Table of Contents

1. legal ethics and professional regulation 4

2. Sources of guidance for ethical conduct 4

A. case law and legislation: constraining what lawyers can/’t do in legal practice 5

Legal professions act 5

Regulations made pursuant to LPA 5

Discipline 5

Law Society of British Columbia v Jabour 1980 BCJ No. 833 6

B. bc code/model code 6

C. Principles or Norms: 6

Unwritten Ethical Norms: 6

3. Conceptualising the L-C relationship 6

A. Duty of loyalty 7

Alice Woolley: In defense of zealous advocacy 7

r v neil 2002 scc 7

szarfer v Chodos 1986 onhcj 7

B. critiquing loyalty as #1 7

r v murray 2000 onscj 8

4. Finding a Client 8

A. Advertising (BC Code rule 4.2-5) 8

stewart v cbc (ont Gen Div, 1997) 9

B. Fee sharing (BC Code Rule 3.6) 9

C. solicitation 9

LS of Sask v merchant [LS sask hearing committee, 2000] 9

D. Choosing a client 10

I. Obligations to *not* take a client 10

II. Obligations to take a client vs. right to decline 10

Proulx and Layton decision-making matrix 10

Hutchinson’s view 11

Commentary after rule 3.01 11

5. Triggering the Lawyer-Client Relationship 11

6. Terminating the Relationship 11

A. Contractual – End of Retainer 11

B. Withdrawal 11

I. Obligatory Withdrawal 12

II. Optional Withdrawal 12

R v Cunningham SCC 2010 – Court approval of Withdrawal 12

III. Whistleblowing/up the chain reporting/Noisy withdrawal 13

IV. Manner of withdrawal 13

7. Confidentiality and Privilege 13

A. Duty to preserve Client Confidences 13

B. Common Law Exceptions 14

1) Crime/Fraud or Criminal Communications 14

Descoteaux v Mierzwinski (1982) SCC 14

2) Public Safety 15

Smith v Jones 15

3) Innocence at stake 15

R v McClure (2001) SCC 15

Brown 15

4) Confidentiality and Lawyers Protecting Their Own Interests 16

5) Client Incapacity 16

6) Other 16

C. Legislative Exceptions 16

Goodis v Ontario (Minister of Correctional Services) 16

LS Sask v Merchant (2008) sask CA 16

AG CAnada v Federation of Law Societies (2015) SCC 17

Cunningham [withdrawal in the criminal context] 17

R v Murray [custody of real evidence] 17

8. The Legal Profession & Lawyer Regulation 17

A. Concept of Law as a profession And arguments for self-reg 17

B. The Practice of Self-Regulation 18

I. Entry Regulation 19

I. Regulating Lawyer Conduct 19

I. Disciplinary Process 19

II. Professional Misconduct 21

Undertakings (Rule 7.2-11) 21

Reporting Other Lawyers (Rule 7.1-3) 21

Adams v Law Society of Albera (2000) ABCA 22

LSUC v Hunter [2007] LSUC Hearing Panel 22

III. Conduct Unbecoming 23

LSUC v BUdd (2009) LSUC Hearing Panel 23

Law Society Of Alberta v Sychuk (1999) Alberta Hearing Committee 23

9. Professionalism and Civility 24

A. Alice Woolley 24

B. The Rule 24

Schreiber v Mulroney (2007) ONSC 25

LSBC v Laarakker (2011) LSBC Hearing Panel 25

R v Felderhof (2005) ONCA 25

LSUC v Groia (ONLSAP) 26

LSUC v Groia (2016) ONCA 26

C. Conclusion 26

10. Good Character and Reputation 26

A. David Luban: The Adversary System Excuse 26

B. The Good Character Requirement 27

Factors relevant to good Character Findings: 28

Preyra v LSUC (2000) Hearing Panel 28

LSUC v Burgess (2006) Hearing Panel 29

LSBC v Mangat (2013) LSBC 29

Gayman v LSBC (2012) LSBC – Credentials Panel Decision 30

Gayman v LSBC (Decision on Review) 31

C. The Future of Good Character 31

11. Ethics in Advocacy 31

A. Pre-Trial Procedures 32

I. Pleadings [Rule 3.2-4; 5.1-2] 32

II. Discovery 32

III. Negotation 33

B. Ethics at trial: Zealous Advocacy vs Unethical Conduct 33

I. WItness preparation: Rules 5.1-2; 5.3; 5.4 33

II. Cross-examination: rule 5.1-2(k) – can’t mislead the court 33

III. Representations about the law 34

C. Ethics in Criminal Law 35

I. Dual Roles 35

II. Ethical Duties of Crown (all reg. duties + more) 35

III. Ethical Duties of Defence Counsel 37

12. Truth and Reconciliation 37

A. TRC Calls to Action 38

B. TRC Executive SUmmary 40

13. Competence & Quality of service 41

Nova Scotia Barristers Society v Richey (2002) NSBC Hearing 42

Cultural Competence 42

R v Fraser (2011) NSCA 43

14. Conflicts of Interest & The Duty of Loyalty 43

A. Client-Client 43

I. Duties to former clients 43

MacDonald Estate v Martin 44

II. Duties to current clients 44

R v Neil (2002) SCC 44

Strother v 3464920 Canada Inc (2007) SCC 45

LSBC v Strother [2015] Hearing Panel 46

CNR v McKercher (2013) SCC 46

B. Lawyer-Client Conflicts 47

Stewart v CBC [1997] Ont. Gen. Div. 47

LSUC v Hunter (2007) Hearing Panel 48

C. Joint Retainers 49

15. Ethics and Conduct in Corporate law 49

A. Fees 49

64 (1) Definitions and interpretation 49

65 Agreement for legal services 49

66 Contingent fee agreement 49

67 Restrictions on contingent fee agreements 50

68 Examination of an agreement 50

69 Lawyer's bill 50

Other Issues: 51

B. Counselling 51

LSUC v Sussman (1995) Discipline Committee 51

David Luban on “Terror Memos” 52

C. Negotiation 52

D. The Organizational Setting 53

Milton C. Regan Jr: “Professional Responsibility & the Corporate Lawyer” 53

Canadian response 54

Privilege for Corporate Counsel 55

# 1. legal ethics and professional regulation

Some overlap but conceptually distinct

|  |  |
| --- | --- |
| ETHICS | PROFESSIONAL REGULATION |
| Body of underlying principles and norms in the governance of the legal profession   * Lawyers’ ethical obligations to each other, organizations, clients, justice, public * Rules, principles, and legal obligations * Moral aspirations of lawyers * Types of DM and ultimate decisions which an ethical lawyer would make | Concerned w/ the ethics of legal practice **at the level of regulation and governance**   * How do we **determine and enforce** ethical constraints on lawyer conduct? * Self-regulation: rules of ethical conduct, standards of admission, enforcement of rules + standards are all set by lawyers |

# 2. Sources of guidance for ethical conduct

## case law and legislation: constraining what lawyers can/’t do in legal practice

The most important source of ‘hard’ ethical rules but do not cover many ethical issues

### Legal professions act

* Establishes the law society and its powers (it is a delegated admin agency, created by statute to regulate the profession)
  + **s. 3:** sets out the mandate of the Law Society: to protect the public interest

∴ should always go here when determining whether something should be enforced by the law society

→ this also differs from the mandate of the CBA (express purpose is to further the interests of lawyers)

* Covers the regulation of lawyers and admission to the bar
* Disciplinary abilities
* Fees
* Restricts non-lawyers from practicing law (i.e. trading legal services for a fee)
  + i.e. it is by virtue of the LPA that lawyers have a monopoly

#### Regulations made pursuant to LPA

* pragmatic and practical but also create some ethical obligations
* Complaints process is administered under the regulations
* ENSURE THESE ARE DISTINCT FROM THE RULES OF THE BC CODE OF CONDUCT

**OTHER ACTS:** Court rules act

**CASE LAW:**

* delivers standards of negligence, FD, contract, evidence, etc. and delineates CL and statutory obligations
* JR of disciplinary hearings are also important b/c they bind the law society in future decisions

#### Discipline

* One of the primary functions of contemporary CDN law societies
* Undertaken as a core aspect of self-regulation not only for punitive reasons but for public protection and to protect the profession’s reputation; also a deterrence measure
  + If to serve a deterrent purpose, must ∴ be reasonably probable that a lawyer could face punishment for misconduct
* CDN law societies empowered by leg’n to discipline their members for:

1. Professional misconduct:

Generally defined by some “disgraceful or dishonourable” conduct – i.e. some degree of moral turpitude req’d (negligence not enough); Conduct which occurs in the scope of practice.

1. Conduct unbecoming a barrister or solicitor

Private conduct that tends to bring discredit upon the legal profession (i.e. dishonesty, criminal conduct, acting predatorily) ∴ professional ethics codes will serve little or no purpose here

Difficult to categorize the type of behaviour that will warrant sanction but it is suggested that it must be of a type which calls into question the lawyer’s integrity or ability to act competently and honestly.

1. Conduct deserving of sanction

* Use of such broad language allows for discipline for conduct which does not constitute either a breach of law or violation of a rule of professional conduct spelled out in code of professional ethical conduct
* The breadth is not borne out in reality; practically, there are very few reasons for a lawyer being sanctioned and
  + This means that the bulk of the provisions found in ethics **do not** serve as the basis for professional discipline

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

→ illustration of the breadth of the powers of law society

|  |  |
| --- | --- |
| **F** | Mr. Jabour was a lawyer who published four advertisements in the newspaper for his services – had a menu of set prices. He was found guilty of conduct unbecoming a member of the law society and was suspended from practicing for 6 months. |
| **I** | does the law society have the power to discipline people for things that are not related to competence issues? How broad is the authority of the law society? |
| **D** | The power to prohibit commercial advertising is granted as part of the broad regulatory power conferred by the act. ∴ the Benchers have the power to prohibit the type of advertising in this case and to discipline accdingly. The legislature intended to delegate to the law society, a very broad range of authority that goes beyond integrity and competency. |
| **RA** | Benchers are the guardians of the proper standards of professional and ethical conduct; they conclude whether it is “contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession.” |
| **A** | It does not need to be **specifically** prohibited before it can be the subject of disciplinary hearings.  *NB:* benchers getting to punish for behaviour that’s contrary to the best interest of the legal profession or to its standing means that discipline **does not need to be serving the public interest;**  Would also run into Charter concerns, once the Charter has been instituted, b/c of freedom of expression |

## bc code/model code

DIFFERENT FROM THE RULES UNDER THE LPA

* Important but not exhaustive
* Non-binding – they’re really just guidance published by the law society
  + General and pretty discretionary rather than specific and mandatory
  + But you contravene them at your own peril b/c the law society will consult these when determining a baseline for ethical behaviour
* Often commentary is more useful in practice than the actual rules
* Canons – general ethical principles

## Principles or Norms:

Lawyers need principles and norms to guide decision making when filling gap between conduct rules and personal morals. They also need to (1) be sensitive to when an ethical issue has arisen; (2) have the judgment to respond appropriately; (3) motivation and courage to enact their response.

### Unwritten Ethical Norms:

Virtue ethics: innate virtues (honesty, loyalty, compassion) can be combined with good judgment to produce human flourishing

Utilitarianism: sacrificing the needs/desires of the few to benefit the many (and harming the few to avoid harming the many) but there is an issue with how you define what the ‘good’ is when doing C:B A

Kantian: (rules-based) – ethical norms are universal and generalizable; people must be treated as an end, not as a means to an end; you reason from universal rules to come to ethical results – it’s not an innate thing

Postmodernist: not a system in itself but rather a critique of the other frameworks – states that the world is unknowable and none of these will be what you draw on when the time comes. Ethics are composed of individual decisions and those decisions will be made according to what you see as being most relevant at the time

Pluralist: depending on the context, one theory/framework may be more persuasive than the next

# 3. Conceptualising the L-C relationship

**Fiduciary duties**

When do FDs arise? When there is a degree of vulnerability of the bene and some public importance to the fiduciary’s role. (clients’ vulnerability derives from the power, authority, and information asymmetry)

**The duty of loyalty** is the key for ethics in this fiduciary relationship

## Duty of loyalty

### Alice Woolley: In defense of zealous advocacy

* The civil compromise of law is reached as a way to resolve disputes, instead of violence.
* The law is complex and this requires the professional role of the lawyer
* The lawyer is the intermediary between the client and “the law” – the lawyer’s role is to guide the client through the maze and help them achieve their stated aim
* ∴ the role of the lawyer is morally justified b/c it allows the functioning of the civil compromise
  + Any act that is required to fulfill this role is also justified – though these acts must fall within an acceptable range, which is itself determined by the law.

### r v neil 2002 scc

|  |  |
| --- | --- |
| **F** | Appellant brought application for SOP b/c there was a conflict: his original law firm ended up representing his co-accused |
| **I** | Is the duty of loyalty required by the fiduciary nature of the L-C relationship? |
| **RA** | The duty of loyalty is intertwined with the fiduciary nature of the LC relationship. The beneficiary is entitled to expect that F will act for his interests along. In the LC context, a litigant needs to be sure that the lawyer has his **undivided loyalty**. O/w the client and the public will lose confidence in the legal system as a place that will resolve their disputes fairly. |
| **A** | Aspects of the duty of loyalty engaged here:   1. Duty to avoid conflicting interests 2. Duty of commitment to the client’s cause (can’t soft-peddle a client’s case out of concern for another client’s case) → zealous representation 3. Duty of candour: if a conflict arises, you tell the client. |

### szarfer v Chodos 1986 onhcj

|  |  |
| --- | --- |
| **F** | Δ was Π’s lawyer in a PI claim; in the course of representation, he learned about issues in Π’s marriage  Δ then had an affair w/ Π’s wife, and Π found out → exacerbated his pre-existing psychological issues (which Δ knew of) |
| **I** | Should we superimpose loyalty as a fiduciary duty beyond that which is contracted for? (i.e. is Δ’s behavior contrary to the duty of loyalty he owed Π?) |
| **D** | Yes. Δ used confidential info obtained from Π and his wife for his own purposes and ∴ breached his FDs |
| **RA** | You can’t use confidential information from a client for your own or others’ gain or to the client’s disadvantage. |
| **RE** | Many ways to derive a personal benefit or to disadvantage a client – it does not need to be a disadvantage to the client’s representation by the lawyer  Δ’s behavior clearly vitiated trust |
| **ETC** | If the lawyer hadn’t known about the confidential particulars, would the outcome have been the same? Maybe. It might have been seen as conduct unbecoming rather than professional misconduct, though. |

## critiquing loyalty as #1

There are two key criticisms:

1. **Setting aside other values:** Loyal advocacy is not the only value to be upheld; it shouldn’t be emphasized at the expense of other equally important values (like justice)
2. **Breeds unethical conduct:** untampered loyalty may encourage lawyers to sacrifice morality in favour of pursuing a client’s (sometimes) immoral aims

Theoretical arguments:

**Simon:**

* the central principle governing lawyers should be justice (understood as legal merit).
* Lawyers should take those actions that, considering the relevant circs of the particular case, seem most likely to promote justice.
* The law, interpreted correctly, is coextensive with morality.

