professional Discipline Team.

Aaron has been a regular lecturer and presenter at various continuing legal education programs as well as a Faculty Member for the Trial Advocacy Workshop presented by the Law Society for Saskatchewan. In 2002 he was presented with a Saskatchewan Legal Education Society volunteer award. In 2011 he was the Si Halyk, Q.C. Visiting Scholar in Advocacy at the University of Saskatchewan. He received the Saskatchewan Trial Lawyers Association Outstanding Lawyer Award for 2017. He also is an Advocacy Advisor for the Supreme Court of Canada Advocacy Institute.

Law Society of Saskatchewan
Continuing Professional Development

**SIDEBAR SOCIAL**

***ETHICS IN EVERYDAY PRACTICE: DEALING WITH YOUR CLIENT***

## Introduction

Multitude of Sources for Ethical Guidelines:

- Code of Professional Conduct;
- Law Society of Saskatchewan Rules;
- Queen's Bench Rules;
- Discipline Rulings; and
- Court Decisions.

## *1. Who Can You Represent?*

(a) Can you represent family or close personal friends? If so, what cautions should you be aware of?

*Zink v. Adrian* 2005 BCCA 93, at para 40.

(b) Can you represent other lawyers in your firm?

*R. v Ironchild* (1984) 30 Sask. R. 269;
*Bilson v. University of Saskatchewan* (1984) 33 Sask. R 1;
*Dustyhorn Estate v. Stickney* 2004 SKQB 53;
*Adams v. Canadian Tobacco* [2010] SJ No. 502; and
*Wanner v. Christie* [2016] SJ No. 259

(c) Can you represent yourself?

Code of Conduct Rule 5.2-1; Commentary [1] The Lawyer as Witness; and Sask. CA Civil Practice Directive No. 1 (July 1, 2016)

## *2. Getting Cash From Your Client*

(a) Can you accept Cash from your Client?
LSS Rule 909(1) and (4).

### *3. Can You Breach Privilege?*

(a) When is it permissible to breach solicitor/client privilege with reference to the new rule in the Code? What do you do if a client threatens to harm someone else? Or harm himself?

*Smith v. Jones* [1999] 1 SCR 435;
Code of Conduct Rule 3.3-3; Commentaries [2] – [6]; and
Code of Conduct Rule 3.3-3A (d) and (e); Commentaries [3] and [4].

What do you do if a client makes comments that do not indicate an intention to do harm, but are disturbing nonetheless?

### 4. *The Lying Client*

(a) What do you do when a client testifies differently from the information he tells you in your office?
What is your duty to the court when presenting evidence? What if you know the evidence your client is going to give is false?

G. Arthur Martin, *Special Lectures of the Law Society of Upper Canada* (1969) Defending a Criminal Case, p. 325; and
LSS Rules 1028 and 1029 Assisting Client with Fraud or other Illegal Conduct.

(b) What do you do when a client, who has just testified, tells you he has lied under oath? Does it make a difference if it is a witness who you have called?

(c) My client has retained a new lawyer to conduct his trial because I told him I would not put him on the stand after he said he intended to perjure himself. What do I do now?

### 5. *Possession of Evidence*

(a) What do you do if a client tells you the location of evidence that you suspect the police are looking for? What if the evidence is at a public location, or in the client's basement? Does this apply to photos, videos, text messages, etc?

Code of Conduct Rule 5.1-2A; Commentaries [2] – [6];
*R. v. Ken Murray* [2000] OJ No. 2182.

## 6. *In Business with your Client*

(a) Are there any ethical concerns if I invest in my client's company or sit on its board of directors?

(b) Can I lend money to a client and continue to act?

Code of Conduct Rule Rules 3.4-23 –30 Transactions With Clients;
Code of Conduct Rule 3.4-31 re: Borrowing From Clients;
Code of Conduct Rule 3.4-32 re: Lawyer's Company Borrowing From Client; and
Code of Conduct Rule 3.4-33 re: Lending To Clients.

(c) Can I take title to a house or land, or a mortgage, in lieu of payment?

See, for example:
LSS v. WRH 2012 SKLSS 8; and
LSS v RCS 2012 SKLSS 1

(d) Can I be an executor of a will that I prepare for a client?

Code of Conduct Rule 3.4-37–39 Gifts and Testamentary Instruments; and
*Frizzell v. Bonneau* [2012] S.J. No. 564

## *7. Advertising*

(a) Can I send out letters soliciting legal work from persons who are not already clients of the firm?

