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# Legal Profession and Lawyer Regulation

## Self-Regulation

* Rules and regulations are determined by other lawyers and is undertaken in the public interest to ensure legal services are provided ethically and competently
* The management and conduct of a law society’s affairs and the exercise of its vested powers occurs through the Benchers, who are a largely elected body
* ***Canada (AG) v Law Society of BC***: the independence of the Bar is a hallmark of a free society. It must be free from state interference, in the political sense, so that it can deliver services to individuals, particularly in the fields of public and criminal law.
* ***Law Society of Manitoba v Savino***: No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules of self-government
* Law societies are statutory delegates of provincial and territorial legislatures – they are empowered to regulate lawyers in the public interest – their decisions are reviewable by provincial superior courts
* Entry regulation
* Conduct regulation

## Duty to Report Other Lawyers

**Categories where you must report:**

1. Abandonment of law practice
2. Participating in criminal activity related to a lawyer’s practice
3. Any other situation where a lawyer’s clients are likely to be materially prejudiced
4. Mental instability of a lawyer of such a nature that the lawyer’s clients are likely to be materially prejudiced
5. Shortage of trust monies
6. Breach of an undertaking or trust condition where it has not been consented to or waived
7. Conduct that raises a substantial question as to another lawyer’s honesty, trustworthiness, or competency as a lawyer

**S3 *Legal Profession Act*** entrenches this paramount interest in public interest – that the overriding purpose of regulation is to ensure that we serve public interests above our own.

## Discipline

* Discipline is for the primary purpose of protecting the public and not for punitive purposes
* Proceedings have three distinct stages:
	+ Complaint and investigation
	+ Hearing stage – adversarial in nature
	+ Penalty/sanction stage

## Canons of Legal Ethics

* These Canons of Legal Ethics in rules 2.1-1 to 2.1-5 are a general guide and not a denial of the existence of other duties **equally imperative** and of other rights, though not specifically mentioned—**statement of general principles** that **underlie the remainder of the rules** in this Code.
* A lawyer is a **minister of justice**, an **officer of the courts**, a **client’s advocate** and a **member of an ancient, honourable and learned profession**.
* In these several capacities, it is a lawyer’s duty to **promote the interests of the state**, serve the **cause of justice**, maintain the **authority and dignity of the courts**, be **faithful** to **clients**, be **candid** and **courteous** in relations with other lawyers and **demonstrate personal integrity**.

2.1-1 To the state

1. A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.
2. **When engaged as a Crown prosecutor,** a lawyer’s primary duty is not to seek a conviction but to see that justice is done; to that end the lawyer should make timely disclosure to the defence of all facts and known witnesses whether tending to show guilt or innocence, or that would affect the punishment of the accused.
3. A lawyer should accept without hesitation, and if need be without fee or reward, the cause of any person assigned to the lawyer by the court, and exert every effort on behalf of that person.

2.1-2 To courts and tribunals

1. **A lawyer’s conduct should at all times be characterized by candour and fairness.** The lawyer should maintain toward a court or tribunal **a courteous and respectful attitude and insist on similar conduct on the part of clients**, at the same time discharging professional duties to clients resolutely and with self-respecting independence.
2. Judges, not being free to defend themselves, are entitled to receive the support of the legal profession against unjust criticism and complaint. Whenever there is proper ground for serious complaint against a judicial officer, it is proper for a lawyer to submit the grievance to the appropriate authorities.
3. A lawyer should not attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should not, either in argument to the judge or in address to the jury, assert a personal belief in an accused’s guilt or innocence, in the justice or merits of the client’s cause or in the evidence tendered before the court.
4. A lawyer should never seek privately to influence a court or tribunal, directly or indirectly, in the lawyer’s or a client’s favour, nor should the lawyer attempt to curry favour with juries by fawning, flattery or pretended solicitude for their personal comfort.
5. Annotations

2.1-3 To the client

1. **A lawyer should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client, and give an open and undisguised opinion of the merits and probable results of the client’s cause.** The lawyer should be wary of bold and confident assurances to the client, especially where the lawyer’s employment may depend on such assurances. The lawyer should bear in mind that seldom are all the law and facts on the client’s side, and that audi alteram partem (hear the other side) is a safe rule to follow.
2. A lawyer should disclose to the client all the circumstances of the lawyer’s relations to the parties and interest in or connection with the controversy, if any, that might influence whether the client selects or continues to retain the lawyer. A lawyer must not act where there is a conflict of interests between the lawyer and a client or between clients.
3. Whenever the dispute will admit of fair settlement the client should be advised to avoid or to end the litigation.
4. A lawyer should treat adverse witnesses, litigants and counsel with fairness and courtesy, refraining from all offensive personalities. The lawyer must not allow a client’s personal feelings and prejudices to detract from the lawyer’s professional duties. At the same time, the lawyer should represent the client’s interests resolutely and without fear of judicial disfavour or public unpopularity.
5. **A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law**. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer’s own sense of honour and propriety.
6. It is a lawyer’s right to undertake the defence of a person accused of crime, regardless of the lawyer’s own personal opinion as to the guilt of the accused. Having undertaken such defence, the lawyer is bound to present, by all fair and honourable means and in a manner consistent with the client’s instructions, every defence that the law of the land permits, to the end that no person will be convicted except by due process of law.
7. A lawyer should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject-matter of the litigation being conducted by the lawyer. A lawyer should scrupulously guard, and not divulge or use for personal benefit, a client’s secrets or confidences. **Having once acted for a client in a matter, a lawyer must not act against the client in the same or any related matter.**
8. A lawyer must record, and should report promptly to a client the receipt of any moneys or other trust property. The lawyer must use the client’s moneys and trust property only as authorized by the client, and not commingle it with that of the lawyer.
9. **A lawyer is entitled to reasonable compensation for services rendered, but should avoid charges that are unreasonably high or low.** The client’s ability to pay cannot justify a charge in excess of the value of the service, though it may require a reduction or waiver of the fee.
10. A lawyer should try to avoid controversies with clients regarding compensation so far as is compatible with self-respect and with the right to receive reasonable recompense for services. A lawyer should always bear in mind that the profession is a branch of the administration of justice and not a mere money-making business.
11. A lawyer who appears as an advocate should not submit the lawyer’s own affidavit to or testify before a court or tribunal except as to purely formal or uncontroverted matters, such as the attestation or custody of a document, unless it is necessary in the interests of justice. If the lawyer is a necessary witness with respect to other matters, the conduct of the case should be entrusted to other counsel.

