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Chapter 5 Relationship to The Administration of Justice

SECTION 5.1 THE LAWYER AS ADVOCATE

Advocacy

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

Commentary

[1] **Role in Adversarial Proceedings** - In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

[2] This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.

[3] The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case.

[4] In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client to take into account the best interests of the child, if this can be done without prejudicing the legitimate interests of the client.

[5] A lawyer should refrain from expressing the lawyer's personal opinions on the merits of a client's case to a court or tribunal.

[6] When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the tribunal is not misled.

[7] The lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent.

[8] In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

[9] **Duty as Defence Counsel** - When defending an accused person, a lawyer's duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and

notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.

[10] Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

[Amended - October 2014]

5.1-2 When acting as an advocate, a lawyer shall not

- (a) abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party,
- (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable,

(c) appear before a judicial officer when the lawyer, the lawyer's associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence, or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice,

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate,

(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime, or illegal conduct,

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute or like authority,

(g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal,

(h) make suggestions to a witness recklessly or knowing them to be false;

(i) deliberately refrain from informing the tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by an opponent,

(j) improperly dissuade a witness from giving evidence or advise a witness to be absent,

(k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another,

(l) knowingly misrepresent the client's position in the litigation or the issues to

be determined in the litigation;

(m) needlessly abuse, hector, or harass a witness,

(n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge,

(o) needlessly inconvenience a witness; or

(p) appear before a court or tribunal while under the influence of alcohol or a drug.

[Amended - October 2014]

Commentary

[1] In civil proceedings, a lawyer has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a lawyer representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the court, should immediately reveal the existence and particulars of the agreement to the court and to all parties to the proceedings.

[2] A lawyer representing an accused or potential accused may communicate with a complainant or potential complainant, for example, to obtain factual information, to arrange for restitution or an apology from the accused, or to defend or settle any civil claims between the accused and the complainant. However, where the complainant or potential complaint is vulnerable, the lawyer must take care not to take unfair or improper advantage of the circumstances. Where the complainant or potential complainant is unrepresented, the lawyer should be governed by the rules about unrepresented persons and make it clear that the lawyer is acting exclusively in

the interests of the accused or potential accused. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.

[3] It is an abuse of the court's process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to secure a civil advantage for the client. See also rules 3.2-5 and 3.2-5.1 and accompanying commentary.

[4] When examining a witness, a lawyer may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition.

[Amended - October 2014]

Incriminating Physical Evidence

5.1-2A A lawyer shall 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

[1] In this rule, "physical evidence" does not depend upon admissibility before a tribunal or upon the existence of criminal charges. It includes documents, electronic information, objects or substances relevant to a crime, criminal investigation or a criminal prosecution. It does not include documents or communications that are solicitor-client privileged or that the lawyer reasonably believes are otherwise available to the authorities.

[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 in fact 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 existence. Possession of illegal things could constitute an offense. A lawyer in possession of incriminating physical evidence should carefully consider his or her options, which may include consulting with a senior legal practitioner. These options include, as soon as reasonably possible:

- (a) considering whether to retain independent legal counsel to provide advice about the lawyer's obligations. If retained, the lawyer and independent legal counsel should consider
 - (i) whether independent legal counsel should be informed of the identity of the client and instructed not to disclose the identity of the instructing lawyer to law enforcement authorities or to the prosecution, and
 - (ii) whether independent legal counsel, should, either directly or anonymously, taking into account the procedures appropriate in the circumstances

(I) disclose or deliver the evidence to law enforcement authorities or the prosecution, or

(II) both disclose and deliver the evidence to law enforcement authorities and to the prosecution;

(b) delivering the evidence to law enforcement authorities or to the prosecution, either directly or anonymously, taking into account the procedures appropriate in the circumstances;

(c) 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

(d) 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 to the prosecution, the lawyer has a duty to protect client confidentiality, including the client's identity, and to preserve solicitor-client privilege.

[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. The lawyer's advice to a client that the client has the right to refuse to divulge the location of physical evidence does not constitute hindering an investigation. 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.

[Amended - June 2017]

[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 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.

[New - February 2016]

Duty as Prosecutor

5.1-3 When acting as a prosecutor, a lawyer shall act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

Commentary

[1] When engaged as a prosecutor, the lawyer's prime duty is not to seek to convict but to see that justice is done through a fair trial on the merits. The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted

practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.

