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# Chapter 1: Introduction

**Sources of Guidance for Ethical Conduct:**

1. Case law and Legislation: Negligence, fiduciary duty, rules of evidence (ie. privilege), inherent authority of the court.

2. Rules and Professional Conduct: Provincial law society codes and CMA’s Model Code for Professional conduct.

3. Law Society and Disciplinary Decisions: insight into interpretation of Codes and clear violations. Most of the vexing questions of ethics do not have obvious answers.

4. Principles or Norms: Lawyers need principles and norms to guide decision making when filling gap between conduct rules and personal morals.

***Law Society of British Columbia v Jabour* 1980 BCJ No. 833**

*Mr. Jabour was a lawyer who published four advertisements in the newspaper for his services. He was found guilty of conduct unbecoming a member of the law society and was suspended from practicing for 6 months.*

**Analysis:** Benchers are given the power to determine which conduct is to be acceptable in the practice of law and even outside the practice for those members.

**Held:** The benchers have the power to prohibit the type of advertising that is found here and to discipline with respect to that type of advertising.

## What Does it Mean to be an Ethical Lawyer?

**1. Loyal Advocacy**

Loyalty is a core moral requirement traditionally associated with the legal practice. There are two central obligations to the lawyer-client relationship. 1) place the interests of the client above other people (***Neil)*** and 2) place the interest of the client above their own (***Szarfer***).

***R v Neil 2002 SCJ***

*Appellant brought application for stay of proceedings in his criminal trial on a basis of abuse of process. The law firm which initially represented him also ended up representing a co accused.*

**Held:** The duty of loyalty is intertwined with the fiduciary nature of the lawyer client relationship. Disloyalty is destructive to the solicitor client relationship. Lawyers have a duty to avoid a conflict of interest.

***Szarfer v Chados***

*Defendant was lawyer who represented plaintiff. Defendant and plaintiffs wife had an affair. Plaintiff was devastated. Defendant knew of plaintiffs psychological issues.*

**Issues:** Is the defendant liable for breaching his fiduciary relationship with the plaintiff?

**Analysis:** Fiduciary relationship between lawyer and client forbids using confidential information in a way that would disadvantage his client. It’s a fundamental principle that when one undertakes a task for another, they put their own interests aside. By engaging in sexual intercourse with the plaintiff’s wife, the defendant put his own interests ahead of the plaintiff. This is in breach to the conflict of interest rule.

Judge found that he used confidential information for his own purposes. In doing so he was in breach of his professional duty to his client. The breach was the cause of the plaintiff’s post-traumatic neurosis. Breach constituted professional negligence and demonstrated an unreasonable lack of skill and fidelity in his professional and fiduciary duties.

**Ratio:** If an individual in a fiduciary relationship puts his own interests ahead of the beneficiary for his personal benefit and his actions are to the detriment of the client, there is a breach of the conflict of interest and the individual may be liable for damages. The defendant has the onus of proving that he acted reasonably in the circumstances.

## 2. The Lawyer as a Moral Agent in Pursuit of Justice

Luban states that an ethical lawyer cannot have an unqualified commitment either to zealous partisanship or to moral non-accountability.

William Simon defines the central moral principle governing lawyering is Justice. " The lawyer should take actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice" .

***R v Murray*** demonstrates the strengths of both Luban and Simon’s views.

**R v Murray [2000] OJ No. 2182**

*Murray was Bernardo's lawyer. Bernardo sexually assaulted and murdered several teenage girls. His residence was searched by the crown by search warrant. Under instruction, Murray went to the home after the search warrants expired and removed several video tapes which contained the sexual assaults. Murray did not submit the video tapes as evidence. The tapes conclusively depict that Murray was guilty forcible confinement, assault and sexual assault and also provided strong circumstantial evidence to prove Bernardo was guilty or murder. Murray did not at first view the tapes. The plan was to use the tapes as part of the defense to prove that Homolka, Bernardo's accomplice, was incredible. Homolka had entered into a plea deal in exchange for giving evidence.*

***Analysis:***

Murray was acquitted of charges on the basis that he did not have the necessary Mens Rea to be convicted of obstruction. He stated that it was never his intention to bury the evidence.

***David Luban, "The Adversary System Excuse", Legal Ethics and Human Dignity, 2007, 32-64***

[Luban challenges the traditional conception of a lawyers role which state that a lawyer must be a partisan advocate for his clients ends. Luban challenges this traditional justification for the lawyers role and states that while the role may legitimately influence a lawyers moral decisions it cannot do so absolutely. ]

Consequentialist Justifications for Adversarial System:

A. Truth

The assumption is that when two adversary attorneys set out to determine the fats in manner most consistent to their clients position and to undermine the opposing witnesses etc, the assumption is the two accounts will cancel out leaving the truth of the manner.

Adversarial tactics sometimes include efforts to ensure that the case never make it to the fact finding stage. Procedural delays are used to exhaust the funds of an opponent.

Luban states that the adversarial system may in fact not get at the truth in many hard cases.

C. Ethical Division of Labour

Luther states that zealous advocacy has been justified by the fact that the other side also has a zealous advocate and that there is an impartial arbiter which provides a further check. He calls this the checks and balances theory. Under this theory a alwyer in this system can go ahead and perform his duties knowing that any injuries or wrongs inflicted will be reflected in another part of the system.. Luther doesn’t agree. Just because there is opposing counsel this does not justify any action. "Certainly the fact that a man has a bodyguard in no way excuses you from trying to kill him". Luther states that the adversary system sets out to evade the system of checks and balances and not to rely on it to save opponents. Rectification also carries with it high transaction costs (Money, time, worry, energy etc).

Non Consequentialist Justifications for the Adversary System

1. Adversary Advocacy is Intrinsically Good

Charles Fried sees the lawyer as a special purpose friend who enhances the clients autonomy and individuality which is an intrinsic moral good. Mellinkoff and Frieds arguments togethor attempt to show that a lawyer serving a client is engaged in an intrinsic moral good. Problem with this argument is it makes clients look more pitable then many actually are (ie. The unscrupulous debtor or the slumlord).

2. Cluster of related Arguments: that adjudication is a valued and valuable tradition, that it enjoys the consent of the governed, and that it is thus an integral part of our social fabric.

# Chapter 2: The Legal Profession and Lawyer Regulation in Canada

Lawyers are both credentialed and regulated .To practice law in Canada you must be admitted to membership in the society in that jurisdiction. It is argued that regulation is in the public interest to ensure that legal services are provided ethically and competently by qualified persons.

## Justification for Self-Regulation

1. Independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society: ***Canada v Law Society of BC.***
2. No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body: **Law Society of Manitoba v Savino.** Lawyers are best equipped to understand technical complexity involved in lawyer regulation- more efficient by extension- higher standards.
3. Balancing the market for lawyers- in essence, self-regulation creates a monopoly over services .

**Critique of Lawyer Self-Regulation:** 1) Underlying information asymmetry about lawyer conduct is product of lawyer monopoly over legal knowledge. 2) Effective government or third party regulation does not depend on the regulator possessing the same knowledge as the regulator.

**Law Society’s:** The LSBC is a creature of statute- the ***Legal Professions Act*** which lays out the basic structure of the LSBC. The LSBC has the power to set credentials for membership, discipline and disbar members and make rules of conduct.

**Self-Regulation of Lawyer Conduct**

Focus of this section is on development of rules of professional conduct to govern and guide lawyers conduct in their practices and activities and on the structure and operation of the contemporary system of professional discipline.

**i) Codes of Conduct:**

* A written code of ethics was required. It’s a means where the profession could solidify its national organization, assert powers of self-governance and project an image of professionalism based on notions of superior learnings, ethical conduct and service in the public interest.
* The Canon of Ethics is a general guide and not as a denial of the existence of other duties equally imperative though not specifically mentioned. Lawyer has a duty to the state, the court, the client, himself and fellow lawyers.
* In 1974 a new Code was adopted by the CBA and again in 1987 and 2009.

Lawyer’s codes have been criticized on a number of basis. Some say that Ethics are a matter of personal decision or choice and that you cannot regulate ethical behaviour through detailed specific rules. Others argue that written codes of conduct are ineffective instruments of regulation.

**ii) The Anatomy of Lawyers' Codes: Structure of the Provincial and CBA codes are similar.**

**A. Duties Owed to Clients, the Courts and Other Lawyers**

In representing clients lawyers are under a number of special obligations which arise out of the fiduciary nature of the lawyer client relationship. Must act honourably and with integrity. Must act competently. Lawyers advocacy for the client is not unbridled (ie cannot abuse process, abuse witnesses etc). Have a duty of confidentiality and a duty to avoid conflict or interests. Both of these duties flow from the fiduciary duty. The duty of confidentiality is not absolute and in some instances disclosures are mandated.

**B. Duties owed to the Profession and Society**

These duties are directed to the maintenance of public confidence in the profession as an independent self-governing occupation. Lawyers are expected to act in a way which encourages Public respect for the administration of Justice and where necessary an obligation to seek its improvement.

**iii) Discipline**

Discipline is one of the primary functions of contemporary Canadian law societies. Intended not just for punitive purposes but to protect the public by sanctioning the offending lawyer and to protect the professions reputation.

**A. Standards of Discipline**

Traditionally professional misconduct has been defined as "disgraceful or dishonourable conduct". Negligence by itself was not enough. Some have stated that the professional codes of misconduct and discipline proceedings is ineffectual and that the grounds for lawyer discipline can be addressed through other bodies such as the courts for civil and criminal jurisdiction.

**B. Discipline Proceedings**

1. **Compliant/Investigation Stage**

Lawyer discipline begins with some sort of complaint. Concern with this is underreporting. Lawyers are reluctant to report the misconduct of their colleagues. Many clients do not know what constitutes misconduct. Longstanding criticism is the mismatch between client needs and regulatory response.

