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# **General Ethical Principles and Canons**

**Sources of Guidance for Ethical Conduct**: **Other than case law, legislation, Rules/Professional Codes, LSBC decisions, principles and norms, we have benchers with the power to determine what conduct is acceptable (*Jabour*).**

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

**1. Loyal Advocacy** – Loyalty is core moral requirement traditionally associated with legal practice.

**2. The Lawyer as a Moral Agent in Pursuit of Justice** – Luban states that an ethical L cannot have unqualified commitment either to zealous partisanship or moral non-accountability. Simon defines justice as the central moral principle governing lawyering. ***Murray*** demonstrates strengths of both views.

**Articling students** have the same duties as lawyers under the Code (**1.1-1**)

## \*\*Canons of Legal Ethics

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| 2.1-1 TO THE STATE | maintain integrity & law // don’t help people to break law **[SEE PAGE \_\_]** |
| 2.1-2 TO COURTS & TRIBUNALS | conduct characterized by candour & fairness // don’t ty to deceive Ct or to improperly influence **[SEE PAGE \_\_]** |
| 2.1-3 TO THE CLIENT | obtain any remedy/defence via fair & honourable means within bounds of law **[SEE PAGE \_\_]** |
| 2.1-4 TO OTHER Ls | conduct characterized by courtesy & good-faith // avoid all sharp practice // fulfill undertakings **[SEE PAGE \_\_]** |
| 2.2 INTEGRITY **[SEE PAGE \_\_]** | [1] trustworthiness of lawyer key to the lawyer-client relationship[2] irresponsible conduct can erode public confidence in the admin of justice[3] dishonorable/questionable conduct by L in private OR professional life reflects adversely on profession |

## Duties Owed to the Profession and Society \*\*Code 2.2-2

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

**2.2-2 L has a duty to uphold standards and reputation of legal profession and assist in advancement of its goals, organizations and institutions.**

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| **[1] Collectively, Ls are encouraged to enhance the profession through activities such as:** (a) sharing **knowledge and experience** with colleagues and students informally in day-to-day practice as well as through contribution to professional journals and publications, support of law school projects and participation in panel discussions, legal education seminars, bar admission courses and university lectures; (b) participating in **legal aid** and community legal services programs or providing legal services on a pro bono basis; (c) filling elected and volunteer positions with the Society; (d) acting as directors, officers and members of local, provincial, national and international bar associations and their various committees and sections; and (e) acting as directors, officers and members of non-profit or charitable organizations. |

# **Lawyer-Client Relationship**

**Client Selection and Discrimination –** Ls have the right to decline representation but subject to anti-discrimination norms.

Once L-C R is established, L’s options about what they are prepared to do are curtailed. Ethical consensus that a lawyer should refuse to take a client if a COI exists, lawyer lacks competence in an 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.

## Duties Owed to Clients: \*\*Code 2.1-3, 3.2-9

**2.1-3** (a) L should **obtain sufficient knowledge of the relevant facts** and consider the applicable law before advising C, and give an open and undisguised opinion of the merits and probable results of the client’s cause. Be wary of bold and confident assurances to the C.

(b) L should disclose to C all the circumstances of the L'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 L [L should maintain a professional detachment]. L must not act where there is a **conflict of interests** between L and C or between Cs.

(e) L should endeavour by all fair and honourable means to obtain for C the **benefit of any and every remedy and defence** that is authorized by law, performed within legal bounds. No C has a right to demand that the L **do anything repugnant to the L's own sense of honour and propriety**.

(f) L’s right to undertake the defence of a person accused of crime, regardless of L’s own personal opinion as to his guilt. Having undertaken such defence, L 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.

**3.2-9**When **C’s ability to make decisions is impaired** because of minority or mental disability, or for some other reason, L must, as far as reasonably possible, maintain a normal L-C R.

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| **[1]** L-C R presupposes that C has the **requisite mental ability** to make decisions about his legal affairs and to give L instructions. Depends on such factors as age, intelligence, experience and mental and physical health. Is C able to understand the information relative to the decision that has to be made and appreciate the reasonably foreseeable consequences of the decision? L will have to assess.**[2]** L who believes a person to be incapable of giving instructions should decline to act. However, if L reasonably believes that the person has no other agent or representative and a failure to act could result in imminent and irreparable harm, L may take action on behalf of the person lacking capacity only to the extent necessary to protect them until a legal rep can be appointed. L undertaking to so act has the same duties under these rules to the person lacking capacity as she would with any C.**[3]** If C’s incapacity is discovered or arises after the S-C R is established, L may need to take steps to have a lawfully authorized rep, such as a litigation guardian, appointed or to obtain the assistance of the Office of the Public Trustee to protect C’s interests. L has an ethical obligation to ensure that C’s interests are not abandoned. Until the appointment of a legal rep, L should act to preserve and protect C’s interests.**[4]** In some circumstances when there is legal rep, L may disagree with the legal rep’s assessment of what is in C’s best interests under a disability.  So long as there is no lack of good faith or authority, the judgment of the legal rep should prevail.**[5]** When L takes protective action on behalf of a person lacking in capacity, gets implied authority to disclose necessary confidential info. |

## Duty of Honesty and Candour: \*\*Code 2.2-1, 3.2-2

**2.2-1 L** has a duty to practice law and discharge all responsibilities to Cs, tribunals, the public and other Ls honourably and with **integrity**.

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| **\*[1] Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about her L's trustworthiness, the essential element in the true L-C R will be missing. If integrity is lacking, the L's [benefit] to the client and reputation within the profession will be destroyed.****\*[2] Public confidence in AoJ** and in the legal profession may be eroded by L’s **irresponsible conduct**. |

**3.2-2 When** advising C, L must be **honest and candid** and must inform C of all info known to L that may affect C’s interests in the matter.

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| **[1]** Incl. L’s relations to the parties and interest in/connection with the matter, if that might influence whether C continues to retain her.**[2]** Give competent opinion based on sufficient knowledge of the relevant facts + adequate consideration of the applicable law + L’s own experience and expertise. Advice must be open and undisguised, clearly disclose what L honestly thinks about the merits and probable results.**[3]** Firmness, without rudeness: L may disagree with C’s perspective, have concerns about C’s position, or give advice that will not please C. |

## Duty of Competence: \*\*Code 3.1-1, 3.1-2, 3.2-1

**3.1-1** “**Competent lawyer**” = L who has and applies relevant knowledge, skills and attributes appropriately to each matter undertaken on C’s behalf

(d)     communicating at all relevant stages of a matter in a timely and effective manner;

(h)     recognizing limitations in one’s ability to handle a matter and taking steps accordingly to ensure C is appropriately served;

(i) managing one’s practice effectively.

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

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| **[1]** C is entitled to assume that L has the ability and capacity to deal adequately with all legal matters to be undertaken on C’s behalf.**[2]** Competence = adequate knowledge of practice, principles, how to apply them in procedures = keep abreast of devs. in areas she practises**\*[3]**  In deciding whether L has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include:(a) complexity of matter; (b) L’s general experience; (c) L’s training and experience in the field; (d) amt of preparation and study; and (e) if it’s appropriate or feasible to refer the matter to another L of established competence in the field in question.**[4]** Where expertise in particular field of law required; often necessary degree of proficiency will be that of the **general practitioner**.**\*[5]** Do not undertake a matter without feeling honestly competent to handle it or to quickly become competent. Otherwise, it’s dishonest to C. **\*[6]**  Recognize where you lack competence, at which point you should: (a) decline to act; (b) obtain C’s instructions to retain, consult or collaborate with a competent, suitable L; or (c) obtain C’s consent for L to become competent without undue delay, risk or expense to C.**[7]** Competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting or other non-legal fields, and, when it is appropriate, the lawyer should not hesitate to seek the client’s instructions to consult experts.**[7.1]** When L considers whether to provide legal services under a limited scope retainer must carefully assess whether she can do it competently. Ensure that C is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services.**[8]** Clearly specify the facts, circumstances and assumptions on which an opinion is based, particularly when can’t justify an exhaustive investigation/expenses. However, unless C instructs otherwise, the lawyer should investigate the matter in sufficient detail still.**\*[9]** Be wary of bold and over-confident assurances to C, especially when L’s employment may depend upon advising in particular way.**\*[10]** [**For corporate counsel**] L may be asked for or may be expected to **give advice on non-legal matters** (e.g. **business**, economic, policy or social complications involved in the course C chose), which will be of real benefit to C. If expressing views on such matters, should point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.**[11]** In a multi-discipline practice, let C know that legal advice may be supplemented by advice or services from a non-L, which must be provided outside the scope of the legal services retainer and from a separate location. Same for non-legal advice unrelated to the legal services retainer.**[12]** L should provide timely service to C and, if she can reasonably foresee undue delay, should inform C.**[15]**No standard of perfection: Error or omission, even though actionable in negligence or K, will not necessarily constitute a failure to maintain the standard of professional competence. |

**3.2-1**L has a duty to provide courteous, thorough and prompt service to clients. The **quality of service** required is service that is competent, timely, conscientious, diligent, efficient and civil. [equal to that of competent L in like situation]

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| **[3]** Duty to communicate effectively with C. What is effective will vary depending on the nature of the retainer, the needs and sophistication of the client and the need for the client to make fully informed decisions and provide instructions.**[6]** Meet deadlines, unless you have a reasonable explanation and ensure that no prejudice to C will result. Be prompt in prosecuting a matter, responding, and reporting developments to C to extent that C reasonably expects. |

# **Withdrawal**

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| 3.7-1 WITHDRAWAL FROM REP | L must not withdraw except for good cause and with reasonable notice to the C |
| 3.7-2 OPTIONAL WITHDRAWAL | serious loss of confidence b/w L & C (ex/ deceit; unreasonable; repeated failure to follow instructions) |
| 3.7-3 NON-PAYMENT | L may withdraw after non-payment with reasonable notice BUT if matter is criminal, CT may not allow |
| 3.7-7 OBLIGATORY WITHDRAWAL | discharge by C // not competent to act // C persists in instructing L to act in unethical manner |
| 3.7-8 MANNER OF WITHDRAWAL | minimize expense & prejudice to C + facilitate orderly transfer to the successor L |
| 3.7-9.1 CONFIDENTIALITY | Can’t disclose reason for w/d if due to confidential communication (ltd. exception for crim non-pay) |

**Proulx and** **Layton** state “withdrawal must be for good cause, with appropriate notice to the C. In instances where withdrawal is justified, L must extricate himself or herself from the case with a minimum of prejudice to the former C”.