Discovery Obligations

5.1-3.1 Where the rules of a tribunal require the parties to produce documents or attend on examinations for discovery, a lawyer, when acting as an advocate

(a) shall explain to their client

(i) the necessity of making full disclosure of all documents relating to any matter in issue, and

(ii) the duty to answer to the best of their knowledge, information, and belief, any proper question relating to any issue in the action or made discoverable by the rules of court or the rules of the tribunal;

(b) shall assist the client in fulfilling their obligations to make full disclosure; and

(c) shall not make frivolous requests for the production of documents or make frivolous demands for information at the examination for discovery.

Disclosure of Error or Omission

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

Commentary

Courtesy

5.1-5 A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings.

[Amended - October 2014]

Commentary

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

[Amended - October 2014]

Undertakings

5.1-6 A lawyer must strictly and scrupulously fulfill any undertakings given by him or her and honour any trust conditions accepted in the course of litigation.

[Amended - June 2009]

Commentary

[0.1] Unless clearly qualified, the lawyer's undertaking is a personal promise and responsibility.

[1] A lawyer should also be guided by the provisions of rule 7.2-11 (Undertakings and Trust Conditions).

Agreement on Guilty Plea

5.1-7 Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

5.1-8 A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,

(a) the lawyer advises the client about the prospects for an acquittal or finding of guilt;

(b) the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

(c) the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and

(d) the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

[Amended - October 2014]

Commentary

[1] The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

SECTION 5.2 THE LAWYER AS WITNESS

Submission of Evidence

5.2-1 A lawyer who appears as advocate shall not testify or submit their own

affidavit evidence before the tribunal unless

(a) permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal, or

(b) the matter is purely formal or uncontroverted.

[Amended - October 2014]

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 to receive special treatment because of professional status.

Appeals

5.2-2 A lawyer who is a witness in proceedings shall not appear as advocate in any appeal from the decision in those proceedings unless the matter about which he or she testified is purely formal or uncontroverted.

[Amended - October 2014]

SECTION 5.3 INTERVIEWING WITNESSES

Interviewing Witnesses

5.3-1 Subject to the rules on communication with a represented party set out in rules 7.2-4 to 7.2-8.2, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer shall disclose the lawyer's interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

[Amended - November 2007]

SECTION 5.4 COMMUNICATION WITH WITNESSES GIVING EVIDENCE

Communication with Witnesses Giving Evidence

5.4-1 [FLSC - not in use]

5.4-2 Subject to the direction of the tribunal, the lawyer shall observe the following rules respecting communication with witnesses giving evidence:

(a) during examination-in-chief, the examining lawyer may discuss with the witness any matter that has not been covered in the examination up to that point;

(a.1) during examination-in-chief by another legal practitioner of a witness who is unsympathetic to the lawyer's cause, the lawyer not conducting the examination-in-chief may discuss the evidence with the witness;

(a.2) between completion of examination-in-chief and commencement of cross-examination of the lawyer's own witness, the lawyer ought not to discuss the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(b) during cross-examination by an opposing legal practitioner, the witness's own lawyer ought not to have any conversation with the witness about the witness's evidence or any issue in the proceeding;

(c.1) between completion of cross-examination and commencement of re-examination, the lawyer who is going to re-examine the witness ought not to have any discussion about evidence that will be dealt with on re-examination;

(c.2) during cross-examination by the lawyer of a witness unsympathetic to the cross-examiner's cause, the lawyer may discuss the witness's evidence with the witness;

(c.3) during cross-examination by the lawyer of a witness who is sympathetic to that lawyer's cause, any conversations ought to be restricted in the same way as communications during examination-in-chief of one's own witness; and

(c.4) during re-examination of a witness called by an opposing legal practitioner, if the witness is sympathetic to the lawyer's cause the lawyer ought not to discuss the evidence to be given by that witness during re-examination. The lawyer may, however, properly discuss the evidence with a witness who is adverse in interest.

[Amended - June 2009]

Commentary

[0.1] If any question arises whether the lawyer's behaviour may be in violation of this rule, it will often be appropriate to obtain the consent of the opposing legal practitioner or leave of the tribunal before engaging in conversations that may be considered improper.

[1] to [6] [FLSC - not in use]

[7] This rule applies with necessary modifications to examinations out of court.

