

## **PRACTICE MANAGEMENT AND THE RULES OF PROFESSIONAL CONDUCT**

### **RULE 6.01 – A RE-EXAMINATION OF THE LAWYER’S RESPONSIBILITY TO THE PROFESSION AND A LOOK AHEAD TO THE MODEL RULES**

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#### **I. The Dilemma**

In your busy practice, you strive to always be aware of your legal and professional obligations, and to comply with them. However, lately, you've learned of certain troubling developments about certain friends colleagues in the legal profession and you wonder what to do. You are told that one of your friends no longer seems to be on top of things, that he has let things slide. He has missed court dates, failed to file documents on time, and failed to respond to other lawyers' enquiries. In fact, it sounds like he is not even going into the office that much, as you don't hear back from him that often when you do contact him. You are concerned that he may no longer be in control of his legal practice, though it is not clear that he has abandoned it outright. In your discussions, you have asked him how things are going, and whether all is well with him personally and professionally. Never better, you are told. Why do you ask?

You hear about another friend who seems to be “pretty casual” with respect to certain ethical and moral obligations, to the point of being cavalier. Her integrity has been questioned by some. She brags about certain legal transactions with which she has been involved, and you are concerned that her conduct may have “crossed the line” on occasions, or worse, may have even been illegal. You are quite disturbed at this, as you have known her for many years, and none of this sounds like the person you know, or knew, but it is.

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What should you do in these cases? Anything, and potentially jeopardize your friendships with these lawyers? Nothing, and hope that it all goes away? What if it gets worse? Are you partially to blame for anything that happens from that point forward if you do nothing to stop it? Should you be calling someone to discuss it? Reporting it to the Law Society?

These are troubling questions. It is true that they are just allegations at this point. After all, it's not like you've performed your own investigation. But the comments seem to stick with you and cause you concern. You don't want to ignore them, but are you obligated to take positive steps to address them with the Law Society? After all, these are your friends, and your relationships with them are important. On the other hand, there is your own professional reputation and what of those obligations to the profession? We all know that the legal profession has had its share of scandals and problem lawyers over the years, and how a few bad apples spoil it for all of us. What should we do when we see or hear about these kinds of problems? These are indeed difficult questions and bring us all up against our personal and professional obligations.

This paper will delve into the obligations that we as lawyers have to the profession. Of course, we cannot go into and address each and every type of problem, but a better understanding of the principles and the obligations that govern us as lawyers will hopefully provide us with the tools we need to make those decisions when we confront them. And hopefully, that will allow us all to sleep better at night.

## II. The Operating Framework

As we have noted, lawyers are often faced with ethical dilemmas. Some of these present themselves at a particular moment; others take time to manifest themselves and require ongoing monitoring. The problems that present themselves at a particular moment are often fairly straightforward and call for immediate, clear actions; others are of the type where the problem or the lawyer seems to have approached or even “crossed the line”, and the more difficult question arises as to what, if anything, should one do at that point.

The *Rules of Professional Conduct* (the “RPC”) of the Law Society of Upper Canada (the “Law Society”)<sup>1</sup> set out the constraints within which the province’s lawyers must operate, at least insofar as professional conduct is concerned, so that, at a minimum, the public may have confidence in the legal profession and the justice system more generally. Rule 6 references the lawyer’s “Relationship to the [Law] Society and Other Lawyers”, while rule 6.01 of the RPC sets out the lawyer’s “Responsibility to the Profession Generally”. It is this latter rule with which we will be dealing in this paper and the corresponding presentation.

However, this paper is being produced at a particular point in time. As part of its ongoing review process in which the Law Society constantly updates and modifies, as necessary, the RPC, Convocation (the Law Society’s governing body) has recently approved significant changes to the RPC. The main objective is to bring the RPC more into line with the *Model Code of Professional Conduct* (the “Model Code”)<sup>2,3</sup> a national initiative

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<sup>1</sup> The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: Law Society of Upper Canada, 2000.

<sup>2</sup> Federation of Law Societies of Canada, *Model Code of Professional Conduct*, Ottawa, 2012.

developed by the Federation of Law Societies of Canada (as the name suggests, the association of all law societies across Canada), and designed to promote national mobility and uniformity across the provinces and territories.<sup>4</sup> It is therefore appropriate that we address rule 6.01 in the context of these changes and provide some forward glances into the changes that await us all. We therefore look at the upcoming changes and provide some commentary on them.

We also look at the current trends within which these changes are taking place. New challenges have emerged in the wake of globalization, advances in communications technology and social media, and the rise of global law firms within Canada's own boundaries.<sup>5</sup> The Model Code recognizes these trends in its Preface by noting that, “[t]he practice of law continues to evolve. Advances in technology, changes in the culture of those accessing legal services and the economics associated with practicing law will continue to present challenges to lawyers.”<sup>6</sup>

It is trite to say that the world today is smaller than at any time in the past and that it is will likely continue to shrink. News is available almost instantaneously; people can now work with their colleagues and clients across the globe, almost without regard, as was the case in the old days, to time and space constraints; and many people now expect instant

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<sup>3</sup> The Law Society of Upper Canada, *New Rules of Professional Conduct*, online: The Law Society of Upper Canada <<http://www.lsuc.on.ca/new-rules/>> [Law Society, *New Rules*].

<sup>4</sup> Convocation, “Background to the Development of the FLSC Model Code of Professional Conduct”, *Convocation – Professional Regulation Committee Report*, online: The Law Society of Upper Canada <[http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2013/convoc13\\_prcmodelcodebackground\(1\).pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2013/convoc13_prcmodelcodebackground(1).pdf)> [Convocation, “Background”]. It should be noted that the RPC were used as a starting point for the development of the Model Code and many of the provisions of the Model Code mirror the RPC quite closely.