In **Cunningham**, SCC ruled that while a lower court has the jurisdiction to refuse to grant L’s request for withdrawal, it should be used sparingly to prevent harm to AoJ. 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 co-accused

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

7) the history of the proceedings

**3.7-1** L must not **withdraw** from representation of a client except for good cause & on reasonable notice to the client.

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| **\*[1] It is inappropriate for L to withdraw on capricious or arbitrary grounds.****\*[2] Reasonable notice**: C should be given sufficient time to retain and instruct replacement counsel. W/d not permitted to waste Ct time or prevent other counsel from reallocating time or resources scheduled for the matter in Q. NOT at critical stage of the matter**[3]** Ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the L's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.**\*[4] Departing L** and old firm have duty to inform all old Cs. Cs will choose who will represent them, **[9]** not subject to any K’tual arrangements**[5]** This **duty does not arise if** the L's affected by the changes, acting reasonably, conclude that the circs make it obvious that a client will continue as a client of a particular L or law firm.**[8] Ls** have a continuing obligation to protect client info and ppty, and must minimize any adverse effect on the interests of clients. This obligation generally includes an obligation to ensure that files transferred to a new L or law firm are properly transitioned, including describing the status of the file and noting any unfulfilled undertakings and other outstanding commitments. |

**3.7-10** Before agreeing to represent C, a successor L must be satisfied that the former L has w/d or has been discharged by the C. **[1]** And has settled outstanding accounts of former L. **But, if a trial or hearing is in progress or imminent, or if the C would otherwise be prejudiced, the existence of an outstanding account should not be allowed to interfere with the successor L acting for the client.**

## Optional Withdrawal: \*\*Code 3.7-2

**3.7-2**If there has been a **serious loss of confidence** between the lawyer and the client, the lawyer may **withdraw.**

**\*[1] Examples: if L is deceived by C; C refuses to accept and act upon L's advice on a significant point; C is persistently unreasonable or uncooperative; L can’t get adequate instructions from C. However, do not use the threat of w/d as a device to force a hasty decision by the client on a difficult Q.**

## Non-Payment of Fees: \*\*Code 3.7-3

***Cunningham***: “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 AoJ”.

**3.7-3**If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, L may withdraw.

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| **\*[1] Ensure sufficient time for C to obtain the services of another L and for that other L to prepare adequately for a hearing or trial.****[3]** L-C-R is **contractual** in nature, so general rules respecting breach of K and repudiation apply. In civil proceedings, L not required to obtain Ct’s approval before w/d-ing as counsel, but must comply with Rules of Ct before being relieved of responsibilities as “solicitor acting for the party.” |

**Canon 2.1-3(j)** – Avoid $ controversy; law is for AOJ, not a mere business

## Withdrawal from Criminal Proceedings: \*\*Code 3.7-4 to -6

**3.7-4 If timing is not an issue, Cts cannot refuse withdrawal [supported by *Cunningham*]; no need to enquire into L’s reasons for seeking to withdraw or require counsel to continue.**

**- If timing is an issue, the ct is entitled to enquire into counsel’s reasons. In the case of ethical reasons (*Cunningham*) or non-payment of fees, the Ct must accept counsel’s answer at face value and not enquire further so as to avoid trenching on potential issues of S-C privilege.**

**3.7-5** If L has agreed to act in a criminal case, the date set for trial, and there is not reasonable time (and there might be prejudice to C: ***Cunningham***), L **must not w/d** **because of non-payment of fees**.

**- Ct may exercise its discretion to refuse counsel’s request if allowing withdrawal would cause serious harm to the AoJ.**

**3.7-6 If timing is issue and reason for w/d is not due to fees, L must attempt to have trial adjourned, may w/d only with Ct’s permission.**

## Obligatory Withdrawal: \*\*Code 3.7-7

**3.7-7** L must withdraw if: (a) discharged by a client; (b) a client persists in instructing the lawyer to act contrary to professional ethics; or (c) L not competent to continue to handle a matter.

**• As far as possible, clients should receive effective representation without delay or costs due to termination.**

**• can be explicit (letter of termination) or implicit (resolution of the action) // clients have absolute discretion to terminate -- lawyer’s ability limited. Explicit termination prevents future COI (cts increasingly interpreted broadly) BUT in L's economic interest to retain rel’s. L's often remain on retainer after completing business for C. This can lead to a COI if the L is later retained by a client whose interests are opposed to the original client's.**

## Manner of Withdrawal: \*\*Code 3.7-8, 3.7-9

**3.7-8** Must try to minimize expense and avoid prejudice to the C, do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor L.

**3.7-9 On discharge or withdrawal, a L must:**

(a) **notify** the C in writing, stating: (i) the fact that L (**[1]** and firm too, if applicable) has withdrawn; (ii) reasons, if any; and (iii) in the case of litigation, that the C should expect that the hearing or trial will proceed on the date scheduled and that the C should retain new counsel promptly;

(b) deliver all papers and property to which C is entitled; **[3] Subject to a L's right of lien**.

(c) subject to any applicable trust conditions, give the client all relevant information in connection with the case or matter;

(d) account for all funds of the client then held or previously dealt with, and refund any $ not earned;

(e) promptly render an account for outstanding fees and disbursements;

(f) co-operate with successor L in file transfer; **[4] such co-operation** includes providing any legal memos on the matter, but confidential info not clearly related should not be divulged without C’s written consent. **[5]** avoid “unseemly rivalry”

(g) comply with the applicable rules of court.

## Lawyer Client Confidentiality and Privilege in Withdrawal from Representation \*\*Code 3.7-9.1

An obligation of confidentiality does not cease when representation of the client ceases. In circumstances where L must withdraw, L must do so in a way that does not jeopardize the client’s right to confidentiality.

**3.7-9.1** L cannot **disclose reason for withdrawal** unless C consents, subject to exceptions in law (e.g. **Cunningham: Disclosure of non-pay of fees where it is unrelated to the merits and will not cause prejudice to the A 🡪 No L-C P protection 🡪 Not an exception to privilege 🡪 Disclose away)**

# **Confidentiality and Privilege**

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| 3.3-1 CONFIDENTIAL  | keep in confidence ALL info concerning client’s business & affairs -do not divulge unless [the 4] |
| 3.3-2 USE  | must not use/disclose for L’s benefit or 3rd parties w/out consent of client |

**2.1-3(g)** L should guard, and not divulge or use for personal benefit, C’s secrets or confidences. Having once acted for C in a matter, L must not act against the client in the same or any related matter.

Ethical **duty of confidentiality** (DoC) and legal principle of **solicitor-client privilege** flow from FD of lawyers. ***Proulx and Layton***: “Justification for imposing DoC is that C who is assured of complete secrecy is more likely to reveal to counsel all information pertaining to the case”. In limited but important circumstances, protection of client confidences subjected to mandated disclosures for greater public interest.

At least four features distinguish **confidentiality** from **privilege**: (Rule 3.3-1 **[2]**)

1. Confidentiality is an ethical principle while privilege is a legal duty.
2. DoC includes all C info acquired over course of relationship, legal privilege refers only to L-C private communications.
3. Ethical obligation continue even after info is known by 3rd parties, legal duty ends once disclosed to 3rd parties.
4. Privilege is a legal duty associated with law of evidence in court. Confidentiality is defining feature of L-C Rs.

## Confidential Information \*\*Code 3.3-1, 3.3-2

***Descoteaux v Mierzwinski, SCC*:** S-C R forms when C first deals with L’s office to obtain legal advice – Confidentiality imposed during initial retainer, before any interview or info gathering or deciding to take on C. All is privileged. A judge must not interfere with the confidentiality of communications between L and C "except to the extent absolutely necessary in order to achieve the ends sought by enabling legislation".

**3.3-1 L** must hold in strict **confidence** **all info concerning C’s business and affairs** acquired in the course of professional S-C R and must not divulge it unless: (a) expressly or impliedly **authorized** by C; (b) required **by law or Ct**; (c) required to disclose **to LSBC**, or (d) otherwise **permitted by this rule**.

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| **[1] L’s professional service to C requires unreserved communication, C must feel secure that matters disclose will be held in strict confidence.****\*[3]** **L owes the DOC to every client w/o exception**, **continues indefinitely** after the L has ceased to act for the client.**\*[4]** L **owes a DOC to anyone seeking advice** or assistance on a matter invoking L's professional knowledge, although L may not render an account or agree to represent that person. **L-C R is often established without formality.** Be cautious in accepting confidential info on an informal or preliminary basis, since possession of the info may prevent the L from subsequently acting for another party in the same or a related matter.**\*[5]** **Don’t disclose having been**: (a) retained by or (b) consulted by a person about a particular matter, whether or not they established L-C-R.**[6]** Avoid disclosure to C of confidential info concerning or received from another C, decline employment that might require such disclosure.**\*[8]** **Avoid indiscreet conversations and other communications** about C’s affairs, **shun any gossip** even if C is not named or identified.**[9]** In some situations, **implied authority to disclose some confidential info** to extent necessary to protect C’s interest. Examples: (1) Disclosure may be necessary in pleading or other Ct document. (2) Unless C directs otherwise, disclose affairs to others in law firm + staff used by L |

***McCormick***: Represented RCMP in harassment inquiry, spilled beans in CBC interview 🡪 45 day suspension

**3.3-2 L** must not **use or disclose a (former) C’s confidential info** to his disadvantage, or **for L or 3rd person’s benefit without (former) C’s consent**. **[1] If L engages in literary works etc., must obtain (former) C’s consent before disclosing.**

***Stewart v CBC***: Greenspan made TV re-enactment of the crime and trial of former C 🡪 Breach of FD, put self-promotion and financial interest before interests of former C

***Szarfer v Chodos***: Slept w/ C’s wife when learned of marital difficulties via S-C R 🡪 Breach of FD

**3.3-4** If L (or associates or Ees) allegedly: (a) committed a criminal offence involving a C’s affairs; (b) is civilly liable with respect to a matter involving C’s affairs; (c) committed acts of professional negligence; or (d) engaged in acts of professional misconduct or conduct unbecoming a lawyer,

L may disclose confidential info in order to **defend against the allegations**, but not more than is required.