Annotations

2.1-4 To other lawyers

1. A lawyer’s conduct toward other lawyers should be characterized by courtesy and good faith. Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. Personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers that cause delay and promote unseemly wrangling.
2. A lawyer should neither give nor request an undertaking that cannot be fulfilled and should fulfil every undertaking given. A lawyer should never communicate upon or attempt to negotiate or compromise a matter directly with any party who the lawyer knows is represented therein by another lawyer, except through or with the consent of that other lawyer.
3. A lawyer should avoid all sharp practice and should take no paltry advantage when an opponent has made a slip or overlooked some technical matter. A lawyer should accede to reasonable requests that do not prejudice the rights of the client or the interests of justice.
4. Annotations

2.1-5 To oneself

1. A lawyer should assist in maintaining the honour and integrity of the legal profession, should expose before the proper tribunals without fear or favour, unprofessional or dishonest conduct by any other lawyer and should accept without hesitation a retainer against any lawyer who is alleged to have wronged the client.
2. It is the duty of every lawyer to guard the Bar against the admission to the profession of any candidate whose moral character or education renders that person unfit for admission.
3. **A lawyer should make legal services available to the public in an efficient and convenient manner that will command respect and confidence**. A lawyer’s best advertisement is the establishment of a well-merited reputation for competence and trustworthiness.
4. No client is entitled to receive, nor should any lawyer render any service or advice involving disloyalty to the state or disrespect for judicial office, or the corruption of any persons exercising a public or private trust, or deception or betrayal of the public.
5. A lawyer should recognize that the oaths taken upon admission to the Bar are solemn undertakings to be strictly observed.
6. All lawyers should bear in mind that they can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity.

# Lawyer-Client Relationship

## Formation of the Solicitor-Client Relationship

### FLSC Model Code

* **3.01(1)** Must make services available to the public efficiently and conveniently
* **3.01(2)** May offer services to a prospective client by any means, so long as they are not:
	+ **(a)** False or misleading
	+ **(b)** Amount to coercion, duress, or harassment
	+ **(c)** Take advantage of vulnerability
	+ **(d)** Otherwise, bring the profession or the administration of justice into disrepute

### Marketing

* **3.02(1)** **A lawyer may market so long as it is:**
	+ **(a)** Demonstrably true, accurate, and verifiable
	+ **(b)** Neither misleading, confusing, or deceptive
	+ **(c)** In the best interests of the public and consistent with the high standards of professionalism
* And NOT:
	+ Stating the amount received in past cases, degree of success without noting that it varies based upon individual facts, and therefore not necessarily indicative
	+ Suggesting qualitative superiority over other lawyers
	+ Raising expectations unjustifiably
	+ Suggesting aggression
	+ Disparaging others
	+ Taking advantage of vulnerable persons/groups
* **3.02(2) Advertising fees – you can advertise if:**
	+ **(a)** If it is reasonably precise to services offered for each quoted fee
	+ **(b)** Whether additional charges are added to that fee are stated
	+ **(c)** And you must strictly adhere to that advertised price
* **3.03(1)** Can’t advertise yourself as a specialist, unless you are certified as a specialist by the LSBC (specializations don’t exist in BC)

### Is the Lawyer Trying to Share Fees with Someone?

**2.06(7)(a) A lawyer must not in/directly split fees with any non-lawyer or (b) give rewards for referral of clients to any non-lawyers.** HOWEVER, they can engage in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients from non-lawyers, including:

* Making an arrangement for the sale of the practice that includes a percentage of the revenues generated
* Paying employees for services, other than referrals, based on the law firm’s revenue
* Occasionally entertaining potential referral sources by purchasing meals, providing tickets for sporting or other activities or client functions

**2.06(8)** This does not apply to multi-disciplinary practices of lawyers and non-lawyers in a partnership agreement to share fees and sharing fees with lawyers if it is an interprovincial firm or if there is Canadian and non-Canadian lawyers.

* **2.06(6)** If a lawyer refers a client to a specialist lawyer, not because of a conflict of interest, a referral fee may be given if **it is reasonable and doesn’t increase the client’s fees** and **if the client is informed and consents**

### Soliciting Clients

The concern is for lawyers trying to stir up business by preying on vulnerable individuals (ie: being ambulance chasers) and stirring up unnecessary litigation.

#### ***Law Society of Saskatchewan v Merchant***

Facts: A guy sent a bunch of letters to First Nations people soliciting clients re: residential schools and included estimations for damages for sexual assault without ever having met the potential clients or hearing their particulars.

Ratio: It is not contrary to marketing rules to attempt to solicit clients by telling them what likely compensation will be if it is reflective of the future reality of compensation. Lawyers should not engage in offensive advertising through solicitation, assuming the likely positions and causes of action of potential clients with whom they’ve never met.

* Whether a party was actually misled may be considered as a factor as to whether the solicitation was misleading, but won’t be determinative

### Public Communications

Public communications about a client’s affairs should not be for the purpose of publicizing the lawyer and should be free from any suggestion that the lawyer’s true purpose is self-promotion (***Stewart v CBC***).

### Choice of Client

* **A lawyer should refuse to take a client if there is a:**
	+ Conflict of interest
	+ Lack of competence
	+ Continuing retainer with a previous lawyer
	+ That lawyer is a potential witness
	+ Illegal client purpose
* Moral non-accountability:
	+ The legal system is very complex and laypersons need guidance
	+ Lawyers are neutral agents and should not be tasked with deciding entitlements
* Taking it personally:
	+ The law is an instrument of power in which real people both benefit and suffer – lawyers are responsible for the choice of clients and the strategies deployed on their behalf
* If the lawyer does reject to represent a client, they should give FREE reasonable assistance to the client to find another competent lawyer

### Model Code

* We must make services available to the public efficiently and conveniently, but there is a general right to decline representing a client. That right, however, must be exercised prudently, particularly if the result is that the person is going to have a hard time getting legal advice.
* You can’t reject a client merely because their cause is unpopular or they are notorious
* You can’t reject them merely because of a powerful interest of malfeasance that is involved
* You can’t reject them out of your personal opinion about their guilt (especially if you’re a criminal lawyer)
* **5.03(1)-(5)** Lawyers may not discriminate against any person – human rights laws apply to the interpretation of this rule
* **3.01(1)** The legal profession should continue to provide pro bono services as much as possible

## Triggering the Lawyer-Client Relationship

**Rule 1.1:** Triggered where the client consults the lawyer and the lawyer agrees to render legal services OR having consulted the lawyer, the client reasonably concludes that the lawyer has agreed.

### ***Descoteaux v Mierzowski***

Facts: The accused filled out legal aid forms at the lawyer’s office – nothing more.

Issue: When does the lawyer-client relationship begin?

Ratio: Items required by a lawyer to decide whether to represent a client are just as much communication in order to obtain legal advice, even if they are administrative in nature. Privilege is triggered prior to the retaining of legal aid through the provision of information on the legal aid forms.