<sup>5</sup> Laurel S Terry, “Trends in Global and Canadian Lawyer Regulation” (2013) 76 Sask L Rev 145 (QL).

<sup>6</sup> Model Code, *supra*, Preface.

replies, and can be heard to voice concerns if their needs are not addressed within the expected time frame. In this context, ethical concerns present themselves as before, but the time to consider the issue, and perhaps consult others before acting, is more limited than at any time in the past.

News of unethical or unprofessional conduct can reach the public sphere within seconds, no longer needing to make its way along the proverbial grapevine. As a result, the lawyer's image, and the need to be aware of that image, is now more important than ever. By the same token, the need to be aware of one's conduct, and how it is perceived, or may be perceived, is more acute than ever before.

Yet, the legal world continues to produce scandals that challenge the public image of the lawyer and diminish the good work being performed both in and out of the courts every day. In the waning days of 2013, a missing lawyer and his firm were found in contempt of court for ignoring a court order to repay \$2.1 million of \$3.6 million held in trust for their clients, a matter that quickly found its way into the public eye.<sup>7</sup> And while it is the case that lawyers are provided with extensive training in the area of legal reasoning and substantive law throughout their legal education and in the course of the bar admission examination process, less concrete guidance is provided in the realm of ethical and professional behaviour.

The changes to the current rule 6.01 that will shortly be introduced by the Model Code represent a move in the right direction. While it remains to be seen what the Model

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<sup>7</sup> See ex Rachel Mendelson, "Secrecy in Javad Heydary case prompts concern" (4 December 2013), online: Toronto Star <[http://www.thestar.com/news/crime/2013/12/04/secrecy\\_in\\_javad\\_heydary\\_case\\_prompts\\_concern.html](http://www.thestar.com/news/crime/2013/12/04/secrecy_in_javad_heydary_case_prompts_concern.html)>; Jeff Gray, "Judge finds missing Toronto lawyer in contempt" (29 November 2013), online: The Globe and Mail <<http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/judge-finds-missing-toronto-lawyer-in-contempt/article15690829/>>; Drew Hasselback, "Missing lawyer Javad Heydary faces contempt of court motion (28 November 2013), online: Financial Post <<http://business.financialpost.com/2013/11/28/missing-lawyer-javad-heydary-faces-contempt-of-court-motion/>>.

Code's actual impact will be, it is hoped that the new focus on integrity will mark a new starting point for and inform enquiries into misconduct. As noted above, we face a new landscape, with new challenges. It is time that the profession considers more seriously what it can do to prevent rogue lawyers from doing harm to the profession and its image. Hopefully, the Model Code will provide the Law Society with tools it needs to exercise greater control and impose greater discipline on those who fail to abide by their obligations and bring the profession into disrepute.

### **III. Rule 6.01 of the Rules of Professional Conduct**

#### **A. The Nuts and Bolts of Rule 6.01**

While it is not practical to reproduce here the entire text of rule 6.01, nor all of its subrules,<sup>8</sup> it is important to show that the drafters of the RPC had in mind a very specific idea when beginning to address the overall responsibility of lawyers to the legal profession. For that reason, we now reproduce the first part of rule 6.01 and subrule 6.01(1) and its headings.

#### **RULE 6.01 RESPONSIBILITY TO THE PROFESSION GENERALLY**

##### **Integrity**

6.01 (1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.<sup>9</sup>

While rule 6.01 by its words addresses the responsibility of the individual lawyer to the profession generally, subrule 6.01(1) begins with a directive to the lawyer to act at all times with integrity.

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<sup>8</sup> We have, however, reproduced the entire text of rule 6.01 with the commentaries in "Appendix A".

<sup>9</sup> RPC, *supra*, r 6.01.

The subheading for subrule 6.01(1) is “Integrity” and the subrule requires the lawyer to act to maintain “the integrity of the profession”. In so doing, it requires lawyers to act at all times in accordance with high ethical standards; and states that, in spite of a lawyer’s particular competence, without integrity, the usefulness of a lawyer to the client and the reputation of the legal profession will be “destroyed”. The remainder of the subrules, subrules 6.01(2) to (8), provide specific directives for specific scenarios, and set out positive acts that lawyers must perform to ensure that they are in compliance with each subrule. In this way, the intent is to remove any ambiguity and to ensure that the directives are clear. However, it is subrule 6.01(1), that, in requiring lawyers to conduct themselves in a way that maintains the integrity of the profession, sets the tone for everything that follows. The commentary to the subrule notes that integrity is “the fundamental quality of any person” who seeks to practice law and that trustworthiness is “the essential element in the true lawyer-client relationship”. Those are very strong statements and strong words. No doubt is left in the mind of the reader as to the importance of integrity and trustworthiness.

The subrules that follow provide more specific guidance. Subrule 6.01(2) requires lawyers to meet financial obligations they incur on behalf of their clients, unless the lawyers make it clear that they are not personally obligated to pay them.<sup>10</sup> The commentary notes that this obligation is quite apart from any legal liability on the part of the lawyer. It encourages lawyers to clarify terms of their retainer in writing when retaining a consultant, expert, or other professional. If the lawyer is not to be responsible for payment of fees, the lawyer should assist in making satisfactory arrangements where possible.

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<sup>10</sup> *Ibid*, r 6.01(2).

Subrule 6.01(3) requires lawyers to report misappropriation or misapplication of trust monies, abandonment of practice, participation in serious criminal activity related to one's practice, serious mental instability, or any other situation where one's clients are likely to be severely prejudiced, unless doing so is itself unlawful or would breach the lawyer-client privilege.<sup>11</sup> The commentary notes that this subrule aims to prevent loss or damage to clients at an early stage and encourages lawyers to seek assistance via counseling services as early as possible, when they find themselves in problematic situations that may lead to improper conduct.