**3.3-5** L may disclose confidential info in order to **establish or collect L’s fees**, but not more than is required.

**3.3-6** L may disclose confidential info to another L to **secure legal or ethical advice about L’s proposed conduct**.

## Privilege \*\*Code 3.3-2.1

**Privilege** protects information from disclosure in court, even where that info is relevant and probative. Rationale: there is value in open communication in certain relationships. Cost of privilege: hinders the truth seeking function.

***Wigmore*** **three-part test for S-C P**: (1) communication between a lawyer and client, (2) for purpose of legal advice, (3) expectation of confidentiality

**3.3-2.1** L who is required, under federal or provincial legislation, to **produce a document or provide information that is or may be privileged must, unless the client waives the privilege, claim S-C P** in respect of the document.

***Goodis v Ontario***: **For FOI or legislation that requires breach of S-C P, test** = Is there an “absolute necessity” to achieve the legislation’s aims 🡪 Just short of an absolute prohibition

**[1]** If required to disclose, L must not disclose more info than necessary

 ***LSBC v McLeod***: Affidavit very detailed 🡪 Ruined S-C P since way beyond what was needed

Three **exceptions** to S-C Privilege: 1) Facilitating a criminal purpose 2) Public Safety/Future Harm 3)”Innocence at Stake”

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

***Descoteaux*:** If communications made for the purpose of committing a crime, C loses protection. Privilege = substantial right.

## Public Safety Exception

**3.3-3** L may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.

***Smith v Jones***: 3 factors – 1) is there a clear risk to an identifiable person or group of persons? 2) is there a risk of serious bodily harm or death? 3) is the danger imminent? If yes 🡪 Set aside S-C P

Major J’s dissent: chilling effect of breaching privilege would discourage those individuals in need of treatment for serious and dangerous conditions from consulting professional help

**[2]** Serious psychological harm may constitute serious bodily harm if it substantially interferes with individual’s health or well-being (***Smith***, para 83)

**[3]** In assessing whether disclosure is justified, L should consider, besides *Smith* factors: (c) the apparent absence of other feasible way to prevent the potential injury; and (d) the circumstances under which lawyer acquired information of the client’s intent/course of action.

## The "Innocence at Stake" Exception

***McClure* Innocence at Risk Test** is the best and most stringent testto decide whether or not to set aside S-C P**:**

**Preconditions**: a) A must establish that the info he seeks is not available from any other source, and b) he is unable to raise a RD as to his guilt in any other way.

**Stage 1**: TJ must find some evidentiary basis that the S-C communication could raise RD as to his guilt.

**Stage 2**: TJ examines the communication and asks "Is there something in it that is likely to raise a RD about A’s guilt"?

* If TJ finds material that would likely raise a reasonable doubt then Stage 2 satisfied and information should be produced to defense, even if this information was not argued as a basis for production by the defense at Stage 1.

## Legislative Exceptions to Confidentiality and Privilege

***Goodis* used *Descoteaux* absolute necessity test** for any document claimed to be subject to S-C P: J 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.

***LSSK v Merchant***: Law society exception to privilege 🡪 Must be absolutely necessary 🡪 See also powers in ***LPA*** *s. 26*

# **Conflicts of Interest & Duty of Loyalty**

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| 3.4-1 Duty to avoid conflicts | L must not continue to act where there’s a conflict, except as permitted |
| 3.4-2 CONSENT |  express / implied consent AND reasonable belief in ability to represent C w/out adverse effect(a) express C must be fully informed + voluntary after disclosure(b) implied C may be inferred under certain circumstance (see ***McKercher***) |
| 3.4-3 DISPUTE |  where **legal interests** are **adverse**, L can’t represent opposing parties, even with consent |
| 3.4-4 CONCURRENT REP |  2 or more lawyers at the same law firm can represent clients w/ competing interests on matters not the subject of the proposed representation ---> allowed under certain circumstances |

## Duty of Loyalty to Current Clients \*\*Code 3.4-1, 3.4-2, 3.4-3

**Duty of loyalty** is essential to public confidence in the legal profession and to the AoJ (***MacDonald Estates***). “Duty of loyalty is intertwined with fiduciary nature of L-C R” (***Neil***). Doesn’t apply where it’s unreasonable for C to expect that a law firm will not act against it in unrelated matters (***McKercher***).

**3.4-1 [1] A conflict of interest exists when there is a substantial risk that L's loyalty to or representation of a client would be materially and adversely affected by the L's own interest or the L's duties to another client, a former client, or a third person. Must be a genuine, serious risk to the DOL or to client representation arising from the retainer. [2] Examine whether a COI exists throughout the duration of a retainer b/c new circumstances or info may establish or reveal a COI.**

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| **[7] F**actors for L's consideration in determining whether a COI exists: 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 Cs involved; and Cs’ reasonable expectations in retaining L for the particular matter or representation. |

SCC’s ***Neil* Bright Line Test of Loyalty**: In concurrent representation (related or unrelated matter), L may not represent C whose interests are **directly adverse** to the immediate interests of another C (***McKercher***; legal interests only, not commercial or strategic; dropping C to avoid COI breaches duty of loyalty to C’s cause), unless:

**3.4-2 If conflict, need express or implied consent from all Cs and L reasonably believes that she is able to represent each C without having a material adverse effect to other C. [7] Precludes L from acting for parties in transaction w/ different interests except in joint rep.**

(a) **Express** **consent** must be fully **informed** and **voluntary** after disclosure.

(b) **Consent may be inferred** and **need not be in writing where all of the following apply:** (i) C is a gov, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel; (ii) the matters are unrelated; (iii) L has no relevant confidential information from one C that might reasonably affect the other; and (iv) C has commonly consented to lawyers acting for and against it in unrelated matters.

 ***Neil*** and ***Strothers***: Implied consent is applicable in exceptional cases only

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| **[1] Disclosure is an essential requirement to obtaining a client’s consent.** Also preferred: seeking independent legal advice before consenting**[2] I**nform C of the relevant circs and the reasonably foreseeable ways that the COI could adversely affect C’s interests. This would include the lawyer’s relations to the parties and any interest in or connection with the matter.**[3]** Following the required disclosure, C can decide whether to give consent. Factors that may affect client's decision on whether to consent are: L's judgment and freedom of action free from other interests, duties or obligations, the availability of another L of comparable expertise and experience, the stage that the matter or proceeding has reached, the extra cost, delay and inconvenience involved in engaging another L, and the latter’s unfamiliarity with client's affairs.**[4] Can request that C consent in advance** to future COIs. Must explain material risks that consent entails and C must reasonably understand it. |

**3.4-3** Despite rule 3.4-2, L must **not represent opposing parties** in a dispute. **[1] It’d be impossible for L to act w/o offending these rules.**

## Lawyer-Client Conflict of Interest \*\*Code 3.4-26.1

Ask: Is L an unbiased advocate, or **does he have his own agenda** (i.e. too-passionate advocacy also potential COI; **3.4-26.1**)?

COIs can undermine L’s ability to represent C properly or create perception that C’s interests are not properly represented. “Loyalty includes putting C’s business ahead of L’s business” (**Neil**) and self-promotion, otherwise breach FD of loyalty to C (***Stewart***). A fiduciary duty is owed to C even following the end of the retainer (***Stewart***).

***Szarfer***: Slept w/ C’s wife when learned of marital difficulties 🡪 Breach of FD (can’t use confidential info for own benefit)

**3.4-1 [8]** Examples of conflicts:(e) lawyer has sexual or close personal relationship w/ client (may be exploitative)

**3.4-26.1 L** must not perform any legal services if there is a substantial risk that a lawyer's loyalty to or representation of C would be materially and adversely affected by the lawyer’s (a) **relationship with C**, or (b) interest in the client or the subject matter of the legal services.

**[1] Any relationship or interest that affects L’s professional judgment, including a relative, partner, Er, Ee, business associate or friend.**

***LSUC v Hunter***: Cs are entitled to L’s independent and objective judgment, unaffected by that L’s COI. Ongoing sexual r’ship with Cs during the period of representation threatens that independence and objectivity 🡪 Recommend ILA

 Factors: C’s vulnerability, power imbalance, privilege put in jeopardy, L might be a witness

## Duties to Former Clients \*\*Code 3.4-10, 3.4-11

**3.4-10** Unless the former C consents, **L must not act against a former C** in: (a) the same matter, (b) any related matter, or (c) any other matter, if L has relevant confidential information from that previous representation that may reasonably affect the former C.

**[1] P**rohibits L from attacking legal work done during the retainer or undermining C’s position on matter central to retainer. L can act against former C if matter wholly unrelated to any previous work for that C and obtained confidential info is irrelevant to the matter.

***Brookville Carriers Flatbed GP***: Cromwell J stated“Ls have a duty [of loyalty] not to act against a former C in a related matter whether or not confidential information is at risk”.

**3.4-11 If L** obtained confidential info from former C relevant to a new matter, **another L in L’s firm may act against that former C** in the new matter, if the firm establishes, in accordance with rule 3.4-20, that it is reasonable that it act in the new matter, having regard to all relevant circumstances, including: (a) adequacy and timing of measures taken to ensure that no confidential info relevant to the new matter is divulged to partner/associate

(b) the extent of prejudice to any party; and (c) the good faith of the parties.