**Luban:**

* Moral non-accountability (i.e. zealous advocacy **or** excessive focus on legal merit) should not be unqualified commitments of the ethical lawyer
* Role morality is a real thing but it doesn’t exempt the lawyer from the everyday moral claims where law and morality conflict

### r v murray 2000 onscj

|  |  |
| --- | --- |
| **F** | Δ: lawyer for PB; PB = suspect in a slew of horrible SA and murders.  PB instructed Δ to go to PB’s house and find these tapes and keep them secret; he instructed Δ not to view them but stated they would be indispensable to the defence  He didn’t report the existence of the tapes to the crown or the police for 17 mos  Eventually he watches them – they contain horrific scenes of PB and PB’s wife (and co-accused) engaged in sexual torture of the victims.  Δ still does nothing; finally goes to the law society for guidance |
| **I** | Did Δ attempt to obstruct justice by concealing the tapes? |
| **D** | No. No MR for the crime – he did not intend to ‘bury’ the tapes, and intended at least that they would be released by the time of the trial. |
| **RA** | Loyalty and the ancillary obligation of zealous advocacy can actually cause a lawyer to lose their way and to obscure their judgment. |
| **ETC** | Seems a bit bullshit that he was planning to use them as a part of litigation strategy but now there are rules about how lawyers need to handle real evidence |

# 4. Finding a Client

## Advertising (BC Code rule 4.2-5)

Tension in perspectives of what lawyers should be:

1. Old school vision of the lawyer as better than regular business folk. We’re service-providers lawyers have the duty to make legal services available, as beneficiaries of the monopoly over legal services. But we don’t talk about money because that’s vulgar.
2. Contemporary reality and arguments around access to justice, also that lawyers are business people and L-C relations should be governed by usual market norms

→ This tension is visible in the Code: in the ***canons (2.1-5(c)),*** lawyer req’d to make services efficiently and conveniently but also a reputation is the best form of advertising…

***Rule 4.2-5:*** Marketing activity must not be:

|  |  |
| --- | --- |
| 1. False 2. Inaccurate 3. Unverifiable | 1. Reasonably capable of misleading the recipient or intended recipient 2. Contrary to the best interests of the public |

**Examples of bad behavior:**

* Stating amounts of awards won for past clients w/o disclaiming that past success is not guarantee
* Suggesting qualitative superiority over other lawyers
* Unjustifiably raising expectations
* Suggestion or implication of aggressive behavior
* Taking advantage of vulnerable persons
* Demeaning/disparaging others
* Using endorsements or testimonials that contain emotional appeals

**Whose interests are served by limiting advertising?**

* Advantageous to larger firms b/c they are more well-known (also flip side to this b/c if allowed, they could outspend smaller firms)
* Perception of the legal profession is elevated b/c it’s not seen as just another hustle
* Some protection should be there for the public – but is all of it necessary?
  + False impressions about cost? (but maybe there should be some indications of cost)
  + Consumer protection legislation could play a role
  + Not giving false impressions about what you can achieve

### stewart v cbc (ont Gen Div, 1997)

|  |  |
| --- | --- |
| **F** | G: counsel for S when S was charged and convicted of criminal negligence causing death  10 years later, G was a host/narrator of an episode for a TV show called ‘scales of justice’ that centred around S’s case |
| **I** | S claimed G breached implied terms of K and also the duty of loyalty |
| **D** | Yes. G paid damages of $2500 and ordered to disgorge profits of doing the episode to S. |
| **RA** | In the context of public media attention directed at a former client/case, lawyers must not engage in behavior motivated by self-promotion or self-aggrandizement  **\*\*See BC code rule 7.5** |
| **RE** | G’s participation was not motivated by an interest in educating the public but rather his own interests. |

## Fee sharing (BC Code Rule 3.6)

***Joint retainer: 3.6-4***

***Division of fees + Referral fees: 3.6-5, 3.6-6 + 3.6-7***

***Multidisciplinary practices: 3.6-8***

**Justification for distinguishing between lawyers and non-lawyers for referral fees?**

* If it’s another lawyer, you know the client has already sought legal advice, so you’re not out there chasing down randoms
* A classist distinction; trying to keep all the money in the family
* This could be different – there could be clickbait for lawyers

## solicitation

### LS of Sask v merchant [LS sask hearing committee, 2000]

|  |  |
| --- | --- |
| **F** | * Δ trying to recruit Indigenous people for a class action RE: residential schools * Sent letters to the complainants (H & B) - Indigenous individuals, which were the cause of their complaint * Made assumptions and promises: “You have nothing to lose” (but in the retainer to be signed, clearly had much to lose); put in actual amounts for damages awards; made it seem like all you had to do was sign and there’d be a cheque coming – no info on the actual process; asked them to refer out other people who could join the action and telling them they would never have to know who referred them; assuming there was a sustainable case; assuming that the individuals went to RS in the first place |
| **I** | 1. Conduct unbecoming: Letter likely to create an unjustified expectation in the mind of the recipient regarding the achievable results? 2. Con Un: Letters to H + B reasonably capable of being misleading? 3. Con Un: Undignified, in bad taste, o/w offensive in a way that’s inimical to the best interests of the public or harmful to the profession? |
| **D** | 1. Amounts offered weren’t totally off side – plus B was a victim of SA (crime for which the numbers quoted) ∴ it was actually a potentially achievable award for her → not guilty 2. Terms of the retainer were onerous and contrary to the splashy headlines version of the situation portrayed in the letter → guilty 3. Yes, it’s marketing. Yes, it’s in horrible taste. But b/c of the way the rule was written, they don’t have jurisdiction to discipline on it. |
| **ETC** | * Reprimanded; fined $5K; costs of $10K * Majority of Sask CA affirmed the judgment * Later, the CBA came out with a resolution that lawyers shouldn’t solicit individual RS survivors   + Tension between A2J and retraumatization |

## Choosing a client

Once you’re in, it’s hard to get out…think carefully about it beforehand.

### Obligations to *not* take a client

A lawyer shouldn’t take a case in these instances:

1. **Incompetence:** not just knowledge but also **capacity** (time, resources, etc.); if you don’t have the expertise, that doesn’t necessarily mean you are incompetent – as long as you are honest w/ client about your level of knowledge and have the time and resources to learn about the case, you can do it.
2. **Where there is a continuing retainer with another lawyer** (you can tell the prospective client that you’d be happy to do it, once the retainer is no longer in play)
3. **Where the lawyer may be a witness in the case** (can’t be both advocate and witness in the same case)
4. **For an illegal purpose**

### Obligations to take a client vs. right to decline

* Obligation to make legal services available ***(Code rule 2.1-5(c))***
* In the UK, there’s the cab rank rule – you have to take whoever’s up next, unless there’s a specific reason you can’t
* Should there be a more regularized system in Canada?

Debate about the lawyer’s obligation to take clients can be divided into two camps:

1. **Moral Non-Accountability:** It’s not the lawyer’s job to make prejudgments about who to take on b/c the job is to play a neutral cog in the justice system. Letting subjective assessments drive client choice is a barrier to accessing the justice system (∴ contrary to the ethical obligation)
2. **Taking it Personally:** lawyers have agency and should be held accountable for their client choices. There is no such thing as moral neutrality, and representation of an immoral cause is an immoral decision for which the lawyer should be held accountable.

#### Proulx and Layton decision-making matrix

Trying to be a middle ground between the 2 divergent views

1. **OVERRIDING ETHICAL IMPERATIVE:** the lawyer **must reject** a retainer where his **personal distaste is so severe** (re: client or case) that the lawyer can **reasonably conclude that the quality of the legal representation would suffer as a result.**

→ If that disgusted, you have a justifiable rejection

→ If not, move on to B.

1. **ANCILLARY QUESTIONS:**

* Sincere belief in the immorality of client?
* Repugnance about the client’s personality or intimately tied to the representation/legal issue?
* Influence of public opinion?
* How important is representation to the client?
* Can the client find other competent counsel?
* View of the client’s innocence or guilt driving the decision? (if so, that’s not enough)
* Discriminating on a prohibited ground? (not okay – *HRC,* ***Code Rule 6.3-5***)

→ If rejected after B, lawyer must provide reasonable assistance for free in helping the client find a new lawyer

#### Hutchinson’s view

* Ethically incumbent on a lawyer to talk to prospective clients before taking them on
* Discuss:
  + Basic expectations of one another
  + Objective of the case → is it worthwhile?
  + Method of achieving the objective → allowable?
* Lawyers must inform clients about ethical limits of their provision of services (eg. Negotiation tactics, x-exam style)
* Must treat clients as moral persons who are capable of engaging in debate and changing

#### Commentary after rule 3.01

* General right to decline must be exercised prudently, esp. if refusal is likely to result in the person having difficulty finding counsel
* Lawyers should not exercise the right:

1. Just b/c the client/case is notorious
2. Powerful interests or allegations of misconduct/malfeasance are involved
3. Lawyer’s private opinion about the guilt of the accused

# Triggering the Lawyer-Client Relationship

How do you know if it’s happened?

***BC Code Rule 1.1-1*** A client is one who consults a lawyer and for whom the lawyer renders or agrees to give service **or** a person who reasonably thinks this agreement exists.

***Descoteaux:* First dealings doctrine**: Relationship arises as soon as the client has first dealing with the law office in order to obtain legal advice.

# Terminating the Relationship

How do you know if it’s over?

## Contractual – End of Retainer

L-C relationship is primarily a contractual one ∴ parties can anticipate the end of it and when it’s done, ending it does not usually attract any ethical concerns. **However,** to ensure you’re not getting into future conflicts, it’s prudent to send formal termination letters which are friendly but clear: this matter has come to a close but you are welcome back for any other future matters.

## Withdrawal

Once a lawyer accepts a client, they have a duty of fidelity and loyalty which limits their ability to pull out prematurely. A lawyers must not withdraw from representation of a client except for a good cause and with reasonable notice.

### Obligatory Withdrawal

**Gavin MacKenzie’s Suggestions on Handling False Evidence:**

***Rule 3.7-7:*** a lawyer **must withdraw** if:

* Discharged by client
* Client persists in instructing the lawyer to act contrary to personal ethics; or
* Lawyer is not competent to handle a matter

***Rule 5.1-1 and 5.1-2:*** you have a duty to not mislead the court

***Rule 5.1-4:*** If you have unwittingly misled the court, you must try to rectify it;

***Commentary:*** if a client wants you to mislead the court or you have already inadvertently done so, and the client will not rectify it, you need to try to prevent the misleading or, failing that, withdraw.

1. Lawyers have no duty to refuse to call evidence UNLESS they have **actual knowledge of its falsity**
2. Where (1) exists, and the client or a witness for the client intends to present the evidence, you need to try and persuade them not to do this
3. Doing (2) may mean that your retainer is terminated. If the client wants to go ahead with the false evidence and also wants you to continue as their lawyer, you have to withdraw.
4. Counsel in civil cases should not call witnesses who the lawyer knows intends to give false evidence. They can call on a witness that will give some true evidence and some false evidence as long as they keep their questions to the truly answered bits.
5. If false evidence is introduced unexpectedly or if the lawyer learns of it after the fact, the lawyer should take reasonable corrective steps:
   1. Urge the client or witness to admit this. If they refuse;
   2. Lawyer must inform the court without explanation that the evidence in question cannot be relied upon.

### Optional Withdrawal

#### R v Cunningham SCC 2010 – Court approval of Withdrawal

***Rule 3.7-2:*** Allowable for serious loss of confidence; i.e. where:

* Lawyer has been deceived by the client
* The client is persistently unreasonable or uncooperative **in a material respect**

***Rule 3.7-3:*** Allowable for client’s failure to pay retainer/fees after they’ve been given notice

* Must do this with reasonable notice to the client, allowing them to get another lawyer

***Rule 3.7-4:*** In criminal matters there are special rules – see ***Cunningham*** – example where your ethical obligations > your personal interests as a businessperson

**RATIO:** procedure to be followed when withdrawing from criminal matter

1. If it’s far enough in advance, cts should not be asking any questions
2. If it’s close to trial
   1. Withdrawal for ethical reasons? Ct can’t ask any more questions and must allow withdrawal.
   2. Withdrawal for nonpayment? Ct can ask further questions AND may refuse to allow withdrawal where necessary to prevent serious harm coming to the administration of justice.

**REASONING:** 3 Arguments dealt with:

1. *Fee Information is privileged and court can’t ask about it* → No. It cannot be used against a client in a criminal matter – it is unrelated to the material issues of the case ∴ it’s not prejudicial.
2. *Law society has exclusive oversight for when counsel can withdraw* → No. Ct has inherent jurisdiction over the administration of court proceedings
3. *Conflict of interest arising from requiring continued representation of a non-paying client* → No. The court will assume that the lawyer will act ethically even though they are not being paid.

### Whistleblowing/up the chain reporting/Noisy withdrawal

***Rule 3.2-8:*** If the lawyer is acting for an organization that is acting/has acted/plans to act dishonestly, fraudulently, criminally, or illegally: the lawyer needs to report the behaviour and advise it be stopped; need to keep reporting it up the chain until someone listens or you get to the top of the ladder. At which point, if the organization persists in acting unlawfully, you must withdraw.

No “noisy” withdrawal is mandatory – you can just slink out of there…but can you **opt** for noisy withdrawal? Probably not, according to the next rule…

### Manner of withdrawal

***Rule 3.8-9:*** Must minimize the expense and prejudice to the client and assist with the transfer of the file. Must notify the client, other parties, and court. Must transfer the file and papers to the client (subject to a lien).

Strongly discouraged from putting a lien on files because:

1. Harms standing of legal profession
2. Directly conflicts with your duty to ensure the withdrawal doesn’t result in prejudice/harm to the client
3. **Distracts you from competently managing the rest of your practice.**

***Rule 3.7-9.1:*** Subject to exceptions permitted by law, if the reason for your withdrawal results from a confidential communication between the lawyer and the client, the lawyer must not disclose the reason for withdrawal, unless the client consents.

