

Table of Contents

Dedication.....	iii
About the Author.....	v
Acknowledgments.....	vii
Foreword.....	ix
Introduction.....	xi
Introduction to the 1995 Supplements.....	xvii
Consolidated Table of Cases.....	TC-1

PART I — IN COURT

CHAPTER 1	LAWYERS AND ETHICS	1-1
1.1	The Public Perception of Lawyers.....	1-1
1.2	Legal Education and Training.....	1-4
1.3	Lawyers and Commercialism.....	1-6.1
1.4	The Importance of Lawyers’ Ethics.....	1-8
1.5	Improving Lawyers’ Ethics.....	1-9
CHAPTER 2	THE ADVERSARY SYSTEM	2-1
2.1	Introduction.....	2-1
2.2	The Sporting Theory of Justice.....	2-2
2.3	Forensic Excesses and the Prisoner’s Dilemma.....	2-3
2.4	Discovery Abuse.....	2-4
2.5	Legal Ethics and the Public’s Ethics.....	2-6
2.6	Rules of Professional Conduct.....	2-9
2.7	Justifications of the Adversary System.....	2-10
2.8	Criminal Prosecutions.....	2-11
2.9	Civil Litigation.....	2-12
2.10	Should We Abolish the Adversary System?.....	2-15
2.11	The Adversary System Today.....	2-16
2.12	Public Law Commissions of Inquiry and Administrative Tribunal Hearings.....	2-18
2.13	Family Law.....	2-19
2.14	Expert Witnesses.....	2-19
2.15	Conclusion.....	2-20
CHAPTER 3	CONFIDENTIALITY.....	3-1
3.1	Introduction.....	3-1
3.2	The Confidentiality Rule.....	3-3
3.2.1	Inadvertent Disclosure of Confidential Information.....	3-10
3.3	Confidentiality and the Corporate Client.....	3-12
3.4	The Future Crime or Harm Exception.....	3-13

TABLE OF CONTENTS

3.4.1	The Innocence at Stake Exception.....	3-14.2
3.5	Lawyer Self-Interest Exceptions	3-15
3.6	Balancing Confidentiality and Other Interests	3-18
 CHAPTER 4 ADVOCACY		4-1
4.1	The Ethics of Advocacy.....	4-1
4.2	The Retainer and the Right to Decline Employment	4-2
4.3	Children and Clients Under a Disability.....	4-6
4.4	Advising Clients Concerning Possible Litigation	4-8
4.5	Medical-Legal Reports	4-9
4.6	Discovery	4-10
4.7	Other Lawyers	4-13
4.7.1	Unrepresented Parties	4-14
4.8	The Duty to Settle.....	4-14.2
4.9	The Law's Delay	4-17
4.10	Withdrawal as Counsel.....	4-19
4.11	Duty to Follow Instructions.....	4-23
4.11.1	Communicating with Represented Parties and With Witnesses Prior to Trial	4-25
4.12	Preparing Witnesses	4-26.2(2)
4.13	Leading Evidence: The Perjury Problem.....	4-31
4.14	Cross-Examination	4-37
4.15	Communicating With Witnesses Giving Evidence	4-41
4.16	Argument.....	4-42.1
4.17	Costs	4-44
4.18	Counsel's Liability for Negligence, Breach of Fiduciary Duty.....	4-45
4.19	Lawyers as Witnesses	4-49
4.20	<i>Ex Parte</i> Proceedings	4-51
4.21	Agreements Guaranteeing Recovery (Mary Carter Agreements)..	4-52
4.22	Control of Advocacy.....	4-53
	(a) Cost Sanctions Against Lawyers	4-53
	(b) Contempt of Court.....	4-56.2
	(c) Law Society Disciplinary Sanctions	4-55
4.23	Lawyers and Judges.....	4-59
4.24	Lawyers and Jurors	4-62
 CHAPTER 5 CONFLICTS OF INTEREST IN LITIGATION.....		5-1
5.1	Introduction	5-1
5.2	Appearances of Impropriety.....	5-2
5.3	Acting For Adverse Parties in Same Litigation.....	5-4
5.4	Acting Against Current Clients in Unrelated Litigation	5-5
5.5	Acting For Co-Parties in Same Litigation	5-8.3
5.6	Acting Against Former Clients	5-13
5.7	Acting Against Persons Associated with Clients	5-20.4.1
5.8	Issue and Procedural Conflicts Between Clients.....	5-20.10
5.9	Lawyer-Client Conflicts of Interest.....	5-20.10.1