## Transferring Lawyers \*\*Code 3.4-17, 3.4-20, 3.4-23, 3.4-24, 3.4-26

***MacDonald Estate***, “Transferring Lawyers Case,” worry about misuse of confidential info, competing values, integrity of justice system, allowing litigant to choose advocate, mobility w/in legal profession

**Test for a disqualifying COI when there has been transfer of Ls**:

(1) Did L receive confidential information attributable to a S-C relationship relevant to the matter at hand?

* Only need show previous S-C R related to new retainer, which is a rebuttable presumption
* ***McKercher***: info must be relevant/capable of being used against the client in a tangible manner, general knowledge on litigation philosophy or unrelated matters doesn't matter

(2) Is there a risk that it will be used to the prejudice of the client? [Objective test. Reaction of a reasonably informed person]

* Assume shared confidences unless measures taken like Chinese walls and cones of silence (see *Appendix D*); affidavits not enough, need real evidence

**3.4-20** If transferring lawyer possesses confidential info that may prejudice former client if disclosed to new law firm, new law firm must cease representing client unless:

**3.4-17** “confidential information” means info not generally known to public/obtained from client

(a) the former client consents to the new law firm’s continued representation of its client; or

(b) the new law firm can establish that (i) it is reasonable that its representation of its client continue, and (ii) it has taken reasonable measures to ensure that there will be no disclosure of confidential info

**[3]** A failure to object promptly to issues caused by a transfer may be sharp practice

**3.4-23** Unless former client consents, transferring lawyer must not: (a) participate in any manner in the new law firm’s representation of its client in that matter; or (b) disclose any confidential information

**3.4-24** Members of the new law firm must not discuss the matter with a transferring lawyer

**3.4-26** Must exercise due diligence in ensuring that each member and employee of the lawyer’s law firm does not disclose any client confidences

***Appendix D*** *,* **Conflicts Arising as a Result of Transfer between Law Firms – Guidelines:** *C*onsider whether hiring transferee would cause conflict and whether transferee has confidential info; also consider whether you can take measure to ensure no disclosure

**1.**  The screened lawyer should have no involvement in the new law firm’s representation of its client.

**2.**  The screened L should not discuss the current matter or any information relating to the representation of the former C (the two may be identical) with anyone else in the new law firm.

**3.**  No member of the new law firm should discuss the current matter or the prior representation with the screened lawyer.

**4.**  Measures taken by the new law firm to screen transferring L should be explained in a written policy sent to all Ls and staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

**5.**  The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised:

(a)     that the screened lawyer is now with the new law firm, which represents the current client, and

(b)     of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.

**6.**  Unless unfair, insignificant or impracticable to do, screened L shouldn’t participate in fees generated by current C matter.

**7.**  The screened lawyer’s office should be located away from the offices or work stations of those working on the matter.

**8.**  The screened lawyer should use associates and support staff different from those working on the current client matter.

## Concurrent Representation

**3.4-4 [2Ls, same firm, Different matters - competing interests]** Where there is no dispute among the clients about the subject matter of representation, **two or more L's in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:**

(a) **disclosure of the risks** of the lawyers so acting has been made to each client;

(b) **each client consents** after having received independent legal advice, including on the risks of concurrent representation;

(c) **the clients each determine that it is in their best interests that the lawyers** so act;

(d) **each client is represented by a different lawyer in the firm**;

(e) **appropriate screening mechanisms are in place to protect confidential information; and**

(f) **all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.**

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| **[1] Concurrent rep is appropriate provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the L's may have to w/d, resulting in potential additional costs.****[2] Example:** Law firm acting for Cs in a matter of competing bids in a corporate acquisition. Although the Cs’ interests are divergent and may conflict, Cs are not in a dispute. Provided that each C is represented by a different L in the firm and there is no real risk of inadequate representation of each C, the firm may represent all even though same subject matter.**[3] The basis for this advice** is whether concurrent rep is in the best interests of Cs. Shouldn’t accept concurrent retainer if C is less sophisticated or more vulnerable in this matter.**[4]** Employ reasonable screening measures to ensure non-disclosure of confidential info within the firm (see Rule 3.4-26). |

## ****Joint Retainer \*\*3.4-5 to -8****

**3.4-5** Before L is retained by more than one client in a matter or transaction, the L must advise each of the clients that:

(a) the L has been **asked to act for both or all of them**;

(b) **no info** received **in connection with the matter from one client can be treated as confidential** so far as any of the others are concerned; and

(c) **if a conflict develops that cannot be resolved**, the L cannot continue to act for both or all of them and **may have to withdraw completely.**

**[1] If C is unsophisticated or more vulnerable, might need to recommend ILA to get informed, genuine, uncoerced consent to joint retainer from C**

**3.4-6 If L has a continuing r’ship with C for whom L acts regularly, before the L accepts a joint retainer from that client and another client, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain ILA about the joint retainer.**

**3.4-7** When L has advised Cs and the parties are content that L act, L must obtain their consent. **[1] in writing.**

**3.4-8** If a contentious issue arises between clients who have consented to a joint retainer,

(a) L must not advise them on the contentious issue and must: (i) refer them to other Ls; or (ii) advise them to negotiate w/o L (provided no legal advice required and 2 clients are sophisticated);

(b) if the contentious issue is not resolved, the lawyer must withdraw from the joint representation.

**3.4-9** Subject to this section, if clients consent to a joint retainer and also agree that, if a contentious issue arises, the lawyer may continue to advise one of them, the lawyer may advise that client about the contentious matter and must refer the other or others to another lawyer.

## Business with Client

**3.4-1 [8]** Examples of conflicts: (d) Lawyer/related 3rd party has a financial interest in the client’s affairs or the matter in which the lawyer is acting for the client (partnership interest or joint business venture).

**3.4-28** L must not enter into **transaction with C** unless it’s fair and reasonable to C, C consents to the transaction, and C has ILA

**3.4-31 L** must not borrow money from a client unless (a) bank, or (b) a related person

# **Lawyers’ Role in Administration of Justice**

## Counselling and Illegal Conduct \*\*Code 3.2-7

In counselling, on one hand L is concerned with client autonomy and respecting C’s desires and decisions. At the same time L is looked to for advice and guidance which can result in L expressly or implicitly making the decision. L must not counsel C to break the law (***Sussman***: Got 1 month suspension).

* Counsel should be unbiased enough that it could also be used for a C who wants the opposite of what C actually wants
* Need to create atmosphere where C feels comfortable and strives to understand all that you’re saying (i.e. it’s clear)

**3.2-7 Must not assist where L knows or ought to know that it will assist in dishonesty, crime, or fraud.**

**[1]** Be on guard against becoming the tool of an unscrupulous C or others. **[2]** L should be alert to unwittingly becoming involved with C engaged in criminal activities such as fraud or money laundering. Vigilance because such activities are aided by transactions for which Ls commonly provide services. **[3]** Before or during a retainer, if L has suspicions or doubts about whether she might be assisting C in any dishonesty, crime or fraud, L should make reasonable inquiries to obtain info about C, the subject matter, and objectives of the retainer.

## “Officers of the Court” \*\*Code 2.1-1, 2.1-2(c)(d)

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

**2.1-1** L is a **minister of justice**, **an officer of the Cts**, a client’s advocate and a member of an ancient, honourable and learned profession. Thus, it is L’s duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the Cts, be faithful to clients, be candid and courteous in relations with other L's and demonstrate personal integrity.

**2.1-2** (c) L 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 J 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.

(d) L 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.

## Advocacy \*\*Code 5.1-1, 5.1-2

Herman Van Ommen: Representations about the law – clear that precedents must be disclosed, difficulty where it's not quite on point – best practice is disclose and then say not applicable because x, y, and z

**5.1-1** When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.

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| **\*[1] Role in adversarial proceedings – In adversarial proceedings, the L has a duty to the client to raise fearlessly every issue, advance every arg and ask every Q, however distasteful, that the L thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The L must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the L's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties’ right to a fair hearing in which justice can be done.** **[2]** This rule extends to ct proceedings, appearances and proceedings before boards, tribunals, ADR.**\*[3] As** L's function as advocate is necessarily partisan, the L is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to C’s case.**\*[5] L** must avoid expressing her personal opinions on the merits of a client's case to a Ct or T.**\*[6] I**n without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, L must take particular care to be accurate, candid and comprehensive in presenting case so as to not mislead the tribunal**[7]** Never waive or abandon C’s legal rights, such as an available defence under a statute of limitations, without C’s informed consent.**\*[8]** In civil proceedings, avoid and discourage C from resorting to merits or tactics that will merely delay or harass the other side. |

***Rondel***: Don’t cast aspersions on other party w/o sufficient basis

**5.1-2 Abuse of Process: When acting as an advocate, L must not:**

(b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;

(c) appear before a judicial officer when L’s business or personal relationships with him might appear to pressure, influence, or affect his impartiality

(d) allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials;

(e) try to deceive a tribunal by offering false evidence, misstating facts or law, presenting or relying upon a false affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

(f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument, or the provisions of a statute;

(g) knowingly assert as fact that which cannot reasonably be supported by the evidence or taken on judicial notice by the T;

(h) make suggestions to a witness recklessly or knowing them to be false;

(j) improperly dissuade a witness from giving evidence or advise a witness to be absent;

(l) knowingly misrepresent the client’s position in the litigation or the issues to be determined in the litigation

(n) when representing a complainant, threatening the laying of a criminal charge or offering to seek or to procure the withdrawal of a criminal charge;

(o) needlessly inconvenience a witness; or

(p) appear before a tribunal while under the influence of alcohol or a drug.