* The relationship is established the moment a potential client has his first dealings with the lawyer’s office in order to obtain legal advice

## Obligation of Competence and Quality of Legal Services

Once the relationship is formed, the **duty of loyalty** exists.

There are actually very few discipline cases for incompetence, despite this being a HUGE client complaint (losers always complain and blame lawyer competence).

* The standard is of a reasonable, ordinarily competent, prudent solicitor: ***Central Trust v Rafuse***
* Many provinces have continuing legal education requirements – BC requires 12 hours a year of CLE, with two focusing on professionalism, ethics, or practice management

### Model Code

**2.01(1) Competency**: A competent lawyer applies and has relevant knowledge, skills and attributes

* **(a)** Must be competent in general legal principles and procedures, substantive law and procedures in the area that they practice in
* **(b)** Must investigate facts, identify issues, and ascertain the client objectively
* **(c)** Skills: legal research, analysis, application of the law to relevant facts, writing and drafting negotiations, advocacy, problem-solving
* **(d)** The lawyer must communicate at all relevant stages of a matter in a timely and effective manner
* **(e)** The lawyer must be cost-effective, diligent, and conscientious in carrying out functions and **(h)** recognize their own limitations
* The lawyer has obligations to pursue appropriate professional development and adapt to changing professional requirements, standards, and techniques.

**2.02(1) Quality of Service:** Lawyers have a duty to provide courteous, thorough, and prompt service

* Quality should be at least equal to that which lawyers generally expect from a competent lawyer in a like situation
* **(a)-(n)** Certain very common sense standards must be maintained: keeping clients reasonably informed and answering reasonable requests, communicates in a timely and efficient manner, responding to phone calls from clients, keeping client appointments, being civil, maintaining adequate office staff, informing a client of a proposal of settlement, making a prompt and complete report when the work is finished, avoidance of self-induced disability

### ***Nova Scotia Barristers’ Society v Richey*** – Professional Misconduct and Incompetence

Facts: A senior lawyer who was highly intelligent and performed well on some files also failed miserably on others. He was not following instructions, responding to communications, had terrible file management, and had issues providing full and timely disclosure – even despite court orders.

Ratio: Analysis was done by looking at a long and predictable pattern, rather than at whether a single instance was incompetence. Regardless of evidence of some good lawyering, patterns of individual acts of neglect that became predictable go above and beyond errors in judgment, thus amounting to professional incompetence.

### ***Law Society of ALberta v Syed*** – Incompetence

Facts: S advised the client to make a guilty plea without ever doing a cursory preliminary investigation. The lawyer didn’t advise the client of the importance of elections, and failed to recognize and advise on an important defence.

Ratio: The conduct of a single file which demonstrates gross negligence is sufficient to establish incompetence, even without a larger pattern. S admitted to conduct deserving of sanction, but claimed to be just short of incompetence.

## Cultural Competence

Voyvodic suggests 5 essential habits:

1. Note the difference between the lawyer and the client
2. Map out the case, considering different cultural understandings of the lawyer and client
3. Consider additional reasons for puzzling client behaviour
4. Identify and solve communication pitfalls to see client’s store through their eyes
5. Examine previous communication failures and develop a proactive way to ensure that it doesn’t happen again

### ***R v Fraser***

Facts: Lawyer didn’t allow his client the potential to challenge jurors for cause – he was dismissive and claimed it had never been an issue for his clients before,

Ratio: The performance of lawyers shouldn’t be reviewed on a standard of perfection, nor subject to a forensic audit when an unfavourable result is achieved – rather, it should be reviewed on an objective standard. The level of competence is measured on a standard of reasonableness.

## Termination of the Lawyer Client Relationship

The retainer agreement may explicitly or implicitly contemplate the demise of the relationship. The client can fire the lawyer at will, but the lawyer can only terminate the relationship if there is good cause.

* **2.07(7) Obligatory withdrawal**:
	+ **(a)** Discharged by the client (no shit?!)
	+ **(b)** Client persists in instructing the lawyer to act contrary to professional ethics
	+ **(c)** The lawyer is not competent to continue
* **2.07(2) Optional withdrawal:**
	+ Client deceives the lawyer
	+ Client refuses to accept the lawyer’s advice on a significant point
	+ Client is persistently unreasonable or uncooperative in a material respect
	+ The lawyer is having difficulty obtaining adequate instructions
		- These may not be used as a threat to force a hasty decision for a difficult question upon a client
* **2.07(3) But what if the client won’t pay?!**
	+ If, after reasonable notice, the client fails to provide payment of fees, the lawyer may withdraw, unless serious prejudice to the client would result (TEST).
		- The lawyer should ensure adequate time for the client to obtain services of another lawyer and for the latter to be prepared for trial
* **Court approval of withdrawal:** courts have the inherent jurisdiction over orderly administration of justice, but in BC, this is rarely invoked
* **2.07(8) Supplementary obligations upon withdrawal:**
	+ The lawyer must give reasonable notice to the client and cannot create a disadvantage or peril to the client
	+ **2.07(9)** The lawyer must notify the client in writing with reasons and explain that the trial will proceed and that they should retain other counsel ASAP
	+ Withdrawal is subject to the lawyer’s rights of a lien, deliver property and papers to which the client is entitled
	+ The lawyer must give the client all relevant information in connection with the case and must account for funds and refund any remuneration not earned
* The lawyer should consider the effect of enforcing a lien for unpaid fees on the client’s position and should not enforce it if it would materially prejudice a client’s position in any uncompleted manner
* If a lawyer leaves a firm, the client’s interest are paramount and should not be abused or harassed to follow – the client should be given notice of their options in writing

### ***R v Cunningham***

Facts: Ms. C worked for Yukon Legal Aid and retained DC to represent the accused. The accused didn’t provide necessary updated financial information so Ms. C applied to have Legal Aid withdraw as counsel after two weeks.

Ratio: Courts review withdrawal in a preventative way: to protect the administration of justice and ensure trial fairness. This does not create a conflict of interest or a breach of solicitor-client privilege. This is the inherent jurisdiction of superior courts. If counsel seeks to withdraw early so no adjournment is necessary or for ethical obligations, the Court must allow withdrawal. If counsel seeks to withdraw for non-payment of fees, the Court should exercise its discretion and consider the following (non-exhaustive) factors:

* Is it feasible for the client to represent themselves?
* Does the client have other means of obtaining representation?
* What is the impact of the client from delay of proceeding?
* What was the conduct of counsel? (ex: was there reasonable notice? Did they apply ASAP?)
* What is the impact on the Crown, co-accused, complainant, witness, jurors?
* Has the client repeatedly switched lawyers in the past?

# Duty to Preserve Client Confidences

There is a conflict between the value of systematic confidence on behalf of the general public that information shared with lawyers is vigorously protected by solicitor-client privilege and the criticism that the larger public interest suffers when lawyers only look out for clients.