# Confidentiality and Privilege

## Duty to preserve Client Confidences

* Info is critical to lawyer’s ability to adequately advise clients and appropriately represent client interests
  + Confidentiality allows client to trust the lawyer which allows the lawyer to do their job ∴ it greases the wheels of the justice system
* Furthers truth-finding – if people were afraid that their lawyer would narc on them, they might be afraid to tell them anything, even things that are not actually incriminating
* Client’s rights are protected – you’re more likely to get a fair trial (and to be seen to get one) where the lawyer has to be 100% loyal
* Fosters autonomy and dignity of client by protecting their privacy
* Closely connected to loyalty – it operates as an assurance that the lawyer can’t use the information against the client b/c there is an absolute bar
* Stops us from becoming a police state where defence advocates are actually enlisted in trying to further the state’s case
* Is there a rational basis for protecting lawyer-client privilege when we don’t protect other relationships where confidential information is just as important?
* Is it justified that we can reveal confidential information to get fees paid but in the case of innocence at stake, sometimes the best option is to let an innocent person go to prison and hope for a pardon?

**Confidentiality =** the giant umbrella rule // **Privilege:** the legal rule that exists underneath it

|  |  |
| --- | --- |
| **Confidentiality** | **Privilege** |
| Broader obligation imposed by law society | Narrower legal obligation imposed by law |
| ETHICAL principle | LEGAL obligation |
| ALL information acquired during the relationship is covered – including information not brought by the client | ONLY private communication that takes place between the L and C is covered |
| Obligation continues, despite any 3P’s knowledge of it – it survives the L-C relationship | Once communicated to 3P, it’s no longer privileged |
| Defining feature of ALL L-C relationships and intertwined with the duty of loyalty and the ability of the client to trust the lawyer | It is a principle of EVIDENCE LAW and FUND’L JUSTICE (means the lawyer can’t be a witness, can’t be called upon to give evidence by police; and their records cannot be subpoenaed) |
| Any communication during the relationship is covered – including the fact that the client ever sought you ought or is your client at all | Only covers communications made for the purposes of obtaining legal advice |

## Common Law Exceptions

***Rule 3.3-1:*** A lawyer must hold in strict confidence all information from a client acquired in the course of the professional relationship **except:**

1. There is express or implied client authorization
2. It’s required by the law or the court
3. It’s required to deliver information to the law society
4. It’s o/w permitted by this rule

### Crime/Fraud or Criminal Communications

#### Descoteaux v Mierzwinski (1982) SCC

|  |  |
| --- | --- |
| **F** | Police obtained a warrant to seize the accused’s legal aid application. He was charged with fraudulently reporting a lower income in order to obtain gov’t services. |
| **I** | Whether financial information pertaining to a legal aid application is confidential |
| **D** | Yes, unless there’s an exception. |
| **RA** | The solicitor-client relationship begins when the client first deals with the law office to seek legal advice. Confidential communications will lose their protection if and to the extent they are made **for criminal purposes** (e.g. obtaining advice about how to engage in a crime) or **when the communication itself is a material element of the crime.**  Substantive Rule of Confidentiality: Four Facets   1. Confidentiality can be raised whenever confidential communications are likely to be disclosed without the client’s consent 2. Unless the law provides otherwise, when and to the extent that the legitimate exercise of a right would interfere with the person’s right to confidentiality, the conflict should be resolved in favour of protecting confidentiality 3. Where there is legal authority to do something that might conflict with confidentiality, the decision to exercise that authority and the means chosen for doing so must be undertaken to ensure the absolute minimum necessary infringement on confidentiality 4. Acts providing otherwise in (2) and enabling legislation in (3) must be interpreted restrictively. |

### Public Safety

#### Smith v Jones

|  |  |
| --- | --- |
| **F** | Δ charged w/ agg assault of a prostitute. His defence counsel set him up with a psych eval. Δ told the psychiatrist (Π) of his extensive plans to kill a prostitute. Π thought Δ was likely to reoffend and wanted to release this information as an exception to S-C privilege. |
| **RA** | S-C privilege is the highest privilege recognised by the courts. In order to be given an exception for public safety:   1. **Clear risk to identifiable group/person**: evidence of long term planning; method; prior hx of violence; violent hx similar to plan; violence increasing in severity    1. **Must be ascertainable group/individual**    2. can’t be too vague UNLESS it’s a particularly compelling, extreme, and imminent threat 2. **Serious risk of serious bodily harm or death:** serious psych harm included; some element of violence is necessary – even if there is a clear imminent plan to commit a crime, it’s not enough if there’s no violence 3. **Danger is imminent:** Some sense of urgency – no bright line test.   If the test has been satisfied, the disclosure must be limited to the minimum amount of information possible to prevent the harm |

\*\* SEE ***RULE 3.3-3*** AND COMMENTARY \*\*

### Innocence at stake

#### R v McClure (2001) SCC

|  |  |
| --- | --- |
| **F** | Δ charged with sexual offences against former students  JC came forward with an allegation and began a civil suit against Δ  M sought production of JC’s lawyer’s files to determine the nature of the claim and to assess his motives for fabrication. |
| **I** | Where is L-C privilege more important than the right of someone to know the case against them? |
| **RA** | Factors to be considered:   1. Is the info otherwise available? 2. Is there another way to raise RD as to guilt? 3. Are core issues going to the guilt of the accused involved? 4. Is there a genuine risk of wrongful conviction?   Process for TJ:  Accused must first establish that the information is not available from any other source and that he is otherwise unable to raise RD   1. Then, accused must establish **some evidentiary basis** that such a communication exists and **could raise a RD about guilt.** TJ decides whether to review. If yes, 2. TJ reviews the evidence to see whether it is **likely** to give rise to RD. If yes, 3. TJ should order production of **only that part that is required to raise the defence claimed.**   \**NB:* If TJ finds info that was not sought originally, but which NTL could raise RD, then they have to turn it over to the defence. |

#### Brown

Doubles down on ***McClure:*** states that this test is strict and that if it’s not met, then the best option is to let the innocent person go to prison and leave it up to royal prerogative provisions to fix it. (i.e. trying to get a pardon).

### Confidentiality and Lawyers Protecting Their Own Interests

### Client Incapacity

***Rule 3.3-4*** When lawyer or their employee is accused of negligence/crime, they are allowed to defend self/others

***Rule 3.3-5*** In order to collect fees

***Rule 3.3-6*** When seeking advice from other lawyers (extension of confidentiality umbrella) → good for client, public, and the profession to allow for this

**KEY:** Not disclosing more than absolutely necessary

May be necessary to disclose *some* confidential info in order to assist them/ensure their rights are protected. So, where do you go for help?

* Practice advisor
* PGT: but how much info do you disclose to PGT w/o jeopardizing the client’s interests? Consider the following:
  + Reasonable belief in capacity: what is leading to the question of capacity? Is it transient?
  + Potential harm to client: e.g. to biz interests
  + Earlier client instructions, when the client was capable

### Other

***Rule 5.5-2 and 5.5-3*** Reqment to disclose info about a juror’s fitness to serve – to judge and opposing counsel

***Rule 5.6-3*** to protect courthouse facilities

## Legislative Exceptions

### Goodis v Ontario (Minister of Correctional Services)

|  |  |
| --- | --- |
| **F** | Journalist investigating SA allegations against probation officers and requested an institution’s records through FOIA. Minister claimed privilege regarding nearly all of the requested docs |
| **I** | Can you use FOI provisions to gain access to info that would o/w be privileged? |
| **RA** | S-C privilege will not yield unless it is **absolutely necessary** to disclose the information in order to achieve the end sought by the enabling leg’n. This is true in the FOI context too.  **TEST:** absolute necessity (a near absolute prohibition – see ***rule 3.3-1***) |

### LS Sask v Merchant (2008) sask CA

|  |  |
| --- | --- |
| **F** | Ct order for Δ to pay into court any funds his client rec’d from a residential school claim in order to secure the client’s child support payments. Δ’s client’s wife made complaint to LS that Δ had disobeyed that order. LS applied for an order authorizing entry into Δ’s office and retrieval of relevant records. |
| **I** | Application refused and LS appealed arguing:   1. Disclosure to LS ≠ breach of privilege and 2. Disclosure absolutely necessary to allow LS to fulfill statutory responsibilities |
| **RA** | Refinement of absolute necessity test:   1. Does the body seeking disclosure of privileged records have the authority to request them? 2. If so, has the authority been exercised so as to not interfere with privilege except to the extent absolutely necessary? |
| **RE** | * Can’t read in the ability to abrogate privilege where language is open-textured * Society must have power to delve into complaints if it is to govern the profession effectively * No other way to obtain the records or to o/w pursue the investigation   TEST:   1. Legislative intention to have LS empowered to demand access to privileged documents ∴ they have authority 2. They have framed the request as narrowly as possible |

### AG CAnada v Federation of Law Societies (2015) SCC

|  |  |
| --- | --- |
| **F** | Challenge to FINTRAC provisions which required lawyers to keep information about financial transactions and imposed criminal sanctions for non-compliance and req’d reporting of suspicious transactions for anti-terrorism and money-laundering purposes   * Permitted sweeping search and seizure, and record retention |
| **I** | s. 7 Charter violation? Overbroad search and seizure (yes; unanimously)  S. 8 Charter violation? Info-gathering on own clients and reporting to gov’t turns lawyers into state agents (yes; majority) |
| **RA** | S-C privilege is a principle of fundamental justice. Therefore, the provisions contravened s. 7 by jeopardizing lawyers’ liberty interests and those of clients contrary to POFJ. |
| **RE** | s. 8: Authorized searches w/o adequate protection for privileged  s. 7: liberty interests of lawyers infringed b/c liable for imprisonment if they don’t comply; should be recognized principle of FJ that the state cannot impose duties on lawyers that undermine their duty of commitment to their clients’ causes  POFJ Must Be:   1. A legal principle; 2. With significant societal consensus that they are fund’l to the fair operation of the legal system; and 3. Precise enough to give a manageable standard against which deprivations of life, liberty, and security can be measured. |
| **ETC** | Anti-laundering rules still exist: “Know your client” rules – can’t take > $10K cash unless it’s for fees or disbursements; you should know a certain amount of information about your client to avoid getting duped. |

### Cunningham [withdrawal in the criminal context]

|  |  |
| --- | --- |
| **I** | Degree to which the lawyer may/must disclose reasons for withdrawal and the degree to which such disclosure might compromise confidentiality or privilege. |
| **RA** | Non-payment of fees ≠ exception to privilege, but a matter to which privilege may or may not attach, depending on the **context.** Where such payment is relevant to the **merits of the case** or might cause some **prejudice** to client, privilege attaches. Where it’s unrelated (as in most criminal cases), privilege doesn’t attach. |

### R v Murray [custody of real evidence]

|  |  |
| --- | --- |
| **F** | Keeping tapes of client’s crimes for 17 mos and not disclosing their existence. |
| **RA** | Privilege protects S-C communication but **not physical evidence.** There is always a legal obligation not to conceal incriminating physical evidence.  Δ had 3 legally justifiable options:   * Immediately turn the tapes over to prosecution (either directly or anonymously) * Deposit them w/ TJ * Disclose their existence and prepare to fight to retain them |
| **ETC** | Not a lot of specific guidance in the BC Code; ***rule 5.1-2*** reflects a lack of consensus on what the lawyer is ethically required to do. |

# The Legal Profession & Lawyer Regulation

## Concept of Law as a profession And arguments for self-reg

**Trait Definition:** The control, direction, governance of lawyers through rules and regs made by lawyers, acting collectively, in the form of an autonomous governing body, undertaken in the public interest to ensure that legal services are provided to the public ethically and competently only by those qualified to do so. → just attributes; tells us nothing about why the hx consideration of law as a profession should be continued

**Weberian Approach:** professions differ from other occupations in the strategies they pursue to gain advantage in a competitive market by:

* Construct: a market for specialized services that are valuable and that cannot be produced by the consumer alone and then
* Limit: that market by controlling production; meant to remedy disorder and overly competitive markets (which would also threaten wealth and prestige of those already w/in the market)

∴ self-regulation is self-serving, not in the public interest; the limitations req’d for protecting the public are not as stringent as those imposed by LS

Interesting question of whether this is a chicken-egg problem: if we didn’t offer or encourage societal competition/stratification, and instead promoted other values, what would the result be?

**Structural/Functional Approach:** professions create order and stability

* Offers constrained structure w/in which people can compete for accolades and wealth (which is better than having no constraints to the striving of rapacious elites)
* Source of community in an individualistic society
* Self-regulation defines professions because:
  + - * 1. Only lawyers possess the knowledge and expertise necessary to monitor/judge others’ behaviour

[***LS of MB v Savino*** accepted this argument; **but** if the monopoly on legal services didn’t exist, this wouldn’t be the case. Furthermore, information asymmetry can be easily overcome]

* + - * 1. Self-regulation is necessary to maintain the independence of the bar

[independent bar = check on unfettered state power ∴ enhances ROFL **but** is self-regulation really necessary for an independent bar? Further, the bar has hx not protected equality or ROFL – that’s an assumption (see: ***Canada (AG) v LSBC:*** Independence of the bar = hallmark of a free society)]

→ the above 2 arguments are the two most prominent.

**Historical Approach:** exclusivity pursued as a way to protect lawyers and elites’ status within society as leaders. Maintaining such a leadership position necessary to protect the essential British-ness of Western Canadian society from new social/ethnic challenges

**Rhetorical:** Social contract with the state to trade monopoly for self-regulation in the public interest. → theoretical ex post justification

**Efficiency:** administrative and enforcement costs are paid by lawyers themselves rather than taxpayers. → But monopoly costs the public far more than a tax would for creating a gov’t monitor

**Criticisms:**

* Protecting established interests
* Exclusive and reinforces bad norms w/in the profession
* Creates monopoly that benefits lawyers at the expense of clients
  + Oversupply of lawyers and undersupply of legal services
  + Market disruption
  + Decreases access and increases costs
* Designed to bolster status of their profession
  + It’s an arbitrary and artificial class distinction something we should be protecting w/ leg’n

## The Practice of Self-Regulation

**The Role of Law Societies:**

* Management of the law society’s affairs and the exercise of its vested powers occurs through benchers who are largely elected
* Admission and discipline decisions which affect individual members of the profession are subject to the supervisory jurisdiction of the superior courts in each province
* Sometimes LS rules are made contingent on gov’t approval
* Intermittent gov’t inquiries also give some transparency
* Nat’l self-regulation is sort of emerging through cooperative action by FLSC
* Self-regulation increasingly supplemented/replaced by leg’n
* Reminder of mandate of LSBC, stated in ***LPA,******s. 3:*** “It is the object and duty of the society to uphold and protect the public interest in the administration of justice.”