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| **[1] L must not mislead the Ct, and must not lend herself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the info in his possession (Felderhof). A bona fide belief is insufficient; L must have reasonable foundation for their positions (Groia) [use (g), above, if needed]. In civil proceedings, a L has a duty not to mislead the tribunal about the position of the client in the adversarial process. Thus, a L representing a party to litigation who has made or is party to an agreement made before or during the trial by which a plaintiff is guaranteed recovery by one or more parties, notwithstanding the judgment of the Ct, should immediately reveal the existence and particulars of the agreement to the ct and to all parties to the proceedings.****[2] L** representing an A or potential A may communicate with a complainant or potential complainant, for ex, to obtain factual info, or to defend or settle any civil claims b/w the A and the complainant. But when the complainant or potential complaint is vulnerable, the L must not take unfair advantage of the circs. If the complainant or potential complainant is unrepresented, the L should be governed by the rules about unrepresented persons and make it clear that the L is acting exclusively in the interests of the A or potential A. When communicating with an unrepresented complainant or potential complainant, it is prudent to have a witness present.**[3]** It’s abuse of the court’s process to threaten to bring an action or to offer to seek withdrawal of a criminal charge in order to gain a benefit.**[4]** When examining a witness, L may pursue any hypothesis honestly advanced via reasonable inference, experience or intuition. |

## Pleadings \*\*Code 5.1-2(a)

Herman Van Ommen: Cs will want pleading to allege fraud/breach of FD (people don't like this so they settle), but this is bad advocacy because frivolous claims make you look unprofessional and expose you to costs

**5.1-2 Abuse of Process:** L must not(a) **abuse** the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;

***DCB v Zellers***: In case of novel claim against Z w/o precedent, Ct says L for Z should have known it was a frivolous claim

**5.1-7**  Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may **discuss with the prosecutor the possible disposition of the case**, unless the client instructs otherwise.

**5.1-8**  A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,

(a)     the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;

(b)     the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;

(c)     the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and

(d)     the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

## Discovery

The duty of **discovery** is and has always been to make full, fair, and prompt discovery (***Grossman***). A moment of apparent cooperation in an otherwise combative system. Subject to significant regulation and high ethical standards since process is private and OOC, open to abuse (***Grossman***). Failing to comply with a notice to produce is subject to a sanction (***Grossman***).

Herman Van Ommen: Also positive obligation to produce all relevant docs, even if something crops up late in the day

## Negotiation \*\*Code 2.1-3(c), 3.1-1(c)(v), 3.2-10

**Negotiation** is subject to relatively minimal legal restrictions and subject to the law imposed by FDs, 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. L should not deliberately mislead and conceal information from another party during a negotiation, but otherwise are free to negotiate unethically if they choose (***LSNL v*** ***Regular***).

L should consider the use of ADR and settlement negotiations more and where appropriate. “Tribunal” includes mediators

Herman Van Ommen: “puffery is allowed, posturing is expected” – you can say you expect to succeed even though you have doubts, but couldn't say this if you expected to lose (i.e. no direct lying)

**2.1-3** (c) Whenever the dispute will admit of **fair settlement** the client should be advised to avoid or to end the litigation.

**3.1-1**  (c)(v) Included in competent L’s duties is implementing negotiation through application of appropriate skills

**3.2-10 Do** not participate in an agreement in which **restriction on any L’s right to practise is part of the settlement** of a C lawsuit or other controversy.

## **Witness Preparation \*\*Code 5.1-2(k)**

Important difference between witness preparation and coaching.

Prep: If in good faith, can do mock questions/cross-examinations, describe the process, and explain what's at issue with C.

Coach (“wilfully counsel evasive evidence”): Unethical, unprofessional (breach duty as officer of Court: ***Sweezey***, NLCA), illegal.

**5.1-2** **Abuse of Process**: L must not (k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;

## Lawyer as Witness \*\*Code 2.1-3(k), 5.2-1, 5.2-2

**2.1-3 (k)** As advocate, can’t submit own affidavit except on formal or uncontroverted matters (e.g. attestation or custody of a doc). If L is a necessary witness wrt other matters, conduct of case should be entrusted to other counsel. [**Can’t appear as both counsel and witness**]

**5.2-1** L who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless

(a)     permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal;

(b)     the matter is purely formal or uncontroverted (**2.1-3(k)** e.g. attestation or custody of a doc); or

(c)     it is necessary in the interests of justice for the lawyer to give evidence.

**[1] Do**n’t express personal opinions or beliefs or assert as a fact anything that is properly subject to legal proof, cross-examination or challenge. **[Can’t appear as unsworn witness and L or put own credibility in issue].** Don’t get special treatment as witness due to professional status

**5.2-2** L who is a witness in proceedings must not appear as advocate in any appeal from the decision in those proceedings, unless the matter about which he or she testified is purely formal or uncontroverted.

## **Cross Examination \*\*Code 5.1-2(m), 5.3, 5.4-1, 5.4-2**

The principal limit in cross examination is counsel must have a good faith basis for putting suggestions to the witness (***Lyttle***). Counsel still barred by rules about harassment, misrepresentation, repetitiousness, and prejudicing court.

**Criteria for Cross Examination Questions/Assertions** from ***Lyttle***: 1) Need to be honestly advanced (can’t put forward assertions you know to be false, cannot mislead witness or trier of fact), and 2) Made on good faith basis (but not obliged to put forward evidence to support those assertions first).

- If improper cross examination of an accused or repeated breach of limits prejudices that accused in his defense or is so improper as to bring AoJ into disrepute, an appellate court must intervene (**R(AJ)**)

**5.1-2** **Abuse of Process**: L must not (m) abuse, hector or harass a witness;

**5.3**  Subject to the rules on communication with a represented party, **L may seek information from any potential witness** but must disclose her interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way.

**5.4-1 L** involved in a proceeding **must not obstruct the examination** and the cross-examination in any manner while they’re in progress.

**5.4-2**  Subject to the direction of the tribunal, a lawyer must observe the following rules respecting **communication with witnesses giving evidence**:

(a)     during examination-in-chief, the examining lawyer may discuss with the witness any matter;

(b)     during cross-examination of the lawyer’s own witness, the lawyer must not discuss with the witness the evidence given in chief or relating to any matter introduced or touched on during the examination-in-chief;

(c)     upon the conclusion of cross-examination and during any re-examination, with the leave of the court, L may discuss with witness any matter;

(d)     during examination for discovery, the lawyer may discuss the evidence given or to be given by the witness on the following basis:

(i) where a discovery is to last 1+ days, counsel for the witness should refrain from having any discussion with witness during this time.

(ii) where a discovery is scheduled for longer than one day, counsel is permitted to discuss with his or her witness all issues relating to the case, including evidence that is given or to be given, at the conclusion of the discovery each day. However, prior to any such discussion taking place, counsel should advise the other side of his or her intention to do so.

(iii) counsel for witness should not seek an adjournment during examination to specifically discuss the evidence that was given by witness. Such discussion should either wait until adjournment or until just before re-examination at conclusion of the cross-examination.

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| **[2]** The term “**cross-examination**” means the examination of a witness or party adverse in interest to the client of the lawyer conducting the examination. It therefore includes an examination for discovery, examination on affidavit or examination in aid of execution. The rule prohibits obstruction or improper discussion by any lawyer involved in a proceeding and not just by the lawyer whose witness is under cross-examination.**[3]** The opportunity to conduct a fully ranging and uninterrupted cross-examination is fundamental to the adversarial system. It is counterbalanced by an opposing advocate’s ability to ensure clarity of testimony through initial briefing, direct examination and re-examination of that lawyer’s witnesses. **No justification for obstruction of cross-examination** by unreasonable interruptions, repeated objection to proper questions, attempts to have the witness change or tailor evidence, or other similar conduct while the examination is ongoing.**[6]** This rule is not intended to prohibit a lawyer with no prior involvement in the proceedings, who has been retained by a witness under cross-examination, from consulting with the lawyer’s new client. |

## Relevant Authorities \*\*Code 5.1-2(i)

L 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”. Ls have a responsibility to bring forward all relevant authorities. If they feel a case is distinguishable they may argue it but they **must bring it** to court’s attention (***Isaac Estate*** & ***Rondel***).

**5.1-2** **Abuse of Process**: L must not (i) deliberately refrain from informing tribunal of any binding authority directly on point not mentioned by other;

## Taking Custody of Real Evidence

S-C P protects communications, not evidence (e.g. video tapes) that pre-existed the S-C R, unless there’s tactical reason for withholding the evidence (***Murray***). Defence should notify the court, turn over the evidence, or be prepared to make arguments for its continued withholding. Concealing evidence = charged with **obstruction of justice**

## Interactions with Jury Panels \*\*Code 5.5-1 to -6

**5.5-1**  Before trial, L cannot communicate with or cause another to communicate with anyone that L knows to be a member of the jury panel.

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| **[1]** A lawyer may investigate a prospective juror to ascertain any basis for challenge, provided that the lawyer does not directly or indirectly communicate with the prospective juror or with any member of the prospective juror’s family. But a lawyer should not conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of either a member of the jury panel or a juror. |

**5.5-2**  Unless the judge and opposing counsel have previously been made aware of the information, a lawyer acting as an advocate must disclose to them any information of which the lawyer is aware that a juror or prospective juror:

(a)     has or may have an interest, direct or indirect, in the outcome of the case;

(b)     is acquainted with or connected in any manner with the presiding judge, any counsel or any litigant;

(c)     is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness; or

(d)     may be legally disqualified from serving as a juror.

**5.5-3**  Promptly disclose to the court any information that you reasonably believes discloses improper conduct by a member of a jury panel or a juror.

**5.5-4** Except as permitted by law, L as advocate must not communicate with any jury member during a trial.

**5.5-5** L who is not connected with a case before the court must not communicate with any jury member about the case.

**5.5-6** L must not have any discussion after trial with a member of the jury about its deliberations.

**[1] Restrictions on communications w/ juror or potential juror also apply to communication with or investigations of family members**

## Crown Prosecutors \*\*Code 5.1-3, 2.1-1(b)

**5.1-3** Prosecutor must act for the public and AoJ resolutely and honourably within the limits of the law [i.e. w/o infringing on A’s rights, gets fair trial]
**2.1-1(b)** Crown prosecutor's primary duty not to seek conviction but to see justice is done

Crown is expected to be fair, objective and dispassionate in presenting the case and is expected to argue forcefully for a legitimate result. The prosecutor is a Minister of Justice. Discretion of the vested in the prosecutor should be exercised with objectivity and impartiality.