1. **Hearing Stage**

Discipline hearings are adversarial in nature, conducted before a panel of discipline or conduct committee. Burden of proof is on law society. Proceedings are conducted by counsel for the law society. Law society counsel must act independently. Discipline hearings are characterized as judicial or quasi-judicial. The proceedings are authorized by statute and therefore are subject to Charter scrutiny and common law judicial review. They are multi stage proceedings where facts must be established, and then the facts must be proven to have constituted professional misconduct or conduct unbecoming a barrister or solicitor. Finally they must decide the appropriate penalty under the circumstances. Typically panels are required to provide reasons for their decisions in writing.

1. **Penalty/Sanction Stage**

The panel must then determine the appropriate sanction. The purpose of the sanction is to protect the public or the professions reputation and not to punish the lawyer. The lawyer may also be required to pay costs. Many law societies publish decisions online. This results in a deterrent effect.

# Chapter 3 The Lawyer Client Relationship

## a) Advertising

***3.02 of Model Code:*** Lawyer may market professional services so long as they are accurate, verifiable, not misleading, and in the best interests of the public and consistent with high standard of professionalism.

## b) Fee Sharing

***2.06 (7) of Model Code :*** Lawyer cant split or divide fees with non-lawyer. Cannot give any financial or other reward for referrals.

## c) Solicitation

Lawyer may market professional services so long as they are accurate, verifiable, not misleading, and in the best interests of the public and consistent with high standard of professionalism (***Merchant***).

***Law Society of Saskatchewan v Merchant 2000*, LSDD No. 24.**

*Merchant law group wrote a letter to residential school survivors. The letter stated that those who experienced sexual abuse were potentially entitled to compensation and that a letter should be sent to the law group outlining their reflections. Letter also asked for recipient to notify law group of others who experienced sexual abuse. Complaint was made to the law society. One recipient said the letter triggered memories of prior sexual abuse.*

**Count 1:** Was the member guilty of conduct unbecoming a lawyer as he sent a letter which created an unjustified expectation about the results the writer may achieve?

**Held:** Key question was the letter likely to create an unjustified expectation in the mind of the intended recipient about the results that the writer may achieve? Hearing found that the letter was not likely to create an unjustified expectation. Mr. Merchant submitted judgments where damages were awarded in the same circumstances as the complainant.

**Count 2:** Was the member guilty of conduct unbecoming a lawyer as the letters were reasonably capable of misleading the intended recipient contrary to the Law Society of Sask Code of Professional conduct which states that a member may initiate contact but that marketing activity must not be false, misleading, or in bad taste or otherwise offensive.

**Held:** Committee found that the allegations in Count 2 were well founded. Lawyers are expected to make legal services available in an efficient and convenient manner and by means compatible with the integrity, independence and effectiveness of the profession.

Letter is misleading as it disregards that the possibility that the recipient may not have a sustainable cause of action. Fails to explain the length and complexity of the litigation process which includes preparation, possibility of interviews etc. Leaves the impression that payment would come without any effort other than writing reflections and returning the authorization. Also says there is nothing to lose and will pay nothing. This is misleading. Fails to disclose that the prospective client has something to lose from an economic perspective and indeed may well pay something, even if the firm recovers nothing.

**Count 3:** Was the member guilty of conduct unbecoming a lawyer as he undertook a marketing activity which was undignified and in bad taste or otherwise offensive in breach of LSS Code of Professional Conduct?

**Held:** The letters fall within the category of a marketing activity and the committee found them to be "undignified, in bad taste, and otherwise offensive". The letters assumed that the recipient was first nations, and that he attended residential school when Mr. Merchant had to knowledge of the likely situation of the recipient, disregarded the potential impact of the letter and stated there would be significant compensation without any information required to make that prediction.

**Decision:** Guilty of the second count and ordered a reprimand, 5,000 fine and 10,000 in costs.

**Ratio:** Lawyer may market professional services so long as they are accurate, verifiable, not misleading, and in the best interests of the public and consistent with high standard of professionalism.

## Choice of Client

Client selection is one of the most important decisions. One the lawyer-client relationship is established the lawyers options about what they are prepared to do are curtailed. Ethical consensus that a lawyer should refuse to take a client if a conflict of interest exists, lawyer lacks competence in a area, lawyer has potential to be a witness in a case, or there is an illegal purpose. Lawyer should reject a retainer where personal distaste for the client is so severe that it quality of the relationship would suffer.

***Rule 3.01 (1)*** of the Model Code says that a lawyer must make legal services available to the public efficiently and conveniently but the commentary states that a lawyer has a general right to decline a particular representation (except when assigned as council by tribunal), but the right should be exercised prudently.

**Client Selection and Discrimination**

Lawyers have the right to decline representation but are subject to anti-discrimination norms. ***Rule  5.03(5)*** Lawyers must not discriminate against any person.

**The Lawyer and the Administration of Justice**

***Rule 4.06*** of the Model Code: A lawyer must encourage public respect for and try to improve the administration of justice.

## Competence and Quality of Service

One the lawyer client relationship is formed the lawyer owes the client a duty of loyalty. A lawyer is expected to serve his clients in a conscientious, diligent, and efficient manner, so as to provide a quality service at least equal to that which lawyers generally expect of a competent lawyer in like situations (***Richey***). Perfection is not expected but “the effectiveness of counsel is to be evaluated on an objective standard through the eyes of a reasonable person such that all an accused can expect of his or her defense counsel is a level of competence based on a standard of reasonableness. A lawyer is expected to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken” (***R v Fraser***).

There are two legal options to address lawyer incompetence: lawyer malpractice and codes of professional conduct. A competent lawyer is conceptualized within the Model Code:

The **Model Code (2.01-2.01)** "competent Lawyer" means a lawyer who has and applies relevant knowledge, skills, and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyers engagement… (Commentary) states that a lawyer has a duty to provide a quality of service at least equal to that which lawyers generally expect of a competent lawyer in a like situation.

In a criminal context, There is a two-step approach to assessing trial counsels competence: 1. The appellant must demonstrate that the conduct or omissions amount to incompetence 2. the incompetence resulted in a miscarriage of justice. Additionally, every situation is different and involves a close examination of the circumstances before such a finding can be made (***R v Fraser***).

***Nova Scotia Barristers Society v Richey*** 2002 LSDD No. 30.

*Richey is charged with professional misconduct and professional incompetence. Richey failed to move file to settlement or trial contrary to client instructions. Failed to file a pre-trial brief in a timely manner. Failed to competently obtain and disclose relevant medical records etc.*

**Analysis:**

* The act identifies the mandate and objects of he society's disciplinary process: it specifically includes protection of the public by inhibiting incompetence.
* Finding of a disciplinary default of both incompetence and professional misconduct is fact and time specific. There should not be an inference that n individual is incapable of meeting generally accepted standards of practice.
* In this instance there was a pattern of poor judgment. Good lawyering skills in other files is no defense.
* Found that Richey was guilty of both of professional incompetence and professional misconduct .

**Ratio:** A lawyer is expected to serve his clients in a conscientious, diligent, and efficient manner, so as to provide a quality service at least equal to that which lawyers generally expect of a competent lawyer in like situations.

**Decision**: Richy was found guilty of both professional misconduct and incompetence.

***Law Society of Alberta v SYED***

*Mr. Syed represented a man charged with sexual assault. Did not explore possible defenses. Did not think consent would be a possible defense in the case. Mr. Syed planned on conducting a plea bargain with the crown. He had always been successful in the past . He put forward a proposal for settlement without first determining whether his client was guilty of the offense. Left the plea bargaining to the trial date and was unprepared for trial if the plea negotiations did not result in summary disposition.*

**Analysis:** Counsel for the law society stated that Chapter 2 of the Canadian Bar Association which states that a member be sanctioned for incompetency where there is evidence of either gross neglect in a particular matter or a pattern of neglect generally. Assuming the plea bargain of guilty to a charge of sexual assault would have been a travesty of justice.

**Ratio:** Rule 2.02 (1)A lawyer has a a duty to provide courteous, thorough and prompt services to clients. The quality of service that is competent, timely, conscientious, diligent, efficient and civil.

**Decision:** The committee found that the member showed gross neglect consistent with incompetence.

**Cultural Competence**

***R v Fraser***

*Appellant was a former high school teacher who was convicted of touching for a sexual purpose. Appealed stating that the legal advice and representation he received was ineffective and crown breached its obligation to provide ongoing disclosure.*

**Issue:** Did the lawyer demonstrate incompetence and does this incompetence result in a miscarriage or justice which should result in a new trial?

**Analysis:**

Ineffective Assistance of Counsel:

* When considering a complaint of ineffective assistance from counsel there is a heavy burden upon the appellant to show that counsels acts or omissions did not meat a standard of reasonable professional judgment.
* There is a two step approach to assessing trial counsels competence: 1. The appellant must demonstrate that the conduct or omissions amount to incompetence 2. the incompetence resulted in a miscarriage of justice.
* Every situation is different and involves a close examination of the circumstances before such a finding can be made.

Challenge for Cause:

* Appellant complained that despite repeated and specific inquiries he was never advised of his right to challenge potential jurors for cause on the basis that he is black.
* The accused right to challenge for cause based on partiality is essential to both the constitutional right to a fair trial and the constitutional right to trial by jury. An impartial jury is a crucial step in the conduct of a trial by jury.
* The accused lawyer advised him that he did not find a challenge for cause very useful and more of a waste of time. He had his own way of selecting jurors.
* Judge found that the lawyers failure to respond to his clients inquiries denied him a statutory right to challenge potential jurors for cause.

Trial Preparation and Performance

* Trial lawyer should never be gauged on the standard of perfection but the effectiveness of counsel is to be evaluated on an objective standard through the eyes of a reasonable person such that all an accused can expect of his or her defense counsel is a level of competence based on a standard of reasonableness. A lawyer is expected to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken.
* Trial counsel never took the time to interview the accused wife even though she was clearly valuable as a witness.
* Appellant entrusted his case to the trial counsel but this was misguided. Meaningful updates and communications did not occur.