See Law Society Rules re: Advertising Part 19;
Code of Conduct Rule 4.1 Making Legal Service Available;
Code of Conduct Rule 4.2 Marketing; and
Code of Conduct Rule 4.3 Advertising Nature of Practice.

## 8. *Dealing with Complaints*

(a) My client threatened to sue me if I didn't cut my bill in half. I just want this to go away. Can I cut a deal with her and get her to waive all claims against me?

(b) Can I settle with a client who made a complaint to the Law Society against me?

LSS v. BH 2014 SKLSS 4; and
LSS v. DB 2014 SKLSS 11

(c) What happens when a professional conduct issue arises with respect to me or my practice? What if a client or another lawyer sues me or threatens to sue me, what do I do?

Obligation to Report to Insurer; and
Rule re: Reporting Charges to Law Society Executive Director LSS Rule 169(1).

## 9. *Firing a Client*

How and when can I fire a client?
Code of Conduct Rule 3.7 Withdrawal From Representation;
Code of Conduct Rule 4.1-1; Commentary [4] Right to Decline Representation;

*R. v. Cunningham* [2010] 1 SCR 331
Queen's Bench Notice to the Profession May 7, 2008 (60 days)
Provincial Court Practice Directive VI May 15, 2012 (45 days)
QB Rules re: Withdrawal in Civil Matters.

## 10. *The Golden Rule*

Do not make ethical decisions alone – always find someone to bounce ideas off. Strongly consider contacting the Law Society for advice.
See: "*Wrestling with Alligators*", Bencher's Digest, August 2011, p. 4.

# Appendix A: Code of Professional Conduct References

## Submission of Evidence

**5.2-1** A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or unless the matter is purely formal or uncontroverted.

| **Commentary** |
| --- |
| **[1]** A lawyer should not express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. The lawyer should not, in effect, appear as an unsworn witness or put the lawyer's own credibility in issue. The lawyer who is a necessary witness should testify and entrust the conduct of the case to another lawyer. There are no restrictions on the advocate's right to cross-examine another lawyer, however, and the lawyer who does appear as a witness should not expect or receive special treatment because of professional status. |

## Future Harm / Public Safety Exception

**3.3-3** A lawyer must disclose confidential information, but only to the extent necessary if the lawyer has reasonable grounds for believing that an identifiable person or group is in imminent danger of death or serious bodily harm and believes disclosure is necessary to prevent the death or harm.

| **Commentary** |
| --- |
| **[2]** A decision to disclose the confidential information of a client cannot be taken lightly. In making that decision the lawyer should be guided by the commentary to Rule 3.3-4. In the case of mandatory disclosure a significant factor to be considered is the imminence of the perceived danger. In the absence of an imminent danger, there may be other alternatives available to the lawyer short of disclosure.<br><br>**[3]** Disclosure of information necessary to prevent a crime will be justified if the lawyer has reasonable grounds for believing that a crime is likely to be committed and will be mandatory when the anticipated crime is one involving violence against the person.<br><br>**[4]** Mandatory disclosure of imminent danger of death or bodily harm is not conditional on a crime occurring. Accordingly, this rule could apply in circumstances such as a threatened suicide or self-mutilation.<br><br>**[5]** A lawyer may be relieved from the mandatory obligation to disclose information arising from a reasonable belief that a person is in imminent danger of death or serious bodily harm if |

the lawyer reasonably believes that disclosure will bring harm upon the lawyer or the lawyer's family or colleagues. This might occur where the lawyer expects that the client is likely to retaliate or has threatened retaliation.

**[6]** Serious psychological harm may constitute serious bodily harm, so long as the psychological harm substantially interferes with the health or well-being of the complainant.

### Permitted Disclosure

**3.3-3A** A lawyer may divulge confidential information, but only to the extent necessary:

(d) if the lawyer has reasonable grounds for believing that a crime is likely to be committed and believes disclosure could prevent the crime; or

(e) if the lawyer has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility.

**Commentary**

**[3]** A decision to disclose pursuant to Rules 3.3-3A(d) and 3.3-3A(e) should be made only in exceptional circumstances. The decision to do so can be based on a number of factors including:

(a) Are there reasonable grounds for believing that a crime will be carried out?

(b) What is the nature of the crime and its impact? How serious is the crime? For example, is it a petty crime without a victim, or a crime that can potentially harm one or more persons or their property? Is it a crime that is likely to involve violence?

(c) Is the information, if disclosed, likely to prevent the crime?