**a. Full Disclosure –** Under Charter s. 7, the accused has a right to make a full answer and defense – full disclosure is essential to this. The Crown has an ethical and constitutional duty to provide **full disclosure** of all relevant information (***Stinchcombe***).

***Krieger v LSA***, **2002 SCC**: Prosecution didn’t disclose exculpatory blood results 🡪 Prosecutorial discretion is independent from partisan interests, however a bad faith decision is outside its ambit and therefore LSA can apply discipline

**b. Crown’s Duty to Call Material Witnesses –** A duty to call the victim of the alleged crime would interfere w/ Crown’s broad discretionary powers that are at heart of adversarial process (and a principle of fundamental justice). No need for Crown to call all material witnesses (***R v Cook***).

**c. Overzealous Advocacy by Crown –** Crown is subject to legal and ethical limits when it comes to cross examination of witnesses and jury addresses. Rand J says Crown cannot use inflammatory or vindictive language to express opinions as to the guilt of the accused, but CAN examine the evidence and ask jury to find A guilty. Can’t imply that Crown’s investigation has found A guilty. Need to make statements of argument (laying out credible evidence) and not fact (***Boucher***).

 ***R v Rose***: Binnie J said Crown must be both ethical and adversarial.

## Defense Counsel

Defense is expected to be **zealous advocate** for A since that’s what A’s granted in this system (Len Doust) while remaining independent of Ct and mindful of the various overriding duties of the court.

A proper functioning adversarial system requires Defense counsel to “fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case” (***Rondel***).

Defense counsel should avoid forming opinions as to C’s guilt or innocence – not ethical and can impact performance.

David Crossin: If you become convinced of your C’s guilt, role is to ensure C a fair/proper conviction. Example: in ***Henry***, Crown was arguably unethical, took advantage of the unrepresented.

***Stinchcombe***: D has no obligation to assist the prosecution, but obligation as officer of the court to act responsibly

**5.1-1 [9]** When **acting as defence counsel**, duty to defend C “**may properly rely on any evidence**, defences, technicalities, not false or fraudulent.”
**[10]** If A admits guilt, and the lawyer believes it, the lawyer “may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

## Errors or Omissions ****\*\*Code 5.1-4****

**5.1-4 L** who has unknowingly done or failed to do sth that would have been in breach of this rule if knowingly done and who discovers it, must, subject to section 3.3 (Confidentiality), **disclose the error or omission** and do all that can reasonably be done in the circumstances to rectify it.

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| **[1] If C wants to take an action that breaches this rule, the L must refuse and do everything reasonably possible to prevent it. If that cannot be done, the L should, subject to rule 3.7-1 (Withdrawal from Representation), withdraw or seek leave to do so.** |

# **Professionalism & Civility**

***LPA s. 3*** LSBC’s duty is to “uphold and protect the public interest in the administration of justice”

**Civility** defined: 1) requirement that Ls treat one another, and those participating in justice system, with degree of politeness; and 2) obligations to act fairly, honestly, and with the utmost integrity in dealings with other Ls & members of the court.

Wedge and Macintosh J: civility & candour are best practice, come off genuine/sympathetic 🡪 good advocacy

Herman Van Ommen - civility vs. zealous representation - no conflict, some of the best advocates are introverts

## \*\*Code 2.1-2, 2.1-3, 2.1-4, 2.1-5, 7.2-1, 7.2-2, 7.2-9

###### **2.1-2** (a) L’s conduct should at all times be characterized by **candour and fairness**. The L should maintain toward a court or tribunal a **courteous and respectful attitude** and insist on similar conduct on the part of clients.

**2.1-3** (d) L should treat adverse witnesses, litigants and counsel with **fairness and courtesy,** refraining from all **offensive** personalities. L must not allow a client’s personal feelings and prejudices to detract from the L’s professional duties. At the same time, the L should represent the client’s interests resolutely and without fear of judicial disfavour or public unpopularity.

###### **2.1-4 (a)** L’s conduct toward other lawyers should be **courtesy and good faith**. Any **ill feeling that may exist between clients or Ls** shouldn’t influence L in conduct and demeanour, and personal remarks and quarrels should be scrupulously avoided.

**(c)** L should avoid all **sharp practice** (i.e. taking advantage of opponent’s slip-up or overlook). L should accede to reasonable requests that do not prejudice the rights of the client or the interests of justice.

###### **2.1-5** To oneself

(a) Assist in maintaining the honour and integrity of the legal profession by exposing before the proper tribunals without fear or favour any L’s **unprofessional or dishonest conduct** and should accept without hesitation a retainer against any L who is alleged to have wronged the C.

(b)     Duty of every L to guard against admission to the Bar of any candidate whose moral character/education renders him unfit for admission.

(d) No client is entitled to receive, nor should any L 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.

(f) All Ls 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.**

**7.2-1** **L must be courteous and civil and act in good faith with all persons with whom L has dealings in the course of his or her practice.**

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| **[1] Public interest demands that matters entrusted to L be dealt with effectively and expeditiously, w/ fair and courteous dealing.****\*[2]** Any **ill feeling that may exist b/w clients** should never be allowed to influence L's in their conduct and demeanour.**[3]** **Avoid ill-considered or uninformed criticism of other Ls’ competence**, conduct, advice or charges, prepared to advise/rep C with L complaint **\*[4] Agree to reasonable requests concerning** trial dates, adjournments, waiver of procedural formalities that do not prejudice the rights of C.**\*[5] L who knows that another L has been consulted in a matter** must not proceed by default in the matter w/o inquiry and reasonable notice. |

***Felderhof, 2003 ONCA***: L was sarcastic/belittling, rude, misled judge, called prosecution dishonest; **Test for abuse of process**: Whether it shocks the conscience and would be unfair to proceed

 - Worried about chilling effect on zealous advocacy: Ls will dial back and fight less hard for C

***LSUC v Groia***: Civility essential to order in court, otherwise AoJ brought into disrepute 🡪 No justification to attack prosecutor’s bona fides 🡪 1 month suspension

***Dore***: Ls face criticism on daily basis, expected to endure w/ civility & dignity but have duty to speak up in some cases

- **Incivility**: “potent displays of disrespect for participants in the justice system, beyond mere rudeness or discourtesy” (mere rudeness not enough for discipline, even if inappropriate)

**7.2-2 L** must **avoid sharp practice** and must **not take advantage of or act without fair warning** upon slips, irregularities or mistakes on the part of other L not going to the merits or involving the sacrifice of a client’s rights.

***Schreiber v Mulroney, Ont 2007***: Gave no notice to counsel that he would be taking default judgment, broke early agreement not to do so 🡪 Way M was treated in the process was incivil.

**7.2-9** When dealing with **unrepresented persons**, must urge them to get legal counsel, and make it clear that you aren’t representing them

## Communications \*\*Code 7.2-3 to -8, 7.2-10

**7.2-3** L must not **use any device to record a conversation** between self and a C/other L, even if lawful, without first informing the other about it

**7.2-4 Don’t send correspondence to anyone that is “abusive, offensive, or otherwise inconsistent with the proper tone**”of prof. communication.

**7.2-5 Answer with reasonable promptness all professional letters and communications** from other lawyers.

**7.2-6**If a person is represented, lawyer must not communicate/negotiation with that person (subject to 7.2-6.1 and 7.2-7)

**7.2-6.1**If person represented by limited scope retainer, can communicate with that person

**7.2-7**If L is not interested in the matter, can give a 2nd opinion to a person

**7.2-8**If suing a corporation/organization, can't communicate with officers/supervisors

**7.2-10** L who “has access to or comes into possession of a document that the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see,” must:

(a) paper document -> return it unread and uncopied to the party to whom it belongs,

(b) electronic document -> delete it unread/uncopied, advise party to whom it belongs, or

(c) read part or all of document -> cease reading and promptly return it or delete it, uncopied, to the party to whom it belongs, advising that party (i) of the extent to which the lawyer is aware of the contents, and (ii) what use the lawyer intends to make of the contents of the document.

## Advertising \*\*Code 4.2-5

**4.2-5** L may market professional services as long as they are accurate, verifiable, not misleading, and in the best interests of the public. And consistent with high standard of professionalism (***Merchant***).

**Speaking to media**: “Nothing is said before going to the courts” is best bet

***Jabour*** (BCCA): Advertised prices, found to be misconduct 🡪 Likely not today

***Merchant*** (2000, LSSK): Letters to residential school survivors found to be misleading

## Undertakings/Trust Conditions \*\*Code 5.1-6, 7.2-11, 7.2-12, 2.1-3(h), 2.1-4(b), 3.6-10

**Undertakings**: Foundation of a solicitor’s practice; solemn promise given in your professional capacity to do something for C and be personally responsible for it. Have to be: in writing, unambiguous in terms, set time conditions in which it’ll be met

* Never allow something that you cannot personally control

**5.1-6**L must strictly and scrupulously **fulfill any undertakings** given and honour any trust conditions accepted in the course of litigation.

**7.2-11**Must not give undertakings that cannot be fulfilled, must fulfill every undertaking, and honour trust conditions once accepted

 - Must be stated at outset; obligation is on lawyer personally, so make sure it's in your personal control

**[1]** “On behalf of my client/vendor” does not relieve L of personal responsibility

**Trust conditions** are imposed on Ls (e.g. holding money in trust for C)

**7.2-12**“Except in the most unusual and unforeseen circumstances, which the lawyer must justify,” if you **withdraw trust funds by cheque**, you undertake that the cheque is good

**2.1-3** (h) Record **receipt of trust $,** use trust property only as authorized by client.

**2.1-4(b)**     L should neither give nor request an **undertaking** that cannot be fulfilled and should fulfil every undertaking given. L should never communicate upon or attempt to negotiate a matter directly with any party who she knows is represented by another L, except with that L’s consent

**3.6-10** A lawyer must not appropriate any client funds held in trust or otherwise under the lawyer’s control for or on account of fees, except as permitted by the governing legislation.