**Ruling:**

Mr. Fraser did not receive a fair trial. The counsel he received fell short of what is reasonably expected of any defence counsel. Constitutional right to make full answer and defense was compromised and a miscarriage of justice occurred. Verdict must be set aside and a new trial ordered.

## Termination of the Lawyer Client Relationship

Once a lawyer accepts a client, the lawyer has a duty of fidelity and loyalty which limits the ability to end the relationship. While the client may terminate the lawyer-client relationship at any time, the lawyer does not enjoy the same freedom (***Rule 2.07).***

## Withdrawal

**The *Rule 2.07*** of the **Model Code**: A lawyer must not withdraw from representation of a client except for **good cause** and on **reasonable notice** to the client. **Proulx and** **Layton** state “withdrawal must be for good cause, with appropriate notice to the client. In instances where withdrawal is justified, the lawyer must extricate himself or herself from the case with a minimum of prejudice to the former client”. In **Cunningham**, the SCC ruled that while a court has the jurisdiction to refuse to grant counsels request for withdrawal, this jurisdiction should be used sparingly. The SCC stated stated that in determining whetheror notto grant a withdrawal request the court should look at the following non exhaustive list of factors:

1) whether it is feasible that the accused represent himself

2) other means for obtaining representation

3) impact on the accused from a delay in proceedings (particularly if the accused is in custody

4) conduct of counsel (reasonable notice allowing client to seek other representation)

5) impact on Crown and any other coaccused

6) fairness to defense counsel, including consideration of the expected length and complexity of the proceedings

7) the history of the proceedings

While **reasonable notice** is not explicitly defined within the **Model Code**, the Commentary of ***Rule 2.07(1)*** states that an essential element of reasonable notice is notification to the client. In addition, a governing principle is that the lawyer should not abandon a client at a critical stage of a matter or at a time when the withdrawal would put the client in a position of peril or disadvantage. A general rule is that the client should have sufficient time to retain and instruct replacement counsel.

**Obligatory Withdrawal *Rule 2.07(7):*** A lawyer must withdraw if discharged by a client, client instructs the lawyer to act contrary to professional ethics or the lawyer is not competent to handle the issue.

**Optional Withdrawal** ***Rule 2.07 (2):*** Lawyer may withdraw if there has been a serious loss of confidence.

**Non payment of Fees** ***Rule 2.07 (3)***: If after reasonable notice the client fails to provide retainer or funds account then a lawyer may withdraw unless it would result in serious prejudice to the client. In ***Cunningham***, The SCC stated “where counsel seeks untimely withdrawal for non-payment of fees, the court must weigh the relevant factors and determine whether untimely withdrawal would cause serious harm to the administration of justice”.

## Court Approval of Withdrawal

***R v Cunnigham***

*Ms. Cunningham was retained as defense council for accused who was charged with three sexual offenses. The accused was required to update his financial information but he did not do so and he lost legal aid. Ms. Cunngham applied to withdraw as council because of his suspension from legal aid and his own limited resources did not allow him to pay for legal services.*

**Issues:**

Does the court have the ability to refuse the right of a defense council to withdraw because the accused has not complied with the financial terms of the retainer.

**Analysis:**

* Council is constrained in his or her ability to withdraw from a case once he or she has chosen to represent an accused.
* Superior courts have the authority to remove counsel from cases and to refuse an application for withdrawal by counsel in order to protect the administration of justice.
* The court must determine whether allowing withdrawal would cause serious harm to the administration of justice. If the answer is yes, withdrawal may be refused.
* This jurisdiction should be exercised exceedingly sparingly.
* Where counsel seeks untimely withdrawal for non-payment of fees

**Ratio:**

The court must determine whether allowing withdrawal would cause serious harm to the administration of justice. If the answer is yes, withdrawal may be refused.

**Decision:** Appeal allowed. Decline to grant an order of costs.

# Chapter 4: The Lawyers Duty to Preserve Client Confidences

The ethical duty of confidentiality and the legal principle of solicitor client privilege are among the forms of communication highly protected by the law. ***Proulx and Layton*** state that the “Justification for imposing duty of confidentiality is that a client who is assured of complete secrecy is more likely to reveal to his or her counsel all information pertaining to the case”. In limited but important circumstances the protection of client confidences does yield to a greater public interest.

## Confidentiality and Privilege:

 A duty of confidentiality has to do with the relationship while privilege has to do with the rules of evidence in court.

At least four features distinguish **confidentiality** from **privilege**:

* 1. Confidentiality is an ethical principle while privilege is a legal duty.
	2. Duty of confidentiality includes all client information acquired over the course of relationship while legal privilege refers only to private communications between lawyer and client.
	3. Ethical obligation continue even after the information is known by third parties while the legal duty is brought to an end once disclosed to third parties.
	4. Privilege is a legal duty associated with law of evidence. Confidentiality is a defining feature of lawyer client relationships.

**Confidential Information 2.03 (1):** Lawyer must at all times keep information concerning the affairs and business of the client confidential unless authorized by the client, required by law to do so, required to deliver the information to the law society or otherwise permitted by law.

Privilege protects information from disclosure in court, even where that information is relevant and probative. Rationale: there is value in open communication in certain relationships. Cost of privilege: hinders the truth seeking function. There are three exceptions to Solicitor-Client Privilege: 1) Facilitating a criminal purpose 2) Public Safety 3)”Innocence at Stake”

## The "Crime/Fraud" or "Criminal Communications" Exception

***Descoteaux v Mierzwinski***

*Ledoux has an application to obtain legal aid and crown tried to obtain it. Appellant applied to quash the seizure on the grounds that it was protected by solicitor client privilege. At trial and on appeal the Court held that the documents were not protected by lawyer client confidentiality or privilege.*

**Issue:** Did the circumstances constitute an exception to solicitor-client privilege to the documents in question?

**Analysis:** Confidential communications, whether they relate to financial means or to the legal problem itself , lose the character if and to the extent that they were made for the purposes of obtaining legal advice to facilitate the commission of a crime.

**Ratio:**

* S/C relationship forms when the client first deals with lawyer’s office to obtain legal advice - initial discussion & preliminary items of information lawyer requires in order to decide whether to represent client are privileged
* A judge must not interfere with the confidentiality of communications between a solicitor and client "except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation".

## Public Safety Exception

***Smith v Jones,* 1999 SCC**

*Mr. Jones was charged with aggravated assault of a prostitute. Mr. Jones had seen a psychiatrist for a psychological assessment. Counsel advised that the consultation was privileged. Dr. Smith advised counsel that he believed that Mr. Jones was a dangerous individual. Dr. Smith received legal advice and filed an affidavit. Henderson J ruled that the public safety exception to the law of solicitor client privilege and doctor-patient confidentiality released Dr. Smith from his duties of confidentiality.*

**Issue:** Did the public safety exception allow Dr. Smith to disclose the information to the Crown and police?

**Analysis:**

* Because of the fundamental importance of the solicitor-client privilege that the onus properly rests upon those seeking to set aside the privilege to justify taking such a significant step. In rare circumstances, these public interests may be so compelling that the privilege must be displaced. Danger to public safety can, in appropriate circumstances, provide the requisite justification.
* 3 factors should be considered when considering to set aside solicitor client privilege:
	1. Is there a clear risk to an identifiable person or group of persons (Clarity)?
	2. Is there a risk of serious bodily harm or death (Seriousness)?
	3. Is the Danger Imminent (Imminence)?
		+ Imminence must be defined in the context of each situation.

* **Dissent** (Major J): "The chilling effect of completely breaching the privilege would have the undesired effect of discouraging those individuals in need of treatment for serious and dangerous conditions from consulting professional help."
* "In my opinion the danger posed by the accused can be adequately addressed by the expression of that opinion by Dr. Smith without exposing the confession".

**Ratio:** When public safety is involved and death or serious bodily harm is imminent, solicitor-client privilege should be set aside.

**Ruling:** File is to be unsealed and the ban on the publication of the contents of the file removed except for those parts that do not fall under the public safety exception.

## The "Innocence at Stake" Exception

***R v McClure* [2001] SCR 445**

*Mclure was charged with a number of sexual offences against former students. JC learned of charges and came forward with further allegations and commenced a civil action. McLure sought access to JC's civil litigation file. Trial judge allowed limited access to enable Mclure to make full answer and defense.**Appealed to SCC.*

**Issue:** Should solicitor client privilege be set aside to permit the accused his right to full answer and defense by permitting him access to a complainants civil litigation file?

**Analysis:**

* Rules and privileges will yield to the Charter guarantee of a fair trial where they stand in the way of an innocent person establishing his or her innocence.
* Solicitor-client privilege and the right to make full answer and defense are principles of fundamental justice.
* The appropriate test to determine whether or not to set aside solicitor-client privilege is the innocence at stake test. Stringent test. Before the test is even considered the accused must establish that the information he is seeking is not available from any other source and he is unable to raise a reasonable doubt as to his guilt in any other way.
* **Innocence at Risk Test:**
	+ Stage 1: Accused seeking production of privileged communication must provide some evidentiary basis which to conclude that there exists some communication which would raise reasonable doubt as to his guilt.
	+ Stage 2: The Trial judge must then ask "Is there something in the solicitor client communication that is likely to raise a reasonable doubt about the accused guilt"?

* If the trial judge finds material that would likely raise a reasonable doubt then stage two of the test is satisfied and information should be produced to the defense even if this information was not argued as a basis for production by the defense at stage one.
* In the case at hand, the litigation file should not be provided to the defense. The first stage of the test was not met.

**Ratio:**

**Innocence at Risk Test:**

* Stage 1: Accused seeking production of privileged communication must provide some evidentiary basis which to conclude that there exists some communication which would raise reasonable doubt as to his guilt.
* Stage 2: The Trial judge must then ask "Is there something in the solicitor client communication that is likely to raise a reasonable doubt about the accused guilt"?