Confidentiality and privilege should not be conflated, although they both arise out of the duty of loyalty.

|  |  |
| --- | --- |
| **CONFIDENTIALITY** | **PRIVILEGE** |
| A broader obligation imposed by the law society | A narrower/legal obligation imposed by the law |
| Ethical principle | Legal duty |
| All client information acquired by the lawyer during the relationship is subject to this obligation | Only private communications that take place between a lawyer and a client are subject to this obligation |
| The obligation continues even if others know that information | Once communicated to 3rd parties, the information is not privileged anymore |
| This is the defining feature of *all* lawyer-client relationships | This is a principle of evidence law and fundamental justice |
| For any communication during the course of professional relationship | For the purposes of providing legal advice |
| Confidentiality survives the relationship |  |

## Model Code

* **2.03(1)** A lawyer must keep in strict confidence all information regarding the client’s business or affairs acquired in the course of the professional relationship and must not divulge unless:
	+ **(a)** There is express or implied client authorization
	+ **(b)** It is required by the law or the court
	+ **(c)** It is required to deliver information to the law society
	+ **(d)** Or it is otherwise permitted by this rule
* Mere communication from the client is confidential but might not be privileged.

## Crime and Fraud Exception to Confidentiality

### ***Descoteaux v Mierzwinski***

Facts: The police obtained a warrant to get the accused’s application for legal aid. He was charged with fraudulently reporting a lower income in order to be eligible for government services like legal aid.

Ratio: The solicitor-client relationship begins when the potential client first deals with the lawyer’s office to obtain legal aid. Confidential communications lose that confidential nature if and to the extent they are made for criminal purposes (ex: obtaining legal advice to engage in crime) and the same is true when the communication itself is a material element (ex: the *actus reus*) of the crime.

## Public Safety Exception to Confidentiality

### ***Smith v Jones***

Facts: J was charged with aggravated sexual assault of a prostitute – psych evaluation revealed J had a murderous plan and Dr. S thought he was a dangerous individual who was likely to commit future offences if not treated. Dr. S applied to be permitted to release this information under the public safety exception to solicitor-client privilege.

Ratio: Solicitor-client privilege is the highest privilege recognized by the Courts, but if certain requirements are met, there is a public safety exception:

1. **Clear risk to identifiable group or person**
	1. Must be ascertainable group
	2. Cannot be too vague, unless it is particularly compelling, extreme, and imminent threat
2. **Seriousness: death or serious bodily harm must be threatened**
	1. Includes serious psychological harm
	2. Needs some element of violence
3. **Danger is imminent**
	1. Imminent threat so that some sense of urgency is created
	2. These can't merely be made in fleeting bouts of rage

When disclosure occurs under this exception, it must be limited as much as possible, providing only that which pertains to the public safety risk.

## When Innocence is at Stake, There is an Exception to Confidentiality

### ***R v McClure***

Facts: M was charged with sexual offences against former students. JC came forward with further allegations and began a civil suit. M sought product of JC’s lawyer and litigation file to determine the nature of the claim and assess the motive for fabrication.

Ratio: TEST FOR INNOCENCE-AT-STAKE-EXCEPTION:

1. Accused must establish some evidentiary basis that a communication exists that could raise a reasonable doubt of guilt and if the accused is not provided with access, they will not otherwise be able to establish a reasonable doubt.
2. The trial judge must examine the communication to see whether or not it will give rise to reasonable doubt.

## Legislative Exceptions to Confidentiality

### ***Goodis v ON (Ministry of Correctional Services)***

Facts: A journalist applied for access to all records pursuant to the *Freedom of Information Act*. The Minister claimed solicitor-client privilege to nearly all relevant documents.

Ratio: Solicitor-client privilege will not yield unless it is absolutely necessary to disclose the privileged information in order to achieve the end sought by the enabling legislation. This is so even in the access-to-info context. TEST: absolute necessity.

### ***Law Society of Saskatchewan v Merchant***

Ratio: The absolute necessity test is two-fold:

1. Does the body seeking disclosure of records, which are subject to the solicitor-client privilege, have the authority to request those records?
2. Is such powers exist, have they have been exercised in such a way as to NOT interfere with privilege except as to the extent absolutely necessary?

### ***FLSC v Canada (AG)***

Facts: Parliament introduced a regime requiring lawyers to collect and retain information on their clients that could be used by law enforcement. This was targeted at money laundering and the financing of terrorism. As a response, the Law Societies had adopted a no-cash and client ID rule.

Ratio: The solicitor-client privilege is a principle of fundamental justice – this legislation is unconstitutional, infringing S7 – jeopardizing lawyer’s liberty interests and those of clients contrary to the principles of fundamental justice.

## Lawyer Withdrawal in a Criminal Context – Privilege and Confidentiality

### ***R v Cunningham***

Ratio: Non-payment of fees is not an exception to solicitor-client privilege, but a matter to which privilege may or may not attach depending upon the context. When payment or non-payment of fees is relevant to the merits of the case, or disclosure of the same may cause prejudice to the client, solicitor-client privilege attaches. Where it is unrelated to the substantive merits of the case (ex: most criminal charges), no solicitor-client privilege attaches to the information.

## Taking Custody and Control of Real Evidence

### ***R v Murray***

Facts: M was B’s lawyer, and upon B’s instructions, M entered his home after a police search and retrieved tapes which depicted some fucked up sexual assaults of his murder victims. He kept the tapes for 17 months – didn’t know their contents, but eventually watched them and figured it out. There was evidence that he discussed the matter with another lawyer, before watching them.

Ratio: Privilege protects solicitor-client communication, not physical evidence. There is always a legal obligation not to conceal incriminating physical evidence.

# Duty of Loyalty (Conflicts of Interests)

Two types of conflicts: client-client, or solicitor to client.

* **3.4.1.:** you should not continue to act when there is a conflict
* **3.4.2:** you must get consent – either express or implied from all clients
	+ Not only consent, but the lawyer must reasonably believe that she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the client
	+ Here, a distinction is made between duty of loyalty and the effect upon representation
	+ The test is one of material adverse effect on representation (which includes interests)
* **3.4.5:** joint retainers – consent should be in writing or you should write a letter noting that consent to both clients
* **3.4.10.:** unless a former client consents, a lawyer must not act against a former client in:
	+ The same matter
	+ Any related matter
	+ Any other matter, if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client

## Client-Client Conflicts

### ***MacDonald Estate v Martin***

Facts: D worked on M’s file at a law firm until it dissolved and D worked at another firm, which merged with another law firm. The new firm represented the defendant in M’s actions. When M found out, he applied to have the new firm removed. D had done no work on the defendant’s file and they gave undertakings that she would not be involved in the future.