TABLE OF CONTENTS

5.10	Migrating Lawyers, Law Firm Mergers and Imputed Disqualification.....	5-20.14
5.11	Payment of Fees by Non-Clients.....	5-37
5.12	Class Actions.....	5-37
5.13	Derivative Proceedings.....	5-39
5.14	Indemnity Insurance Litigation.....	5-40
5.15	Client Consent.....	5-43
5.16	Requests for Proposals and Inquiries from Potential Clients.....	5-45
5.17	Conflict Management.....	5-47
	(a) Computer Assisted Conflict Searches.....	5-47
	(b) Who Decides Whether the Firm May Act in the New Matter.....	5-49
	(c) Informed Consent.....	5-50
	(d) Ethical Screens.....	5-51
	(e) Retainer Letters.....	5-52
	(f) New Client and Matter Lists.....	5-53
	(g) Opening and Closing Files.....	5-53
 CHAPTER 6 PROSECUTING.....		 6-1
6.1	Doing Justice.....	6-1
6.2	Who is the Client?.....	6-5
6.3	The Charging Decision.....	6-6
6.4	Disclosure.....	6-10
6.5	Plea Bargaining.....	6-12
6.6	Impermissible Tactics.....	6-14
6.7	The Magisterial Prosecutor.....	6-17
 CHAPTER 7 CRIMINAL DEFENCE.....		 7-1
7.1	The Ethics of the Criminal Defence Lawyer.....	7-1
7.2	Confidentiality and Truth.....	7-6
7.3	The Duty Not to Destroy or Conceal Physical Evidence.....	7-8
7.4	Cross-Examining the Truthful Witness.....	7-12
7.5	The Perjurious Client.....	7-14
7.6	Conflicts of Interest.....	7-18
7.7	Plea Bargaining.....	7-20.4
7.8	Withdrawal as Counsel.....	7-23
 CHAPTER 8 CIVILITY.....		 8-1
 PART II — ACCESS TO JUSTICE 		
CHAPTER 9 HOW MUCH JUSTICE CAN YOU AFFORD?.....		9-1
CHAPTER 10 ADVERTISING.....		10-1

TABLE OF CONTENTS

CHAPTER 11	SOLICITATION.....	11-1
CHAPTER 12	CONTINGENCY FEES	12-1
CHAPTER 13	THE MEDIA	13-1
PART III — OUT OF COURT		
CHAPTER 14	COUNSELLING	14-1
CHAPTER 15	NEGOTIATION.....	15-1
CHAPTER 16	MEDIATION.....	16-1
CHAPTER 17	REAL ESTATE.....	17-1
17.1	Ethics in Real Estate Practice.....	17-1
17.2	The Ontario Rules.....	17-1
17.3	Unauthorized Use of Client Funds in Speculative Real Estate Ventures and the Ontario Spot Audit Programme	17-3
17.4	Conflicts of Interest in Real Estate Practice.....	17-4
17.5	Undertakings	17-7
CHAPTER 18	ESTATES	18-1
18.1	Testamentary Capacity and Undue Influence.....	18-1
18.2	Wills Benefitting Lawyers	18-3
18.3	Other Conflicts of Interest	18-5
18.4	Confidentiality	18-8
18.5	Competence and Quality of Service	18-9
CHAPTER 19	TAX.....	19-1
CHAPTER 20	THE CORPORATE COUNSEL	20-1
20.1	House Counsel.....	20-1
20.2	Moonlighting.....	20-4
20.3	Responsibility to Law Society.....	20-5
20.4	Non-Legal Advice	20-6
20.5	Who is the Client?.....	20-7
20.6	Whistleblowing	20-10
CHAPTER 21	GOVERNMENT LAWYERS.....	21-1

TABLE OF CONTENTS

21.1	Introduction	21-1
21.2	Who is the Client?	21-1
21.3	Limitations on Forensic Strategies	21-3
21.4	Whistleblowing	21-4
21.5	Conflicts of Interest	21-6
CHAPTER 22	CONFLICTS OF INTEREST.....	22-1
22.1	Introduction	22-1
22.2	Other Client Conflicts of Interest	22-3
22.3	Lawyer-Client Conflicts of Interest.....	22-8
22.4	Conflicts of Interest Involving Non-Clients.....	22-13
22.5	Errors and Omissions Claims	22-14
PART IV — THE REGULATION OF THE PROFESSION		
CHAPTER 23	ADMISSION TO THE BAR.....	23-1
23.1	Introduction	23-1
23.2	Purposes of the Good Character Requirement	23-2
23.3	History and Application of the Good Character Requirement....	23-4
23.4	Alternatives to the Good Character Requirement	23-16
CHAPTER 24	REGULATING LAWYER COMPETENCE AND QUALITY OF SERVICE	24-1
24.1	Rules of Professional Conduct.....	24-1
24.2	Discipline Proceedings.....	24-3
24.3	Continuing Legal Education.....	24-4
24.4	Insurance Loss Prevention Programmes	24-4
24.5	Practice Review Programmes.....	24-5
24.6	Solicitors’ Negligence Litigation.....	24-6
24.7	Judicial Intervention	24-7
24.8	Conclusion	24-8
CHAPTER 25	RULES OF PROFESSIONAL CONDUCT.....	25-1
25.1	Introduction	25-1
25.2	History, Nature, and Application of Rules of Professional Conduct.....	25-2
25.3	Client Property	25-10
25.4	Borrowing From Clients.....	25-12
25.5	Fees	25-13
	(a) Fairness of Fees	25-13
	(b) Fee Splitting and Referral Fees.....	25-16
25.6	Lawyers and the Administration of Justice	25-17
25.7	Responsibility to the Profession.....	25-18
25.8	Retired Judges Returning to Practice.....	25-21