(d) Will the information be disclosed through other means in any event, or does urgency dictate more immediate action?

(e) Does the client envision involving the lawyer in the events relating to the crime? Is the lawyer being duped into participating in a fraud, for example?

(f) Is the communication part of a conspiracy to commit a crime or in furtherance of a crime? If so, no (evidentiary) privilege attaches to it as it cannot be said to be a legitimate communication for the purpose of obtaining legal advice.

(g) Is there reliance on the lawyer by a victim?

(h) What is the impact of disclosure on the client? Will disclosure make a difference to the client? For example, could the client be subject to a reduced charge if the crime is not carried out?

(i) What is the impact on the lawyer's practice?

(j) What is the impact on the lawyer? Are there concerns about the personal safety of either the lawyer or the lawyer's family?

(k) What will disclosure mean to the administration of justice and our legal system?

(l) What does the lawyer's conscience say?

**[4]** Once a decision to disclose is made, the lawyer will then need to consider how to disclose, to whom, and how to ensure that the disclosure is no more than is necessary to prevent the crime or dangerous situation at the court facility from occurring. Furthermore, the lawyer must also be mindful of the obligations under Rule 3.2-2 to be honest and candid with the client and to inform the client of the disclosure where appropriate.

### Incriminating Physical Evidence

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

**Commentary**

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

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

(a) delivering the evidence to law enforcement authorities or the prosecution, either directly or anonymously;

(b) delivering the evidence to the tribunal in the relevant proceeding, which may also include seeking the direction of the tribunal to facilitate access by the prosecution or defence for testing or examination; or

(c) disclosing the existence of the evidence to the prosecution and, if necessary, preparing to argue before a tribunal the appropriate uses, disposition or admissibility of it.

**[4]** A lawyer should balance the duty of loyalty and confidentiality owed to the client with the duties owed to the administration of justice. When a lawyer discloses or delivers incriminating physical evidence to law enforcement authorities or the prosecution, the lawyer has a duty to

protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the evidence.

**[5]** A lawyer has no obligation to assist the authorities in gathering physical evidence of crime but cannot act or advise anyone to hinder an investigation or a prosecution. A lawyer who becomes aware of the existence of incriminating physical evidence or declines to take possession of it must not counsel or participate in its concealment, destruction or alteration.

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

### Lawyer Due Diligence for Non-lawyer Staff

**3.4-23** A lawyer or a law firm must exercise due diligence in ensuring that each member and employee of the law firm, and each other person whose services the lawyer or the law firm has retained:

a) complies with Rules 3.4-17 to 3.4-23, and

b) does not disclose confidential information of:

(i) clients of the firm; or

(ii) clients of any other law firm in which the person has worked.

**Commentary**

**[1]** This rule is intended to regulate lawyers and articled law students who transfer between law firms. It also imposes a general duty on lawyers and law firms to exercise due diligence in the supervision of non-lawyer staff to ensure that they comply with the rule and with the duty not to disclose confidences of clients of the lawyer's firm and confidences of clients of other law firms in which the person has worked.

**[2]** Certain non-lawyer staff in a law firm routinely have full access to and work extensively on client files. As such, they may possess confidential information about the client. If these staff move from one law firm to another and the new firm acts for a client opposed in interest to the client on whose files the staff worked, unless measures are taken to screen the staff, it is reasonable to conclude that confidential information may be shared. It is the responsibility of the lawyer/law firm to ensure that staff who may have confidential information that if disclosed, may prejudice the interests of the client of the former firm, have no involvement with and no access

to information relating to the relevant client of the new firm.

**3.4-24** ***[deleted]***

**3.4-25** ***[deleted]***

**3.4-26** ***[deleted]***

### Doing Business with a Client

### Definitions

**3.4-27** In Rules 3.4-27 to 3.4-41,

"**independent legal advice"** means a retainer in which:

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction,

(b) the client's transaction involves doing business with

(i) another lawyer, or

(ii) a corporation or other entity in which the other lawyer has an interest other than a corporation or other entity whose securities are publicly traded,

(c) the retained lawyer has advised the client that the client has the right to independent legal representation,

(d) the client has expressly waived the right to independent legal representation and has elected to receive no legal representation or legal representation from another lawyer,

(e) the retained lawyer has explained the legal aspects of the transaction to the client, who appeared to understand the advice given, and

(f) the retained lawyer informed the client of the availability of qualified advisers in other fields who would be in a position to give an opinion to the client as to the desirability or otherwise of a proposed investment from a business point of view;

**"independent legal representation"** means a retainer in which

(a) the retained lawyer, who may be a lawyer employed as in-house counsel for the client, has no conflicting interest with respect to the client's transaction, and

(b) the retained lawyer will act as the client's lawyer in relation to the matter;

**Commentary**

**[1]** If a client elects to waive independent legal representation and to rely on independent legal advice only, the retained lawyer has a responsibility that should not be lightly assumed or

perfunctorily discharged.