### Entry Regulation

2 requirements must be met:

1. Attaining educational requirements:

* meant to facilitate entry but often a barrier in itself
* Articling: scarcity and uneven experiences
* Bar admission course: supposed to make up for uneven articling but mostly just replicative of uni
* Bar exam: a bar to outright incompetence but not much else

1. Good Character:

* Ensuring that only those persons worthy of trust, with moral strength, and integrity are admitted to the profession and practice
* Meant to protect the public but it’s a malleable standard ∴ a dangerous instrument leading to arbitrary and discriminatory denial to practice
* Similar misconduct ≠ similar results (unpredictable even w/in the same jurisdiction)

### Regulating Lawyer Conduct

#### Disciplinary Process

**3 Distinct Stages:**

1. **Complaint and investigation**

* Less formal than other two stages
* Complaint from a client or former client complaining of actual or perceived misconduct (can also come from members of the judiciary, other lawyers, or members of the public, or audits, media commentary, legal proceedings, or law enforcement reports)
* Note: complaints are not anonymous – procedural fairness requires that the target of the complaint be able to answer the charge
* Complaints made by clients: taken to have waived confidentiality over anything req’d to investigate the complaint (as narrow an infringement as possible though)

1. **→ complaint reviewed and assessed**

* Chief concern here is of underreporting
  + b/c there is a reluctance (despite ethical obligs) to report the misconduct of their colleagues, fearing retaliation, hostility, etc.
    - Should failure to report someone else result in disciplinary action?
  + Clients also do not know what constitutes lawyer misconduct, or they think that reporting would be futile
* Also, complaints about the quality of services being provided are not adequately addressed b/c many times they fall o/s the focus on ethical duties and competence
  + LSs can’t give the consumer anything for their issue – they can only intervene administratively in order to bring about a resolution or refer the complaint to another agency which could provide a remedy
    - Clients complaining about fees → court taxation processes
    - Complaint of neglect/loss → go see another lawyer for a possible malpractice claim

1. **→ complaint reduced to writing, reviewed by admin staff, and shared with the lawyer in question**

* lawyer req’d to answer any questions or provide docs/records as req’d
* Further investigation then takes place, as necessary

1. **→ decision made to either dismiss the matter or refer to either practice standards committee (for competence concerns) or a conduct or discipline committee (where ethics or violation of LS rules)**

* If dismissed, complainant allowed to appeal

1. **→ conduct committee reviews the complaint**

* Can include further investigation, referral to a conduct review committee or a bencher for a mandatory review, or a referral to a practice standards or review committee

1. **→ conduct committee decides whether to dismiss or prepare citation**

* Citation sets out the charges and/or alleged misconduct to be considered by the hearing committee

WHAT HAPPENS TO COMPLAINTS?

- Most (around 80%) are closed by staff. Around 10-15% referred to the Discipline Committee, which can order:

* No further action
* Conduct Letter
* Conduct Meeting
* Conduct Review
* Citation
* Section 36(h) summary proceeding
* Referral to Practice Standards
* Referral to member file

- So, the Discipline Committee can decide lots of things including but also other than a hearing. It’s only when a matter proceeds to a citation and a hearing that that goes on the lawyer’s disciplinary log

- A lawyer can have a number of complaints, but nothing every made to the hearing stage. A member of the public wouldn’t be able to see the long, long list of complaints if nothing every got to a hearing. BUT the Discipline Committee can see the history of complaints, and it can impact their decision.

1. **Hearing**

* Adversarial in nature, conducted before a panel of the discipline or conduct committee
* Conducted by counsel for the law society (either an employee of LS or a private practitioner appointed specifically for the proceedings)
* Burden of proof borne by the LS whose counsel must provide clear and convincing evidence of misconduct
* Bears a strong resemblance to crim proceedings
  + accused lawyer is entitled to full disclosure of all relevant docs, all witness statements, and experts’ reports but accused lawyer does not have to make disclosure to the same extent
    - Lawyer *is* req’d to cooperate in the investigation and to produce any documents as req’d
  + But lawyer is also compellable as a witness
* Lawyer entitled to notice, representation, and hearing before an impartial adjudicator (∴ LS folks need to keep their various roles distinct)
* B/c they are authorized by statute, the proceedings are subject to Charter scrutiny and common law judicial review
  + S. 7 rights apply (const’lly guaranteed procedural rights) but not s. 11 (b/c it has been held to be regulatory not penal or criminal in nature)
  + Cts likely to give the tribunals a fair amount of deference

Process of decision making by the panel:

1. **Determine whether the facts have been proven**
2. **Determine if the facts, as proven, constitute professional misconduct/conduct unbecoming**
3. **Decide what the appropriate penalty under the circs**

* Final decision must be in writing, with reasons provided

1. **Penalty/Sanction**

* Purpose of any sanction must be protection of the public or the profession’s reputation (not the punishment of the lawyer)
* Panels typically empowered to impose a range of remedies; in determining what is appropriate, they will look at:
  + Nature and extent of injury to others
  + The blameworthiness of the conduct
  + Penalties imposed on others of similar misconduct
  + Mitigating and aggravating circs (e.g. lawyer’s general reputation/character and attitude towards discipline, whether they have made restitution, whether it was an isolated event or a re-occurrence, prior discipline record, need for deterrence, mental state)
* A right of appeal exists from the decisions of hearing panels to either an appeal panel (or to the benchers, as a whole) or to the courts, or both
  + Panel’s decision re: prof misc/conduct un. → reviewable by ct on reasonableness standard ( is the decision intelligible, transparent, and justified + does it fall w/in range of reasonable outcomes?)
  + Procedural issues: reviewed on correctness standard

**POSSIBLE CITATION OUTCOMES**:

* Dismissal
* Adverse determination (lawyers, former lawyers and articled students) [NOTE: “adverse determination” = “a finding against”]
  1. Professional misconduct
  2. Conduct unbecoming a lawyer
  3. Breach of Act or Rules
  4. Incompetent Performance of Duties
* Reprimand
* Fine (max: $50,000 for lawyers and $5,000 for students)
* Suspension (lawyers or former lawyers)
* Conditions and restrictions (lawyers)
  1. Ex: you need to get anger management, you need to participate in a substance abuse program, you can only practice under another lawyer’s supervision, you can only practice in a certain area, etc.
* Disbarment (lawyers or former lawyers)
* Extension of articling term or setting aside enrollment

#### Professional Misconduct

**TEST:** Marked departure from conduct that the LS expects of its members (***LSBC v Martin (2005) LSBC***)

**Guiding Principles for Sanction:**

Protection of the public, **not punishment** is the focus

* Must ensure public confidence
* Deterrence (specific and general)
* Rehabilitation

##### Undertakings (Rule 7.2-11)

* Solemn promise that you’re going to do the thing you’re promising to do
* Must be fully w/in your control
* Must consider at the outset if the undertaking can be fulfilled
* Do not accept or impose unreasonable undertakings from another lawyer
* if you have an undertaking that you cannot fulfil, you can ask the other lawyer to waive it, but if they don’t agree, you have to report yourself.
* If an undertaking or a trust condition has been imposed on you, you must:
  + - * 1. Fulfill it
        2. Amend it in writing immediately or
        3. Reject it and return the subject of the undertaking (e.g. if it’s about depositing a cheque, you need to return the cheque)

##### Reporting Other Lawyers (Rule 7.1-3)

* Breach of (non-waived) undertaking
* Shortage of trust funds
* Abandonment of a law practice
* Participation in a criminal activity related to the lawyer’s practice
* Questions as to honesty, trustworthiness, or competency
* Mental instability such that clients are likely to be prejudiced
* Any other situation likely to materially prejudice clients

##### Adams v Law Society of Albera (2000) ABCA

|  |  |
| --- | --- |
| **F** | 1. Appeal by Adams from LSA’s decision to disbar him 2. 4 complaints, including 2 counts concerning conviction for sexual exploitation of 16 yo client 3. Pled guilty to sexual exploitation and admitted breaching FD 4. Admitted conduct was disreputable and deserved sanction but argued disbarment was manifestly unreasonable |
| **I/RE** | Did the hearing committee err in:   1. Overemphasizing the harm to the legal profession’s reputation: he was in a trust position – the girl wanted to get her BF out of prison and Adams persuaded her to have sex w/ him. He acknowledged he acted inappropriately and had brought dishonour to the profession ∴ no overemphasis 2. Failing to accord sufficient weight to good character evidence: Committee did hear good character evidence but that doesn’t displace the facts of the actual events at issue ∴ not applicable. 3. Failing to admit expert evidence RE: likelihood to reoffend: They read the report and nothing in it that gave assurance of no reoffending. 4. Relying an aggravating factors that were unproven and    1. Speculating as to complainants motives and vulnerability: she didn’t testify but there’s no dispute about her desire to get her BF out of jail and she could have believed, being a naïve 16 yo, that having sex w/ Adams could have secured her better legal services    2. Misapprehending whether Adams offered any consideration for sexual favours: Unclear whether he offered inducements and benchers declared as much; the behaviour is condemnable NTL.    3. Exaggerated the prevalence of risk of sexual misconduct like Adams’: Unreasonable to argue that sexual misconduct is unlikely ∴ doesn’t need to be punished. 5. Imposing a penalty that departed markedly from penalties imposed on similar offenders for similar offences. There has been a past tendency to excuse/minimize misconduct of a sexual nature; facts of each sexual misconduct case will vary greatly and each will have different sanctions. |
| **D** | Affirmed the decisions to disbar. |
| **RA** | Trust is the **overarching foundation** of the legal profession. It’s difficult to measure the precise impact of misconduct on the profession but there’s little doubt that public confidence and trust will be eroded. Disbarment is not restricted to the most serious cases – it is one of a range of available sanctions. |

##### LSUC v Hunter [2007] LSUC Hearing Panel

|  |  |
| --- | --- |
| **F** | * Bencher and treasurer of LSUC had a sexual relationship with his **adult** client, which resulted in a COI * He was depressed and his marriage was falling apart but he didn’t face it; instead he began other romantic relationships which led to a downward spiral: employment difficulties, stepped down from LSUC, marriage broke up, discipline case * Now, working through his depression and is deeply remorseful and recognizes the impact of his behaviour on the people around him |
| **I** | What is the appropriate sanction? → 60 day suspension + $2500 fine |
| **RA** | In deciding the appropriate sanction, the law society will consider the **severity** of the conduct, the lawyer’s **remorse**, the need for **deterrence**, and the need to ensure **public respect** for the profession. |
| **A** | **Severity of conduct:** COI; client vulnerability *but* no evidence his actual legal work was impacted by the COI  **Deterrence:** Specific has been met by the negative impacts he’s already suffered ∴ only general deterrence is a necessary consideration  **Mitigating Factors:**   * Cooperated fully with LSUC * Acknowledged wrongdoing @ earliest opportunity * Self-reported * Negotiated an agreed statement of facts so that complainant wouldn’t have to testify * Consented to her filing psychological findings and a victim impact statement * Spoke positively about the complainant * Deeply remorseful * Didn’t seek to justify or minimize his conduct |

#### Conduct Unbecoming

***Rule 2.2-1:*** A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, and the public and other members honourably and with integrity

→ what does this entail?

Narrow understanding: discipline for conduct which is substantially though not technically connected to the lawyer’s conduct w/in practice

Broad understanding: discipline for conduct which is ‘unbecoming’

***LSBC v Berge (2007) LSBC***

Intrusion into the lawyer’s private life is a consequence of imposing a high standard of social responsibility and a cost to be paid for the privilege of membership within a self-governing professional. Conduct unbecoming is not just obviously criminal conduct or dishonesty but any act of any member that will **seriously compromise the body of the profession in the public estimation.**

***LPA*** also defines conduct unbecoming; LS will likely not interfere with **purely personal** conduct – so what makes the following cases different? → sexual misconduct with clients is very concerning: lack of candour; lack of objectivity; what happens when things go wrong? → sexual exploitation of minors

##### LSUC v BUdd (2009) LSUC Hearing Panel

|  |  |
| --- | --- |
| **F** | Δ convicted of exploiting 2 teenage girls  Argues his behaviour was aberrational relative to the rest of his professional and personal life  Psychiatrist said he wasn’t likely to reoffend (just a regular guy who exploited his trust and access to young girls but not a pedophile…) |
| **I** | Appropriate sanction? → revoke license. |
| **RA** | In determining whether a lawyer has committed **conduct unbecoming**, consider:   1. Protection of the public 2. Preservation of public confidence in the profession 3. Maintenance of high professional standards   In determining the **appropriate sanction** for conduct unbecoming:   1. Gravity of the conduct 2. Need for deterrence (general and specific) 3. Particular circumstances of the offending lawyer and the context of misconduct (i.e. mitigating and aggravating factors) |
| **A** | Found a similar case and compared (*Johnston* case, where crown counsel took advantage of prostitute ‘clients’)   * Δ took advantage of 2 girls over several years * Breached relationships of trust with sisters and mom * Employed one girl in an effort to mask the sexual relationship   Specific Deterrence: just b/c he has behaved well o/w and might not reoffend does not erase the questions thrown up by these incidents  General deterrence: needs to show others that this is not okay  Public Interest: same as above – need to protect public and engender trust in the profession  Mitigating factors? None – they’re all aggravating or neutral   * Character evidence: just shows the behaviour doesn’t result from a specific psychological issue ∴ only explanation is that he put his own self-gratification before the welfare of children * No rehabilitation sought b/c he didn’t see it as an issue to be treated * Sisters’ allegedly consented? No. * Criminal conviction ∴ already suffered enough? No. * No remorse: acknowledged his mistake in terms of the consequences to his own professional life but did not acknowledge the harm to the sisters or LS/profession |

##### Law Society Of Alberta v Sychuk (1999) Alberta Hearing Committee

|  |  |
| --- | --- |
| **F** | Applicant disbarred 10 years previous, following a second degree murder conviction. Applied to be reinstated |
| **I** | Should he be reinstated? → No. |
| **RA** | The commission of a serious offence is not a bar to admission; rehabilitation is a controlling factor. But the more serious the crime, the more evidence of rehabilitation is necessary. Further, rehabilitation is not paramount and will not supersede the need to maintain the standing of the profession.  Applications for reinstatement are different from applications for admission b/c it implies that the oath of office has been broken. It is an exacerbating factor that someone committed a serious offence at a time when they were sworn to uphold the law. Good character without good reputation is insufficient |
| **RE** | * Δ has made remarkable progress but it’s important to maintain public perception of the law * The role of lawyers in society and the administration of justice demands public respect – compounded b/c the profession is self-governing * Life sentence being served is part of public denunciation of crime – it would detract from this denunciation to reinstate his license * One of the main reasons he wants to be reinstated is to improve his respectability w/in the community: this acknowledges that being a lawyer brings public respect and such regard would be diminished if he were reinstated |

# Professionalism and Civility

***Dore:*** Lawyers not only have the right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignity and restraint. Charter right to free expression is not unfettered – one can say whatever one pleases but that will not protect you from law society discipline.