Ratio: An undertaking to avoid a conflict, on its own, is insufficient to prevent a conflict. Knowledge is not necessarily imputed throughout a huge firm, but the test is the “**possibility of real mischief**” in determining whether there is a conflict. The question is: would a reasonably-informed member of the public be satisfied that use of confidential information would not occur? Did the lawyer receive confidential information and was there a possibility that it was used to prejudice?

* **Probability of real mischief:** need proof that a lawyer has information and will probably use it against them
* **Possibility of real mischief:** disclosure might occur
* Is there a disqualifying conflict of interest?
	+ Did the lawyer receive confidential information attributable to a solicitor and client relationship matter at hand?
		- Once the relationship is established, the Court should infer that this type of information was imparted unless the lawyer convinces the court this wasn’t the case
	+ Is there a risk that it will be used to prejudice the client?
		- Disqualification is automatic if acting against a former client
		- It is unrealistic to say that no one else at the firm can act, but the lawyer must convince the court that reasonable efforts and assurances were taken as to not share/depart this information

## Duties to Current Clients

### ***R v Neil***

Ratio: Although a 2nd client might present with an issue factually and legally unrelated to the interests of the 1st client, the 2nd might still be adverse in interest to the 1st and should not be taken on, so as to avoid a conflict of interest. **The bright line rule against conflicts of interests:** generally a lawyer may not represent one current 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 she is able to represent both without adversely affecting the other. The duty of loyalty requires that client interests be put before lawyer interests.

* The fiduciary duty goes beyond the broad duty just not to disclose confidential information:
	+ Duty to avoid conflicting interests
	+ Duty to commitment to a client’s cause
	+ Duty of candour – on-going obligation

### Model Code

* Did not adopt the bright line test
* **2.04(1):** A lawyer must not act or continue to act for a client where there is a conflict of interest” (ex: substantial risk that a lawyer’s loyalty or representation of a client would be materially and adversely affected by the lawyer’s own interests or duties to another client, a former client, or a 3rd person), except as permitted by the Code.
	+ More than a mere possibility of a conflict of interest – this is a genuine, serious risk.
* The underlying values are to protect the public confidence in the integrity of the legal profession and the administration of justice
* Factors to consider when determining if a conflict exists:
	+ Immediacy of the legal interest
	+ Whether the legal interest is directly adverse
	+ Substantive or procedural issue
	+ Temporal relationship between the matters
	+ Significance of the issue to the immediate and long-term interests of the client involved
	+ Client’s reasonable expectations

## Former Client Conflicts

The duty of loyalty owed to past clients is less onerous than to current clients. Even if the duty of loyalty allows the lawyer to act against a former client (ie not on the same or related matter), the duty of confidentiality may prevent it from happening.

### Model Code – **2.04(10)**

* Unless the former client consents, lawyers must not act against a former client in:
	+ The same matter
	+ A related matter
	+ Any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may be prejudicial to that client
* The conflict extends to the whole firm:
	+ **2.04(11)** When a lawyer has acted for a former client and obtained confidential information, another lawyer at that firm may act in the new matter against the former client if
		- **(a)** There is consent of the former client OR
		- **(b)** The law firm establishes that in the interests of justice, considering all relevant circumstances, such as:
			* **(i)** The adequacy of the assurances of non-disclosure
			* **(ii)** Adequacy and timing of measures taken to ensure non-disclosure
			* **(iii)** Extent of prejudice to any party
			* **(iv)** Good faith of the parties
			* **(v)** Availability of suitable alternative counsel
			* **(vi)** Issues affecting public interests
* Duty not to act against a former client in a related matter whether or not confidential information is at risk: ***Brookville***

### ***Strother v ME***

Ratio: Where concurrent clients are business competitors, but there is no legal conflict. **A lawyer is not in breach of his or her duty of loyalty unless there is a substantial risk that the lawyer’s representation will be materially and adversely affected**. This test is most flexible when there is no confidential information at risk.

### ***Wallace v CN Railway***

Ratio: **Bright-line test and substantial risk principle:** Absent proper consent, a lawyer must not act directly adverse to the immediate interests of a current client unless the lawyer is able to demonstrate no substantial risk that the lawyer’s representation of the current client would be materially or adversely affected by the new, unrelated matter.

**PROFESSIONAL LITIGANT EXCEPTION:** Consent will be implied and cannot be retroactively withdrawn if not previously expressed in a retainer contract when:

1. It is a large corporate client
2. Matters are sufficiently unrelated
3. There is no danger of confidential information being abused
4. In the circumstances, its application will be consistent with the high standards of the legal profession and integrity of the justice system

Such clients tend to have many resources, are not vulnerable, and are able to materially limit the choice of counsel of opposing parties. When there is no serious risk to the representation of the client and there’s no confidential information at risk, something short of disqualification is required.

### ***CNR v McKercher LLP***

Ratio: **A lawyer cannot unilaterally drop a client in order to circumvent the duty of loyalty.** The bright line rule:

1. Applies only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting
2. Applies only when clients are adverse in legal interest
3. Cannot be successfully raised by a party who seeks to abuse it
4. Does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in an unrelated matters (ex: professional litigants)

**Substantial Risk Rule**: When a situation falls outside the scope of the bright line rule for any of the reasons discussed above, the question becomes whether the concurrent representation creates a substantial risk that the lawyer’s representation of the client would be materially and adversely affected. The determination of whether there exists a conflict becomes more contextual and looks to whether the situation is **“liable to create conflicting pressures on judgement”** as a result of the presence of factors which may reasonably be perceived as affecting judgment. The onus falls upon the client to establish, on a balance of probabilities, the existence of a conflict – there is only a deemed conflict of interest if the bright line rule applies.

## Lawyer-Client Conflicts

### ***Stewart v CBC***

Ratio: The fiduciary relationship exists even after the termination of the retainer, such that when a lawyer involved himself again in the subject matter of the retainer, the fiduciary duty of loyalty was triggered. The duty of loyalty can prevent a lawyer from discussing the subject matter of her retainer despite wide-knowledge about the non-confidential information.

### ***LSUC v Hunter***

Facts: H was a bencher and treasurer for LUSC – had sex with a client over the 2.5 years of representation as her family lawyer. He ended things then tried to get her to sign a statement that he had acted professionally. She basically said fuck you and wouldn’t sign. He was charged with professional misconduct.

Ratio: When a lawyer acts for someone with whom they’ve had a personal relationship, that may interfere with the duty to provide objective, disinterested, professional advice to the client. **2.04(3)** Lawyers shall not (continue to) act for a client where there is (or likely to be) a conflicting interest, unless the client has received adequate disclosure to make an informed decision and consents to continued representation with conflict. Where the client is vulnerable and unsophisticated, lawyers should recommend independent legal advice to make sure the client consents and that their consent is informed, genuine, and uncoerced. Sexual relationships are not absolutely prohibited but they raise serious questions about whether the lawyer has a conflict of interest that will jeopardize the solicitor-client relationship.