TABLE OF CONTENTS

25.9	Practice by Unauthorized Persons and Delegation to Non-Lawyers	25-22
25.10	Outside Interests and the Practice of Law	25-25
25.11	Interprovincial Law Firms	25-27
25.12	Duties of Articling Principals and Students	25-27
25.13	Sexual Harassment	25-28
25.14	Representation of Clients Under a Disability	25-29
25.15	Discrimination	25-30
CHAPTER 26	DISCIPLINE PROCEEDINGS	26-1
26.1	Purposes of Discipline Proceedings.....	26-1
26.2	Are Discipline Proceedings Civil or Criminal?.....	26-2
26.3	Impartiality of Adjudicators and the Independence of Law Society’s Counsel.....	26-7
26.4	Investigation of Complaints	26-8
26.5	Parallel Criminal and Civil Proceedings	26-14
26.6	Disclosure Pending Hearing	26-17
26.7	Professional Misconduct	26-19
26.8	Conduct Unbecoming a Barrister and Solicitor	26-25
26.9	Public Hearings.....	26-26.3
26.10	Effect of Delay.....	26-26.5
26.11	Disqualification for Bias.....	26-28.1
26.12	Duty to Act Judicially.....	26-35
26.13	Adjournments and Interim Suspensions	26-38
26.14	Hearing Panel’s Use of Own Expertise.....	26-38.1
26.15	Use of Transcripts of Previous Testimony—Section 13 of the <i>Charter</i>	26-38.2
26.16	Standard of Proof.....	26-40
26.17	Penalty	26-42
26.18	Decision and Reasons	26-54.1
26.18.1	Costs	26-56
26.19	Judicial Review and Appeal	26-56.1
26.20	Special Cases: Crown Attorneys, Judges, Legislators.....	26-60
26.21	Incapacity Proceedings	26-62
26.22	Readmission	26-62.1
CHAPTER 27	THE INDEPENDENCE OF THE BAR	27-1
27.1	Introduction	27-1
27.2	The Independence of the Bar from the State.....	27-2
27.3	Rules of Professional Conduct.....	27-6
27.4	Independence from Clients.....	27-6.1
27.5	Independence from the Courts.....	27-8
27.6	The American Experience: Discipline by the Courts.....	27-13
27.7	Conclusion	27-15

TABLE OF CONTENTS

APPENDIX A	CODE OF PROFESSIONAL CONDUCT (CANADIAN BAR ASSOCIATION)	A-i
APPENDIX B	GUIDELINES FOR PRACTISING ETHICALLY WITH INFORMATION TECHNOLOGIES (Canadian Bar Association)	A-91
APPENDIX C	GUIDELINES FOR ETHICAL MARKETING PRACTICES USING NEW INFORMATION TECHNOLOGIES (Canadian Bar Association)	A-131
APPENDIX D	CANADIAN CODE OF PRETRIAL CONDUCT (American College of Trial Lawyers)	A-145
	CANADIAN CODE OF TRIAL CONDUCT (American College of Trial Lawyers)	A-165
APPENDIX D.1	CANADIAN CODE OF CONDUCT FOR TRIAL LAWYERS INVOLVED IN CIVIL ACTIONS INVOLVING UNREPRESENTED LITIGANTS (American College of Trial Lawyers)	A-186.1
APPENDIX E	MODEL CODE OF PROFESSIONAL CONDUCT (Federation of Law Societies of Canada).....	A-187
APPENDIX F	CONFLICTS OF INTEREST TOOLKIT (CBA Task Force on Conflicts of Interest)	A-309
APPENDIX G	FAQs ABOUT PRIVILEGE AND CONFIDENTIALITY FOR LAWYERS IN PRIVATE PRACTICE (Canadian Bar Association)	A-391
APPENDIX H	FAQs ABOUT PRIVILEGE AND CONFIDENTIALITY FOR IN-HOUSE COUNSEL (Canadian Bar Association)	A-419

TABLE OF CONTENTS

APPENDIX I	ASSESSING ETHICAL INFRASTRUCTURE IN YOUR LAW FIRM: A PRACTICAL GUIDE (Canadian Bar Association)	A-459
APPENDIX J	CLOUD COMPUTING CHECKLIST (The Law Society of British Columbia)	A-489
APPENDIX K	NATIONAL MOBILITY AGREEMENT 2013 (Federation of Law Societies of Canada).....	A-501
LEGAL MEMORANDA.....		LM-i
ICLL INDEX		ICLL-1
WORDS AND PHRASES		WP-1
INDEX		I-1