Rule 6.01 not only addresses the responsibilities of individual lawyers, it also places obligations upon lawyers to work with clients in dealing with certain types of claims those clients may have involving other lawyers, and to report conduct to the Law Society in certain cases involving particularly egregious conduct on the part of lawyers.

To this end, subrules 6.01(4) to (7) require lawyers to: encourage their clients to report any dishonest conduct on the part of another lawyer to the Law Society, and in particular, the facts of any claims against apparently dishonest lawyers before pursuing private remedies;<sup>12</sup> if the clients refuse to report any such claims, to inform clients of the policy of the Compensation Fund and obtain instructions in writing to proceed with a client's claim without notice to the Law Society if clients maintain their refusal;<sup>13</sup> to inform clients of section 141 of the *Criminal Code*<sup>14</sup> dealing with the concealment of indictable offences in

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<sup>11</sup> *Ibid*, r 6.01(3).

<sup>12</sup> *Ibid*, r 6.01 (4).

<sup>13</sup> *Ibid*, r 6.01 (5).

<sup>14</sup> *Criminal Code*, RSC 1985, c C-46.

exchange for an agreement to obtain valuable consideration;<sup>15</sup> and, if the client wishes to pursue a private agreement with an apparently dishonest lawyer, to not continue to act for the person if such an agreement would breach section 141 of the *Criminal Code*.<sup>16</sup>

Finally, subrule 6.01(8) requires lawyers to self-report to the Law Society any charges against them under By-law 8, and the eventual disposition of such charges in accordance with the By-law.<sup>17</sup>

When faced with the scenarios contemplated in subrules 6.01(2) to (8), a lawyer is more likely to identify when action is required and what it is that she is required to do. It is therefore that grey area, between the overarching requirement of integrity, and the clear-cut directives of subrules 6.01(2) to (8), with which we concern ourselves in the balance of this paper.

## **B. The Historical Background**

Codes of ethics have traditionally been promulgated to remind lawyers that their profession is more just than a business, and that they are quasi-public officials who are expected to share with judges a community-minded devotion to the law.<sup>18</sup> Rules of professional conduct for lawyers were actually only developed in the twentieth century.<sup>19</sup>

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<sup>15</sup> RPC, *supra*, r 6.01 (6).

<sup>16</sup> *Ibid*, r 6.01(7).

<sup>17</sup> *Ibid*, r 6.01(8).

<sup>18</sup> Gavin Mackenzie, “The Valentine’s Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession” (1995) 33 Alta L Rev 859; Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Harvard University Press, 1993); WW Pue, “Becoming ‘Ethical’: Lawyers’ Professional Ethics in Early Twentieth Century Canada” (1991) 20 Man LJ 227. Consider also the fact that in most Canadian courts, lawyers duties are not only to the client, but also to the court, and that lawyers are considered officers of the court and are obliged to wear black robes, as are judges, to show that lawyers have a participatory role in the justice system, and in ensuring that justice is seen to be done.

<sup>19</sup> Mackenzie, *ibid*.

The original Canons of Legal Ethics (similar to the RPC) of the Canadian Bar Association (the “CBA”) were first adopted in 1920,<sup>20</sup> and were based upon the Canons of Professional Ethics of the American Bar Association (the “ABA”), first adopted in 1908.<sup>21</sup> Both sets of canons emphasised that lawyers have a greater public responsibility than non-lawyers, and included serving the cause of justice and securing respect for and compliance with the law. Successive reviews of and changes to the Canons led to the adoption by the CBA in 1974 of its own distinct Code of Conduct (the “CBA Code”).<sup>22</sup>

In 1984, the national executive committee of the CBA appointed a committee to review and revise the 1974 CBA Code, which in turn led to the promulgation of a new CBA Code of Professional Conduct in 1987.<sup>23</sup> Both the 1974 and the 1987 CBA Codes were reviewed by the Law Society as part of its own exercise in preparing the latest version of the RPC in 2000. Since that time, the RPC have been amended on numerous occasions, and at least annually.

### **C. The Model Code and the Soon-to-Be New Rule**

As previously noted, Convocation recently approved amendments to the RPC that effectively implement the Model Code and its provisions in Ontario.<sup>24</sup> The new rules will come into effect on October 1, 2014. The other Canadian law societies across the country are also adopting the Model Code in an effort to support national mobility for lawyers and to

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<sup>20</sup> Canadian Bar Association, *Canons of Legal Ethics* (Ottawa: Canadian Bar Association, 1920).

<sup>21</sup> Mackenzie, *supra* at 6.

<sup>22</sup> Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1974).

<sup>23</sup> Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1987).

<sup>24</sup> Law Society, *New Rules*, *supra*.

promote public confidence in a self-regulated profession with a national set of common standards for professionalism and ethical behaviour. It is hoped that the Model Code will also help promote consistency throughout the profession, despite the fact that each jurisdiction has its own enabling legislation and code of conduct.

The Federation of Law Societies prepared the Model Code of Professional Conduct Committee (“the Model Code Committee”) back in November 2004.<sup>25</sup> The Model Code Committee was tasked with drafting a Model Code containing, as much as possible, uniform ethical and professional conduct standards for the legal profession in Canada.<sup>26</sup> As noted above, the Law Society's RPC were used as the starting point and the basis for the Model Code.