**Ruling:** The appeal is allowed and the order for production is set aside.

**Legislative Exceptions to Confidentiality and Privilege**

***Goodis v Ontario (Ministry of Correctional Services)***

**Facts:** Journalist applied for access to records pertaining to sexual abuse of offenders by probation officers. Ministry claimed solicitor client privilege. Freedom of Information adjudicator ordered that 19 pages be disclosed. On appeal the judge ordered that the entire private record be disclosed. Appealed to SCC.

**Issue:** Can the records in issue be disclosed to counsel for the requester notwithstanding the Ministry's claim for solicitor client privilege?

**Analysis:**

* The test laid out in Descoteaux is that a judge must not interfere with confidentiality of communications between solicitor and client except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.
* Absolute necessity is a restrictive test as may be formulated short of an absolute prohibition in every case.
* There is no evidence in this case that disclosure of records to counsel for the purpose of arguing whether or not they are privileged is absolutely necessary.
* No reason for establishing a new or different test for disclosure of records subject to a claim for solicitor client privlidge in an access to information case.

**Ratio:** The correct test to be applied for any document claimed to be subject to solicitor client privilege is the "absolute necessity" test.

**Ruling:** The absolute necessity test was not applied. Had it been disclosure of all the records would not have been ordered.

***Law Society of Saskatchewan v EFA Merchant QC***

*The law society was investigating a complaint that Merchants client had received money from a settlement of a residential school claim and had not paid into court this money to secure his child support obligations. The law society sought authorization to enter Merchants office and take possession of records relevant to the complaint.*

**Issue:** Is the absolute necessity test satisfied?

**Analysis:**

* The absolute necessity test is concerned with whether the documents should be produced at all.
* The law society would need to have the authority to demand production of records subject to solicitor client privilege and if they have such powers consideration must be given to whether that authority has been exercised as not to interfere with privilege unless absolutely necessary.
* The Legal profession Act gives the Law Society authority to demand the production of privileged records.
* The scope of the request is significant. In this case the society carefully framed its request so as to limit it just to matters relative to the complaint. It abandoned its original broader request.
* The Law Society has a duty to investigate complaints and the authority to demand privileged documents. It framed its request as reasonably narrow as possible. There was no other way to obtain those records or pursue the investigation.

**Ratio:** Solicitor-client privilege may be infringed to the extent absolutely necessary in order to achieve the end sought by the enabling legislation.

**Decision:** Appeal allowed.

**Lawyer Client Confidentiality and Privilege in the Context of Withdrawal from Representation**

An obligating of confidentiality does not cease when then representation of the client ceases. In circumstances where the lawyer must withdraw it must do so in a way that does not jeopardize the clients right to confidentiality.

***R v Cunningham***

**Facts:** *Ms. Cunningham was retained as defense council for accused who was charged with three sexual offenses. The accused was required to update his financial information but he did not do so and he lost legal aid. Ms. Cunngham applied to withdraw as council because of his suspension from legal aid and his own limited resources did not allow him to pay for legal services.*

**Analysis:**

* Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception to privilege such as innocence at stake or public safety exceptions.
* If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. If timing is an issue, the court should enquire further.
* If the withdrawal is sought for ethical reasons then the court must grant withdrawal.

**Taking Custody and Control of Real Evidence**

***R v Murray***

*Murray was Bernardo's lawyer. Bernardo sexually assaulted and murdered several teenage girls. His residence was searched by the crown by search warrant. Under instruction, Murray went to the home after the search warrants expired and removed several video tapes which contained the sexual assaults. Murray did not submit the video tapes as evidence. The tapes conclusively depict that Murray was guilty forcible confinement, assault and sexual assault and also provided strong circumstantial evidence to prove Bernardo was guilty or murder. Murray did not at first view the tapes. The plan was to use the tapes as part of the defense to prove that Homolka, Bernardo's accomplice, was incredible. Homolka had entered into a plea deal in exchange for giving evidence.*

**Issue:** Did Mr. Murray obstruct Justice?

**Analysis:** Solicitor client privilege protects communications. Not evidence such as video tapes . They pre-existed the solicitor-client relationship. Murrays concealment of the tapes was an act that has the tendency to pervert or obstruct the course of justice. Judge found that there was reasonable doubt as to Murrays intention to obstruct Justice.

**Ratio:**

**Judgement:** Not guilty.

Following *Murray,* The FLSC Model code provision is set out:

***Rule 2.05(6):*** A lawyer is never required to take or keep possession of property relevant to a crime or offense. If he/she comes into possession it should be turned over to prosecution, trial judge, deposit with the court, or disclose the existence of the property to the prosecution and prepare to argue the issue of possession of property.

# Chapter 5: The Duty of Loyalty and Conflicts of Interest

## 1. Duties to Former Clients

In ***MacDonald Estate***, Sopinka J. stated that mergers, partial mergers and the movement of lawyers from one firm to another is part of the modern practice of law. However, slackening the standard of what constitutes a conflict of interest in not in the interest of the public or the profession. The test for a disqualifying conflict of interest when there has been a transferring of lawyers is : (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?”. (***MacDonald Estate***). Cory J advocated for a stricter standard in order to preserve public confidence in the judicial system. He stated “…there is an irrebuttable presumption that the knowledge of such a lawyer, including confidential information disclosed to him or her by the former client, has become the knowledge of the new firm”.

***MacDonald Estate v Martin-* "Transferring Lawyers Case"**

*Ms. Dangerfield worked at a firm which represented Mr. Martin who was involved in a lawsuit related to the MacDonald Estate. That firm dissolved and Ms. Dangerfield joined another law firm which represented the defendant in the action. When the plaintiff and counsel learned of this they made an application to have the firm disqualified from continuing to represent the defendant in litigation. Ms. Dangerfield was not involved in anyway in representing the client.*

**Issue:** Should the defendants be disqualified from continuing to represent the client and what standard should be applied in determining if the law firm should be disqualified?

**Analysis:**

The Supreme Court of Canada stated that in determining such a case, the court must consider three competing values, namely

a) the concern to maintain the high standards of the legal profession and the integrity of the justice system; b) the concern that a litigant ought not to be deprived of his or her counsel of choice without good cause; c) the desirability of permitting reasonable mobility in the profession

 **Held:** The court held that once it is shown that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no such confidential information was shared. The court also ruled that it should draw the inference that confidential information will be disclosed, unless satisfied otherwise of the basis of clear and convincing evidence.

**Ratio:**

(1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?

* There is a presumption that is rebuttable.

(2) Is there a risk that it will be used to the prejudice of the client?”

* Objective test. Reaction of a reasonably informed person.

## 2. Duties to Current Clients

The duty of loyalty is essential to public confidence in the legal profession and to the administration of justice (***MacDonald Estates***). “The duty of loyalty is intertwined with the fiduciary nature of the lawyer client relationship” (***Neil***). The commentary of ***s. 2.04*** of the ***Model Code*** states that “Arising from the duty of loyalty are other duties such as the duty to commit to the clients cause, the duty of confidentiality, the duty of candour and the duty not to act against the interests of the client. In ***Neil***, Binnie J. quoted the biblical homily that “no man can serve two masters: either he will he will hate the one and love the other; or else he will hold to the one and despise the other”. The SCC developed the **Bright Line Test** which states that “a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client even if the two mandates are unrelated unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other” **(Neil).** If there is a substantial risk that the lawyers representation of the current client will be materially and adversely affected by the matter, the lawyer may not act, whether or not the matters are unrelated (***Neil, Strothers***). Following ***Neil*** the Law Societies in BC and AB amended their codes of professional conduct and adopted the "bright line" prohibition.  ***s. 3.4-1*** of the ***BC Code*** states “A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code”. The commentary states that this duty arises even if the matters are unrelated.

***BC Code* Commentary [7]:**Accordingly, factors for the lawyer’s consideration in determining whether a conflict of interest exists include:

* the immediacy of the legal interests;
* whether the legal interests are directly adverse;
* whether the issue is substantive or procedural;
* the temporal relationship between the matters;
* the significance of the issue to the immediate and long-term interests of the clients involved; and
* the clients’ reasonable expectations in retaining the lawyer for the particular matter or representation.

***Model Code*** ***Rule 2.04 (3)*** A "Conflict of Interest" means the existence of a substantial risk that a lawyers loyalty to or representation of a client would be materially and adversely affected by the lawyers own interest or the lawyers duties to another client, former client, or a third person.

**Professional Litigant Exception:** consent can be inferred or expressed to allow a law firm to act adverse in interest are a) the client is a large corporate client such as a government or a bank, b) the matters are sufficiently unrelated c) there is no danger of confidential information being abused d) the application is consistent with the high standards of the legal profession and the integrity of the justice system (***Wallace***).

***R v Neil* 2002 SCJ No. 72**

*Neil was a paralegal in Edmonton. Referred business to Venkatraman when matters exceeded his competence. Law Society took the view that those referrals did not happen often enough. A number of complaints were made which led to a 92 count indictment. The Venkatraman firm acted simultaneously for Mr. Neil and his business associate Lambert in circumstances where their interests were averse.*

**Issue:** The issue was whether Lazin created a conflict of interest by assisting in establishing the charges against Neil, when he was a past client.

**Analysis:**

* SCC rejected any implication that as long as no confidential information is disclosed, a law firm may simultaneously act for clients whose interests are adverse to each other.
* The Venkatraman firm owed a duty of loyalty to Mr. Neil at the material time, and its representation of Mr. Doblanko, though factual y and legally unrelated to the Canada Trust matters, was adverse to Mr. Neils interest.
* The Court adopted a definition of "conflict" which states that in order for a law firm to be disqualified, the risk of harm must be substantial, and the potential harm to the clients interests must be material.
* There is a firm with conflicting loyalties who is trying to serve two masters.
* The duty of loyalty is with us still. It ensured because it is essential to the administration of justice… unless a litigant is ensured...

**Ratio:**

The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client even if the two mandates are unrelated unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.

## 3. Former Client Conflicts

When considering conflict of interest of former clients, the courts appear to be guided by the overriding principle of of the lawyers duty of loyalty to his or her client.In ***Brookville Carriers Flatbed GP Inc.,*** Cromwell J. stated“lawyers have a duty not to act against a former client in a related matter whether or not confidential information is at risk…”.The **Model Code *Rule 2.04 (10*):** Unless the former client consents, a lawyer must not act against a former client in : a) the same matter b) any related matter c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.