**“lawyer”** includes an associate or partner of the lawyer, related persons as defined by the *Income Tax Act* (Canada), and a trust or estate in which the lawyer has a beneficial interest or for which the lawyer acts as a trustee or in a similar capacity.

**“related persons”** means related persons as defined in the *Income Tax Act* (Canada);

### Transactions with Clients

**3.4-28** A lawyer must not enter into a transaction with a client unless the transaction with the client is fair and reasonable to the client.

**3.4-29** Subject to Rules 3.4-30 to 3.4-36, where a transaction involves: lending or borrowing money, buying or selling property or services having other than nominal value, giving or acquiring ownership, security or other pecuniary interest in a company or other entity, recommending an investment, or entering into a common business venture, a lawyer must, in sequence:

(a) disclose the nature of any conflicting interest or how a conflict might develop later;

(b) consider whether the circumstances reasonably require that the client receive independent legal advice with respect to the transaction; and

(c) obtain the client’s consent to the transaction after the client receives such disclosure and legal advice.

**3.4-30** Rule 3.4-29 does not apply where:

(a) a client intends to enter into a transaction with a corporation or other entity whose securities are publicly traded in which the lawyer has an interest; or

(b) a lawyer borrows money from a client that is a bank, trust company, insurance company, credit union or finance company that lends money in the ordinary course of business.

**Commentary**

**[1]** The relationship between lawyer and client is a fiduciary one. The lawyer has a duty to act in good faith. A lawyer should be able to demonstrate that the transaction with the client is fair and reasonable to the client.

**[2]** In some circumstances, the lawyer may also be retained to provide legal services for the transaction in which the lawyer and a client participate. A lawyer should not uncritically accept a client’s decision to have the lawyer act. It should be borne in mind that if the lawyer accepts the retainer the lawyer’s first duty will be to the client. If the lawyer has any misgivings about being able to place the client’s interests first, the retainer should be declined. This is because the lawyer cannot act in a transaction with a client where there is a substantial risk that the lawyer’s

loyalty to or representation of the client would be materially and adversely affected by the lawyer's own interest, unless the client consents and the lawyer reasonably believes that he or she is able to act for the client without having a material adverse effect on loyalty or the representation.

**[3]** If the lawyer chooses not to disclose the conflicting interest or cannot disclose without breaching confidence, the lawyer must decline the retainer.

**[4]** Generally, in disciplinary proceedings under this rule, the burden will rest upon the lawyer to show good faith, that adequate disclosure was made in the matter, that independent legal advice was received by the client, where required, and that the client's consent was obtained.

**Documenting Independent Legal Advice**

**[5]** A lawyer retained to give independent legal advice relating to a transaction should document the independent legal advice by doing the following:

(a) provide the client with a written certificate that the client has received independent legal advice;

(b) obtain the client's signature on a copy of the certificate of independent legal advice; and

(c) send the signed copy to the lawyer with whom the client proposes to transact business.

## Borrowing from Clients

**3.4-31** A lawyer must not borrow money from a client unless:

(a) the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public; or

(b) the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer:

(i) discloses to the client the nature of the conflicting interest; and

(ii) requires that the client receive independent legal advice or, where the circumstances reasonably require it, independent legal representation.

**3.4-32** Subject to Rule 3.4-31, if a corporation, syndicate or partnership in which either or both of the lawyer and the lawyer's spouse has a direct or indirect substantial interest borrows money from a client, the lawyer must:

(a) disclose to the client the nature of the conflicting interest; and

(b) require that the client obtain independent legal representation.

| Commentary |
| --- |
| **[1]** Whether a person is considered a client within Rules 3.4-32 and 3.4-33 when lending money to a lawyer on that person's own account or investing money in a security in which the lawyer has an interest is determined having regard to all circumstances. If the circumstances are such that the lender or investor might reasonably feel entitled to look to the lawyer for guidance and advice about the loan or investment, the lawyer is bound by the same fiduciary obligation that attaches to a lawyer in dealings with a client.<br><br>**[2]** Given the definition of "lawyer" applicable to these "Doing Business with a Client" rules, a lawyer's spouse or a corporation controlled by the lawyer would be prohibited from borrowing money from a lawyer's unrelated client. As such, in the transactions described in the rule, the lawyer must make disclosure and require that the unrelated client from whom the entity in which the lawyer or the lawyer's spouse has a direct or indirect substantial interest is borrowing has independent legal representation. |

