

**Attachment 2: Model Code****4.04 COMMUNICATION WITH WITNESSES GIVING EVIDENCE**

**4.04 (1)** A lawyer involved in a proceeding must not, during an examination and a cross-examination, obstruct the examination and the cross-examination in any manner.

**Communication with Witnesses Giving Evidence**

**4.04 (2)** Subject to the direction of the tribunal, a lawyer must 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;
- (b) during cross-examination of the lawyer's own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;
- (c) upon the conclusion of cross-examination and during any re-examination the lawyer may discuss with the witness any matter.

**Commentary**

The application of these rules may be determined by the practice and procedures of the tribunal and may be modified by agreement of counsel.

The term "cross-examination" means the examination of a witness or party adverse in interest to the client of the lawyer conducting the examination. It therefore includes an examination for discovery, examination on affidavit or examination in aid of execution. The rule prohibits obstruction or improper discussion by any lawyer involved in a proceeding and not just by the lawyer whose witness is under cross-examination.

The opportunity to conduct a fully ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing advocate's ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer's witnesses. There is therefore no justification for obstruction of cross-examination by unreasonable interruptions, repeated objection to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing.

While any testimony-related discussion is generally prohibited during breaks, there are two qualifications to the rule as it relates to examinations for discovery. First, if the examination for discovery of a witness is adjourned for longer than one week, it is permissible for counsel to discuss with the witness all issues arising out of the matter, including evidence that has been or is to be given, provided that opposing counsel has been advised of the lawyer's intention to do so. If opposing counsel objects, the matter must be resolved by the court having jurisdiction over the proceedings.

This rule is not intended to prevent discussions or consultations that are necessary to fulfill undertakings given during an examination for discovery. However, under no circumstances are such qualifications to be interpreted as permitting improper briefing such as that described in this rule.

This rule is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has been retained by a witness under cross-examination, from consulting with the lawyer's new client.

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

**Attachment 3: Proposed rule for adoption:**

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[Addition] A lawyer who has called a witness has a duty not to communicate with that witness about the matter including the witness' evidence in the matter, without leave of the court or tribunal, from the time when the witness is called into the witness box until the time when the witness concludes his or her testimony under examination, cross-examination or re-examination and is dismissed from the witness box.

**Commentary**

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## Attachment 1: *Legal Ethics Handbook*

### Chapter 14 – Duties to the Court

#### Rule

When acting as an advocate, the lawyer has a duty to treat the court with candour, courtesy and respect.

#### Guiding Principles

A lawyer has a duty not to

- (a) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring another party
- (b) knowingly assist or permit the client to do anything that the lawyer considers to be dishonest or dishonourable;
- (c) subject to Commentary 1, appear before a judge when the lawyer, the lawyer's associates or the client have business or personal relationships with such judge that give rise to real or apparent pressure, influence or favouritism affecting the impartiality of such judge or which might place the lawyer in a preferred position;
- (d) attempt or allow anyone else to attempt, directly or indirectly, to influence the decision or actions of a court or any of its officials by any means except open persuasion as an advocate;
- (e) knowingly attempt to deceive or participate in the deception of a court or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive or exaggerated or inflammatory 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 something for which there is no reasonable basis in evidence or the admissibility of which must first be established;
- (h) deliberately refrain from informing the court of any pertinent adverse authority that the lawyer considers to be directly in point and that has not been mentioned by an opponent;
- (i) dissuade a material witness from giving evidence, or advise such a witness to be absent;
- (j) knowingly permit a witness to be presented in a false or misleading way or to impersonate another;
- (k) needlessly abuse, hector or harass a witness;
- (l) needlessly inconvenience the court or a witness;
- (m) needlessly pursue trivial, irrelevant matters.

#### Commentary

##### Disclosure to court and counsel

**14.1** The Rule contained in Guiding Principle (c) is not violated if the lawyer discloses to the judge before whom the matter is to be heard, and all other counsel, the circumstances giving rise to a possible conflict. It is the judge, not the lawyer, who is to decide if the matter should be heard by the judge.