# Ethics in Advocacy

* **4.01(1):** Represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.
	+ Raise every issue, ask every question, advance every argument – however distasteful – seek every remedy, and advance all defences
	+ Should de-emphasize own views/opinions
* Must also be faithful to administration of justice – the duty to the Court is paramount – higher cause of truth and justice – therefore, the lawyer must produce all relevant authorities, even those contrary to their client’s position

## Ethics at the Pre-Trial Stage

Pleadings:

* How to fearlessly raise every issue and argument without participating in an abuse of process
* Pleadings cannot contain scandalous allegations – those will be struck
* **4.01(1)** and **4.01(2)(b):**
	+ The lawyer should not abuse the process of a tribunal by instigating proceedings clearly motivated by malice for the sole purpose of injuring
	+ Shall not pursue improper steps
		- Taking advantage of slips or oversights
		- Using tactics to delay or harass
		- Knowingly participating or assisting in the dishonest or dishonourable acts of clients
	+ The lawyer should:
		- Use fair and honourable means
		- Use candour, fairness, courtesy and respect
		- Seek to promote a party’s right to a fair hearing in which justice can be done

### ***DCB v Zellers***

Ratio: A competent and responsible lawyer should know when there is no legal principle to support his or her client’s position and should not pursue action in such case.

## Ethics at Discovery

* Provincial court rules speak to these
* During the day-to-day course of things, this is very much in the hands of lawyers, not judges, so there is large room for unethical behaviour

### ***Grossman v TO General Hospital***

Ratio: Lawyers have a duty to make full, fair, and prompt disclosure, including making diligent inquiries about material documents in the possession of others for the client, and when asserting privilege, the lawyer should at least describe the documents so that it may be contested and mediated by the court, if necessary. Excessive zeal may increase unfairness, obstruct the search for truth, and waste time and money.

## Ethics During Negotiation

* **2.02(4):** Lawyers have a duty to encourage client compromise, when possible, on a reasonable basis, and must discourage commencing/continuing useless legal proceedings
* There are no Model Code rules on the conduct of negotiation

## Ethics at Trial

* There is a need to balance the duty to the client with the duty to the court

### Witness Preparation

* In good faith and proper conduct, a lawyer may prepare a witness on case theories, line of questioning, area of particular interest of opposing counsel, basic issues, etc
* Counsel may not coach a witness – it’s illegal, unethical, and unprofessional, an obstruction of justice and witness tampering – could also result in costs awarded against the lawyer personally (or the client), Law Society sanctions and/or criminal sanctions

### Cross-Examination

* ***R v Lyttle*** – cross examination of an opposing witness: counsel may put questions to witnesses for which they have a good-faith basis for putting forward (*any* hypothesis that is honestly advanced on the reasonable inference, experience, or intuition of counsel) and counsel need not show evidence to bring forward the same. However, counsel may not cross in a manner that is calculated to mislead.
* ***R v R(AJ)*** – cross examination by Crown Counsel: cross examination by Crown Counsel that involves argumentation with the accused, personal opinion, and abusive tone may prejudice the accused’s defence and undermine the appearance of a fair trial.

## Representations About the Law

Lawyers have a duty not to deliberately refrain from informing a tribunal of binding authority that the lawyer considers to be directly on point and which has not been mentioned by the authority party.

### ***GMAC v Isaac Estate***

Ratio: It doesn’t matter if related case law is distinguishable, it must still be brought forward, even if it’s adverse to the lawyer’s case. Counsel has a duty to bring all relevant case law in the relevant jurisdiction (not others) to the attention of the Court so that the judge may remain restrained in their adjudication. This involves reported cases only (unless the unreported are known), on points of law (not similar facts necessarily), and determining relevant authority – ignorance is not an excuse.

## Advocacy and Civility

* Politeness to others in the justice system and acting fairly, honestly, and with the utmost integrity in dealings with other lawyers and members of the court.
* Four sources of the obligation:
	+ Court’s inherent jurisdiction to govern courtroom proceedings
	+ **Model Code:**
		- **6.02(1)** Lawyers should be courteous, civil, act in good faith
			* Agree to reasonable requests (ex: procedure and formalities) that do not prejudice the rights of the client
		- **6.02(2)** Avoid sharp practice and slips not going to the merits
		- **6.02(4)** Not correspond abusively or offensively or in an improper tone
	+ Best practice civility codes (seriously?!)
	+ Lawyer’s own personal ethics for positive self-regulation
* Civility does not conflict with a lawyer’s duty of zealous representation. In fact, if the lawyer is uncivil, it may impair the client’s interests by forming a bad impression with the judge or the jury
* **Basically, be nice to people because people don’t like being yelled at or have people be rude to them.**

### ***Schreiber v Mulroney***

Facts: There was a delay in M’s statement of defence which was understood and consented to by S – S got annoyed instead and decided to seek default judgment despite agreeing not to do so.

Ratio: Sharp practice is impermissible.

### ***LSBC v Laarakker***

**Test for professional misconduct:** Marked departure from the conduct that the Law Society expects of its members.

# Counselling and Negotiation

* Providing information, offering an opinion, applying law to client’s factual situation
* Tension between client autonomy and decision-making and lawyers expressly or implicitly making the actual decision
* Can’t just tell a client what they want to hear – must be honest and candid

## Counselling Illegal Conduct

### ***LSUC v Sussman***

Ratio: A lawyer commits professional misconduct when he or she brings the administration of justice into disrepute by counselling a client to disobey a court order. There are very limited situations in which it is acceptable to ignore a court order – there must be a reasonable and honest belief of imminent risk or danger to the child, which must co-exist with an immediate application to the court to have the issues determined. If the order remains, it must be obeyed unless and until there is a full hearing for a permanent change that finds otherwise.

## Model Code

* **2.02(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.
* **2.02(7)** – The lawyer must never knowingly assist or encourage any dishonesty, crime, fraud, or illegal conduct, or instruct the client on how to violate the law and avoid punishment.
* **2.02(8)** – The lawyer who is employed by an organization and known that the organization intends to act dishonestly, fraudulently, criminally, or illegally, must do the following:
	+ **(a)** advise the person from whom the lawyer takes instructions and the chief legal officer that the proposed conduct is, was, or would be dishonest and must be stopped
	+ **(b)** if necessary, advise the next person up, including ultimately, the board of directors/trustees
	+ **(c)** if the organization continues, withdraw.

## Negotiation

* Lawyers must act with integrity and in good faith when they deal with other lawyers and the self-represented – cannot misrepresent or conceal
* Must be careful using deception and bluffing tactics during negotiations
* **Model Code: 2.01(1)(c)** – competent lawyers is those who can apply relevant knowledge, skills, and attributes on behalf of the client, including negotiation.