***Strother v 3464920 Canada Inc***

*Monarch entertainment was a film development and financing company. Monarch retained Davis and Company to handle its legal business. Strother was a senior tax partner and was responsible for much of the tax advice to Monarch. A tax loophole was closed and Monarch began to wind down. Darc, a former senior employee at Monarch, approached Strother and discussed a new submission to the tax department seeking an advance tax ruling which would result in the tax loophole remaining open. Strother agreed to develop the submission without a fee under the agreement that should it be successful, he would be entitled to be a partner with Darc under the new business. Strother did not communicate this to Monarch nor to Davis and Company. They received a favourable tax ruling and Strother left Davis and joined Darc as a partner in the lucrative business.*

**Issue:** Did Strother and Davis and Company violate its obligations allegedly owed to Monarch as its former client?

**Analysis:**

* Davis and Strother failed to provide candid and proper legal advice in breach of the 1998 retainer.
* Issues rose despite Strothers duty to an existing client he acquired a major personal financial interest in another client in circumstances where his prospects of personal profit were enhanced by keeping Monarch on the sidelines.
* Monarch was a current client and was acting for client
* The risk did not exist here except that even handed representation had been skewed by Strothers personal undisclosed financial Interests.
* As set out in Niel, the impact must be "material and adverse". The test was met here due to Strothers undisclosed personal financial interests.
* Davis and Strother were free to take on Darc as a new client. Issues of confidentiality are routinely dealt with by being candid with the legal advice. Strother had an option interest while he was still representing Monarch. The new company and Monarch were potential competitors and Strother aligned his personal financial interest with the new company. This compromised Strothers duty to "zealously" represent Monarchs interest.
* Majority and dissent agree that scope of duty of loyalty informed by terms of contract, but Majority also emphasizes overlay of fiduciary duties

**Ratio:** As set out in Niel, the impact must be "material and adverse".

**Held:** No absolute prohibition. However still prohibits conduct that respondent engaged in.

***Wallace v Canada* 2011 SKCA**

*Law firm commenced a class action against CN Rail on behalf of Wallace. The firm had represented CN Rail in the past. Just prior to representing Wallace it withdrew as counsel for CN on a number of actions. Trial judge disqualified the law firm on the basis that CN's representation had been adversely and materially affected as there was a long standing relationship between CN and the firm, they were their go to firm, the magnitude of the claim was substantial and had the potential for significant damages etc.*

**Issue:** Is the McKercher disqualified from acting in the class action against CN Rail?

1) Did McKercher possess relevant confidential information that could be used to the prejudice of CN?

2) Is CN a professional litigant and can its consent to adverse representation be implied in the circumstances?

3) Was the duty of loyalty breached?

4) If McKercher breached the duty of loyalty, what is the appropriate remedy?

**Analysis:**

* As outlined in Neil, there are three aspects of the duty of loyalty: i) the duty to avoid conflicting interests, including a lawyers personal interests; ii) a duy of commitments to the clients cause (which includes an assurance that a lawyers divided loyalties do not cause him or her to compromise his or her "zealous representation") and (iii) a duty of candour with the client on matters relevant to the retainer.
* "**Substantial Risk Principle** "Formulation of a disqualifying conflict arising from a breach of loyalty: "substantial risk that the lawyers representation of the client will be materially and adversely affected by the lawyers own interests or by the lawyers own interests or by the lawyers duties to another current client, a former client or a third party." *(Neil)*
* Exception to the Bright Line Rule: In exception cases consent can be inferred. "Professional litigant exception"

1) There was not an imparting of what amounts to confidential information. There was not sufficient risk of prejudice to CN in McKercher acting on Wallace's claim.

2) Reasonable to assume in some situations that the client will have broad minded attitude and generally accept counsel may act adverse to its interest. Some factors outlined in Niel are whether the client is a larger corporate client such as a government or a bank. The materials or sufficiently unrelated, and there is no danger of confidential information being abused.

* Vulnerability is also a factor. An unsophisticated individual client who relies exclusively or even primarily on one lawyer or law firm for his representation is far more vulnerable if that individual or firm decides to act against him than a large sophisticated corporation with in house counsel and who employs a variety of law firms to represent it.

Trial judge correctly determined that CN was a professional litigant. Erred in not determining that it was not reasonable to infer consent to act pursuant to the exception. Reasonable that CN's consent was implied. Large corporate client with low dependency on the firm for legal services. Low vulnerability. No retainer agreement between the two with express objection. Implied consent operates in the absence of express consent. This Is not a case where the public's confidence in the profession and the legal system would be dimmiinshed by the application of the proffesional litigant exception given the low dependency by CN on the firm.

3. In was incumbent on the law firm to continue to represent CN where it could so long as CN wanted it to. The firm did breach its duty of loyalty in repect to failing to continue to act on CN files where It could and failure to be completely candid the CN.

4. CN has option of suing for damages. Does not justify disqualification.

**Ratio:** Professional Litigant Exception where consent can be inferred or expressed to allow a law firm to act adverse in interest are a) the client is a large corporate client such as a government or a bank, b) the matters are sufficiently unrelated c) there is no danger of confidential information being abused d) the application is consistent with the high standards of the legal profession and the integrity of the justice system.

## 4. Lawyer and Client Conflicts

Lawyer client conflicts have the potential to undermine the lawyers ability to represent the client properly or to create the perception that the clients’ interests have not been properly represented. “Loyalty includes putting the clients business ahead of the lawyers business” (**Neil**). A fiduciary duty is owed to a client following the end of the retainer. Favouring one’s own financial interest or self-promotion over the interests of the previous client is a breach of fiduciary loyalty (***Stewart***). Clients ae entitled to a lawyers independent and objective judgment, unaffected by that lawyers conflict of interest (***Hunter***).

**Stewart v Canadian Broadcasting Corp**

*Stewart was convicted of criminal negligence causing death after running a woman aver and dragging her body. Greenspan was the lawyer retained for sentencing. Years later, Greenspan creates a tv show which discusses the case.*

**Issue:** Did Mr. Greenspan owe a duty of loyalty to his former client and if so did this duty require him from refraining from involvement in the broadcast portrayal of the subject matter of his concluded retainer?

**Analysis:**

* Mr. Greenspan breached his fiduciary duty of loyalty to Mr. Stewart was by putting "his own self-promotion or self-aggrandizement before the interests of the plaintiff".
* Primary purpose was to publicize himself and his services as counsel to a national audience.
* Rule 17 states that a lawyer must not allow an outside interest to "jeopardize" the lawyers professional integrity.
* Obligation ends when the retainer ends but that does not end the fiduciary relationship. The duty was alive and inoperative through the years that they were independent of each other. Greenspan brought himself in that sphere when he chose to involve himself in the subject matter again.
* Mr Greenspan breached his fiduciary duty of loyalty as he favoured his financial interests over his previous clients. Put his own self-promotion over the clients’ interests.

**Ratio:**

A fiduciary duty is owed to a client following the end of the retainer. Favouring one’s own financial interest or self-promotion over the interests of the previous client is a breach of fiduciary loyalty.

***Law Society of Upper Canada v. Hunter***

*Lawyer was a prominent family lawyer in large firm. Entered into consensual sexual/romantic relationship with client. Client "XY" agreed that relationship was consensual but claimed that lawyer took advantage of confidential information to take advantage of her. Lawyer ended the relationship and tried to get XY to sign acknowledgement that he had complied with rule 2.04 regarding the existence of a conflict. Lawyer informed law firm and cooperated fully with law society. Charged ith and admitted to professional misconduct.*

**Issue:** Did the lawyers sexual/romantic relationship result in a conflict of interest resulting in professional misconduct?

**Analysis:** The sexual/romantic relationship created a conflict of interest. Given the conflict of interest, a lawyer is obligated to discuss with the client at the outset of the relationship whether he/she should continue to act on his/her behalf. Rule does not compel to advise client to get independent legal advice about the conflicting interests in all cases. If client is unsophisticated and vulnerable then the lawyer should recommend such advice.

**Ratio:**

Clients ae entitled to a lawyers independent and objective judgment, unaffected by that lawyers conflict of interest. An ongoing sexual relationship with clients during the period of representation threatens that independence and objectivity.

***CNR v. McKercher***

**Ratio:**

The bright line rule is based on the inescapable conflict of interest inherent in some situations of concurrent representation and it reflects the essence of a fiduciary’s duty of loyalty. The rule cannot be rebutted or otherwise attenuated and it applies to concurrent representation in both related and unrelated matters. However, the rule is limited in scope. It applies only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting and it applies only to legal interests, as opposed to commercial or strategic interests. It cannot be raised tactically. It does not apply in circumstances where it is unreasonable for a client to expect that a law firm will not act against it in unrelated matters.

# Chapter 6: Ethics in Advocacy

The **Model Code** states that while acting as an advocate, the lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness and respect (***Rule 4.01(1)***). This requires lawyers to not only emphasize their client’s views, but to deemphasize their own.

## 1. Pretrial Procedures

***DCB v Zellers***

*D.C.B.'s 14-year-old son shoplifted in Zellers along with a friend. He took $59.95 worth of goods which were recovered unharmed. Legal counsel for the store wrote the mother demanding restitution of $225, failing which the store would proceed with a civil action against her in accordance with the store's policy to recover the incremental costs of shoplifting from shoplifters and, in the case of children, their parents. D.C.B. paid the $225, but after obtaining legal advice, she sought the return of these funds.*

**Issue:** Was the plaintiff entitled to have the money returned?

**Analysis:** Jewers held that the store did not have a valid claim against D.C.B. as a parent as there was no general rule that parents were liable for the torts of their children. Parents could only be liable if they were in some way negligent or had committed a tort in their personal capacities. While forbearance to sue was valid consideration for a contract, such a contract could not be upheld where the forbearer did not have a valid claim against the other party. D.C.B.'s mistaken belief that the store had a valid claim against her entitled her to a refund.