**Errors or omissions**

**14.2** On discovering an error or omission done unknowingly that, if done knowingly would have constituted a breach of this Rule, a lawyer has a duty to the court, subject to the Rule relating to Confidentiality, to disclose the error or omission and to do all that can reasonably be done in the circumstances to rectify it.

**A client unsympathetic to the Rule**

**14.3** If the client wishes to adopt a course of action that would involve a breach of this Rule, the lawyer has a duty to

- (a) refuse to take the course of action;
- (b) do everything reasonable to prevent it; and
- (c) withdraw or seek leave of the court to do so, if the client persists in such a course.

**The lawyer as witness**

**14.4** A lawyer who appears as an advocate in a proceeding, and every partner or associate of that lawyer in the practice of law has a duty not to submit an affidavit or testify in the proceeding, except as permitted by local rule or practice or as to purely formal or uncontroverted matters.

**14.5** A lawyer has a duty not to undertake a matter when it is probable that the lawyer or a partner or associate of the lawyer will be required to give evidence. If the engagement is accepted and the improbable occurs, the lawyer has a duty to withdraw and the matter should be entrusted to a lawyer outside of the original lawyer's firm. If this is seen to impose on the client a substantial hardship because of cost, delay or inability in locating alternative counsel, the original lawyer should bring the problem and the client's difficulty to the attention of the court and other counsel to attempt to secure a means for resolving the problem.

**14.6** A lawyer who is an advocate in a proceeding has a duty not to express, in the proceeding, personal opinions or beliefs, assert in the proceeding anything that is properly subject to legal proof, cross-examination or challenge, and not to become an unsworn witness or put his or her own credibility in issue.

**14.7** A lawyer who is a necessary witness in a proceeding has a duty to

- (a) testify; and
- (b) entrust the conduct of the case to someone else.

**14.8** There are no restrictions upon an advocate's right to cross-examine another lawyer and the lawyer who appears as a witness should not expect to receive special treatment by reason of professional status.

**14.9** A lawyer who has been a witness in a proceeding has a duty not to appear as an advocate in any appeal from a decision in the proceeding.

**Interviewing witnesses**

**14.10** A lawyer may properly seek information from any potential witness, whether or not under subpoena, but has a duty in the course of doing so to

- (a) disclose the lawyer's interest; and
- (b) take care not to subvert or suppress any evidence or to attempt to procure a witness from giving evidence by such means, for example, the removal of the witness from the jurisdiction.

**Ex parte proceedings**

**14.11** When opposing interests are not represented, for example in ex parte or uncontested matters, or in other situations where the full proof and argument inherent in the adversary system cannot obtain, the lawyer has a duty to take particular care to be accurate, candid and comprehensive in presenting the client's case so as to ensure that the court is not misled.

**Communicating with witnesses**

**14.12** A counsel who has called a witness has a duty not to communicate with that witness about the matter including the witness' evidence in the matter, without leave of the court, from the time when the witness is called into the witness box until the time when the witness concludes his or her testimony under examination, cross-examination or re-examination and is dismissed from the witness box.

**Agreements guaranteeing recovery**

**14.13** In civil proceedings the lawyer has a duty not to mislead the court about the position of the client in the adversary process. Thus, where a lawyer representing a client has made or is party to an agreement made before or during the trial whereby a plaintiff is guaranteed recovery from one or more parties to the proceeding notwithstanding the judgment of the court, the lawyer has a duty to disclose full particulars of the agreement to the court and all other parties.

**Undertakings**

**14.14** A lawyer has a duty to fulfill an undertaking given to the court. .

**Scope of the Rule**

**14.15** The principles of this Rule apply generally to the lawyer as advocate and therefore extend not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals and other bodies, regardless of their function or the informality of their procedures.<sup>20</sup>

**Distinction between contempt and breach of ethical and professional duties**

**14.16** Legal contempt of court and breach of ethical or professional duty are not identical. A consistent pattern of rude, provocative or disruptive conduct by the lawyer, even though unpunished as contempt, might well merit disciplinary action.