The reasons provided for this project were as follows: the increased mobility of lawyers between jurisdictions within Canada and an expectation that, with the advent of the Federation’s National Mobility Agreement, that trend would continue; a belief that there are already existing national, and international, ethical standards for the practice of law, which should be reflected in consistent conduct rules across this country; and, the presence of a number of external factors, such as anti-money laundering legislation, that brought the core values of the profession under scrutiny.<sup>27</sup>

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<sup>25</sup> Convocation, “Background”, *supra* at 1.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

#### **D. The U.S. Experience**

The initiative to move to a model code or model rules of conduct mirrors, in part, what happened in the United States. In 1969, the ABA Canons (first established in 1908) referred to above were replaced by the ABA Model Code of Professional Responsibility (“ABA Model Code”), which, like the CBA Codes and the Law Society’s RPC, has since been revised several times. The ABA Model Code was then adopted, in some form, by most of the state bar associations. In 1983, the ABA then developed its own Model Rules of Professional Conduct (“ABA Model Rules”). A majority of the state bar associations then went on to adopt a version of the ABA Model Rules, though several are still governed by a version of the prior ABA Model Code.

One important difference between the ABA Model Code and the ABA Model Rules is that the Model Code consists of brief general statements of duties, which are identified as “canons” and are comprised of lengthy, explanatory “aspirational ethical considerations”; along with several black letter, mandatory “disciplinary rules”.<sup>28</sup> These rules represent minimally accepted standards of conduct, while ethical considerations point to morally praiseworthy conduct.

The newer ABA Model Rules eliminated this duality. The ABA Model Rules consist of rules with commentaries that are intended to aid interpretation. However, the ABA Model Rules are mostly confined to injunctions (mandatory and prohibitive) that aid the regulation of the profession to protect clients and third parties. They do not generally define or explore the ethical and ideological dimensions of practising law. They also do not elaborate on the ethical or aspirational aspects of legal practice. Indeed, one could argue that, in the ABA

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<sup>28</sup> Mackenzie, *supra* at 7.

Model Rules, as the name suggests, they have moved beyond the aspirational aspects of the governance of lawyer conduct and imposed strict rules mandating what lawyers can and cannot do, all as part of a greater move toward protecting clients and third parties.

### **E. The Canadian Model Code v. the U.S. Experience**

The Ontario RPC have tended to reflect both purposes. Some rules prohibit certain conduct, while others encourage conduct as a way of striving toward ethical standards of practice. The (Canadian) Model Code explicitly acknowledges in its Preface that it sets out statements of principle, followed by exemplary rules and commentaries, which are intended to provide context to those principles.<sup>29</sup> The principles define the expected standard of ethical conduct and inform the more specific guidance in the rules and commentaries. Some sections apply generally and some sections, in addition to providing ethical guidance, may be read as aspirational. For Ontario, this is consistent with the current RPC, which, again, were used as a starting point for the (Canadian) Model Code.

The decision to address a lawyer's conduct through disciplinary action based on a breach of the Model Code is to be made on a case-by-case basis, following an assessment of the situation. A failure to meet the ethical standards embodied in the Model Code may result in a finding that a lawyer has engaged in "conduct unbecoming" or "professional misconduct", though neither term is specifically defined.

While it is the case that the RPC and the Model Code follow an evolution, from simple statements of ideals to which members of the profession aspire, to mandatory rules designed to be enforced in disciplinary proceedings, one might argue that this evolutionary process progressed in the United States, with the ABA Model Rules following the ABA

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<sup>29</sup> Model Code, *supra*, Preface.

Model Code. However, it may simply be that events in the United States have been such that there was a greater need in that country for a rules based code of conduct than has been the case to date in this country.

It should also be noted that the ABA Model Rules make it clear that they do not provide exhaustive moral and ethical considerations, as no worthwhile human activity can be completely defined by legal rules. They also state they merely provide a framework for the ethical practice of law. However, it remains to be seen how many more specific rules can be implemented, while still maintaining that the practice of law is a “worthwhile human activity”.

#### **F. The Model Code – A Separate Rule for Integrity**

As noted above, rule 6.01 (really subrule 6.01(1)) of the RPC begins with a statement of ideals – that lawyers will conduct themselves with integrity, and then follows that up with more specific guidance in the subrules that follow respecting meeting financial obligations, reporting misconduct, encouraging clients to report dishonest conduct, and self-reporting of offences. The most significant change introduced by the Model Code as regards the lawyer and the profession is the separation of subrule 6.01(1) from the remainder of the rule.

In the new rules, integrity is the subject of a new rule (actually Chapter 2) and the lawyer’s obligation to act with integrity is incorporated into rule 2.1 with commentaries that follow in respect of two subrules.<sup>30</sup> The change places integrity, both physically and metaphorically, at the forefront of the aspirational aspects of legal practice. In the revised, new RPC, integrity will be the first things lawyers read, following the definitions section.

Again, we reproduce here the text of the new rules, without the commentaries:

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<sup>30</sup> The entire text of rule 2.1 with commentaries may be found in “Appendix B”.

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.

2.1-2 A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

Not only is the lawyer now required to act “honourably and with integrity”, but he or she also now has a “duty to uphold the standards and reputation of the legal profession” as well. The commentaries flesh out the requirements set out in the sections, and go so far as to encourage lawyers to even become involved in their communities and other activities to enhance the reputation of the legal profession.

The remainder of what is rule 6.01 of the current RPC is also incorporated with minor amendments into rule 7.1 of the Model Code, though one notable exclusion is the requirement that the lawyer report certain offences with which they themselves are charged by the Law Society.<sup>31</sup>

### **G. Integrity – Is this Something New?**

So, with the new separate focus on integrity, and its conspicuous placement at the beginning of the new RPC, the question to be answered is this: how prominent will the notion of integrity be when dealing with individual lawyer conduct? Is it something that ought to be considered in every case?

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<sup>31</sup> We have reproduced the entire text of rule 2.1 with commentaries in “Appendix C”.