## 2. Discovery

Discovery is a moment of apparent cooperation in an otherwise combative system. The area of discovery is subject to significant regulation. The duty of discovery is now and has always been to make full, fair and prompt discovery (***Grossman***). Failing to comply with a notice to produce is subject to a sanction (***Grossman***).

***Grossman v Toronto General Hospital***

*Man died in hospital and wasn’t found for 12 days. Plaintiffs sued hospital and defendants only disclosed the medical record.*

**Analysis:** Bad practice to only make production of documents which is forced on them. Can cause delay and expense. Pretrial discovery is one of the most important tools of the pre trial process. Modern courts strongly favour disclosure.

**Ratio:** A lawyers conduct which amounts to refusal to comply with the notice to produce and is subject to sanction. In absence of any indication that the defendants conduct was other than as advised by their lawyers then the responsibility must fall on the lawyer.

**Decision:** Appeal dismissed.

## 3. Negotiation

Settlement negotiations are increasingly being encouraged by litigation lawyers and the professional code provisions which govern them. ***Rule 2.02(4)*** of the ***Model Code*** states “A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings”.

**Commentary:** Lawyer should consider the use of ADR where appropriate. Most codes are silent on professional obligation of lawyers during negotiations. Lawyer does have an obligation not to lie.

## 4. Ethics at Trial

i) Witness Preparation:There is an important difference between witness preparation and coaching. Coaching is unethical and unprofessional. Coaching is also illegal. In ***Sweezy***, the CA stated “A lawyer who attempts to obstruct justice by willfully counselling evasive evidence not only commits an offense contrary to … the Criminal Code but also breaches his solemn duty as an officer of the Court”.

ii) Cross Examination:The principle limit in cross examination is counsel must have a good faith basis for putting suggestions to the witness. Question under cross examination need to be honestly advanced and made on a good faith basis (***Lyttle***). In addition, If improper cross examination of an accused prejudices that accused in his defense or is so improper as to bring the administration of justice into disrepute, an appellate court must intervene (**R(AJ)**)

***R v Lyttle***

Prosecution for robbery, assault; victim had been beaten by assailants with bats. Victim (V) stated that they were beating him to recover a chain that they mistakenly thought that he had stolen. Accused (A) stated that it was really a bad drug deal. In cross-examination, counsel for A wanted to put the drug deal theory to various witnesses, without presenting any evidence to support the theory.

**Issue(s):** Can you put suggestions to witnesses even though there is no basis as of yet to support the theory?

**Ratio:** Principal limit in cross-examination: Must have a good faith basis for putting suggestions to the witness.

**Analysis:**

Court noted that:

→ 1. Honestly advanced: you cannot put forward assertions you know to be false (cannot mislead a witness or trier of fact).

→ 2. Good faith basis: You need a good faith basis for putting an assertion to a witness; you are not obliged to put forward evidence to support those assertions first.

**Holding:** Appeal allowed in favour of Lyttle.

***R.v R (AJ)***

*Accused was charged with multiple counts of incest and sexual assault in relation to his daughter T. and grandaughter J.*

**Issue:** Was Crowns cross examination of the appellant result in a miscarriage of Justice?

**Analysis:**

* Crown conducted a 141 page cross examination on appellant. There are limits to cross examination. The danger of a miscarriage of justice is real when the line between aggressive and abusive is crossed.
* If improper cross examination of an accused prejudices that accused in his defense or is so improper as to bring the administration of justice into disrepute, an appellate court must intervene.
* Crown counsels approach to the cross examination was calculated to demean and humiliate the appellant.
* Engaged in extensive argument with the appellant. No counsel can abuse the witness. Statements of counsels personal opinion have no place in cross examination.
* The cross examination, considered in its totality and in the context of the entire trial, prejudiced the appellant in his defense and significantly undermined the appearance of the fairness of the trial.

**Ratio:** If improper cross examination of an accused prejudices that accused in his defense or is so improper as to bring the administration of justice into disrepute, an appellate court must intervene.

**Ruling:** Appeal allowed.

## 5. Representation about the Law

A lawyer has an obligation to inform the court about governing authorities – both positive and negative- which is part of an advocate’s role of being a “minister of justice”. Lawyers have a responsibility to bring forwars all relevant authorities. If they feel a case is distinguishable they may argue it but they must bring it forward (**General Motors Acceptance Corp of Canada**).***Rule 4.01(2)(i)*** of the ***Model Code*** states that a lawyer shall not deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by any other party.

***General Motors Acceptance Corp of Canada v Isaac Estate***

*There was an appeal case, Sherwood, that directly bore on the matter, to the detriment of the plaintiff. Neither counsel brought it to the attention of the court. When the Master mentioned the case at the end of trial, plaintiff's counsel admitted to knowing of the case – he was counsel on it!*

**Analysis:** It’s a responsibility of a lawyer to bring a relevant binding case to the attention of the court .Silence about a relevant binding case is not acceptable.

**Ratio:** Counsel must bring all relevant cases to the attention of the court. If counsel feel the case is distinguishable they can argue as such, but this does not allow them to fail to mention the case. Duty to assist the court may override the duty to the client. Ignorance is no excuse.

## 6. Advocacy and Civility

Civility is defined as two things : 1) requirement that lawyers treat one another , and those participating in the justice system, with a degree of politeness. 2) obligations on lawyers to act fairly, honestly, and with the utmost integrity in their dealings with other lawyers and with members of the court. ***Rule 6.02(1)*** of the **Model Code** states: A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice. Woolley states “Incivility deserves sanction not because it is rude, but because it impacts the functioning of the justice system, is contrary to the interests of the client or whatever the specific circumstance gives rise to”.

**Woolley, Does Civility Matter?**

Civility is used to refer both to good manners and to other, substantive obligations such as assisting the court by accurately drafting orders and not submitted perjured evidence. To the extent that civility refers to good manners, that should not be regulated because it may harm the ability of lawyers to be critical (in a good way) of one another or to advocate for their client. Determining whether a statement or course of conduct is “civil” is too subjective, and the standard provides no guidance for lawyers. When civility is being used to refer to other ethical rules, then those rules should be stated explicitly instead since otherwise the emphasis on civility obscures what has actually occurred. Incivility deserves sanction not because it is rude, but because it impacts the functioning of the justice system, is contrary to the interests of the client or whatever the specific circumstance gives rise to.

***Law Society of British Columbia v Laarakker***

Respondent was a lawyer who represented woman who received a demand letter to pay to company after her child was caught shoplifting. Respondent wrote lawyer back and posted comments on internet. The ontario lawyer made a complaint to the Law Society of British Columbia. Respondent states that none of his actions constituted professional misconduct.

**Issue:** Did the respondent engage in professional misconduct?

**Analysis:** The appropriate avenue for the lawyer would have been to complain to the law society and not post remarks on the internet. The respondents actions were a marked departure from the conduct expected from the law society. Letter to lawyer can’t be considered to be conduct unbecoming as it was undertaken within the lawyers practice. The blog post was a mix of private life and in the course of the lawyers practice.

**Ratio:** Professional misconduct is defined as a "whether the facts as made out disclose a marked departure from the conduct of the law society expects of its members; if so, it is professional misconduct.

* Test for **professional misconduct:** Outlined in Law Society of BC v. Martin, Whether the facts as made out disclose a marked departure from that conduct the Law Society expects of its members; if so, it is professional misconduct.
* Test for **Conduct Unbecoming a Lawyer**: s. 1(1) of the Legal Profession Act LSBC 1998 defines "conduct unbecoming a lawyer" as conduct that is considered in the judgement of the benchers or panel:
	1. To be contrary to the best interest of the public or the legal profession, or
	2. To harm the standing of the legal profession.

# Chapter 7: Counselling and Negotiation

## 1. Counselling

There is a tension in the counselling process. On the one hand the lawyer is concerned with client autonomy and respecting the client’s desires and decisions. At the same time the lawyer is looked to for advice and guidance which can result in the lawyer expressly or implicitly making the decision. Lawyers are required to be honest and candid. The advice must be clear and in terms the client can understand. A lawyer must not counsel a client to break the law (***Sussman***). ***Rule 2.02(7)*** of the **Model Code** states that a lawyer must never knowingly assist on or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

**Code of Professional Conduct for BC**

**Honesty and candour**

***3.2-2*** When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

***Law Society of Upper Canada v Sussman***

Sussman represented client in matrimonial proceedings. Clients ex-husband had weekend visitation rights. Lawyer advised client to disobey the court order for the visitations. Didn’t apply to the court to vary the order to say that the father was denied access.

**Issue:** Is a lawyer allowed to counsel a client to break or disobey the law?

**Analysis:**

"There can be no behavior more disruptive to our system of justice and more likely to bring administration into disrepute than a lawyer, while representing a party to a dispute, counselling his or her client to disobey the clear, unequivocal terms of a Court Order".

**Ratio:** A lawyer is not to counsel a client to break or disobey the law. Lawyers are obliged to be honest and candid.

Model Code 4-14

**Decision:** Lawyer was suspended from practice for one month.

## 2. Negotiation

Negotiation is subject to relatively minimal legal restrictions and subject to the law imposed by fiduciary duties, deceit and misrepresentation, individuals can act in their own best interest and are free to negotiate unethically if they choose. It is part of the negotiation process that positions are advanced that do not represent what a party truly expects or is prepared to agree to in the end. A lawyer should not deliberately mislead and conceal information from another party during a negotiation (***Regular***).

***Code of Professional Conduct for BC***

**3.1-1**  In this section

**“competent lawyer”** means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement, including: ...

(c)     implementing as each matter requires, the chosen course of action through the application of appropriate skills, including: ...