### Lending to Clients

**3.4-33** A lawyer must not lend money to a client unless, before making the loan, the lawyer:

(a) discloses to the client the nature of the conflicting interest;

(b) requires that the client:

(i) receive independent legal representation; or

(ii) if the client is a related person as defined by the *Income Tax Act* (Canada), receive independent legal advice; and

(c) obtains the client's consent.

| Commentary |
| --- |
| See also Rule 3.4-32, Commentary. |

### Gifts and Testamentary Instruments

**3.4-37** A lawyer must not accept a gift that is more than nominal from a client unless the client has received independent legal advice.

**3.4-38** A lawyer must not include in a client's will a clause directing the executor to retain the lawyer's services in the administration of the client's estate.

**3.4-39** Unless the client is a family member of the lawyer, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer a gift or benefit from the client, including a testamentary gift.

| **Commentary** |
| --- |
| **[1]** A conflict of interest between lawyer and client may exist in cases where the lawyer gives property to or acquires it from the client by way of purchase, gift, testamentary disposition or otherwise. In cases of inter vivos gifts or purchases, it **may** be sufficient to ensure that the client has independent legal advice before proceeding with the transaction. However, in cases of testamentary dispositions or where there is any indication that the client is in a weakened state or is not able for any reason to understand the consequences of a purchase or gift or there is a perception of undue influence, the lawyer must not prepare the instrument in question and the client must be independently represented. Independent representation and preparation of the instrument will not be required where the gift, purchase or testamentary disposition is insubstantial or of a minor nature having regard to all of the circumstances, including the size of the testator's estate. |

## 4.1 MAKING LEGAL SERVICES AVAILABLE

### Making Legal Services Available

**4.1-1** A lawyer must make legal services available to the public efficiently and conveniently and, subject to Rule 4.1-2, may offer legal services to a prospective client by any means.

| **Commentary** |
| --- |
| **[1]** A lawyer may assist in making legal services available by participating in the Legal Aid Plan and lawyer referral services and by engaging in programs of public information, education or advice concerning legal matters.<br><br>**[2]** As a matter of access to justice, it is in keeping with the best traditions of the legal profession to provide services *pro bono* and to reduce or waive a fee when there is hardship or poverty or the client or prospective client would otherwise be deprived of adequate legal advice or representation. The Law Society encourages lawyers to provide public interest legal services and to support organizations that provide services to persons of limited means.<br><br>**[3]** A lawyer who knows or has reasonable grounds to believe that a client is entitled to Legal Aid should advise the client of the right to apply for Legal Aid, unless the circumstances indicate that the client has waived or does not need such assistance.<br><br>**Right to Decline Representation:**<br><br>**[4]** A lawyer has a general right to decline a particular representation (except when |

assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another lawyer qualified in the particular field and able to act. When a lawyer offers assistance to a client or prospective client in finding another lawyer, the assistance should be given willingly and, except where a referral fee is permitted by Rule 3.6-6, without charge.

### Restrictions

**4.1-2** In offering legal services, a lawyer must not use means that:

(a) are false or misleading;

(b) amount to coercion, duress, or harassment;

(c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered; or

(d) otherwise bring the profession or the administration of justice into disrepute.

**Commentary**

**[1]** A person who is vulnerable or who has suffered a traumatic experience and has not recovered may need the professional assistance of a lawyer, and this rule does not prevent a lawyer from offering assistance to such a person. A lawyer is permitted to provide assistance to a person if a close relative or personal friend of the person contacts the lawyer for this purpose, and to offer assistance to a person with whom the lawyer has a close family or professional relationship. The rule prohibits the lawyer from using unconscionable, exploitive or other means that bring the profession or the administration of justice into disrepute.

## 4.2 MARKETING

### Marketing of Professional Services

**4.2-1** A lawyer may market professional services, provided that the marketing is:

(a) demonstrably true, accurate and verifiable;

(b) neither misleading, confusing or deceptive, nor likely to mislead, confuse or deceive;

(c) in the best interests of the public and consistent with a high standard of professionalism.