**2 Central Meanings:**

1. Treat others with a degree of politeness
2. Obligations – independently enshrined in the code –on lawyers to act fairly, honestly, and with integrity in their dealings w/ other participants in the justice system

**Purpose:** Help lawyers uphold their duties to the court and improve the standing of the administration of justice

**Sources of the Obligation:**

1. Ct’s inherent jurisdiction to govern proceedings in the ctroom, including lawyers’ conduct
2. Code
3. Best practice civility codes: not binding but provide guidelines
4. Personal ethics – important role of self-regulation

## Alice Woolley

Argument against using ‘civility’ as an all-encompassing ethical value:

1. It obscures the real ethical principles at play in advocacy and ∴ doesn’t offer helpful guidance
2. Relatedly, it suppresses speech and fosters protectionism
   1. Self-censorship of critique, for fear it will be perceived as uncivil
3. Undermines the ability of LS to regulate lawyer behaviour
   1. Variable and imprecise standard which may differ according to culture, personality, attitude, etc.
   2. Undermines the quality of critique and debate about how to balance competing ethical values; Uncomfortable and even rude speech which contributes to good regulation is good.
4. Conflicts with the requirement of zealous advocacy

## The Rule

“A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of practice.” – see ***Rule 7.2-1; 2.1-4; 7.2, generally***

**Characterized by:** respect; courtesy; good faith; avoiding sharp practice; candour; fairness.

### Schreiber v Mulroney (2007) ONSC

|  |  |
| --- | --- |
| **F** | Lawyers for the 2 parties agreed that while a jurisdictional issue was being resolved, Δ wouldn’t file a statement of defence and Π wouldn’t not note Δ in default. But, parties had a disagreement and Δ obtained relief from a master b/c Π had attempted to receive a certificate of non-attendance. Π then obtained a default action against Δ. |
| **I** | Should the default judgment be set aside? → Yes, Π breached obligations to the ct and the other lawyer |
| **RE** | * Π didn’t tell client about the deal w/ Δ; didn’t tell him there was a pending motion to extend the time for filing a defence; lied about Δ going to the master and not giving Π the opportunity to be heard * Gave client 3 options, noting he owed Δ “no courtesy” * Ct not told about prior agment, outstanding jurisdictional dispute, or the motion for extension * Π called Δ and did not disclose that he had obtained default judgment earlier that day ∴ misleading * Π took steps of his own accord (i.e. o/s of the instructions of his client) |
| **ETC** | Misled the court, sharp practice (taking advantage of Δ’s position), breach of an undertaking, breach of candour to the client…is this *really* about him not respecting professional civility? There are a whole host of independently impermissible actions. |

### LSBC v Laarakker (2011) LSBC Hearing Panel

|  |  |
| --- | --- |
| **F** | Ontario lawyer (OL) had sent a demand letter to the mother of a child who had shoplifted.  R was mom’s lawyer and he sent a fax back to OL with discourteous and personal remarks  R then went online and posted same commentary about this lawyer  R felt he was justified in doing these things in dealing with a rogue lawyer |
| **I** | Whether R’s actions were professional misconduct and/or conduct unbecoming? Why? |
| **D** | Fax = w/in the scope of practice ∴ Professional misconduct // posts = mixed |
| **RE** | **Prof Mis:** Occurring w/in the scope of practice // TEST: “A marked departure from the conduct the law society expects of its members” ***(Martin)***  **Con Un:** Conduct in a lawyer’s life (***Berge; Watt***) // TEST: s. 1(1) of ***LPA:*** Contrary to the best interest of the public, or of the legal profession, or harming the legal profession  **Incivility** Defined in the canons but also: be courteous, fair and respectful. **Refrain from personal remarks;** remain objective and dignified; **purpose of all communication =** **further the client’s interests**  **Comments:** Public writings or comments which promote such acrimony or denigrate others in the justice system have a negative effect upon the system as a whole **(*Greene)***   * Should have reported OL to LSUC/LSBC – can’t just become a vigilante * Belief in correctness of his position ≠ justification |
| **ETC** | What could he have done if he had wanted to warn the public?   * Could have provided **general** legal info and not targeted a specific lawyer * Also bad form to possibly be getting referrals from your professional misconduct… |

### R v Felderhof (2005) ONCA

|  |  |
| --- | --- |
| **F** | * Felderghof was charged w/ a bunch of financial crimes (e.g. insider trading) and Groia was his lawyer * G and the crown had a disagreement over whether the crown was ‘burying’ G w/ documents; accused crown and attacked integrity; called them lazy, was sarcastic; implied crown was guilty of prosecutorial misconduct, despite knowing he did not have the evidence to support such an allegation * This went on for more than 70 days * Crown accused G of trying to implode the trial |
| **I** | After 70 days of trial, crown argued that TJ had lost jurisdiction and undermined the trial’s fairness, b/c of his failure to sanction/restrain G in his rhetoric. |
| **D** | Application dismissed – Crown appealed – Appeal dismissed |
| **RA** | While the defence has a right to make allegations about abuse of process and prosecutorial misconduct, such allegations must have some foundation in the record; there must be some possibility that the allegation would lead to a remedy and they should be made at appropriate times during the trial. |
| **RE** | G was totally inappropriate but that does not mean TJ lost jurisdiction |

### LSUC v Groia (ONLSAP)

|  |  |
| --- | --- |
| **F** | Picking up from the ***Felderhof*** case, disciplinary hearings were initiated against G. G appealing from the hearing panel decision which found him guilty of professional misconduct RE: uncivil and unprofessional courtroom submissions and statements.  Sidenote: using trial transcripts as the facts of the hearing is inappropriate, hearing before the LS is not a ‘relitigation of the issues’ |
| **I** | When does courtroom conduct and communication cross the line into professional misconduct? |
| **D** | Misconduct upheld but penalty reduced. Hearing panel erred in treating G’s lack of remorse as an aggravating factor. |
| **RA** | A lawyer must not impugn the motives/integrity of opposing counsel unless on a good faith and reasonable basis; civility ≠ being ‘nice’ to one another |
| **RE** | A single moment or a few nasty, sarcastic comments are not usually enough for finding prof mis, esp. if it’s in a heated moment and an apology is made but here, it went on for 70 days…  Provocation is a **relevant consideration** but **not a total defence**  Repeated personal attacks on prosecutor’s integrity and repeated allegations of deliberate prosecutorial wrongdoing that did not have a reasonable basis  Even when a lawyer honestly and reasonably believes that opposing counsel is engaging in prof mis or prosecutorial misconduct, they need to avoid a stream of invective, attacking counsel’s personal integrity  Zealous advocacy did not require G to make such unfounded allegations; in fact, makes client’s case look worse ∴ not a mitigating factor  Nature and seriousness of misconduct informs the appropriate penalty; among other things n assessing the seriousness of the conduct, the hearing panel relied on findings that:   1. G **knew his allegations were wrong in law** and his position on the docs was not well founded in evidence law or in precedent 2. In making allegations, G was **motivated to disrupt the trial** by provoking the prosecution and creating conditions for trial implosion, which **undermines the administration of justice** |

### LSUC v Groia (2016) ONCA

|  |  |
| --- | --- |
| **RE** | **Scope of LSUC’s Authority:** a presiding judge’s view on the propriety of counsel’s in-court behaviour does not control the LS’s disciplinary powers.  **Incivility:** precise definition is elusive and undesirable b/c inquiry into whether conduct warrants review is contextual and fact-specific ∴ must be given a flexible definition, capable of encompassing diverse situations and context.  TEST: “potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy” – ***Dore***  **Zealous Advocacy**: Duty of ZA is important but not absolute – **it does not permit the advocate to act unprofessionally.**  **Civility “trend”:** It’s not a radical phase, it’s a codified ethical obligation necessary to the effective functioning of the administration of justice. |
| **D** | Appeal dismissed; requirement for professionalism, including zealous advocacy and civility, secures the nobility of the profession. |
| **DIS** | Although ct decribed G’s rhetoric as improper and inappropriate, TJ didn’t take him to task so LS shouldn’t discipline him. → an odd argument, b/c the reason for pursuing LS discipline was that TJ had failed to sanction him… |

## Conclusion

* Does civility work against diversity?
  + Holding people to an ideal standard which is subjectively defined
  + Are we sanctioning communication styles which are merely cultural differences?
* Who decides (in)civility?
* If not well-defined, how is an ‘outsider’ to the business/legal/generally upper-middle class supposed to learn the rules, if they have a different style of communicating?

# Good Character and Reputation

## David Luban: The Adversary System Excuse

Standard conception of lawyer’s role = a partisan advocate for his client’s ends, w/ no moral accountability for those ends; the lawyer’s role w/in the adversarial system exempts them from moral choices → Luban argues that lawyers must retain some responsibility for making moral choices within the system

**Justifications for the adversarial system:**

1. CONSQUENTIALIST:
   1. Truth: Adversarial system gets at the truth…

* But the adversarial system licenses and even req’s behaviour designed to obfuscate the truth
* Difference between seeing the case from X’s POV and Y’s POV, then trying to work out the truth, and seeing the case from the POV of X’s **interests**
  1. Ethical Division of Labour: Adversarial advocate is justified b/c the opposing side also has partisan advocate and the case decided by an impartial arbiter…
* Doesn’t work b/c zealous advocates will actively try and evade such ‘checks and balances’ in the system
* Also assumes that eventually the course will correct itself
  + And ignores the high costs of ‘righting’ such a wrong; incurring such costs will only be justified if they’re a **necessary externality** of the adversarial system, not an initial justification of the system itself
* If morality is segmented in this way, the risk is that all of the actors w/in it, will claim to have no moral responsibility for the outcomes in the system

1. NON-CONSEQUENTIALIST:
   1. L-C Relationship is an inherent moral good: ideal of service to the ‘man in trouble’…

* Can’t use this to trump whatever morally bad thing the service might actually be accomplishing
* Argument that ‘the system’ is the one perpetrating the immoral act (e.g. foreclosing on a destitute widow’s home) is just pulling the levers of an impersonal and mandatory system to produce a predetermined outcome ignores the lawyer’s own creative choices in bringing about a certain outcome; also, how do we then justify the system that perpetrates such immoral things?
* Actions of the agents of the system *are* the actions of the system
  1. Historical arguments: adversary adjudication is valued and valuable tradition; enjoys the consent of the governed ∴ an integral part of our social fabric

1. PRAGMATIC: Version of the hx argument but purged of ideology…
   1. Seems to do as well as any other system
   2. Some adjudicatory system is necessary
   3. It’s been entrenched for >100 years

→ does not **endorse** the system, it merely **endures it** until such time as a better alternative becomes available

* Where an institution is only **pragmatically justified,** it cannot provide inst’l excuses for immoral acts b/c it does not create a positive moral good
* Inst’l excuses may *only* work in a criminal context b/c
  + Political reasons for handicapping gov’t as an enforcer
  + Δ is the closest fit to the archetypal ‘man in trouble’
* In other contexts, it has only slight moral force ∴ can only exclude slight moral wrongs

**Conclusion:** Where a lawyer is **morally obligated** to do A and **professionally obligated** not to do A, there is a **presumption in favour of professional obligation** but this will be rebutted by any serious countervailing moral obligation.

## The Good Character Requirement

**Character:** “That combination of qualities or features distinguishing one person from another. Good character connotes **moral or ethical strength…**an amalgam of various attributes and traits which include, among others, **integrity, candour, empathy, and honesty.”** (***Preyra***)

***LPA, s. 19(1):*** No person may be enrolled as an articled student, called and admitted, or reinstated as a member unless the benchers are satisfied that he person is **of good character and repute** and is **fit to become a barrister** and solicitor of the Supreme Court. → Statutory authorization of LS to look into somebody’s character

Good character = absence of bad character (e.g. crim convictions, academic dishonesty, or attempting to deceive LS)…if such conduct has occurred, applicant must show they are **repentant and rehabilitated.**

**Purposes:** Public protection, maintaining high ethical standards, maintaining public confidence in the legal system…the ability of the good character requirement to achieve such aims depends upon the truth of a specific premise, namely that **character determines conduct** and an applicant with bad character is more likely to act unethically and more likely to pose a risk to the public.

* How plausible is this?
* If plausible, how likely is it that LS will be able to accurately gauge an applicant’s character?
* Does it matter that good character = absence of bad shit rather than presence of good deeds?
* Is the conduct under inquiry actually concerned with the applicant’s **character?**

**Notable Things About Good Character Hearings:**

* Very few cases end up at the hearing stage – even fewer result in the applicant not being admitted
* Usually when an applicant is not willing to own up to their misdeeds
* Onus on the applicant to prove their character – determined on BOP
* Relevant time of character is at the time of the hearing (i.e. not conditional on guarantees of future behaviour)
* Mostly looking for a change of character vs just a change in behaviour
  + This is an interesting point given the initial premise that the LS can glean character from behaviour. From what else is the law society drawing to find ‘good character’ **as opposed** to ‘just good behaviour’. If behaviour reflects character, why wouldn’t good behaviour be enough?