The notion of integrity in one's dealings, including in the legal profession, is hardly novel.<sup>32</sup> Michael Birks, when writing of solicitors and attorneys back in 1700s England, stated as follows:

With their fortunes hitched to the wheels of the Industrial Revolution, which produced a new spate of clients, the behaviour of solicitors and attorneys had to match the principles of the rising class of manufacturers and traders. Success...could not be achieved by the tricks and niceties of special pleading which hitherto had marked the successful lawyer. To be successful he now had to acquire a reputation for integrity and straight dealing.<sup>33</sup>

FAR Bennion in his treatise on professions and ethics wrote that:

Integrity, probity or uprightness is a prized quality in almost every sphere of life, and nowhere more so than in the professions...The Professions exact a higher standard of integrity than is found in many other walks of life.<sup>34</sup>

Bennion then itemized some characteristics he considered to evidence a professional's integrity: the preservation of confidentiality, the display of impartiality, the taking of full responsibility, the exhibition of competence, fairness and fearlessness.<sup>35</sup>

More recently, legal historian Daniel Duman wrote that:

...[B]y the middle of the 19th century, if not earlier, the members of the professions had begun to distinguish themselves from both the business and the landed classes. They had established the ideal of service as a central art of their occupational creed.<sup>36</sup>

Further, on October 27, 1994, Convocation emphasized the importance of the notion of integrity when it adopted its Role Statement, that maintains that the Law Society exists to govern the legal profession in the public interest by ensuring that the people of Ontario are

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<sup>32</sup> Beverley G Smith, *Professional Conduct for Lawyers and Judges*, 4th ed (Fredericton: Maritime Law Book Ltd, 2011) at 11-12.

<sup>33</sup> Michael Birks, *Gentlemen of the Law* (London: Stevens & Sons Limited, 1960) at 145, cited in Smith, *ibid* at 11-12.

<sup>34</sup> FAR Bennion, *Professional Ethics* (London: Charles Knight & Co Ltd, 1969) at 108, cited in Smith, *supra* note 10 at 11.

<sup>35</sup> *Ibid* at 12.

<sup>36</sup> Daniel Duman, *The Judicial Bench in England 1727-1875* (London: Royal Historical Society, 1982) at 5, cited in Smith, *supra* note 10 at 14.

served by lawyers who meet high standards of learning, competence and professional conduct; and upholding the independence, integrity and honour of the legal profession; for the purpose of advancing the cause of justice and the rule of law.<sup>37</sup> This Role Statement was met with some resistance due to its focus on protecting the public interest, as opposed to the interest of lawyers.<sup>38</sup>

## **H. The Significance of the Changes**

The changes represented by the addition of a separate rule with respect to integrity are significant, if only because they clarify and explicitly recognize the central role that integrity plays in the role of a lawyer and the governance of lawyer conduct. While there was a recognition of this in subrule 6.01(1), one could argue that the new placement of the aspirational provision at the forefront of the changes of the new RPC enhances its role, and not merely its position.

It remains to be seen if those tasked with the enforcement of the Model Code (once it is incorporated into the Law Society's new rules of professional conduct) in this province will take a different approach under the new model rule when they are faced with their first actual case of disciplinary action, than that taken under the current version of the RPC.

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<sup>37</sup> See Law Society of Upper Canada, *The Law Society of Upper Canada Strategic Plan 2000 – 2003*, online: Law Society of Upper Canada <<http://www.lsuc.on.ca/media/StrategicPlan.PDF>>.

<sup>38</sup> David M Tanovich, "Law's Ambition and the Reconstruction of Role Morality in Canada" (Fall, 2005) 28 Dalhousie LJ 267 at note 73. Note that the primary role of the Law Society is not to promote the interest of lawyers or the legal profession, as some mistakenly believe; rather, it is to protect the interest of the public. Promotion of the interest of lawyers and the legal profession is part of the mandate of other organizations, including the Canadian Bar Association, but not the Law Society. The distinction is important, as the right of the legal profession to self-government requires that the Law Society act in the interest of, and protect, the public. Other organizations do not have that requirement as part of their mandate.

## IV. The Crossroads

### A. Lawyers in the Public Eye

As noted above, the world has changed and with it the image of lawyers. It can be fairly said that with the advent of faster and more widespread communications, what might have previously been a little known event can now be seen and heard around the world in very short order. The public image of lawyers, let us admit, never one that has been tremendously positive, has suffered recently.<sup>39</sup> The last few years have seen numerous ethical issues raised in the lawyering context that question the role and effectiveness of the RPC, or at least their enforcement.<sup>40</sup>

The beginning of the twenty-first century saw the trial and acquittal of lawyer Ken Murray on a criminal charge of obstruction of justice in connection with certain videotapes involved in the Bernardo/Homolka trial.<sup>41</sup> In response, the Law Society began an investigation into Murray's conduct, but eventually abandoned it in favour of enacting an additional rule of professional conduct to address the issue of a lawyer's duties when dealing with physical evidence of a crime. However, after preparing a draft rule, the Law Society failed to move to have it incorporated it into the RPC and left the matter after that.

Other scandals involved law students – those very persons who were seeking admission to the legal profession, and who were supposed to be at the forefront of learning,

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<sup>39</sup> Adam M Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 45 Osgoode Hall LJ 1.

<sup>40</sup> *Ibid.*

<sup>41</sup> *R v Murray* (2000), 144 CCC (3d) 289 (Ont Sup Ct J) (acquitting Murray of charges of attempting to obstruct evidence by retaining physical evidence of a crime for seventeen months after his client Paul Bernardo had instructed him on how to locate videotapes which showed Bernardo committing crimes; Murray was acquitted on grounds that he lacked the *mens rea* to commit the crime).

including learning about ethical issues and ethical conduct. In 2001, thirty students at the University of Toronto, Faculty of Law were caught up in allegations of misrepresenting their grades to prospective summer employers; twenty-four received sanctions ranging from reprimands to one-year suspensions from the study of law.<sup>42</sup> Three years later, another cheating scandal was revealed at the Law Society's own Bar Admission Course, once again raising questions as to how it could be that such conduct could occur among certain young people who were on the verge of becoming licenced legal practitioners.