**Commentary**

**[1]** Examples of marketing that may contravene this rule include:

(a) stating an amount of money that the lawyer has recovered for a client or referring to the lawyer's degree of success in past cases, unless such statement is accompanied by a further statement that past results are not necessarily indicative of future results and that the amount recovered and other litigation outcomes will vary according to the facts in individual cases;

(b) suggesting qualitative superiority to other lawyers;

(c) raising expectations unjustifiably;

(d) suggesting or implying the lawyer is aggressive;

(e) disparaging or demeaning other persons, groups, organizations or institutions;

(f) taking advantage of a vulnerable person or group; and

(g) using testimonials or endorsements that contain emotional appeals.

### Advertising of Fees

**4.2-2** A lawyer may advertise fees charged for their services provided that:

(a) the advertising is reasonably precise as to the services offered for each fee quoted;

(b) the advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee; and

(c) the lawyer strictly adheres to the advertised fee in every applicable case.

## 4.3 ADVERTISING NATURE OF PRACTICE

**4.3-1** A lawyer must not advertise that the lawyer is a specialist in a specified field unless the lawyer has been so certified by the Society.

**Commentary**

**[1]** Lawyers' advertisements may be designed to provide information to assist a potential client to choose a lawyer who has the appropriate skills and knowledge for the client's particular legal matter.

**[2]** A lawyer who is not a certified specialist is not permitted to use any designation from which a person might reasonably conclude that the lawyer is a certified specialist. A claim that a lawyer is a specialist or expert, or specializes in an area of law, implies that the lawyer has met some objective standard or criteria of expertise, presumably established or recognized by a Law Society. In the absence of Law Society recognition or a certification process, an assertion by a lawyer that the lawyer is a specialist or expert is misleading and improper.

**[3]** If a firm practises in more than one jurisdiction, some of which certify or recognize specialization, an advertisement by such a firm that makes reference to the status of a firm member as a specialist or expert, in media circulated concurrently in Saskatchewan and the certifying jurisdiction, does not offend this rule if the certifying authority or organization is identified.

**[4]** A lawyer may advertise areas of practice, including preferred areas of practice or a restriction to a certain area of law. An advertisement may also include a description of the lawyer's or law firm's proficiency or experience in an area of law. In all cases, the representations made must be accurate (that is, demonstrably true) and must not be misleading.

**[5]** A lawyer shall not use the title "specialist", "expert", "leader" or any similar designation suggesting a recognized special status or accreditation in an advertisement, public communication or any other contact with a prospective client, unless authorized to do so in accordance with this rule.

## 3.7 WITHDRAWAL FROM REPRESENTATION

### Withdrawal from Representation

**3.7-1** A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client.

**Commentary**

**[1]** Although the client has the right to terminate the lawyer-client relationship at will, a lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship. It is inappropriate for a lawyer to withdraw on capricious or arbitrary grounds.

**[2]** An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down as to what constitutes reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. When the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril. As a general rule, the client should be given sufficient time to retain and instruct replacement counsel. Nor should withdrawal or an intention to withdraw be permitted to waste court time or prevent other counsel from reallocating time or resources scheduled for the matter in question. See Rule 3.7-8 – Manner of Withdrawal.

**[3]** Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

**[4]** When a law firm is dissolved or a lawyer leaves a firm to practise elsewhere, it usually results in the termination of the lawyer-client relationship as between a particular client and one or more of the lawyers involved. In such cases, most clients prefer to retain the services of the lawyer whom they regarded as being in charge of their business before the change. However, the final decision rests with the client, and the lawyers who are no longer retained by that client should act in accordance with the principles set out in this rule, and, in particular, should try to minimize expense and avoid prejudice to the client. The client's interests are paramount and, accordingly, the decision whether the lawyer will continue to represent a given client must be made by the client in the absence of undue influence or harassment by either the lawyer or the firm. That may require either or both the departing lawyer and the law firm to notify clients in writing that the lawyer is leaving and advise the client of the options available: to have the departing lawyer continue to act, have the law firm continue to act, or retain a new lawyer.

### Optional Withdrawal

**3.7-2** If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

**Commentary**

**[1]** A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss

of confidence, for example, if a lawyer is deceived by his client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

### Non-payment of Fees

**3.7-3** If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw unless serious prejudice to the client would result.

**Commentary**

**[1]** When the lawyer withdraws because the client has not paid the lawyer's fee, the lawyer should ensure that there is sufficient time for the client to obtain the services of another lawyer and for that other lawyer to prepare adequately for trial.

