

## **Law Society of Newfoundland and Labrador Code of Professional Conduct**

Following is a synopsis of amendments approved by the Benchers on December 9, 2019. Excerpts from the Code of Professional Conduct with the amendments noted in red are appended.

(i) **Competence; Appendix (A)**  
**revise Rule 3.1-2 Commentary**

The amendments are in relation to the rules on competence and add guidance on technological competence to the commentary to Rule Model Code 3.1-2. The approved amendment is included as red text in Appendix A.

Paragraph [4A] expresses the purpose of the proposed commentary: to remind lawyers of their obligation to be technologically competent in a manner appropriate to their areas of practice and circumstances.

Paragraph [4B] provides interpretive guidance. It clarifies that determining whether a lawyer has maintained the required level of technological competence is a contextual inquiry. The paragraph includes a non-exhaustive list of factors for lawyers and regulators to consider in determining the appropriate level of technological competence.

(ii) **Typographical Errors; Appendix (B)**

The reference in Commentary [1] to Rules 3.4-31 and 3.4-32 to "rules 3.4-32 and 3.4-33" has been corrected to refer to "rules 3.4-31 and 3.4-32". The reference in Commentary [2] to "Rule 3.4-33" has been corrected to refer to "Rule 3.4-32".

The Law Society of Newfoundland and Labrador *Code of Professional Conduct* (Code) is available on the Society's website at <http://lsnl.ca/lawyers-students/>

Please note that the amendments are effective on **January 1, 2020**. The amended *Code of Professional Conduct* will be available on-line on January 2, 2020.

Members are further advised that the Federation of Law Societies of Canada has launched the Interactive Model Code of Professional Conduct, an online tool that links the provisions in the Federation's Model Code to the matching or related rules of professional conduct in every law society in Canada.

This interactive tool will allow mobile lawyers, law society staff and leaders, academic researchers and others to quickly and easily find the enforceable rules in every Canadian jurisdiction using the national Model Code as the central reference point. Users will be able to isolate specific sections of the Federation's Model Code and view the corresponding code of conduct of another jurisdiction. Members may access the interactive tool at <http://flsc.ca/interactivecode/>

Thank you.

Law Society of Newfoundland and Labrador

## Competence

**3.1-2** A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.

### Commentary

**[1]** As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf.

**[2]** Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.

**[3]** In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include:

- (a) the complexity and specialized nature of the matter;
- (b) the lawyer's general experience;
- (c) the lawyer's training and experience in the field;
- (d) the preparation and study the lawyer is able to give the matter; and
- (e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

**[4]** In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.

**[4A]** To maintain the required level of competence, a lawyer should develop an understanding of, and ability to use, technology relevant to the nature and area of the lawyer's practice and responsibilities. A lawyer should understand the benefits and risks associated with relevant technology, recognizing the lawyer's duty to protect confidential information set out in section 3.3.

**[4B]** The required level of technological competence will depend upon whether the use or understanding of technology is necessary to the nature and area of the lawyer's practice and responsibilities and whether the relevant technology is reasonably available to the lawyer. In determining whether technology is reasonably available, consideration should be given to factors including:

- a) The lawyer's or law firm's practice areas;
- b) The geographic locations of the lawyer's or firm's practice; and
- c) The requirements of clients.

**[5]** A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client. The lawyer who proceeds on any other basis is not being honest with the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.

**[6]** A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should:

- (a) decline to act;
- (b) obtain the client's instructions to retain, consult or collaborate with a lawyer who is competent for that task; or
- (c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.

**[7]** The lawyer should also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting or other non-legal fields, and, when it is appropriate, the lawyer should not hesitate to seek the client's instructions to consult experts.

**[7A]** When a lawyer considers whether to provide legal services under a limited scope retainer the lawyer must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement for such services does not exempt a lawyer from the duty to provide competent representation. The lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also rule 3.2-1A.

(Adopted December 9, 2013, Amended January 15, 2016)

**[7B]** In providing short-term summary legal services under Rules 3.4-2A – 3.4-2D, a lawyer should disclose to the client the limited nature of the services provided and determine whether any additional legal services beyond the short-term summary legal services may be required or are advisable, and encourage the client to seek such further assistance. (Amended January 15, 2016)

**[8]** A lawyer should clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when the circumstances do not justify an exhaustive investigation and the resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. A lawyer should only express his or her legal opinion when it is genuinely held and is provided to the standard of a competent lawyer. (Amended October 23, 2017)

**[9]** A lawyer should be wary of providing unreasonable or over-confident assurances to the client, especially when the lawyer's employment or retainer may depend upon advising in a particular way. (Amended October 23, 2017)

**[10]** In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

**[11]** In a multi-discipline practice, a lawyer must ensure that the client is made aware that the legal advice from the lawyer may be supplemented by advice or services from a non-lawyer. Advice or services from non-lawyer members of the firm unrelated to the retainer for legal services must be provided independently of and outside the scope of the legal services retainer and from a location separate from the premises of the multi-

discipline practice. The provision of non-legal advice or services unrelated to the legal services retainer will also be subject to the constraints outlined in the rules/by-laws/regulations governing multi-discipline practices.

**[12]** The requirement of conscientious, diligent and efficient service means that a lawyer should make every effort to provide timely service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

**[13]** The lawyer should refrain from conduct that may interfere with or compromise his or her capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.

**[14]** A lawyer who is incompetent does the client a disservice, brings discredit to the profession and may bring the administration of justice into disrepute. In addition to damaging the lawyer's own reputation and practice, incompetence may also injure the lawyer's partners and associates.

**[15] Incompetence, Negligence and Mistakes** - This rule does not require a standard of perfection. An error or omission, even though it might be actionable for damages in negligence or contract, will not necessarily constitute a failure to maintain the standard of professional competence described by the rule. However, evidence of gross neglect in a particular matter or a pattern of neglect or mistakes in different matters may be evidence of such a failure, regardless of tort liability. While damages may be awarded for negligence, incompetence can give rise to the additional sanction of disciplinary action.

### 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;
  - (ii) requires that the client receive independent legal advice or, where the circumstances reasonably require, independent legal representation, and
  - (iii) obtains the authorization of Benchers as required by the Law Society Rules.

(Amended January 15, 2016)

**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.

(Amended January 15, 2016)

#### Commentary

[1] Whether a person is considered a client within rules ~~3.4-32~~ 3.4-31 and ~~3.4-33~~ 3.4-32 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.

[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. Rule ~~3.4-33~~ 3.4-32 addresses situations where a conflicting interest may not be immediately apparent to a potential lender. 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.

(Amended January 15, 2016)