(v)        negotiation;

***Law Society of Newfoundland and Labrador v Regular***

*Regular represented a client who had 75 percent of the shares in a company and was involved in a negotiation with another party to acquire the remaining shares in the company. The solicitor for the other party sent correspondence to Mr. Regular asking if the rumors were true with regard to the sale of the company. Mr. Regular responded that these rumors were not true when they were.*

**Issue:** Did Mr. Regular deceive and to conceal the sale of the company to the other lawyer ?

**Analysis:**

Mr. Regulars response was delibralty intended to mislead Mr. Hughes. It was deliberately intended to conceal the sale of assets. Mr. Regular failed to act with integrity, failed in responsibility to an individual lawyer and failed to avoid questionable conduct.

**Ratio:** A lawyer should not deliberately mislead and conceal information from another party during a negotiation.

# Chapter 8: Ethics and Criminal Law Practice

## 1. Counsels Dual Role in the Adversary System

Both the Crown and Defense counsel have dual roles in the criminal trial. The Crown is expected to be fair, objective and dispassionate in presenting the case and is expected to argue forcefully for a legitimate result. The Defense is expected to vigorously represent the interests of the accused while remaining independent of the client and mindful of the various overriding duties of the court.

## 2. Ethical Duties of Crown Counsel

The prosecutor is a Minister of Justice. The Crown is charged with the broad duty to ensure that every accused is treated fairly. Prosecutor may seek a conviction but must ensure that the accused receives a fair trial. Prosecutor’s goal is to assist the court in eliciting truth without infringing upon the rights of the accused. Discretion of the vested in the prosecutor should be exercised with objectivity and impartiality.

## Full Disclosure

Most important obligation is full disclosure to the defense of all relevant information in the Crown Possession. Under s. 7 of the Charter, the accused has a right to make a full answer and defense- full disclosure is essential to this process. The Crown has an ethical and constitutional duty to provide full disclosure of all relevant information (***Stinchcombe***). ***Rule 4.01(3)*** of the **Model Code** states that “When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law…”.

***R v Stinchcombe***, **1991 SCC**

Lawyer charged with breach of trust // Crown decided key W wasn’t credible & wouldn’t be called to testify //

A sought disclosure of W’s statements but Crown refused to produce // COURT - “no practical reason” to

oppose broad duty to disclose // A has constitutional right to make full answer & defence // limited

exceptions -- subject to review by court

***Krieger v LS of Alberta***, **2002 SCC**

Crown did not disclose exculpatory E in murder case, claimed he was “delaying” disclosure as per discretion

under Stinchcombe // A complained to LS // LS starts discipline process // AG tries to stop -- claims actions

of Crown immune from external disciplinary review // COURT -- NO -- Crown subject to LS except wrt

certain core elements

**Overzealous Advocacy by Crown**

The Crown is subject to legal and ethical limits when it comes to cross examination of witnesses and jury addresses. In a jury address, the Crown cannot use inflammatory or vindictive language to express opinions as to the guilt of the accused. Can’t imply that the Crowns investigation has found the accused guilty. Need to make statements of argument and not fact (***Boucher***).

## 3. The Ethical Duties of “Officers of the Court”

Lord Morris in ***Rondel v Morsley*** stated “The advocate has a duty to assist in ensuring that the administration of justice is not distorted or thwarted by dishonest or disreputable practices”.

## 4. The Ethical Duties of Defense Counsel

A proper functioning adversarial system requires defense counsel “fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case” (***Rondel v Worsley***). ***Rule 4.01(1)*** of the **Model Code** states that defence counsel must “represent the client resolutely”.

**Defending the Guilty Client**

Defense counsel should avoid forming opinions as to the guilt or innocence of the client- it’s not ethical and can impact performance. If you become convinced of your clients guilt you can continue to represent your client but must not use any defense which involved knowingly misleading the court.

**Negotiating a Plea Bargain**

One of the most important responsibilities of a defense counsel is duty to appropriately negotiate a guilty plea and sentence for client who faces an inevitable conviction or who wishes to acknowledge guilt.

**R v K(S), 1995 ONCA**

*youth plead guilty to sexual offences due to convenience - constantly maintained innocence to defence counsel // new E*

*speaks to his innocence // youth applies to have guilty plea set aside*

COURT - protestations of innocence made it impossible for youth to successfully complete counseling provision of probation // plea set aside & new trial ordered

• guilty plea + refusal to admit guilt can create problems for client while serving sentence & in trying to obtain or complete parole/probation (R v K(S))

• BUT -- lawyer cannot give or offer “valuable consideration” (including settling of a related civil matter) to another person to influence Crown’s conduct of criminal complaint -- unless the lawyer obtains the consent of the Crown -- 3.2-6(a)

# Chapter 12: Access to Justice

## Constitutional Right to Access to Justice

Access to legal services is fundamentally important to a free and democratic society but the jurisprudence and the history of the concept does not support that there is a broad and general right as an aspect or a precondition of the rule of law. Apart from fundamental legal rights, there is no constitutional obligation on the state to ensure access to justice. (***Christie***)

***British Columbia (Attorney General) v Christie***

*Christie was a lawyer in Vancouver who provided legal services at low or not cost to individuals in downtown Vancouver. BC Government implemented a 7 percent tax on legal services. Because his clients did not pay him, his practice ran into financial difficulties. Mr. Christie brought a constitutional challenge to the Court of Appeal. The BC Gov appealed to the SCC.*

**Issue:** Is general access to legal services in relation to court and tribunal proceedings dealing with rights and obligations a fundamental aspect of the rule of law?

**Analysis:**

• It is argued that access to justice is a fundamental constitutional right that embraces the right to have a lawyer in relation to court and tribunal proceedings (BCGEU). It is argued that a tax on legal services prevents people from accessing the courts.

• The right affirmed in BCGEU is not absolute. The province ahs the ability to pass laws pursuant to s.91(14) and this implies the power of the province to impose at least some conditions on how and when people have a right to access the courts.

• Access to legal services is fundamentally important to a free and democratic society but the jurisprudence and the history of the concept does not support that there is a broad and general right as an aspect or a precondition of the rule of law.

**Ratio:**

• Access to legal services is fundamentally important to a free and democratic society but the jurisprudence and the history of the concept does not support that there is a broad and general right as an aspect or a precondition of the rule of law.

• Apart from fundamental legal rights, there is no constitutional obligation on the state to ensure access to justice.

**Decision:** Appeal allowed and cross appeal dismissed.

Access to Justice Problem: The Access to Justice problem is that there are people that require the services of a lawyer but can’t afford legal services.

## Solving the Access to Justice Problem:

**Brent Cotter, Thoughts on a Coordinated and Comprehensive Approach to Access to Justice in Canada**

• Access to justice means access to 'knowledge, resources or services', as needed to address the individual’s particular circumstances.

Roles and Responsibilities of the 'Legal Actors in Relation to Access to Justice

1. Legal Education: There needs to be a greater commitment to 'public service' in our law schools. Should teach students the importance of access to justice, be proactive in our expectations that law students learn about public service through experience, rethink our curriculum with a greater emphasis on service, think of ways for laws to be changed to facilitate access to justice and attract candidates who have a genuine inclination toward service.

2. Lawyers and the Legal Profession: Lawyers owe it to the system to help make it better as we benefit from the system.

* Lawyers should be required to provide a modest portion of their time, or moneys worth of their time, to support a pro bono program.
* There needs to be a redesign of the legal system which is not lawyer centered and allows suitably qualified persons to deliver legal services at a lesser cost.

3. The Judiciary:

* Court processes and our explanation of these processes can be simplified.
* Need to be open to the dispute resolution processes that are less focussed on the legal framework which is less focused on the legal framework of the dispute and is more focused on the interests of the parties.
* Need to consider the role of the judge in the case of an unrepresented individual. This is in order to provide better justice to unrepresented litigants.

4. Governments:

* Greater financial support is both justified and needed to facilitate access to justice for citizens.
* Laws should be crafted in clear, simple and understandable ways.
* Policy screens should be used to determine if a law, policy or admin practice facilitates or impedes access to justice for citizens. Laws that impeded would require special justification.

## Government

**Have Governments gone far enough in fulfilling the general societal obligation to foster access to Justice?**

***Public Commission on Legal Aid in British Columbia, Foundation for change: Report of the Public Commission on Legal Aid in British Columbia*** (March 8, 2011)

Executive Summary

• Legal services in British Columbia are too little and their longevity or consistency too uncertain.

• Legal aid is essential in criminal matters where persons are accused of serious crimes and they cannot otherwise afford to pay a lawyer. Liberty is at stake. '

• Timely legal aid may prevent additional health care costs, the commission of criminal offenses, and further burden the social welfare system.

• Report made 9 recommendations including: recognize legal aid as an essential public service and increasing long term, stable funding.

Lawyers and The Legal Profession

• Legal aid operates only for individuals with very limited financial resources.

• Legal aid pays lawyers much less than the market rate and does not cover all the work necessary to ensure effective resolution of legal disputes.

## Lawyers and the Legal Profession

***Rule 3.01*** of the **Model Code** states “As a matter of access to justice it is in keeping with the best traditions of the legal profession to provide pro bono services and to reduce or waive a fee when there is hardship or poverty or the client or prospective would otherwise be deprived of adequate legal advice or representation”.

**Richard Devlin, *Breach of Contract? The New Economy, Access to Justice***

Arguments for mandatory pro bono:

* Rights based argument is that there is an unmet right to access legal assistance and that contractually, the legal profession is obliged to respond to that need because of its privileged monopoly situation.
* Education of lawyers is also subsidized by the state. Practice of law is state created and facilitated privilege and advantage.
* Lawyers have proactively encouraged their monopoly on legal services. Resistant to paralegals and other non-lawyers.
* Utilitarian Argument: Lawyers will have more fulfilling lives. Can be in the interest of both lawyers and law firms. Morale boosted, legal skills developed and enhanced. Law firms can attract young lawyers who aspire to do more than just maximize billable hours. Increases loyalty to the firm.

Arguments against Mandatory Pro Bono:

* Lawyers should not be compelled to provide services without remuneration.
* Would be unfair, it’s easier for large law firms and more affluent lawyers to absorb the cost of pro bono. Not all lawyers are competent as a result of specialization and they should not be providing low quality legal services. Administratively impractical.