### Withdrawal from Criminal Proceedings

**3.7-4** If a lawyer has agreed to act in a criminal case and the interval between a withdrawal and the trial of the case is sufficient to enable the client to obtain another lawyer and to allow such other lawyer adequate time for preparation, the lawyer who has agreed to act may withdraw because the client has not paid the agreed fee or for other adequate cause provided that the lawyer:

(a) notifies the client, in writing, that the lawyer is withdrawing because the fees have not been paid or for other adequate cause;

(b) accounts to the client for any monies received on account of fees and disbursements;

(c) notifies Crown counsel in writing that the lawyer is no longer acting;

(d) in a case when the lawyer's name appears on the records of the court as acting for the accused, notifies the clerk or registrar of the appropriate court in writing that the lawyer is no longer acting; and

(e) complies with the applicable rules of court.

**Commentary**

**[1]** A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client. The notice should merely state that the lawyer is no longer acting and has withdrawn.

**3.7-5** If a lawyer has agreed to act in a criminal case and the date set for trial is not such as to enable the client to obtain another lawyer or to enable another lawyer to prepare adequately for trial and an adjournment of the trial date cannot be obtained without adversely affecting the client's interests, the lawyer who agreed to act must not withdraw because of non-payment of fees.

**3.7-6** If a lawyer is justified in withdrawing from a criminal case for reasons other than non-payment of fees and there is not a sufficient interval between a notice to the client of the lawyer's intention to withdraw and the date on which the case is to be tried to enable the client to obtain another lawyer and to enable such lawyer to prepare adequately for trial, the first lawyer, unless instructed otherwise by the client, should attempt to have the trial date adjourned and may withdraw from the case only with the permission of the court before which the case is to be tried.

| **Commentary** |
| --- |
| **[1]** If circumstances arise that, in the opinion of the lawyer, require an application to the court for leave to withdraw, the lawyer should promptly inform Crown counsel and the court of the intention to apply for leave in order to avoid or minimize any inconvenience to the court and witnesses. |

### Obligatory Withdrawal

**3.7-7** A lawyer must withdraw if:

(a) discharged by a client;

(b) a client persists in instructing the lawyer to act contrary to professional ethics; or

(c) the lawyer is not competent to continue to handle a matter.

### Manner of Withdrawal

**3.7-8** When a lawyer withdraws, the lawyer must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor lawyer.

**3.7-9** On discharge or withdrawal, a lawyer must:

(a) notify the client in writing, stating:

(i) the fact that the lawyer has withdrawn;

(ii) the reasons, if any, for the withdrawal; and

(iii) in the case of litigation, that the client should expect that the hearing or trial will proceed on the date scheduled and that the client should retain new counsel promptly;

(b) subject to the lawyer's right to a lien, deliver to or to the order of the client all papers and property to which the client is entitled;

(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, including the refunding of any remuneration not earned during the representation;

(e) promptly render an account for outstanding fees and disbursements;

(f) co-operate with the successor lawyer in the transfer of the file so as to minimize expense and avoid prejudice to the client; and

(g) comply with the applicable rules of court.

**Commentary**

**[1]** If the lawyer who is discharged or withdraws is a member of a firm, the client should be notified that the lawyer and the firm are no longer acting for the client.

**[2]** If the question of a right of lien for unpaid fees and disbursements arises on the discharge or withdrawal of the lawyer, the lawyer should have due regard to the effect of its enforcement on the client's position. Generally speaking, a lawyer should not enforce a lien if to do so would prejudice materially a client's position in any uncompleted matter.

**[3]** The obligation to deliver papers and property is subject to a lawyer's right of lien. In the event of conflicting claims to such papers or property, the lawyer should make every effort to have the claimants settle the dispute.

**[4]** Co-operation with the successor lawyer will normally include providing any memoranda of fact and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client.

**[5]** A lawyer acting for several clients in a case or matter who ceases to act for one or more of them should co-operate with the successor lawyer or lawyers to the extent required by the rules and should seek to avoid any unseemly rivalry, whether real or apparent.

### Duty of Successor Lawyer

**3.7-10** Before agreeing to represent a client, a successor lawyer must be satisfied that the former lawyer has withdrawn or has been discharged by the client.

**Commentary**

**[1]** It is quite proper for the successor lawyer to urge the client to settle or take reasonable steps towards settling or securing any outstanding account of the former lawyer, especially if the

latter withdrew for good cause or was capriciously discharged. But, if a trial or hearing is in progress or imminent, or if the client would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor lawyer acting for the client.