Some of the recent scandals involved money. In British Columbia, solicitor Martin Wirick perpetrated the largest legal fraud in Canadian history for an estimated \$40 million, that triggered the largest audit and investigation undertaken by the Law Society of British Columbia.<sup>43</sup> And with the rise of class action lawsuits came cases that questioned whether certain lawyers had placed their own economic interests ahead of the legal interests of their clients, be it in the form of \$56 million in fees for the settlement of the tainted blood scandal before a single victim was paid,<sup>44</sup> or the \$100 million that Regina's Tony Merchant hoped to obtain as part of the record estimated \$1.9 billion settlement of residential schools abuse claims.<sup>45</sup>

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<sup>42</sup> Dodek, *supra* at 10; CBC News, "U of T Suspends Students in Marks Scandal" (2 May 2001), online: CBC News <<http://www.cbc.ca/news/canada/u-of-t-suspends-students-in-marks-scandal-1.281107>>.

<sup>43</sup> CBC News, "Disbarred Vancouver Lawyer Gets 7-Year Jail Sentence for Fraud" (9 June 2009) online: CBC News <<http://www.cbc.ca/news/canada/british-columbia/disbarred-vancouver-lawyer-gets-7-year-jailsentence-f-or-fraud-1.835474>>; David Baines, National Post (9 July 2009), online: National Post <<http://www.nationalpost.com/story.html?id=1681475>>.

<sup>44</sup> Dodek, *supra* at 13.

<sup>45</sup> CBC News, "Court Mulls Legal Fees on Residential School Settlement" (23 March 2007), online: CBC News <<http://www.cbc.ca/news/canada/saskatchewan/court-mulls-legal-fees-on-residential-school-settlement-1.687801>>.

Further, the problems were not only restricted to practising lawyers. The Supreme Court of Canada decided two cases regarding questionable judicial conduct, one involving statements made by a judge in court,<sup>46</sup> and the other concerning attempts to remove a judge because of a later-discovered criminal conviction.<sup>47</sup> The Supreme Court also dealt with two judicial disqualification cases, each of which arose in unique circumstances and involved allegations of bias against members of the Supreme Court.<sup>48</sup>

In 2006, a former Law Society treasurer resigned and was ultimately disciplined and suspended for two months in connection with a sexual relationship with a client.<sup>49</sup> Lawyer Peter Shoniker pleaded guilty to money laundering and was sentenced to fifteen months in prison.<sup>50</sup> In the following years, lawyers from Torys LLP frequently made headlines in relation to advice they gave Conrad Black and other members of Hollinger Inc. regarding non-compete agreements at the center of the Black trial in Chicago.<sup>51</sup> Two of the defendants in the Black trial were lawyers and Black himself is a law graduate of the Laval University, Faculty of Law.<sup>52</sup> More recently, missing lawyer Javad Heydary and his firm were found in

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<sup>46</sup> *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 SCR 249.

<sup>47</sup> *Re Therrien*, 2001 SCC 35, [2001] 2 SCR 3.

<sup>48</sup> *Wewaykum Indian Band v Canada*, 2003 SCC 45, [2003] 2 SCR 259; *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39, [2005] 2 SCR 91.

<sup>49</sup> Cristin Schmitz, “Ex-Law Society Treasurer gets Two-Month Suspension after Affair with Family Law Client” (16 February 2007) online, The Lawyers Weekly <<http://www.lawyersweekly.ca/index.php?section=article&articleid=424>>.

<sup>50</sup> CityNews, “Prominent Toronto Lawyer Pleads Guilty to Money Laundering” (19 August 2006), online: CityNews.ca <<http://www.citynews.ca/2006/08/19/prominent-toronto-lawyer-pleads-guilty-to-money-laundering/>>; *R v Shoniker*, [2006] OJ No 5368 (QL) (Ont Sup Ct).

<sup>51</sup> See eg Jeff Gray, “The Snail’s Pace of Legal Discipline” (7 August 2012), online: The Globe and Mail <<http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/the-snails-pace-of-legal-discipline/article4468579/>>.

<sup>52</sup> Dodek, *supra* at 13.

contempt for “deliberately or recklessly” ignoring a court order to repay \$2.1 million of \$3.6 million held in trust for their clients.<sup>53</sup>

The range of conduct for which disciplinary sanctions were meted out under rule 6.01 has also seen many lower profile cases, including lawyers who failed to co-operate with the Law Society, and caused problems for their clients;<sup>54</sup> lawyers who misapplied trust funds and misappropriated funds;<sup>55</sup> those who failed to properly serve clients and who had misled clients;<sup>56</sup> overbilled the Ontario Legal Aid Plan, on multiple occasions;<sup>57</sup> misappropriated significant amounts of trust funds;<sup>58</sup> betrayed the public trust, engaging in conduct which went to the core of public trust and integrity;<sup>59</sup> those who failed to serve several clients properly and failed to act so as to maintain the integrity of the profession;<sup>60</sup> and those who had fraudulently conveyed property to themselves.<sup>61</sup> While these cases may have received less media attention than some of those cited earlier, they are no less of a concern when considering the integrity of those persons who dedicate themselves to helping others pursue their legal remedies and rights.

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<sup>53</sup> See note 6.

<sup>54</sup> *Law Society of Upper Canada v Robson*, [2012] LSDD No 52, 2012 ONLSHP 50 (LSUC).