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

Ratio: A lawyer cannot deliberately mislead another lawyer to gain an advantage to a favourable outcome.

# Ethics and Criminal Law

Crown: quasi-judicial minister of justice – cannot take a purely adversarial position.

* Excludes any notion of winning or losing
* May still be adversarial in the sense that they can advocate forcefully for a conviction, assuming that is a legitimate result on the evidence
	+ Argue forcefully for a legitimate result but be fair, objective, and dispassionate in the presentation of the case of the Crown

Defence: entitled to be purely adversarial – no obligation to assist prosecution

Both: overriding duty to the court, the profession, and the public

## Ethical Duties of Crown Counsel

* Duty to be fair and objective towards the accused
* Needs institutional independence to safeguard the public interest
* Seek justice in the public interest:
	+ Seek a conviction, all the while striving for a fair trial
	+ May not try to obtain a conviction at any cost, but must assist the Court in eliciting truth without infringing upon legitimate rights of the accused
	+ Exercise prosecutorial discretion with objectivity, impartiality, and not in a purely partisan way

## Crown Disclosure

* The Crown has the duty to disclose all relevant information in the Crown’s possession to defence and has discretion to disclose any irrelevant information

### ***R v Stinchcombe***

Ratio: There is an asymmetrical duty to disclose imposed on the Crown and triggered by the request of the accused. Disclosure should be complete (including evidence the Crown won’t rely upon) with only some discretion as to timing and privilege when an informer’s identity is at stake. This duty is not imposed on defence who should maintain their adversarial role. The Crown may not be adversarial. The Crown’s role is to lay before the jury all credible and relevant evidence. It may firmly argue but must be fair, within its public duty, with no considerations of winning or losing. The fruits of the investigation of the Crown are public property.

### Model Code

**4.01(3):** 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.

* Primary duty is to seek that justice is done through a fair trial on its merits – it’s not to seek a conviction
* Must act fairly and dispassionately

### ***Krieger v Law Society of Alberta***

Ratio: The law society may analyze the professional ethics of Crown Counsel (ex: acting in bad faith or for improper purposes online – otherwise, the exercise of prosecutorial discretion is not reviewable.

## The Crown’s Duty to Call All Material Witnesses

Pre-*Stinchcombe*, the Crown had to call all credible material witnesses, given their role as a “quasi-judicial minister of justice”

### ***R v Cook***

Ratio: There is no duty upon the Crown to call witnesses, nor specifically the complainant or victim. Decisions of how to present the case must be left to the Crown’s discretion, absent evidence that such discretion is being abused.

## Overzealous Advocacy by Crown Counsel

* ***R v Boucher*** was the inflammatory jury address case – involving personal opinion, inflammatory and vindictive language, suggesting the conclusion had already been reached due to Crown investigations
* Should not appeal to “passion” – should be “dignified”
* Should not make the Crown into a witness

## Ethical Duties of the “Officers of the Court”

This duty applies to both parties – they are constrained from highly adversarial behaviour as “officers of the court”.

* The purpose of both is to seek justice and truth (is this really true of defence counsel?)
* Defence is a representative, not a delegate, and must give the client the benefit of his learning, skills, and experience, but keep in mind the duty owed to the Court and to the lawyer herself
* What does it mean to be an officer of the Court?
	+ Not mislead
	+ Not cast aspersions on the other party/witnesses where there is no sufficient basis
	+ Not withhold authorities, even those that are against the client
	+ Not make frivolous argument
	+ Act civilly – otherwise, that lowers pubic respect for the administration of criminal justice and undermines the legitimacy of the results: ***Felderhof***

## Ethical Duties of the Defence Counsel

Fearlessly raise every issue, advance every argument, and ask every question, no matter how distasteful – must represent the client resolutely.

## Defence Counsel: Defending the Guilty Client and not Misleading the Court

* Avoid forming any opinions on the subject of guilt or innocence in the first place – counsel’s opinion is generally irrelevant and might actual cause counsel to fail in carrying out their partisan duty of resolutely defending the client
* **When counsel knows the client is guilty,** there are ethical constraints to not mislead the court – the accused must be made aware of this
	+ If the accused confessed to the lawyer, the lawyer may not suggest some other person committed the crime or call any evidence that is believed to be false based upon that confession
	+ They may still test evidence (admissibility, sufficiency), jurisdiction, form of indictment, etc

### ***R v Tuckiar***

The defence should have upheld the accused’s confidences even after the guilty verdict had been given.

## Taking Custody and Control of Real Evidence

* **4.01(2)(e):** a lawyer cannot knowingly attempt to influence the course of justice by suppressing what ought to be disclosed or otherwise assisting in any fraud, crime, or illegal conduct.
* Generally, the defence does not have to disclose anything to the Crown except: 1) alibi evidence, 2) notice of a psychiatric defence, and 3) any expert opinion evidence
* Clients generally think that their lawyer cannot disclose anything and must keep confidences, so assume that giving the “bloody shirt” to their lawyer is the same as throwing it into a swamp.
* ***R v Murray***: from a criminal law perspective:
	+ The defence can take possession and conceal the real evidence during pre-trial period if the defence honestly believes that it has exculpatory uses at trial and if counsel intends to so use it at trial
	+ The defence cannot take possession of real evidence and conceal it if counsel realizes that the evidence is inculpatory.
		- This creates a large loophole – honest mistake of fact
		- Not satisfactory for regulatory regime of lawyer’s ethics
* When defence obtains potentially inculpatory real evidence, she must at a minimum:
	+ Review the material immediately and refuse to accept instructions not to review it
	+ Advise the client that accepting such instructions is unethical
	+ Advise the client that if material, once reviewed, is substantially or predominately inculpatory, it is illegal and unethical for counsel to conceal it from the authorities
	+ If exculpatory uses are not plain and obvious, or are not clearly the predominate use, counsel must consult immediately with a panel of senior lawyers
* Lawyers can turn over such evidence:
	+ To prosecution, directly or anonymously
	+ Deposit it with the trial judge
	+ Deposit it with the court to facilitate access for testing by both defence and Crown
	+ Disclose its existence to Crown and prepare arguments

## Negotiating a Guilty Plea

**4.01(7):** Before a charge is laid or any time after, a lawyer of the accused or potential-accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

**4.01(8):** The lawyer may enter into an agreement with the prosecutor about a guilty plea if:

* **(a)** The lawyer advises the client about prospects of an acquittal or finding of guilt
* **(b)** The lawyer advises the client of implications and possible consequences of a guilty plea, particularly that the court is not bound by an agreement about a guilty plea and sentencing is at the discretion of the court
* **(c)** The client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged
* **(d)** The client voluntarily instructs the lawyer to enter into the agreement

Four main ethical rules:

* The lawyer must not conclude plea or sentence discussions without first completing a thorough analysis of the facts and law applicable to the case
* Post-investigation, the client is entitled to skilled advice from counsel about prospect and implications of a guilty plea
* The decision must be the client’s and must be made voluntarily
* The plea must be based upon an admission of the necessary factual and mental elements of the offence charged

### ***R v K(S)***

Ratio: Lawyers must be assured that the client is prepared to admit the necessary factual and mental elements of a guilty plea before permitting the client to enter a guilty plea. This is a plea of convenience scenario.