### Factors relevant to good Character Findings:

|  |  |
| --- | --- |
| Helpful to Applicant | Not Helpful |
| * Evidence of changed character (not just behaviour * Passage of time * Rigorous psychological treatment * Being totally candid * Restitution * Contrition * Fully informed character references | * Only behavioural changes * Referees don’t know full extent of applicant’s misdeeds * Lying to LS – including omissions and understatements * Lying to others, esp. about being involved w/ LS * Quick transition to good character * Passing/inadequate psychological treatment |

### Preyra v LSUC (2000) Hearing Panel

|  |  |
| --- | --- |
| **F** | * Finished law school but couldn’t get articles so he falsified his transcripts and other academic pursuits on applications * After his misreps were discovered, he continued to misrepresent the events to the dean of the law school, his LSUC mentor, prospective employers, his own lawyer, and his articling principal * Lying carried on at least between 1994-98 |
| **I** | Applicant definitely not of good character between 94-98, but has he now become of good character? |
| **D** | No. He continually lied, as recently as one year before the hearing. He has not shown enough of a rehabilitative record. |
| **RA** | The road to good character is not an event, it is a process. |
| **RE** | * Behaviour flows from character ∴ from bad behaviour, one can draw an inference of bad character * His change in behaviour to being truthful, however, resulted not from a change in character but resulted from being caught * Only 6 sessions w/ a psychologist who determined there was no underlying illness but noted applicant’s anger and entitlement * Duration of lying compared with brevity of treatment – unsatisfactory * Continued to lie, even after being caught |

### LSUC v Burgess (2006) Hearing Panel

|  |  |
| --- | --- |
| **F** | * Agreed statement of facts showed that A plagiarized on a paper in 4th year of undergrad @ UT * Material taken verbatim from the internet but she claimed in a letter to LSUC that it was a misunderstanding – that the ‘plagiarism’ was really the fact that she had submitted 2 papers for different classes that were deemed to be too similar; she stated she had chosen to admit this but believed she had not actually done anything wrong * LSUC gets a disciplinary report from UT contradicting this letter and only when confronted with this, does she acknowledge the true facts * 2 principals and academic references continued to stand by her, after they found out (but she did not tell them the full truth, either) |
| **I** | Has she transitioned into being a person of good character? |
| **D** | No; insufficient passage of time and evidence of rehab. |
| **RE** | * High level of sophistication in the lie * Lied/omitted important facts to character refs * Continued to lie to LS + refs over an extended period of time * Only 6 sessions of psych (not enough evidence) * Not enough time |
| **ETC** | Is it appropriate to place so much weight on psychological/psychiatric evidence?  I would argue no, it conflates mental illness with ‘bad’ behaviour. Demonizes the mentally ill as being liars/cheats. Opportunistic behaviour will likely not be cured by psychological intervention if the applicant believes they did nothing wrong – there is no point in hiding behind the number of psychological visits as a reason to state they do not have good character. Can a psychologist tell you anything about a person’s character? Should they be asked to do so? |

### LSBC v Mangat (2013) LSBC

|  |  |
| --- | --- |
| **F** | * Called to ON bar in 2011 after completing law school but did not practice. * Applied for call and admission in BC, on transfer from ON. * Former gang member, as a youth he committed several crimes * However, granted a pardon on all offences * Turned his life around became active in student communities, youth outreach, social justice |
| **D** | Clear, from his long trajectory towards good character, that he meets the requirements. |
| **RA** | Good character: 2 stage test   1. CHARACTER: Comprises at least these qualities    1. Appreciation of the difference between right and wrong    2. The moral fibre to do what is right, despite discomfort and to not do what is wrong, despite the personal consequences    3. Belief that the law, insofar as it forbids things which are bad in themselves, must be upheld and the courage to see that it is. 2. OF GOOD REPUTE: highly regarded and esteemed by people |
| **RE** | * Amply demonstration of going from criminal activities to constructive, legal ones and an est’d pattern of positive community contributions * Federal pardon and acceptance to LSUC – not determinative but do carry weight * Straightforward and forthright in answering questions; esp. notable when asked about possible inconsistencies (i.e. didn’t try to make up a lie on the spot) * Restitution: he paid back ALL of his regulatory fines * Had letters of reference from 2 groups:   + Group 1: didn’t know full details before writing (applicant did not know he needed to spell out all details) but still endorsed the applicant after given full knowledge   + Group 2: had full disclosure from day 1 (given more weight) * Side note about open court principles: openness can only be overridden by very narrow set of superordinate social values – e.g. protecting personal safety; curtailing public accessibility must be **necessary to achieve justice** // applicant’s request to have certain personal details excluded from record for sake of his family’s safety was partially granted |
| **ETC** | * To what extent is ‘bad character’ just a product of lower SE circumstances? → this gets at the question of whether character really defines or determines conduct * *But* ***Preyra*** and ***Burgess*** were also driven to make bad decisions b/c of the pressure of their circumstances; those circumstances are certainly less appealing or attractive to us so this reveals the obscurity of what the good character requirement *actually* requires * Do we just like a redemption story like ***Mangat***’s more than we are willing to tolerate the desperation of a law student? * What is it that actually differentiates these cases? |

### Gayman v LSBC (2012) LSBC – Credentials Panel Decision

|  |  |
| --- | --- |
| **F** | * Alcoholic lawyer whose intake was escalating * Approached by a friend who asked him to be a trustee; G agreed despite not having any experience w/ trust or tax law * One of the people who wanted this trust set up (SP) approached G soon after and asked him to release $350K (contrary to trust terms) G complied and SP turned around and said he had lost it and ordered G to give him the remainder of the funds. G also complied with that * Investors started asking Qs and he failed to respond; they complained to his partner but eventually sought judgment against him. * 1992 – someone else made a complaint about G to LS and G failed to respond for > 2 years (cited for professional misconduct for such failure) * 1999: eventually LS convened for breach of trust allegation and G disbarred * Hit bottom, got sober, started working for salvation army after he got out of rehab and is currently in a senior position there * Wants reinstatement for two reasons: Closure and to apologize (i.e. no specific plans re: returning to practice) * Provided comprehensive medical evidence |
| **I** | 1. Under what circumstances may a disbarred lawyer be reinstated? 2. Have those circumstances been met in this case? |
| **D** | Reinstated under > 10 conditions (e.g. follow dr’s instrux, support group, can’t operate a trust acct, can only practice in an area approved by the credentials committee) |
| **RA** | For lawyers seeking readmission, the hearing panel will look into:  His/her dealings w/ LS prior to ceasing to be a member  Reason s/he ceased to be member; if it’s substance abuse or mental illness, panel must be satisfied that those problems are adequately resolved;  What the lawyer has been doing during time o/s practice  ***Schuetz*** [previous LSBC decision]***:* 3 part test for determining eligibility** for readmission if applicant is alcoholic:  Has applicant engaged in **meaningful rehabilitation?**  Can **safeguards** be implemented to ensure **abstinence?**  Can other safeguards be implemented to ensure **public protection?**  ***Watt*** [not a BC decision]: **6-part test for reinstating disbarred lawyer:**  Long course of conduct showing app can be trusted?  App’s conduct since disbarment unimpeachable?  Has there been a sufficient lapse of time between disbarment and application for reinstatement?  Has the applicant purged his guilt?  Is there subst’l evidence that the applicant is extremely unlikely to misconduct himself if readmitted?  Has app remained current in the law thorugh continuing legal education or is there an appropriate plan to become current?  → panel chose ***Watt*** test but stated it was consistent with ***Schuetz*** as well |
| **RE** | * Public would not have confidence in the legal profession if we did not give this individual a second chance because it would send the message to all people with drinking problems that there is no opportunity for a second chance * Public protection cuts both ways – public protection and inclusiveness are considerations – though if they conflict, protection wins out * Alcoholism ≠ defence or an excuse – must show real rehabilitation |
| **A** | ***Watt*** Test:   1. Worked for salvation army for >8 years; lots of responsibility w/in the org; many letters of sr. barristers who support his application 2. Yes 3. Yes > 10 years – sufficient time to demonstrate character change 4. Admitted breach of trust but is not in a position to make restitution ∴ is given an exemption only in this rare case. 5. Yes; this was an isolated event with a clear cause 6. Hasn’t practiced in >17 years ∴ will need to fulfill req’s of LS rules if he wants to start practicing again |
| **ETC** | Why was Gayman so exceptional?   * In depth medical reports supporting sustained recovery submissions * Long rehab effort * Earnest and sincere * Subject to intense restrictions |

### Gayman v LSBC (Decision on Review)

|  |  |
| --- | --- |
| **D** | * In assessing good character, repute, and fitness under s. 19(1), consideration of the overriding objectives and duties of LS to uphold and protect the public interest are necessarily and appropriately included * There is only one question, of which considering whether **in all the circumstances** the nature and quality of the original misconduct is such as to bar readmission is a part. (not a separate test) * Decision of hearing panel correct. * ***Watt*** is a fine test but should also consider the 10 factors from ***Leveson*** |
| **RA** | ***Leveson factors:***   1. Society regulates the legal profession in the public interest 2. Public confidence in the legal profession is more important that the fortunes of any one lawyer 3. Ability to practice law is a privilege, not a right 4. Once the privilege is lost, it’s hard to regain 5. Regaining privilege is NTL possible, however egregious the initial conduct, provided that compelling evidence of rehab is there 6. Readmission may be granted where misconduct was committed b/c of underlying medical or psychiatric illness 7. May occur even w/o such a diagnosis, so long as there is compelling evidence of changed is provided 8. Legal profession has a special responsibility to recognize cases of true rehabilitliation; independent corroborating evidence is req’d to establish genuine and enduring rehab, though 9. Burden on the applicant is close to but not as high as BRD; it’s at least as high as the burden on the society to disbar the applicant 10. Readmission can’t be detrimental to the integrity and standing of the bar, the judicial system, or be contrary to the public interest. |

## The Future of Good Character

* Federation of Law Societies has proposal to focus on ‘suitability’ rather than ‘character’
* Based around four principles:

1. ROFL and administration of justice
2. Honesty
3. Governability
4. Financial responsibility

# Ethics in Advocacy

**Rule 5.1-1**: “When acting as an advocate, a lawyer must represent the client resolutely and honourably w/in the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.”

**Advocacy at trial:** where a lawyer is supposed to act most zealously in favour of client and also where the lawyer has the greatest responsibility to protect and ensure proper functioning of the justice system

## Pre-Trial Procedures

### Pleadings [Rule 3.2-4; 5.1-2]

→ Don’t bring abusive proceedings

**Consider:** What is my client’s case?

* How can I best plead the case in order to raise fearlessly every issue and advance every argument?
  + By doing this, am I overstating the merits of the case?
  + Is this client just using the system to ‘get’ the other side?
    - If so, am I participating as an advocate in an abuse of process?
* Note that when pursuing a claim w/o legal merit, you place the client @ risk of liability for an action for abuse of process

***DBC v Zellers* [1996] Man. QB**

|  |  |
| --- | --- |
| **F** | Π’s son (a minor) stole from Zellers (~$50 value), goods were recovered and resold. After the incident, Arkin (Δ’s lawyer) sent Π a demand letter claiming Δ had legal right to claim civil restitution from her, demanded money and threatened to take the case to ct if she didn’t.  Π pays $ and then gets a legal advice and wants her money back. |
| **I** | Can Π recover money paid to Δ b/c their claim was invalid? |
| **RA** | Forbearance is valid consideration but only if the case was valid and the party offering forbearance honesty intended to pursue it. |
| **RE** | * No general rule stating parents responsible for their kids’ torts – only if they were negligent * But she paid the $ so do they have an enforceable K? → No. She paid it under a mistake ∴ invalid K. * As a competent + responsible lawyer knew or ought to have known that the claim had no prospect of succeeding in ct and was futile to pursue |
| **ETC** | ***Rule 3.2-4 & 5.1-2:*** put limits on pleadings – this was just a letter; should this be viewed as an extension of pleadings, given the function is the same (i.e. negotiate an agreement while the prospect of ct case looms overhead)? |

### Discovery

**RULE:** lawyers must make full, fair, and prompt discovery. This responsibility rests on the lawyer and is vulnerable to serious abuse.

***Grossman v Toronto General Hospital* [1983] ONHC**

|  |  |
| --- | --- |
| **F** | * G was a patient at TGH and got lost in the hospital; after 12 days, found dead in an air duct shaft * Δ only revealed dec’d’s hospital records and nothing about the search/death * Stated that Π had failed to establish that any docs existed that should be produced * Claimed privilege on lots of docs and then didn’t describe what those docs were |
| **D** | Δ’s conduct = deliberate refusal to comply w/ notice to produce and subject to sanction. Δs relied on their solicitors and they are ultimately responsible. BUT this was excessive zeal and lawyer doesn’t have to personally pay for costs. |
| **RA** | Duty upon solicitor is and always has been: full, fair, and prompt discovery. Must carefully supervise and investigate the discovery process and advise client about what to include b/c client does not know.   * Can’t necessarily be satisfied w/ client’s statements about the docs – if there is reasonable grounds for believing there’s more, he has to take reasonable steps to ascertain truth * If client insists on making an incomplete affidavit, lawyer should withdraw * If lawyer innocently puts incomplete or incorrect info on the affidavit, he must put it right * Sufficient information must be given about docs for which privilege is claimed – enough to enable a party opposed in interest to be able to identify them. |
| **RE** | * Rules of practice meant to facilitate not frustrate production * Most, if not all of the info is w/in Δ’s scope of knowledge, not Π’s ∴ compliance w/ disclosure is acutely necessary * Integrity of justice depends on parties obeying their duties   + A2J concerns arise here b/c if you have a lot of $ you can withstand the stonewalling |
| **ETC** | * This ethical obligation arises from the rules of court, not the code. |

### Negotation

* A positive obligation on the lawyer to present the alternatives to court

**Rule 3.2-4:** Commentary [1]: a lawyer should consider the use of ADR when appropriate, inform client of ADR options + if so instructed, take steps to pursue those options.

* But this is not the operating assumption in practice or law school
* Not much focus in the rules and ethical obligations or in training new lawyers on how to actually **do** ADR, despite the fact that it is often in a client’s best interests
  + **Rule 5.1-2(f):** you can’t mislead opposing counsel in negotiations
    - Does this create a positive obligation to disclose info to the opposing party? Def can’t lie but lies of omission may be allowed?