**Alice Woolley, Imperfect Duty: Lawyers obligations to Foster Access to Justice**

Woolley rejects many of the arguments offered by Devlin on the basis that they do not give a sufficiently accurate portrait of the lawyers role in the legal system. Argus that there is a special obligation on lawyers to foster access to justice based on the imperfections in the market for legal services.

# Chapter 13 Issues in Regulation

## 1. The Good Character Requirement

In addition to standard competency requirements for applicants of bar admission, provincial law societies requires the applicant to be of “good character”. The purpose of this requirement is to protect the public and maintain public confidence in the legal profession. Character is the combination of qualities or features distinguishing one person from another. Good Character connotes moral or ethical strength, distinguishable as an amalgam of virtuous attributes or traits which would include, among others, integrity, candour, empathy and honesty (***Preyra***). Test for good character: has the applicant established his good character at the time of the hearing on the balance of probabilities? (***Preyra***). Where the level of deception in great, a sufficient passage of time must be taken to establish that an applicant is of good character and should be admitted to the bar (***Burgess***).

***Preyra v Law Society of Upper Canada***

*Law student falsified his grades and made other misrepresentation on his resume and cover letter in an attempt to secure an articling position. Altered 11 grades on his transcript, stated was a Rhodes scholar. Lied to Dean of school about how many firms he applied to with fraudulent grades.*

**Issue:** Is the applicant of good character and should he be admitted to the bar?

**Analysis:** The purpose of the good character requirement is to ensure that the Law Society can protect the public and maintain high ethical standards in the lawyers the law society admits to practice.

Definition of Good Character is: Character is the combination of qualities or features distinguishing one person from another. Good Character connotes moral or ethical strength, distinguishable as an amalgam of virtuous attributes or traits which would include, among others, integrity, candour, empathy and honesty.

Onus is on applicant to prove he is of good character at the time of hearing application. Standard of proof is BoP.

**Test:** has the applicant established his good character at the time of the hearing on the balance of probabilities?

This was not a simple lapse of judgement resulting from a stressful situation.

**Ratio:**

Test for good character: has the applicant established his good character at the time f the hearing on the balance of probabilities?

**Decision:** Applicant had not satisfied that he was a person of good character.

***Law Society of Upper Canada v Burgess*** 2006 LSDD No. 81

*Applicant was a 28 year old law student who completed bar admission course and articles.**She had been disciplined in the 4th year of her undergraduate degree for plagiarising a paper. She lied about the full extent of the plagiarism to the law school, to her principle and an academic reference. Once her principal found out he did still continue to support her as a person of good character.*

**Issue:** Should the applicant be admitted to the bar? Did the applicant establish that she was of good character today?

**Analysis:**

* Due to the serious nature of the deception the law society cannot accept that a sufficient passage of time has taken place to conclude that the applicant was of good character and should be admitted to the bar.
* Principal stated that she was one of the best articling students he had ever had.
* *Preya*: The transition from being a person of good character is a process and not an event.
* Applicant has not satisfied on a balance of probabilities that she is now of good character.

**Ratio:** Where the level of deception is great, a sufficient passage of time must be taken place to establish that an applicant is of good character and should be admitted to the bar.

## 2. Extra Professional Misconduct

Law Societies have jurisdiction over misconduct by lawyers outside of their legal practice. This allows a law society to regulate ethical misconduct which is substantially, but not technically, related to the lawyers conduct within legal practice. At its broadest, this allows LS to regulate much further, for example, for any behaviour which the law society believes constitutes "conduct unbecoming" a member of the law society. In ***Budd***, Law Society of Upper Canada outlined the criteria to which LS may determine an appropriate conduct order. The LS stated “The Criteria for determining the appropriate conduct order is the protection of the public, the preservation of the public’s confidence in the legal profession, and the maintenance of high professional standards; and in that context and to serve those objectives, the gravity of the misconduct, the need for both specific and general deterrence and the particular circumstances of the offending lawyer and the context of the misconduct”.

***Law Society of Upper Canada v Budd***

*Lawyer had been convicted of criminal conduct involving the sexual exploitation of two young sisters (14 and 16 when they had first intercourse with the lawyer). The girls and their mother were friends with the lawyer prior to the sexual relationship beginning. Peter Budd showed little remorse. The acts were consensual and the girls were over 14.*

**Issue:** Did the lawyers, Brian Budd, contravene s. 33 of the Law Society Act by engaging in conduct unbecoming a licensee?

**Analysis:**

* Rule 1.02 of the Rules of Professional Conduct define conduct unbecoming a barrister or solicitor.
* In determining the appropriate conduct order, an essential exercise is to ensure that the conduct order imposed upon the lawyer is comparable to the conduct order imposed in other similar cases.
* General deterrence was considered a factor of importance in this case. Lawyers must know that an act in the fashion which the lawyer acted in this case is unacceptable and will receive a severe response from the law society.

**Ratio:**

* The Criteria for determining the appropriate conduct order is the protection of the public, the preservation of the public’s confidence in the legal profession, and the maintenance of high professional standards; and in that context and to serve those objectives, the gravity of the misconduct, the need for both specific and general deterrence and the particular circumstances of the offending lawyer and the context of the misconduct.

**Decision:** Revocation of licence.

**Appeal panel of the Law Society of Upper Canada:** Revocation of licence is deserved as a matter of general deterrence and of maintaining public confidence in the legal profession.

## 3. Bar Readmission

There is no per se bar to readmission on the basis that the applicant is on parole. When determining whether an individual should be readmitted to the bar following the conviction of a criminal offense, the controlling factor to an application to readmission at law is rehabilitation. The more serious the crime, the more clearly it has to be demonstrated that rehabilitation has been complete (***Sychuk***).

***Law Society of Alberta v Sychuk* 1999 LSDD No. 15**

*Applicant was disbarred in 1990 following his conviction of second degree murder for murdering his wife. Defense argued that it should be manslaughter because of his intoxication. Wife was stabbed 22 times and left arm had been broken from a twisting motion. He was sentenced to life imprisonment without eligibility for parole for 10 years. In 1998, the applicant applied to be reinstated as a member of the law society. Applicant attempted suicide following the murder and deep feelings of agony, guilt, remorse, self-loathing and depression plagued him for years. Lost relationship with two of his children. Has a good relationship with youngest son.*

**Issue:** Should the applicant, who was convicted of second degree murder, be readmitted to the bar?

**Analysis:**

* There is no per se bar to readmission on the basis that the applicant is on parole. The controlling factor to an application to readmission at law is rehabilitation.
* The more serious the crime, the more clearly it has to be demonstrated that rehabilitation has been complete.
* Disbarment is not a life sentence.
* The letters to the law society ought to be discounted as the letters opposing his reinstatement are authored by people who have had no contact with the applicant since his disbarment.
* People are not admitted as students at law unless they are "of good character and reputation".
* Good character without good reputation is insufficient.
* An application for readmission is much different from an application to the bar.
* The life sentence that the applicant received reflected society's denunciation of the crime that he committed.
* The applicants readmission would tarnish the badge of respect that being a member of the Law Society of Alberta comes with not because he is a bad person but because of the enormity of the crime that he has committed.
* While evidence of rehabilitation is substantial, he has only been on day parole since January 1,1998 and insufficient time has passed to provide sufficient comfort of complete rehabilitation.

**Ratio:**

* There is no per se bar to readmission on the basis that the applicant is on parole. The controlling factor to an application to readmission at law is rehabilitation.
* The more serious the crime, the more clearly it has to be demonstrated that rehabilitation has been complete.

## 4. Sanctioning Lawyers for Misconduct

***Adams v Law Society of Alberta***

*Appeal regarding lawyers disbarment as a result of four complaints. The first two counts concerned Adams conviction of sexual exploitation of his 16 year old client. Adams convinced his client, who was trying to get her boyfriend released from jail, to have sex with him. Adams argued on appeal that the Hearing Committee overemphasized the harm to the reputation of the legal profession, failed to accord sufficient weight to good character evidence, erred in rejecting expert evidence as to the risk of Adams reoffending, erred in relying on aggravating factors that were not proven, and imposed a penalty that is a marked departure from penalties imposed for similar offenses.*

**Issues:** Should the applicant be readmitted to the bar?

**Analysis:**

* It is erroneous to suggest that in professional disciplinary matters, the range of sanctions may be compared to penal consequences and to suggest that only the most serious misconduct by the most serious offenders warrants disbarment.
* Disbarment is one disciplinary option available from a range of sanctions and is not reserved for only the very worst conduct engaged in by the worst lawyers.
* The question of what effect the lawyers conduct will have on the legal profession generally is at the heart of a disciplinary proceeding and is clearly best considered by elected members of that profession and the lay benchers appointed to assist in that task and others.

**Ratio:**

It is erroneous to suggest that in professional disciplinary matters, the range of sanctions may be compared to penal consequences and to suggest that only the most serious misconduct by the most serious offenders warrants disbarment.

**Decision:** Decision upheld.

***Law Society of Upper Canada v Hunter***

*George Hunter was disciplined by the Law Society of Upper Canada for his sexual relationship with a client and the resulting conflict of interest. He was deeply remorseful and did not seek to minimize, justify or excuse his misconduct.*

**Analysis:** The determination of penalty is exclusively the function of the Law Society .

Reprimand is not in the public interest. Such a reprimand would fail to reflect the seriousness of the misconduct. CA did not accept the necessity for a suspension of a length recommended by the Society. Gave a 6o day suspension and a fine.

## Undertakings

Undertakings are an integral part of the practice of law. They provide means for legal transactions to be carried out. Undertakings are a promise, from one lawyer to another, which must be kept.

**BC Code:**

7. A lawyer must

(a) not give an undertaking that cannot be fulfilled,

(b) fulfil every undertaking given, and

(c) scrupulously honour any trust condition once accepted.

7.1 Undertakings and trust conditions should be

(a) written, or confirmed in writing, and

(b) unambiguous in their terms.