# Lawyers in Organizational Settings (Corporate Counsel)

## Model Code

* **2.02(3) When the client is an organization:** although a lawyer may receive instructions from an officer, etc, when a lawyer is employed or retained by an organization, the lawyer must act for the organization in exercising his duties and providing professional services.
* **2.02(8) Dishonesty/fraud when a client is an organization:** A lawyer, who is employed or retained by an organization to act in a matter for which the lawyer knows the organization has acted, is acting, or intends to act dishonestly, fraudulently, criminally, or illegal, must do the following, in addition to her **7** obligations:
	+ **advise the person from whom the lawyer takes instructions** and the CLO (or both CEO and CLO) that the proposed conduct is, was, or would be dishonest, etc. and should be stopped
	+ if necessary because the person from whom the lawyer takes instructions, the CLO or CEO refuses to cause the proposed conduct to be stopped, advise progressively **up the ladder**, including ultimately the board (of directors, trustees) that the proposed conduct was, is, or would be dishonest, etc. and should be stopped, **and**
	+ if the org continues with or intends to pursue the proposed wrongful conduct, **withdraw** from acting in the matter in accordance with Rule 2.07
* **2.03(3)** **Future harm exception** – a lawyer may disclose confidential info, but must not disclose more info than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclose is necessary to prevent the death or harm.

### ***Wilder v Ontario (Securities Commission)***

Ratio: The acts of corporate counsel may be regulated by the securities commission in the public interest, which may have implications for client confidentiality when both counsel and their client are subject to commission scrutiny.

# Undertakings

A promise and responsibility of a lawyer to do something, engaging both professional responsibilities and legal obligations. Undertakings dealing with management of property are called “trust conditions.” Terms of undertakings are specified in writing.

How do you breach an undertaking?

* By not observing the promise or conditions the undertaking is concerned with
* Can be breached in relation to:
	+ A lawyer’s relationship to the profession
	+ A lawyer’s relationship with their client
	+ During the course of litigation
	+ To another lawyer
* Lawyers who don’t practice (**2-3(1)**) and lawyers who retire (**2-4(1)**) can remain members to the LSBC if they undertake in writing to the Executive Director not to engage in the practice of law.
	+ These members may apply to the Executive Director under **2.4-1(1)** to be released from their undertaking and begin practicing again.
	+ If not released, these members can continue to provide pro bono legal services or act as a paralegal (**2-4.2**)
* Under **2-32.01(2)**, an articled student must not:
	+ **(b)** give an undertaking unless the student’s principal or another practicing lawyer supervising the student has also signed the undertaking, or
	+ **(c)** accept an undertaking unless the student’s principal or another practicing lawyer supervising the student also accepts the undertaking
* **7.2-11**: a lawyer must **(a)** not give an undertaking that cannot be fulfilled, **(b)** fulfill every undertaking given, and **(c)** honour every trust condition once accepted

# Issues with Regulation

## Good Character Requirement

* Law societies require a demonstration of a lack of bad character, namely an absence of criminal convictions, academic dishonesty, attempts to deceive the law society
	+ If it has occurred, the law societies want to see repentance and rehabilitation – that the applicant has recovered from the behaviour which has raised a negative inference about their character
* Aim is to protect the public, maintain high ethical standards and maintain public confidence in the legal profession

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

Ratio: 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 admitted to practice. Good character is judged at the time of application – “risk of reoffending” and forgiveness have no bearing – and the onus rests on the applicant on a balance of probabilities.

### ***Law Society of Upper Canada v Burgess***

Ratio: The transition from being “of bad character” to “of good character” is a process, not an event. It may never happen and the Law Society is unlikely to be satisfied that it happened during a short passage of time.

### ***LSUC v Manilla***

Not admitted on the basis of the character requirement for making ethnic slurs, posting defamatory letters, other offensive conduct, and dropped criminal charges.

## Extra-Professional Misconduct

Regulation of conduct by lawyers outside of their legal practice, which may be technically, but not substantially, related to their practice of law. This will result in a citation of conduct unbecoming (ex: public nudity, failing to care for animals, writing a bad cheque to a landlord, etc)

### ***LSUC v Budd***

Ratio: **In determining whether a lawyer should be found to have committed conduct unbecoming:** (i) protection of the public, (ii) preservation of public confidence in the legal profession, and (iii) maintenance of high professional standards. In determining just and appropriate conduct order to serve disciplinary objectives, **must consider the gravity of misconduct, need for specific and general deterrence, particular circumstances of the offending lawyer and context of the misconduct.**

### ***LS Alberta v Sychuk***

Ratio: The commission of a serious offence is no bar to admission, rehabilitation is a controlling factor – but the more serious the crime, the more necessary evidence of rehabilitation is. Rehabilitation is not paramount and does not overtake the need to protect the standing of the profession given its self-regulating status. Good character without good reputation is insufficient. An application for reinstatement is much different than an application for admission because it implies that the oath of office has been broken and the oath to be an officer of the court has been violated in addition to the serious offence. This is an exacerbating factor given that the lawyer who commits an offence was, at the time, sworn to uphold the law.

## Sanctioning Lawyers for Misconduct

A huge range of discipline – fines, orders, disbarment

### ***Adams v LSA***

Ratio: Trust is the overarching foundation of the legal profession. It’s difficult to measure the precise impact of misconduct on the profession, but there’s little doubt that public confidence and trust in the legal profession will be eroded. Disbarment is not restricted to the most serious cases. It’s one of a range of sanctions available for disciplinary decisions.

### ***LSUC v Hunter***

In deciding the proper sanction, the Law Society will consider the severity of the conduct, the lawyer’s remorse, the need for deterrence, and the need to sanction conduct to ensure continued public respect for the profession.

## Regulating Unauthorized Practice of Law

Balancing protecting the public from harm from non-lawyers and promoting access to justice.

### ***LSUC v Boldt***

Ratio: Although mediation is a valuable service to the public and in a family law context, a non-adversarial approach to conflict resolution, it’s “form cannot be used as a shield to protect those who are carrying out unauthorized practice”. Despite issues with access to justice, mediators cannot be used as low-price alternatives to lawyers.

### ***Laneman v AB***

Ratio: Whether a non-lawyers is practicing law is a question of degrees.