## Ethics at trial: Zealous Advocacy vs Unethical Conduct

### WItness preparation: Rules 5.1-2; 5.3; 5.4

* Lawyers are **expected** to prep witnesses – generally includes a blanket instruction to always tell the truth but also discussion of other matters
  + Review of both parties’ theories of the case

When conducted properly and in good faith, this is all acceptable

* + Some of the basic issues and materials in the case
  + Review of the issues witness may be asked to speak about
  + Specific areas of questioning
  + Areas of particular interest to other side
  + What exam and x-exam will look like
  + What judge might say
  + May conduct mock exam and x-exam

**Witness Coaching:** illegal and unethical; goes **beyond familiarizing witness** with the process and his/herknowledge of the case and into evidence/witness tampering/obstruction

* CANNOT: Assist or encourage client/witness in giving false/misleading evidence
  + A lawyer who attempts to obstruct justice by willfully counselling evasive evidence not only commits a criminal offence but also breaches his solemn duty as an officer of the court (***Sweezey***)

### Cross-examination: rule 5.1-2(k) – can’t mislead the court

***R v Lyttle* [2004] SCC**

|  |  |
| --- | --- |
| **F** | At trial, theory of defence articulated that a beating happened b/c of a drug debt. TJ ruled that Δ counsel could only x-examine crown witness on this theory if she could furnish “substantive evidence” in support of it. |
| **I** | On x-exam, is counsel allowed to ask good faith questions which may allude to disputed facts or must she provide an evidentiary foundation for such an assertion? |
| **D** | Good faith basis only req’d to ask a question on cross. |
| **RA** | At times there will be no other way but cross-exam to expose falsehood, rectify error, correct distortion, elicit information ∴ cross-examiner may pursue any hypothesis that is **honestly advanced** on the strength of reasonable inference, experience, or intuition BUT CANNOT assert/imply things in misleading ways.  Counsel has a role as a resolute advocate but also an overriding duty to the ct, profession, and public. |
| **RE** | * X-exam is necessary to test veracity and credibility of witness testimony and part of the Δ’s right to give full answer and defence * Counsel cannot: harass, misrepresent, be extremely repetitive, ask irrelevant Qs, or Qs whose prejudice > probative value * If TJ thinks Q is tenuous/suspect, they can conduct a voir dire to seek and obtain counsel’s assurance that good faith exists (part of TJ’s discretion to ensure fairness @ trial) |

***R v R (A.J.)* [1994] ONCA**

|  |  |
| --- | --- |
| **F** | Accused charged w/ multiple counts of incest and SA on his daughter and granddaughter – convicted @ trial and appealed |
| **I** | Whether crown’s x-exam of appellant resulted in a miscarriage of justice b/c it was so improper and prejudicial as to render trial unfair? → Yes. |
| **RE** | * Crown was well-prepared and vigorous in x-exam * Isolated transgressions during cross may be of little consequence to overall fairness but repeated improprieties can become abusive * Where x-exam prejudices Δ in his defence or brings administration of justice into disrepute, appellate ct must intervene   Crown’s transgressions:   * Sarcastic, editorialized, insulting, referred to Δ’s answers as ‘incredible’; Qs calculated to demean and humiliate * Argued extensively w/ Δ in front of jury * Illustrated her contempt for Δ   Crown’s duty: has heightened responsibility re: X-exam of an accused; heightened expectations of strict propriety also where jury is in the room |
| **ETC** | **Rule 5.2-1 Commentary:** “A lawyer should not express personal opinion or beliefs during…cross-examination or challenge” |

### Representations about the law

**Rule:** Must inform ct of governing authorities – both supportive and unsupportive. This is part of a lawyers role as a MoJ (***Rondel v Worsley***)

***General Motors Acceptance Corp of Canada v Isaac Estate* [1992] ABQB**

|  |  |
| --- | --- |
| **F** | * Δ surrendered car through dealer and Π but Π also wanted to get a judgment for possession of the car (i.e. wanted to sue for value of the car AND keep the car) * Π involved in a very similar previous case that had just gone to the court of appeal (***Sherwood***); Π’s counsel the same in both cases * ABCA ruling on Sherwood had come out just a few weeks before * Judge assumed neither party knew about it but then he disclosed his knowledge and Π’s counsel admitted he had been counsel on it and the CA had just rejected it |
| **RA** | 1. You don’t have to search out unreported cases. But if counsel knows of a relevant unreported case, they need to bring it up 2. On point does not mean resemblance on the facts – it means cases which decide a **point of law.** 3. Counsel cannot discharge this duty by not bothering to determine whether there’s a relevant authority – ignorance is no excuse. 4. Counsel is not entitled to **assume** that the case is distinguishable and so not provide it; they have to bring it forward and then try and distinguish |
| **RE** | Judicial self-restraint in the adversarial system is founded on the assumption that counsel will do their duty to assist the court in doing justice according to the law. When a point is deserving of consideration, judge must have regard to *all* relevant authorities. |

## Ethics in Criminal Law

### Dual Roles

* Crown and defence both have dual roles to seek truth and justice and not subvert those, while also acting as strong advocates in an adversarial system → largely encompassed in **rule 5.1-2**
  + Crown: Fair, objective and dispassionate in presenting crown’s case **but** also argue forcefully for a legit result (which is often conviction)
  + Defence: vigorous representation of the accused’s interest BUT must remain independent of the client + mindful of overriding duties to the ct
* Duty to not make frivolous arguments: lawyer not just mouthpiece of client; esp. hard in crim law b/c creativity may be necessary in mounting a defence
* Duty of Civility: relates to effectiveness and fairness of adversarial trials, which depend on counsel acting w/ honesty and integrity. (e.g. ***Felderhof*** – don’t make unfounded or irrelevant personal attacks against honesty, integrity, motives of counsel for opposing party.)

### Ethical Duties of Crown (all reg. duties + more)

**Linchpin Duty:** Seeking justice in the public interest; which encapsulates:

**Rule 5.1-3:** when acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably w/in the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

* Seeking conviction while ensuring Δ has a fair trial
* Conviction not to be sought at all costs
* Must assist ct in eliciting truth w/o infringing legit rights of accused
* At each stage, prosecutorial discretion must be exercised w/ objectivity + impartiality (not pure partisanship)

**Need for Independence:** AG + his agents permitted liberal discretion and must be secure from political or social pressures when making decisions affecting prosecution. Allows for courageous decision-making and safeguards the public interest

* + - * 1. **Full Disclosure:** ***Stinchcombe*** occurred 2 years after Marshall commission concluded; the commission recommended introducing a statutory requirement of full pretrial disclosure b/c of the evidence that Crown and police were in possession of significant exculpatory evidence that would have led to Marshall’s acquittal

***Stinchcombe* [1991] SCC**

|  |  |
| --- | --- |
| **F** | After preliminary inquiry, police took 2 statements from a defence witness and did not disclose contents to defence. Δ sought production and Crown argued 5 points in favour of disclosure being a matter of crown discretion (i.e. not a legal right/duty):   1. There is value in taking an opponent’s witnesses by surprise in cross-exam 2. Absence of reciprocity unfairly skews the system 3. Delays and inefficiencies would result 4. Danger that defence witnesses will form their evidence based on crown disclosure 5. Danger that wits will be killed/threatened if evidence disclosed prior to trial |
| **D** | Only argument #5 accepted – partially. Justified to *delay* disclosure until vulnerable witnesses are safe but cannot completely deny disclosure. |
| **RA** | Anything short of complete disclosure by the crown = indecent + unfair. There is an overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This right has acquired new vigour since its inclusion in s. 7 of the Charter. |
| **RE** | * Prosecutorial discretion: relates to the **timing and manner** of disclosure, where rules of privilege adhere and where informers’ identities must be protected * Crown should err on side of inclusion when determining relevancy of disclosure * Where every disclosure would impede investigation, delay may be necessary but must be rare and discouraged * Discretion of Crown reviewable by TJ – defence can initiate a review if there’s issues w/ crown’s exercise of discretion in such a matter and Crown will then have to justify its actions |

***Krieger v Law Society of Alberta* [2002] SCC**

|  |  |
| --- | --- |
| **F** | * Krieger: Crown on murder case in 1994 – 2 weeks before preliminary inquiry, he got results from blood tests @ scene that implicated a different person * Did not disclose to defence, told him that the results wouldn’t be available for preliminary inquiry but defence found out they existed * Defence complained to AG’s office and law society * K argued he was exercising permissible discretion, under ***Stinchcombe***, in delaying disclosure of the results |
| **I** | Are K’s actions exempt from LS scrutiny b/c they are covered by prosecutorial discretion? |
| **RA** | 2 things are **not** covered by prosecutorial discretion:   * 1. Acting in bad faith or for an improper purpose (such actions are not within their power)   2. Decisions governing prosecutor’s tactics or court conduct (governed by inherent jurisdiction of ct to control its own process) |
| **RE** | Prosecutorial discretion ≠ any decision made by crown  = the use of **core power** of AG’s office – involving ultimate decisions as to whether a prosecution be brought, continued, ceased, for what to prosecute (i.e. **nature and extent** of prosecution)  → these decisions will be treated w/ deference by cts + members of exec as well to statutory bodies like LS. Intentional departure from fund’l ethical duty to act fairly = question that *can* be asked by LS. |

* + - * 1. **Duty to call all material witnesses:**

***R v Cook* [1997] SCC**

|  |  |
| --- | --- |
| **F** | Victim, D, allegedly assaulted. Instead of calling D, Crown called his GF, R. |
| **I** | Is there a duty on crown to call the complainant/alleged victim? → No. |
| **RA** | There is no duty upon the crown to call witnesses nor a more specific duty to call the complainant/victim. Decisions on how to present the case = under prosecutorial discretion, absent evidence that this discretion is being abused. |
| **RE** | Interference w/ prosecutorial discretion to require crown to call certain witnesses, regardless of their truthfulness, willingness to testify, or overall effect on the trial. → This req’ment has been extinguished by disclosure rules developed in ***Stinchcombe*** |

* + - * 1. **Zealous advocacy?**

***R v Boucher*:** involved inflammatory jury address; ct imposed two limitations on crown’s jury addresses.

**→ Can** examine all evidence and **ask** the jury to come to the conclusion that Δ guilty. But assisting the jury is exceeded when:

* 1. Crown expresses by inflammatory or vindictive language his **personal opinion** that Δ is guilty or
  2. When remarks tend to leave jury with impression that they **should** find Δ guilty b/c the Crown has **proven** this.

### Ethical Duties of Defence Counsel

**Rule 5.1-1:** When acting as an advocate, a lawyer must represent the client resolutely and honourably w/in the limits of the law, while treating the tribunal w/ fairness, candour, courtesy, and respect. [see esp. commentary 9 + 10]

* + - * 1. **Duty to the Client:** **purely** partisan duties owed to client
* Essential to adversarial system b/c w/o the resolute defence by a skilled and loyal advocate, innocent may be convicted
* Esp important = duty of confidentiality
  + - * 1. **Defending the guilty client/not misleading the court:** must avoid forming any opinions on subject of guilt
* Just as crown’s should never express personal opinion RE: accused guilt, defence counsel’s personal opinion is irrelevant and could be harmful to their ability to fulfill duty of partisan advocacy
* Avoid Q altogether b/c to determine guilt usurps judge’s role
* Where lawyer **cannot help** but be convinced of a client’s guilt, the lawyer is subject to certain ethical constraints in the conduct of their defence which arise from the duty not to mislead the court

**Rule 1.1 [commentary 10]; Rule 2.1-3(f)**

|  |  |
| --- | --- |
| CAN   * object to: jurisdiction of ct; form of indictment; admissibility/sufficiency of evidence; * Can also *test* evidence given by each individual witness | CAN’T:   * suggest someone else committed offence * call any evidence that, by reason of the admissions, the lawyer believes to be false * set up an affirmative case inconsistent w/ the admissions (e.g. alibi evidence) |

* There may be times when lawyer has to withdraw in order to avoid misleading the ct or violating confidentiality **[see rule 2.1-2]**

**Principles:**

1. Counsel can continue to defend a client, even when convinced of their guilt; BUT
2. Can only use certain means of defence in such a case, which do not involve knowingly misleading the ct

# Truth and Reconciliation

- Indian Residential Schools Settlement Agreement: mandated the establishment of the TRC

- TRC had 2 tasks: shine light on the truth; prepare the way for reconciliation

* TRC had backward and forward looking mandates
  + Backward: Reveal, uncover, and document to Canadians the legacy of the residential school system and the harms it perpetrated again Aboriginal peoples
  + Forward: Goal was to guide and inspire a process of truth and healing leading to reconciliation within Aboriginal families and communities, as well as among non-Aboriginal peoples, leading to a relationship of mutual respect

- TRC engaged in a national process; produced a Summary Report accompanied by the 94 Calls to Action; followed up with full Report

- TRC also revealed how the residential schools functioned as part of this policy

* They didn’t function as education programs as we understand them
* They didn’t teach students and try to expand their minds – instead, they provided inculcation with European cultures and religions and rejection of indigenous cultures and religions, and this was done in abusive ways (sexual, physical, withholding medical treatment, etc.)

**The TRC Reports**

TRUTH

* Canada deployed a policy of cultural genocide in its aim to assimilate Aboriginal people into broader Canadian society:
  + “Cultural genocide is the destruction of those structures and practices that allow the group to continue as a group.”
  + “At the end of this process, Aboriginal people were expected to have ceased to exist as a distinct people with their own governments, cultures and identities.”
* The Residential School system was a component of a program of cultural genocide
  + Separation of children from family
  + Breaking links to culture and identity
    - Language, spirituality, social structures
  + Systemic abuses of children
  + Failure to provide education
* The effects of the residential schools are not confined to history
  + Educational, income, health, social disparities
  + Intense racism; systemic discrimination
  + Endangered languages
* The program of assimilation and cultural genocide was not successful
  + Indigenous cultures are alive and strong
  + Movement for exercise and recognition of indigenous laws and governance is mobilized
  + Indigenous peoples are determined to see rights respected
* What can we do w/ the truth: “stop and take a look and not look away.” (D. Elliot, descendant of Survivors)

## TRC Calls to Action

RECONCILLIATION

* The 94 Calls to Action are a roadmap for the first post-TRC phase of reconciliation and required for its success.
* Themes of the Calls to Action:
  + Education: awareness, understanding
  + Justice: Equity, a nation-to-nation relationship
  + Recognition: commemoration, formalization
  + Broad Scope of action: all levels of government, all sectors of Canadian life

LEGACY ACTION ITEMS

* Actions aimed to redress the ongoing effects of the residential schools policy, and the reality that indigenous people in Canada have experienced extreme disadvantage.
* This requires education and action in all areas of social policy:
  + Child Welfare [1-5]
  + Education [6-12]
  + Language and Culture [13-17]
  + Health [18-24]
  + Justice [25-42]
* Ex: Cindy Blackstock and her Canadian Human Rights tribunal claim
* Actions aimed to advance the process of reconciliation – a new relationship and ways of living together, requiring everyone to act:
  + Adoption of UN Declaration by governments and settlement parties [43-44, 48-49]
  + Royal Proclamation by the Crown to affirm a nation-to-nation relationship [45-47]
  + Equity in the Legal System [50-52]
  + Creation and support for Reconciliation-specific Institutions:
    - National Council for Reconciliation (oversight, reporting) [53-56]
    - National Centre for Truth and Reconciliation (information and archive) [77-78]
  + Church Apologies [58-61]
  + Education at all levels, Professional Development [62-65, 57]
  + Youth Programs [66]
  + Museums and Archives [67-70]
  + Missing children burial information [71-76]
  + Commemoration [79-83]
  + Specific Sectors
    - Media [84-86]
    - Sports [87-91]
    - Business [92]
  + Newcomers to Canada [93-94]