# **Admission to the Profession**

In addition to standard competency requirements for applicants of bar admission, LSBC requires the applicant to be of “**good character**”. Purpose: To protect the public and maintain public confidence in the legal profession.

 - Assessed at time of application (hence allowing for rehabilitation and repentance)

***Mangat*** Southin J’s on good character: 3 qualities: 1) an appreciation of the difference between right and wrong; 2) the moral fibre to do the right thing, no matter how uncomfortable that may be; 3) a belief that the law at least so far as it forbids things which are *malum in se* must be upheld and the courage to see that it is upheld.

**Test for Good Character**: Has the applicant established his good character at the time of the hearing on BoP? (***Preyra***).

- “Good character” connotes moral or ethical strength, distinguishable as an amalgam of virtuous attributes or traits which could include: integrity, candour, empathy, honesty.

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***: Plagiarized undergrad essay, lied to LSUC 🡪 Panel says no)

***Mohan (Review Panel)***: Lied/cheated during undergrad; onus on applicant to establish good character

***Martin v LSBC*** *(1950, BCCA)*: In Comm Party 🡪 Refused entry to LSBC; Shows “good character” is arbitrary, unpredictable

# **Discipline**

Ls are both credentialed and regulated, arguably done in the public interest to ensure that legal services are provided ethically and competently by qualified persons.

## Justification for Self-Regulation

1. Independence of Bar from the state in all its pervasive manifestations is a hallmark of a free society: ***Canada v LSBC***
2. Ls have best expertise of self-regulation since they’re involved in all stages of a regulatory process (***LSMB v Savino***)
3. Deb: Proactive regulation - prevent issues before they crop up
4. trying to change - complainants review, non-lawyer benchers
5. impose criteria like continuing training or custodianship which benefits the public

**Critique of Lawyer Self-Regulation:** 1) Underlying info asymmetry about L conduct due to L monopoly over legal knowledge. 2) Effective govt or 3rd party regulation does not depend on the regulator possessing the same knowledge as the regulator. 3) Balancing the market for lawyers – in essence, self-regulation creates a monopoly over services. 4) Bastion of privilege unrepresentative of Canadian society. 5) Disappearing in most professions (law societies gone outside of North America)

**LSBC** has the power to set credentials for membership, discipline and disbar members and make rules of conduct.

* Mandate: proactive regulation, distinguishing its role from CBA, need to be protecting public interest (and seen doing so), public involvement in its processes (e.g. benchers/board members, committee members, hearing panelists), Complaints Review Committee

**Self-Regulation of Lawyer Conduct:** Focus on development of rules of professional conduct to govern and guide Ls’ conduct in their practices and activities and on the structure and operation of the contemporary system of professional discipline.

## Discipline

A primary function 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 profession’s reputation.

**a. Standards of Discipline:** Some believe professional codes of misconduct and discipline proceedings is ineffectual and that the grounds for L discipline can be addressed through other bodies such as the courts for civil and criminal jurisdiction.

**b. Discipline Proceedings**

1. **Complaint/Investigation Stage:** L discipline begins with some sort of complaint. Lawyers are reluctant to report the misconduct of their colleagues. Many Cs do not know what constitutes misconduct. Longstanding criticism is the mismatch between client needs and regulatory response.
2. **Hearing Stage:** Discipline hearings are adversarial in nature, conducted before a panel of discipline or conduct committee. Burden of proof is on LSBC. 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. ***Ogilvie*** factors always cited in disciplinary phases:
		1. the nature and gravity of the conduct proven;
		2. the age and experience of the respondent;
		3. the previous character of the respondent, including details of prior discipline;
		4. the impact upon the victim;
		5. the advantage gained, or to be gained, by the respondent;
		6. the number of times the offending conduct occurred;
		7. had respondent acknowledged the misconduct and taken steps to disclose and redress the wrong;
		8. the possibility of remediating or rehabilitating the respondent;
		9. the impact upon the respondent of criminal or other sanctions or penalties;
		10. the impact of the proposed penalty on the respondent;
		11. the need for specific and general deterrence;
		12. the need to ensure the public’s confidence in the integrity of the profession; and
		13. the range of penalties imposed in similar cases.
3. **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.
	1. Common sanctions: Reprimand, fine, suspension, disbarment, or ungovernability (***McLean***, ***Welder***)

## Professional Misconduct \*\*Code 3.2-5, 3.2-6

**Professional misconduct** traditionally is "disgraceful or dishonourable conduct" in L’s practice; negligence itself not enough

**3.2-5 L** must not, in an attempt to gain a benefit for C, threaten, or advise C to threaten:

(a)     to initiate or proceed with a criminal or quasi-criminal charge; or

(b)     to make a complaint to a regulatory authority.

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| **[1]** Threat to make or advance a complaint in order to secure the satisfaction of a private grievance, even if C has a legitimate entitlement to be paid monies = Abuse of court or regulatory authority’s process.**[2]** Not improper: Notifying appropriate authority of criminal or quasi-criminal activities while also taking steps through civil system. |

**3.2-6** **(Inducement for withdrawal of criminal/regulatory proceedings)** L must not:

(a)     give or offer to give, or advise A/anyone to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority’s conduct of a criminal or quasi-criminal charge or a complaint, unless L obtains the consent of the Crown or the regulatory authority to enter into such discussions;

(b)     accept or offer to accept, or advise a person to accept or offer to accept, any valuable consideration in exchange for influencing the Crown or a regulatory authority’s conduct of a criminal or quasi-criminal charge or a complaint, unless L obtains the consent of the Crown or regulatory authority to enter such discussions; or

(c)     wrongfully influence any person to prevent the Crown or regulatory authority from proceeding with charges or a complaint or to cause the Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

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| **[2]** As L for A, never influence a complainant not to communicate or cooperate with the Crown. Does not prevent L for A from communicating with a complainant to obtain factual information, arrange for restitution or an apology from an accused, or defend or settle any civil matters between A and the complainant. Ls advising a complainant or potential complainant with respect to any such negotiations can do so only with the consent of the Crown or regulatory authority.**[4]**When the complainant is unrepresented, L should have regard to the rules respecting unrepresented persons and make it clear that she is acting exclusively in A’s interests. If the complainant or potential complainant is vulnerable, L should take care not to take unfair or improper advantage of the circumstances. When communicating with an unrepresented complainant, have a witness present. |

**Test for Professional Misconduct** in ***LSBC v Martin***: Do the facts disclose “a marked departure” from conduct LSBC expects?

## Conduct Unbecoming \*\*LPA s. 1

LSBC can regulate ethical misconduct which is substantially, but not technically, related to the L’s conduct within legal practice, e.g. any behaviour which the law society believes constitutes "**conduct unbecoming**" a member of the law society.

**2.2-1 [3]** Dishonourable or questionable conduct in either private life or professional practice will reflect adversely upon the **integrity** of the profession and the AoJ. If conduct is unbecoming and knowledge of it might impair C’s trust in L, LSBC may be justified in taking disciplinary action.

**[4]** Generally, LSBC not concerned with purely private or extra-professional activities of L that do not bring into question the L's professional integrity.

**CL Test for Conduct Unbecoming a Lawyer**: Not only criminal acts, but “any act of any member that will seriously compromise the body of the profession in public estimation” (***LSBC v Berge***: Drove drunk, mouthwash to avoid breathalyzer)

***LPA s. 1*** “**conduct unbecoming of a lawyer**” includes a matter, conduct or thing that is considered, in the judgment of the benchers, a panel or a review board, (a) to be contrary to the best interest of the public or of the legal profession, or (b) to harm the standing of the legal profession;

* Examples: Complaining about LS or about another lawyer in blog post and in letter (***Laarakker***)

***Budd* Criteria for Determining the Appropriate Conduct Order**: 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.

***Rea****:* Downloaded child pornography, defended by Len Doust, QC 🡪 Suspended 6 months (after not having practiced for 3 years); in similar cases, the suspension should be 3-4 years

***Power***: Didn’t disclose old name b/c had convictions, lied to Law Society 🡪 Conduct unbecoming (disbarred)

***LSUC v Budd*** *(2009)*: Sleeps with 14 & 16 year old daughters of family friends 🡪 Disbarred

- Long and distinguished career, glowing reference letters, tried to argue the girls consented

- However must protect the public and preserve public confidence in legal profession

- Aggravating factors: conduct continued a long time, breach of trust to friends and victims, showed no remorse

***Hunter***: Former bencher, very good reputation, lots of reference letters; psychiatrist said he had been depressed 🡪 Repeatedly slept w/ C when she was vulnerable 🡪 Cooperated with law society, acknowledged wrongdoing at earliest opportunity and apologized 🡪 COI 🡪 Suspended for 60 days

## Bar Readmission

***LSA v Sychuk*** *(1999)*: Former bencher and law professor killed his wife while drunk 🡪 Ended up suicidal, kids won’t speak to him, has not touched alcohol since, getting counseling, 11 years ago

- More serious crime = more serious evidence needed of **rehabilitation** = Controlling factor to app for readmission

- Rehabilitation not the only value, this is also about society denouncing this conduct

***LSBC v Mangat*** *(2013)*: From wrong side of tracks, joins gang, many charges; turns his life around, works on social justice, educates youth about gangs 🡪 In the public interest to admit Ls with diverse backgrounds; he’s been rehabilitated 🡪 Admitted

***LSBC v Gayman*** *(2012, Credentials Review Panel)*: Messed up $1m trust fund, tried to cover up, alcohol/coke addiction, lost 2 families along the way, hit rock bottom 🡪 Turning point – cleans up and starts volunteering

-Intervening time very important because he turned his life around

-No restitution (for his crimes?), but the panel said “excusable” because no opportunity to do so

## Sanctioning Lawyers for Misconduct

**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 Ls (***Adams v LSA***). The question of what effect L’s 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 benchers appointed to assist in that task and others.

* Disbarment must be commensurate with similar cases/evolving mores (Adams sexually exploited teenage C who needed his help 🡪 Convicted in ABCA and disbarred)

Keep in mind what sanction is in the public interest: a reprimand must reflect the seriousness of the misconduct (***Hunter***).