<sup>55</sup> *Law Society of Upper Canada v Vandor*, [2012] LSDD No 172, 2012 ONSLHP 152 (LSUC).

<sup>56</sup> *Law Society of Upper Canada v Lapointe*, [2011] LSDD No 229, 2011 ONLSHP 208 (LSUC).

<sup>57</sup> *Law Society of Upper Canada v Pecoraro*, [2011] LSDD No 19, 2011 ONLSHP 11 (LSUC).

<sup>58</sup> *Law Society of Upper Canada v Sullivan*, [2011] LSDD No 53, 2011 ONLSHP 40 (LSUC).

<sup>59</sup> *Law Society of Upper Canada v Chojnacki*, [2011] LSDD No 226, 2011 ONLSHP 170 (LSUC).

<sup>60</sup> *Law Society of Upper Canada v Brousalis*, [2009] LSDD No 176, 2009 ONLSHP 106 (LSUC).

<sup>61</sup> *Law Society of Upper Canada v Marler*, [2009] LSDD No 143, 2009 ONLSHP 110 (LSUC).

## **B. Food for Thought**

Will the new RPC, based on the Model Code, change any of this? Or better still, would any of the individuals have acted differently if the Model Code or the new integrity rule had been in place? Would any of the cases or matters referred to above have turned out differently, if the new integrity rule had been in place? The sad reality is, probably not. Aspirational statements are all well and good, but without a proper, vital enforcement system backing them up, rules or codes of conduct are simply not enough to deter unethical conduct, be it in the legal system or anywhere else. This is hardly revelatory.

If the concept of integrity is to have any real meaning, those who sit in judgment of the conduct of others must do more to stress the importance of ethical conduct. They must squarely address the need for more ethical behaviour in their decisions and more importantly, impose greater penalties, where appropriate, to ensure that there is greater awareness of the consequences of the failure to act in an appropriate, ethical manner. The old adage of how actions speak louder than words is just as apt in these types of situations and unethical conduct still needs to be deterred, perhaps more so now than before.

Due consideration should also be given to the role that lawyers play in society and the negative impact that such unethical conduct has and will continue to have on the entire legal profession and its place in that society. Members of the Law Society must know that there will be serious consequences from any failure to act ethically, and that there is a strong likelihood that their livelihood, and in particular, their ability to practise law, will be seriously impacted. Otherwise, we will be left with a “paper” or “toothless” tiger. And all of the new statements, rules and codes will have been for naught. If it is important to place the rule regarding integrity at the forefront of the RPC, it is important that that rule in particular

be enforced. Integrity and ethical conduct must be front and centre in practice as well as in print. Justice, and the legal profession that serves that ideal, requires nothing less.

## **V. Back to the beginning**

Rule 6.01 provides you with answers to your questions about your lawyer friend identified at the outset. If you have a concern that this lawyer may no longer be serving his clients and that those clients may be severely prejudiced by the lawyer's lack of action, you are required to report that to the Law Society. If it turns out that he has actually abandoned his legal practice, you must report that too to the Law Society. You may also wish to have regard to the commentary that encourages lawyers to seek assistance as early as possible with respect to "problematic situations", and suggest that your friend seek counseling to avoid any further problems.

As for your concerns about your other friend and her unethical and potentially illegal conduct, the rules are less clear. While her integrity has been questioned, it is not clear that you have an obligation to report what you heard or even what you know to the Law Society, though you are certainly at liberty to do so, if you deem it appropriate.

The Model Code will bring about some significant changes to the RPC. Whether they will be sufficient to bring about a change in the conduct of the Law Society's members as a whole, such that there will be a greater willingness on the part of lawyers to act with greater integrity, to act responsibly, and to act with the interest of the legal profession in mind, remains to be seen. Anything that can be done to bring about such change, however, will be welcome.

## Appendix A – Rule 6.01 of the RPC

### Rule 6 Relationship to the Society and Other Lawyers

#### 6.01 RESPONSIBILITY TO THE PROFESSION GENERALLY

##### Integrity

6.01 (1) A lawyer shall conduct himself or herself in such a way as to maintain the integrity of the profession.

##### Commentary

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

Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect credit on the legal profession, inspire the confidence, respect and trust of clients and the community, and avoid even the appearance of impropriety.

*[Amended – June 2007]*

##### Meeting Financial Obligations

(2) A lawyer shall promptly meet financial obligations incurred in the course of practice on behalf of clients unless, before incurring such an obligation, the lawyer clearly indicates in writing to the person to whom it is to be owed that it is not to be a personal obligation.

*[Amended - January 2009]*

##### Commentary

In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed, or undertaken on behalf of clients unless, the lawyer clearly indicates otherwise in advance.

*[Amended - January 2009]*

When a lawyer retains a consultant, expert, or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to

be provided, and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so.

If there is a change of lawyer, the lawyer who originally retained a consultant, expert, or other professional should advise him or her about the change and provide the name, address, telephone number, fax number, and e-mail address of the new lawyer.

### **Duty to Report Misconduct**

(3) A lawyer shall report to the Society, unless to do so would be unlawful or would involve a breach of solicitor-client privilege,

- (a) the misappropriation or misapplication of trust monies,
- (b) the abandonment of a law or legal services practice,
- (c) participation in serious criminal activity related to a licensee's practice,
- (d) the mental instability of a licensee of such a serious nature that the licensee's clients are likely to be severely prejudiced, and
- (e) any other situation where a licensee's clients are likely to be severely prejudiced.

*[Amended – June 2007]*

### **Commentary**

Unless a licensee who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules or the rules governing paralegals. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

Nothing in this paragraph is meant to interfere with the traditional solicitor-client relationship. In all cases the report must be made *bona fide* without malice or ulterior motive.