[Amended - June 2009]

SECTION 5.5 RELATIONS WITH JURORS

Communications Before Trial

5.5-1 When acting as an advocate, before the trial of a case, a lawyer shall not communicate with or cause another to communicate with anyone that the lawyer knows to be a member of the jury panel for that trial.

Commentary

[1] A lawyer may investigate a prospective juror to ascertain any basis for challenge, provided that the lawyer does not directly or indirectly communicate with the juror or with any member of the juror's family. But a lawyer should not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror.

Disclosure of Information

5.5-2 Unless the judge and opposing counsel have previously been made aware of the information, a lawyer acting as an advocate shall disclose to them any information of which the lawyer is aware that a juror or prospective juror

- (a) has or may have an interest, direct or indirect, in the outcome of the case;
- (b) is acquainted with or connected in any manner with the presiding judge, any counsel or any litigant; or
- (c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness.

5.5-3 A lawyer shall promptly disclose to the court any information that the lawyer reasonably believes discloses improper conduct by a member of a jury panel or by a juror.

[Amended - October 2014]

Communication During Trial

5.5-4 Except as permitted by law, when acting as an advocate, a lawyer shall not during a trial of a case communicate with or cause another to communicate with any member of the jury.

5.5-5 and **5.5-6** [FLSC - not in use]

Commentary

[1] The restrictions on communications with a juror or potential juror should also apply to communications with or investigations of members of their family.

SECTION 5.6 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

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

Commentary

[1] The obligation set out in the rule is not restricted to the lawyer's professional activities but is a general responsibility resulting from the lawyer's position in the community. A lawyer's responsibilities are greater than those of a private citizen. A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations. The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. Yet for the same reason, a lawyer should not hesitate to speak out against an injustice.

[2] The admission to and continuance in the practice of law implies on the part of a lawyer a basic commitment to the concept of equal justice for all within an open, ordered, and impartial system. However, judicial institutions will not function effectively unless they command the respect of the public, and because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby maintain public respect for it.

[3] Criticizing Tribunals - Although proceedings and decisions of tribunals are properly subject to scrutiny and criticism by all members of the public, including lawyers, judges and members of tribunals are often prohibited by law or custom from defending themselves. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should avoid criticism that is petty, intemperate, or unsupported by a bona fide belief in its real merit, bearing in mind that in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, where a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to and should support the tribunal, both because its members cannot defend themselves and because in doing so the lawyer is contributing to greater public understanding of and therefore respect for the legal system.

[4] A lawyer, by training, opportunity, and experience is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions, and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

Seeking Legislative or Administrative Changes

Commentary

[1] The lawyer may advocate legislative or administrative changes on behalf of a client although not personally agreeing with them, but the lawyer who purports to act in the public interest should espouse only those changes that the lawyer conscientiously believes to be in the public interest.

Security of Court Facilities

5.6-3 A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility shall inform the persons having responsibility for security at the facility and give particulars.

[Amended - October 2014]

Commentary

[1] Where possible, the lawyer should suggest solutions to the anticipated problem such as (a) the necessity for further security, and (b) that judgment ought to be reserved.

[2] Where possible, the lawyer should also notify other lawyers who are known to be involved in proceedings at the court facility where the dangerous situation is likely to develop. Beyond providing a warning of danger, this notice is desirable because it may allow them to suggest security measures that do not interfere with an accused's or a party's right to a fair trial.

[3] If client information is involved in those situations, the lawyer should be guided by the provisions of the rules 3.3-1 to 3.3-6 (Confidentiality).

SECTION 5.7 LAWYERS AS MEDIATORS

Role of Mediator

5.7-1 A lawyer who acts as a mediator shall, at the outset of the mediation, ensure that the parties to it understand fully that

(a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and

(b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by the solicitor-client privilege.

Commentary

[1] In acting as a mediator, generally a lawyer should not give legal advice as opposed to legal information to the parties during the mediation process. This does not preclude the mediator from giving information on the consequences if the mediation fails.

[2] Generally, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of the rules in Section 3.4 (Conflicts) and its commentaries and the common law authorities.

[3] Generally a lawyer-mediator should suggest and encourage the parties to seek the advice of separate counsel before and during the mediation process if they have not already done so.

[4] Where in the mediation process the lawyer-mediator prepares a draft contract for the consideration of the parties, the lawyer-mediator should expressly advise and encourage them to seek separate independent legal representation concerning the draft contract.

[Amended - October 2014]

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