***Zoraik***: Fabricated evidence in crim trial 🡪 Disbarred w/o hearing (see **rule 4-52**) 🡪 BCCA sent matter back to the discipline committee, saying should have considered *Charter* issues

## Regulatory Compliance \*\*Code 7.1-1 to -4, 7.8-1

**7.1-1** L must (a)     reply promptly and completely to any communication from the Society; (b)     provide documents as required to the Law Society; (c)     not improperly obstruct or delay Law Society investigations, audits and inquiries; (d)     cooperate with Law Society investigations, audits and inquiries involving the lawyer or a member of the lawyer’s firm; (e)     comply with orders made under the Legal Profession Act or Law Society Rules; and (f)      otherwise **comply with the Law Society’s regulation** of the lawyer’s practice.

**7.1-2 P**romptly **meet financial obligations** in relation to L’s practice **[1]** incurred, assumed, or undertaken on behalf of Cs unless clearly indicated in writing not to be personal.

**[2]**When L retains a consultant, expert, etc., clarify terms in writing. If L not responsible for payment, help make satisfactory arrangements for such.

**7.1-3** Unless to do so would involve a breach of S-C C or P, L **must report to the Society**: (a)     a shortage of trust monies; (a.1)  a breach of undertaking or trust condition that has not been consented to or waived; (b)     the abandonment of a law practice; (c)     participation in criminal activity related to a lawyer’s practice; (d)     the mental instability of a lawyer of such a nature that the lawyer’s clients are likely to be materially prejudiced; (e)     conduct that raises a substantial question as to another lawyer’s honesty, trustworthiness, or competency as a lawyer; and (f)      any other situation in which a lawyer’s clients are likely to be materially prejudiced. **[Duty to squeal]**

**[2]**Report must be made without malice or ulterior motive. **[3]**Often, instances of **improper conduct arise from emotional, mental or family disturbances or substance abuse**. Ls who suffer from such problems should be encouraged to seek assistance as early as possible. The Society supports professionalsupport groups in their commitment to the provision of confidential counselling.

**7.1-4** A lawyer must encourage a **client who has a claim or complaint against an apparently dishonest L** to report the facts to LSBC ASAP.

**7.8-1**  When L discovers an **error or omission** that is or may be damaging to C and that cannot be rectified readily, L must:

(a)     promptly inform C of the error or omission without admitting legal liability;

(b)     recommend that C obtain ILA concerning the matter (also any rights arising from the error or omission); and

(c)     advise C of the possibility that, in the circumstances, L may no longer be able to act for C.

**[1]**Contractually obligated to report an error/omission to the Insurance Fund

# **Corporate Counsel**

**In-house counsel** may get called on for more business and risk advice. Don’t have to be insured in BC 🡪 No coverage

***Wilder v Ontario*** *(2001, ONCA)*: Securities Comm. has no jurisdiction to discipline lawyer b/c can't reveal privileged info

***Pritchard*** *(SCC)*: S/C privilege applies, however only for legal advice and not business advice

## \*\*Code 3.2-3, 3.2-8, 7.8-1

**3.2-3** Although L may receive instructions from an officer, employee, agent or representative, when L is employed or retained by an organization, including a corporation, the L must act for the organization in exercising his or her duties and in providing professional services.

**[1] A corporate client has a legal personality distinct from its shhs, officers, dirs and Ees. Ensure that organization’s interests are served and protected [regardless of who gives instructions]. Check that person giving instructions for organization is acting within his/her authority.**

**[2]** L may also accept a **joint retainer** and act for a person associated with the organization (e.g. L may advise an officer of an organization about liability insurance). In such cases, be alert to possible COI and should comply with rules to avoid **COI (3.4).**

**3.2-8 L** who is employed or retained by an organization to act in a matter in which the L knows or ought to know that the **organization** has acted, is acting or intends to act dishonestly, criminally or fraudulently, must do the following, in addition to her obligation [to avoid engaging] in any activity that L knows or ought to know assists in or encourages any dishonesty, crime or fraud (3.2-7):

(a) L must advise the person from whom L takes instructions and the chief legal officer, or both CLO and CEO, that the proposed conduct is, was or would be dishonest, criminal or fraudulent and should be stopped; **[5] must advise the chief legal officer** of the misconduct.

(b) if the persons [in part a] refuses to cause the proposed conduct to be stopped, L **must advise progressively** the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, criminal or fraudulent and should be stopped [**“Up the ladder” reporting/whistleblowing**]; and

(c) if the organization, despite the L's advice, continues with or intends to pursue the proposed wrongful conduct, L must w/d from acting in the particular matter in accordance with section 3.7-1. **[5]** In some but not all cases, w/d means resigning from her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

**[1] The past, present, or proposed misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency, but also for the public who rely on organizations. The misconduct of publicly traded commercial and financial corporations may have serious consequences for the public at large. [3]** Includes acts of omission, conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization **[4]** In considering her responsibilities, L should consider whether it is feasible and appropriate to give any advice in writing. **[6]** Ls acting for organizations & in-house counsel can advise that it’s in the organization and public’s interest not to violate the law, can advise the executive officers about the PR and public policy concerns that motivated the law, can guide organizations to act in ways that are legal, ethical, reputable and consistent with the organization’s responsibilities to its constituents and to the public.

# **Fees**

Anne Stewart: Best practice is to discuss up front, explain disbursements (incl. staff/printing), timing

## \*\*Code 3.6-1 to -9, LPA s. 67(2), 65(4), 69(4), 70, Law Society Rule 3-59

**3.6-1** L must not charge or accept a **fee or disbursement**, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.

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| **\*[1] What is a fair and reasonable fee depends on such factors as: (a) the time and effort required and spent; (b) the difficulty of the matter and the importance of the matter to the client; (c) whether special skill or service has been required and provided; (d) the results obtained; (e) fees authorized by statute or regulation; (f) special circs, such as the postponement of payment, uncertainty of reward, or urgency; (g) the likelihood, if made known to the client, that acceptance of the retainer will result in the L's inability to accept other employment; (h) any relevant agreement** **between the L and the client; (i) the experience and ability of the L; (j) any estimate or range of fees given by the L; and (k) the client’s prior consent to the fee.** **\*[2]** FR b/w L and C **prohibits any** **hidden fees**. No compensation related to professional employment may be taken by L from anyone other than C without full disclosure to and the consent of C.**[3] L** should provide to the client in writing, as much information regarding fees and disbursements, and interest, as is reasonable and practical in the circs, including the basis on which fees will be determined.**[4] L** should be ready to explain the basis of the fees and disbursement charged to the C, incl. sth unusual or unforeseen. Confirm with C in writing the substance of all fee discussions that occur as a matter progresses, and L may revise an initial estimate of fees and disbursements. |

**3.6-2** Subject to rule 3.6-1, L's **fee can be contingent**, in whole or in part, on the outcome of the matter (capped at 33% for PI, 40% for wrongful death; not available for child custody or matrimonial matters.

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| **[1] In determining the appropriate percentage or other basis of a contingency fee, L and C should consider a number of factors, including the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs. The test is whether the fee, in all of the circs, is fair and reasonable.****[2] When the retainer is pursuant to a contingency agreement**, L has impliedly undertaken the risk of not being paid if the suit is unsuccessful. |

 ***LPA s. 67(2)* Can’t receive contingency on both amounts recovered and on costs**

**3.6-3** In a **statement of account** delivered to C, L must clearly and separately detail the amounts charged as fees and disbursements**. [2]** Party-and-party costs are C’s property and paid for by C. L’s obligation to disclose costs to C not affected by agreements to change L’s costs entitled

 ***LPA s. 65(4)*** Agreement about fees must be signed by L

***LPA s. 69(4)*** Bill must describe services, provide detailed statement on disbursements, and must be (1) delivered and (3) signed

**3.6-4** If 2+ clients in same matter, must divide fees and disbursements equitably between them (**joint retainer**), unless Cs agree otherwise.

**3.6-5 If C consents,** **fees for a matter may be divided between L's** who are not in the same firm, provided that the fees are divided in proportion to the work done and the responsibilities assumed.

**3.6-6** If another L refers based on expertise (and not conflict), can have **referral fee**, provided that (a) fee is reasonable (and doesn’t increase C’s payment), (b) client is informed and consents

**3.6-7 L** must not: (a) directly or indirectly share, **split or divide his or her fees** with any person other than another L; or (b) give any financial or other reward for the referral of Cs or client matters to any person other than another L. [1] Rule prohibits Ls from paying referral fees to non-Ls, but can still spend on promotional items or activities for non-Ls (e.g. spending on meals or sports events)

**3.6-6.1** In rule 3.6-7, **“another lawyer”** includes a person who is: (a) a member of a recognized legal profession in any other jurisdiction; and (b) acting in compliance with the law and any rules of the legal profession of the other jurisdiction

**3.6-8** Can share fees with non-L of multi-disciplinary practice if he is actively involved in MDP's delivery of legal services to clients/management
**3.6-9** If L & C agree that L will act only if retainer is paid in advance, must confirm that agreement in writing and specify a payment date.

***Law Society Rule 3-59***(1) **can’t accept more than $7,500 in cash as retainer** from any one client; (4) exception if the cash is paying your fees; (5) if under sub (4), can’t make refund greater than $1000

***LPA s.70*** C can apply to BCSC registrar to review the bill w/in 1 year of receiving it

- Onus on the lawyer to prove it's fair and reasonable (so keep good records)

- L must pay costs if more than 1/6 of the costs are removed after the review

- By refusing to pay/challenging the bill, client waives privilege

- If unpaid, use a solicitor's lien

# **Access to Justice**

Way of protecting public interest in the practice of law; professional obligation to encourage respect for administration of law

Mainly an issue due to lack of financial resources 🡪 Leads to more **self-representing litigants**

***Pro Bono***: Reducing or waiving a fee where there is hardship or poverty

Jurisprudence and the history of the concept does not support that a broad and general right is 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. Right of access to court =/= right to counsel (***Christie***).