*[Amended – June 2007]*

Often, instances of improper conduct arise from emotional, mental, or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports Homewood Human Solutions (HHS),

and similar support services that are committed to the provision of confidential counselling for licensees. Therefore, lawyers acting in the capacity of peer counsellors for HHS, the Ontario Lawyers' Assistance Program (OLAP) or corporations providing similar support services will not be called by the Society or by any investigation committee to testify at any conduct, capacity, or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

[Amended – January 2013]

### **Encouraging Client to Report Dishonest Conduct**

(4) A lawyer shall attempt to persuade a client who has a claim against an apparently dishonest licensee to report the facts to the Society before pursuing private remedies.

(5) If the client refuses to report his or her claim against an apparently dishonest licensee to the Society, the lawyer shall inform the client of the policy of the Compensation Fund and shall obtain instructions in writing to proceed with the client's claim without notice to the Society.

(6) A lawyer shall inform a client of the provision of the *Criminal Code of Canada* dealing with the concealment of an indictable offence in return for an agreement to obtain valuable consideration (section 141).

(7) If the client wishes to pursue a private agreement with the apparently dishonest lawyer, the lawyer shall not continue to act if the agreement constitutes a breach of section 141 of the *Criminal Code of Canada*.

[Amended – June 2007]

### **Duty to Report Certain Offences**

(8) If a lawyer is charged with an offence described in By-law 8 of the Society, he or she shall inform the Society of the charge and of its disposition in accordance with the By-law.

[Amended – June 2007]

## Commentary

By-law 8 relates to the reporting of serious criminal charges under the Criminal Code and charges under other Acts that bring into question the honesty of a lawyer or that relate to a lawyer's practice of law. Such a charge may be a red flag that clients may need protection. The Society must be in a position to determine what, if any, action is required by it if a lawyer is charged with an offence described in By-law 8 and what, if any, action is required if the lawyer is found guilty.

*[Amended - June 2007]*

## Appendix B – Rule 2.1 of the Model Code

### CHAPTER 2 – STANDARDS OF THE LEGAL PROFESSION

#### 2.1 INTEGRITY

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

##### Commentary

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

[2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.

[3] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client's trust in the lawyer, the Society may be justified in taking disciplinary action.

[4] Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer's professional integrity.

2.1-2 A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.

## Commentary

[1] Collectively, lawyers are encouraged to enhance the profession through activities such as:

(a) sharing knowledge and experience with colleagues and students informally in day- to-day practice as well as through contribution to professional journals and publications, support of law school projects and participation in panel discussions, legal education seminars, bar admission courses and university lectures;

(b) participating in legal aid and community legal services programs or providing legal services on a pro bono basis;

(c) filling elected and volunteer positions with the Society;

(d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and

(e) acting as directors, officers and members of non-profit or charitable organizations.

## Appendix C – Rule 7.1 of the Model Code

### CHAPTER 7 – RELATIONSHIP TO THE SOCIETY AND OTHER LAWYERS

#### 7.1 RESPONSIBILITY TO THE SOCIETY AND THE PROFESSION GENERALLY

##### Communications from the Society

7.1-1 A lawyer must reply promptly and completely to any communication from the Society.

##### Meeting Financial Obligations

7.1-2 A lawyer must promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy, when called upon to do so.

##### Commentary

[1] In order to maintain the honour of the Bar, lawyers have a professional duty (quite apart from any legal liability) to meet financial obligations incurred, assumed or undertaken on behalf of clients, unless, before incurring such an obligation, the lawyer clearly indicates in writing that the obligation is not to be a personal one.

[2] When a lawyer retains a consultant, expert or other professional, the lawyer should clarify the terms of the retainer in writing, including specifying the fees, the nature of the services to be provided and the person responsible for payment. If the lawyer is not responsible for the payment of the fees, the lawyer should help in making satisfactory arrangements for payment if it is reasonably possible to do so.

[3] If there is a change of lawyer, the lawyer who originally retained a consultant, expert or other professional should advise him or her about the change and provide the name, address, telephone number, fax number and email address of the new lawyer.

##### Duty to Report Misconduct

7.1-3 Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

- (a) the misappropriation or misapplication of trust monies;

- (b) the abandonment of a law practice;
- (c) participation in criminal activity related to a lawyer's practice;
- (d) the mental instability of a lawyer of such a nature that the lawyer's clients are likely to be materially prejudiced;
- (e) conduct that raises a substantial question as to another lawyer's honesty, trustworthiness, or competency as a lawyer; and
- (f) any other situation in which a lawyer's clients are likely to be materially prejudiced.

#### Commentary

[1] Unless a lawyer who departs from proper professional conduct is checked at an early stage, loss or damage to clients or others may ensue. Evidence of minor breaches may, on investigation, disclose a more serious situation or may indicate the commencement of a course of conduct that may lead to serious breaches in the future. It is, therefore, proper (unless it is privileged or otherwise unlawful) for a lawyer to report to the Society any instance involving a breach of these rules. If a lawyer is in any doubt whether a report should be made, the lawyer should consider seeking the advice of the Society directly or indirectly (e.g., through another lawyer).

[2] Nothing in this paragraph is meant to interfere with the lawyer-client relationship. In all cases, the report must be made without malice or ulterior motive.

[3] Often, instances of improper conduct arise from emotional, mental or family disturbances or substance abuse. Lawyers who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports professional support groups in their commitment to the provision of confidential counselling. Therefore, lawyers acting in the capacity of counsellors for professional support groups will not be called by the Society or by any investigation committee to testify at any conduct, capacity or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or in criminal activity related to the lawyer's practice. The Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.

#### **Encouraging Client to Report Dishonest Conduct**

7.1-4 A lawyer must encourage a client who has a claim or complaint against an apparently dishonest lawyer to report the facts to the Society as soon as reasonably practicable.