## Making Legal Services Available

**4.1-1** A lawyer must make legal services available to the public efficiently and conveniently and, subject to Rule 4.1-2, may offer legal services to a prospective client by any means.

**Commentary**

**Right to Decline Representation:**

**[4]** A lawyer has a general right to decline a particular representation (except when assigned as counsel by a tribunal), but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. Generally, a lawyer should not exercise the right merely because a person seeking legal services or that person's cause is unpopular or notorious, or because powerful interests or allegations of misconduct or malfeasance are involved, or because of the lawyer's private opinion about the guilt of the accused. A lawyer declining representation should assist in obtaining the services of another lawyer qualified in the particular field and able to act. When a lawyer offers assistance to a client or prospective client in finding another lawyer, the assistance should be given willingly and, except where a referral fee is permitted by Rule 3.6-6, without charge.

# Appendix B: Law Society of Saskatchewan Rule References

**Cash Transactions**

909. (1) A member shall not receive or accept from a person, cash in an aggregate amount of $7,500 or more Canadian dollars in respect of any one client matter or transaction.

(4) Despite paragraph 3, paragraph 1 does not apply when the member receives cash

(a) from a financial institution or public body;

(b) from a peace officer, law enforcement agency or other agent of the Crown acting in his or her official capacity;

(c) pursuant to a court order, or to pay a fine or penalty, or

(d) in an amount of $7,500 or more for professional fees, disbursements, expenses or bail, provided that any refund of $1,000 or more out of such receipts is also made in cash. Every member who pays a cash refund pursuant to subrule 909. (4)(d) must obtain a signed acknowledgement of the payment from the person receiving the refund showing the date, amount, client reference and name of the person who received the funds.

**Criminal Activity, Duty to Withdraw at Time of Taking Information**

1028. (1) If in the course of obtaining the information and taking the steps required in Rules 1022 and 1025(1) or (3), a lawyer knows or ought to know that he or she is or would be assisting a client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

Application

(2) This section applies to all matters, including new matters for existing clients, for which a lawyer is retained after this Rule comes into force.

**Criminal Activity, Duty to Withdraw After Being Retained**

1029. (1) If while retained by a client, a lawyer knows or ought to know that he or she is or would be assisting the client in fraud or other illegal conduct, the lawyer must withdraw from representation of the client.

Application

(2) This section applies to all matters for which a lawyer was retained before this Rule comes into force and to all matters for which he or she is retained after that time.

## Part 19

## Marketing of Legal Services

### Definitions

1600. In this Part,

**"weakened state"** means a physical, emotional or mental condition which may render a prospective client unduly vulnerable to persuasion or importuning by a lawyer and shall, without limiting the generality of the foregoing, be deemed to include the state of any prospective client who is an alleged victim of physical and/or sexual abuse.

[Rule 1600 "weakened state" added June 10, 1999]

## Specific Prohibitions

1602.1(1) No member shall initiate contact with a prospective client who is in a weakened state for the purpose of soliciting the prospective client's legal work except by mail or advertisement.

(2) Any correspondence, brochure or informational package sent to or intended to be provided to prospective clients shall state in bold letters at the bottom of every page "Advertising material. This is a commercial solicitation".

(3) Any correspondence sent to a named prospective client in physical and sexual abuse cases must be marked personal and confidential and state how the member obtained the identity of the prospective client.

(4) A member may only attend a meeting held to provide information to a group of prospective clients who are in a weakened state if:

(a) the meeting is arranged by the prospective clients or other non-members who are not connected to the member; and

(b) the member has been invited by the prospective clients or non-members who are arranging the meeting.

## Notification of Proceedings

169. (1) A member, Student-at-law, applicant for admission or re-admission, or a lawyer practicing in Saskatchewan pursuant to Rules 192-204 shall immediately report to the Executive Director:

(a) particulars of charges and any disposition of the charges laid under the following:

(i) an offence under any law in force in Canada where the offence was prosecutable either as an indictable offence or as a summary conviction offence;

(ii) the *Securities Act* of any province of Canada;

(iii) an offence committed outside Canada and similar to any of the kinds of offences described in clauses (a) or (b);

(b) any suspension, investigation, supervision, undertaking, conditions or similar processes including, but not limited to, discipline, professional standards, competency, accounting, or audit proceedings, by a professional regulatory body in any jurisdiction.