HIGHLIGHTS IN THE CALLS TO ACTION: EXAMPLES

* Education
  + As area for redress: taking steps to narrow educational gaps, including education legislation [6-12]
  + As required for reconciliation: curriculum and training [62-65]
* Media
  + Increase Aboriginal programming, including language, increase CBC funding
  + Increasing access to employment and leadership
  + News coverage of issues of importance to Aboriginal people and all Canadians
  + APTN – leadership in media
  + Journalism programs to provide education on history/legacy

**HIGHLIGHTS IN THE LEGAL PROFESSION**

* Action #27: Law Societies called on to ensure lawyers receive appropriate cultural competency training and education in indigenous law, Aboriginal rights.
* Action #28: Law Schools called on to provide education in history and legacy of residential schools, indigenous law, Aboriginal-Crown relations.
  + An interesting thing about this is a project underway by law professors called “the reconciliation syllabus” – it’s an effort that took its guidance from “the Charleston syllabus”

|  |
| --- |
| - 27: We call upon the Federation of Law Societies of Canada to ensure that lawyers receive appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.  - 28: We call upon law schools in Canada to require all law students to take a course in Aboriginal people and the law, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti- racism. |

**HIGHLIGHTS: LEGAL/JUSTICE ISSUES**

- Lawyers are also implicitly called on throughout the calls to action. The law was often itself a tool for assimilation and oppression, so it’s critical that now that that’s subverted, and the law and legal structures be used for reconciliation. We need to address the need for a new legal relationship

* Royal proclamation and covenant of reconciliation [45-47]
  + Formally Renew a nation-to-nation relationship
  + Principles for working collaboratively
  + Repudiate colonial concepts (*terra nullius*)
* Indigenous law
  + Commit to recognition and implementation of Aboriginal justice systems [42]
  + Fund establishment of indigenous law institutes [50]
* Adoption and implementation of *UN Declaration* [43-44]
* Criminal Justice and sentencing
  + Eliminating overrepresentation of Aboriginal people in custody [30]
  + Implement realistic alternatives to imprisonment, respond to underlying causes [31]
  + Amend criminal code to allow departure from mandatory minimum sentences and restrictions on conditional sentences [32]
  + Recognize/prevent FASD and create culturally-appropriate programs, and better address needs of offenders with FASD [33-34]
  + Eliminate barriers to creation of Aboriginal healing lodges in corrections [35]
  + Provide culturally relevant services to inmates on substance abuse, domestic violence, overcoming sexual abuse [36]
  + More supports for Aboriginal programming in halfway houses & parole services [37]
  + Commit to eliminating over-representation of Aboriginal youth in custody [38]
* Criminal Victimization of Aboriginal people
  + Develop national plan to collect data on criminal victimization of Aboriginal people [39]
  + Create adequately funded Aboriginal-specific victim programs [40]
  + Call an inquiry regarding victimization of Aboriginal women and girls (MMIWG) [41]
* Issues respecting proceedings against the Crown:
  + Confirm RCMP independence to investigate crimes in which Crown has interest as potential party in civil litigation [25]
  + Crown should review and amend statutes of limitations regarding historic abuse [26]
  + Canada: develop policy of transparency by publishing legal opinions regarding scope and extent of Aboriginal and treaty rights [51]
  + Canada: to adopt legal principles applicable to title claims [52]
* Work with plaintiffs not included in Residential Schools settlement agreement [29]

## TRC Executive SUmmary

**“Reconciliation” Defined**

“Reconciliation is about establishing and maintaining a respectful relationship between Aboriginal and non-Aboriginal peoples in this country. In order for that to happen, there has to be awareness of the past, acknowledgment of the harm that has been inflicted, atonement for the causes, and action to change behaviour.”

WHAT SHOULD RECONCILIATION DO?

“Reconciliation must support Aboriginal peoples as they heal from the destructive legacies of colonization that have wreaked such havoc in their lives. But it must do even more. Reconciliation must inspire Aboriginal and non-Aboriginal peoples to transform Canadian society so that our children and grandchildren can live together in dignity, peace, and prosperity on these lands we now share.”

WHY SHOULD RECONCILIATION HAPPEN?

“Without truth, justice and healing there can be no genuine reconciliation. Reconciliation is not about “closing a sad chapter of Canada’s past,” but about opening new healing pathways of reconciliation that are forged in truth and justice.”

INSTITUTIONAL RESPONSIBILITY

Every organization is in some way implicated by the calls to action.

* Governments’ tasks are identified but require specific plans to implement
* Other organizations may have more nuanced obligations

ORGANIZATIONAL ACTION

* Develop a framework for Advancing Reconciliation in your organization, including:
  + Preliminary education within the organization
  + Conducting an internal audit
  + Identifying actions and priorities
  + Implementing actions
  + Ongoing review of efforts
* Case Study:
  + Vancouver Park Board
    - Decided to respond to calls to action
    - Conducted review of Calls to Action to determine which are applicable, found 8 in Park Board jurisdiction, 20 over which Park Board may have influence
    - Conducted review of own work: areas where work underway, areas where further work required
    - Made own recommendation for direction to staff about how to fulfill these calls to action through 11 strategies.
  + City of Vancouver
    - Decided to respond
    - Identified 27 Calls to Action the city can respond to
    - Created Reconciliation Work plan for 2016
* Law firm, company, organization, non-profit:
  + Create a Strategic Plan for Reconciliation suited to your role as service provider, employer, community representative
* Law Society:
  + Create a strategic plan for reconciliation suited to your role as a statutorily empowered governing body for a profession

PERSONAL RESPONSIBILITY

* Obligations of lawyers and law professionals:
  + Educate yourself – what did the TRC find and what does it require?
  + Evaluate yourself – where are you falling short?
  + Identify potential actions and priorities – what is your area of influence?
  + Put those into action
  + Educate yourself on how to be an ally

BEING AN ALLY

* Understand the responsibilities of an ally
* Don’t burden your indigenous colleagues and friends with your own education. But receive knowledge with gratitude when you can learn from survivors and their descendants.
* Embody respect and humility
* Leave space and create space for indigenous voices
* Prepare to feel discomfort and deal with it appropriately
* Turn your reactions and feelings into action

WHAT EFFORTS MIGHT INCLUDE SOCIETY AS A WHOLE?

* Making meaningful apologies
* Providing individual reparations; collective reparations
* Follow through with concrete actions that demonstrate real societal change
* Revitalization of indigenous law and legal traditions
* Listening, silence and creating space
* Contemplation and deep internal deliberation
* Speaking out: not ignoring racism
* Speaking out: promoting respect and education
* Reconciliation and the environment

WHAT MIGHT OUR EFFORTS INCLUDE AS INDIVIDUALS?

* Listening, silence, and creating space
* Contemplation and deep internal deliberation
* Speaking out: not ignoring racism
* Reconciliation and the environment

→ “The Survivors acted with courage and determination. We should do no less. It is time to commit to a process of reconciliation. By establishing a new and respectful relationship, we restore what must be restored, repair what must be repaired, and return what must be returned.”

# Competence & Quality of service

|  |  |
| --- | --- |
| Rule 3.1 Competence | *Rule 3.2 Quality of Service* |
| **3.1-1** “competent lawyer” = has and applies relevant knowledge, skills, and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement.  **3.1-2** …must perform all legal services undertaken on a client’s behalf to the standard of a competent lawyer | …duty to provide courteous, thorough, and prompt service…Quality of service req’d is competent, timely, conscientious, diligent, efficient, and civil  \*\* a wider concept than competence; the commentary to 3.2 indicates issues revolve around communication |

* Competence and quality don’t usually get att’n from LS; singular events of incompetence largely dealt w/ instead w/ malpractice (mostly negligence) in civil law
  + Leading case on standard of care expected of lawyers (***Central Trust Co. v Rafuse***): “reasonably competent solicitor, ordinarily competent solicitor, and the ordinarily prudent solicitor”
* Problems with punting these issues to cts?
  + All the assoc’d costs of going into the civil justice system (i.e. A2J)
* Why would LS want to punt?
  + Standard is too subjective; complaints are outcome-dependent; feeling that we’ve all made mistakes, reluctance to judge others too harshly; embarrassing for the profession; reluctance to call another lawyer incompetent
* Issues may end up in the realm of practice standards – you may get a practice advisor who will essentially help you run your practice better
* In order to get LS interested in discipline for incompetence, there needs to be either:
  + **Pattern of incompetence** (***Richey***; ***rule 3.1-2*** commentary) OR
  + **Gross negligence** on a particular case (***Syed***)

### Nova Scotia Barristers Society v Richey (2002) NSBC Hearing

**Richey’s Actions:**

* Failed to move files to settlement or trial, contrary to client instrux
* Gave reps about timelines which he didn’t follow
* Failed to file pre-trial briefs
* Failed to obtain and disclose all relevant records and info as req’d by civ pro rules
* failed to commence discoveries
* Wasn’t ready for trial
* Breach of undertakings to ct
* Failed to respond to communications and requests for info from clients and other lawyers
* Inadequate BF system
* Aggravating factor: he was senior counsel (∴ should’ve known better)

**Result:** R failed to serve his clients in a diligent, conscientious and efficient manner so as to provide a quality of service at least equal to that which we generally expect of a competent lawyer in like situations. Incompetence in this instance determinable by its **consistent pattern.** When a pattern of poor judgment arises, good lawyering on some files is insufficient defence. When the pattern of neglect becomes troublingly predictable, then it’s no longer isolated judgment errors and it’s become incompetence.

**Reprimand:** Fined $1000; ordered to pay costs for the proceeding (~$30K), practice subject to monitoring

***Syed*** – gross negligence in a single case

**Actions:** not advising client of election as to mode of trial; no discussion w/ client about defences; began negotiating a guilty plea w/o ascertaining guilt; generally unprepared for trial; also a senior member

**Reprimand:** Much lower than in ***Richey*** – maybe b/c it looked like the rest of his practice was fine, it was just this one case where he dropped the ball?

## Cultural Competence

A set of values, behaviours, attitudes, and practices w/in a system, organization, program, or among individuals and which enables them to work effectively cross-culturally – **National Centre for Cultural Competence**

* Although ***Rule 3.1-1*** doesn’t require cultural competence per se, it does require effective communication, including ascertaining the client’s goals – so maybe it’s an implicit requirement?
* Rules also require lawyers to adapt to changing standards
* Range of harms result from a lawyer’s lack of cultural competence: lost income; possible LS discipline; damaged personal reputation; standing of legal profession harmed if law seen as culturally incompetent

**Rose Voyvodic’s 3 Dimensions of Cultural Competence:**

1. **Knowledge** about how cultural diffs affect client experiences of legal process and interactions w/ lawyers
2. **Skills** through self-monitoring, to identify how assumptions and stereotypes influence one’s own thinking as well as others’ and working to lessen the effects of these influences
3. **Attitude** of self-awareness as a cultural being and of the harmful effects of power and privilege; willingness to practice competently

→ Really targeting empathy and self-awareness

**5 Habits for Developing Culturally Competent Legal Practice:**

1. Take note of differences
2. Map out the case and take into account the different cultural understandings of roles of lawyer and client
3. Brainstorm ideas for puzzling client behaviour
4. Identify and solve pitfalls in L-C communications to allow L to see C’s story through C’s POV
5. Examine failed interactions w/ C and develop ways to ensure they don’t recur

**Jatrine Bentsi-Enchill:** Effective cross-cultural communication = ability to communicate w/ individuals from other cultures in a way that **minimizes conflict,** promotes **greater understanding,** and maximises one’s ability to establish **trust + rapport** which leads to better representation; req’s lawyers to learn how to interpret verbal and non-verbal cues; a skill that develops w/ training and exercise

### R v Fraser (2011) NSCA

|  |  |
| --- | --- |
| **F** | Appellant a former high school teacher, convicted of SA against white female teenage student. A alleged that he received ineffective legal advice and representation @ trial. |
| **I** | Whether trial counsel incompetent – and whether it rose to level of miscarriage of justice → yes. |
| **RA** | Effectiveness of counsel is evaluated on an objective standard through the eyes of the reasonable person: expectation of competence based on a standard of reasonableness. A lawyer is expected to bring **reasonable care, skill, + knowledge** to the performance of the professional task which he has undertaken. |
| **RE** | 2-step process for determining incomp: (1) demonstrate incomp and (2) show it resulted in miscarriage  **Trial counsel’s actions:**   * Despite repeated and specific inquiries, A never advised of right to challenge for cause on the basis of race * Challenge for cause ensures impartial jury which is part of const’l right to trial by jury and right to a fair trial * Never interviewed A’s wife or aunt, even though they had relevant + useful information and could have been key witnesses * Did not give meaningful updates or communicate well * Failed to put himself in the shoes of client – this led to his downfall and made this general and cultural incompetence. |

# Conflicts of Interest & The Duty of Loyalty

Obligations to avoid COI derive from duty of loyalty (and supports the integrity of + public trust in legal system); there are countervailing factors: nat’l and multi-nat’l firms; A2J; client’s right to choose lawyer

2 subtypes [not mutually exclusive]: **CLIENT-CLIENT // LAWYER-CLIENT**

## Client-Client

### Duties to former clients

\*\*\*See: ***Rule 3.4-10*** // Mostly regards the potential for misuse of confidential information

#### MacDonald Estate v Martin

|  |  |
| --- | --- |
| **F** | * Martin was Π in lawsuit related to MacDonald estate * Dangerfield: Martin’s lawyer in the matter (privy to confidential info pertaining to the case) * Danger’s firm dissolved and she joined a new firm: Thompson   + Thompson rep’d estate in the lawsuit started by Martin; litigation continuing when Danger joined up   + BUT Danger not directly involved in the case nor representation of estate * Martin made application to have firm disqualified from rep’ing estate |
| **I** | What constitutes a disqualifying COI in acting against former clients? Did Thompson have one RE: this case and Martin? |
| **RA** | 2 Questions to be answered:   1. **Did the lawyer receive confidential info attributable to the S-C relationship, relevant to the matter at hand? [REBUTTABLE PRESUMPTION]** IF YES go to 2  * Once client shows there was a previous relationship suff’ly related to retainer at hand, the ct should infer that confidential was imparted UNLESS solicitor can satisfy ct otherwise   + Hard b/c lawyer can’t reveal specific of privileged communications + public must be assured that no info passed; but shouldn’t close the door completely  1. **Is there a risk that it will be used to the prejudice of the former client :**  * Individual lawyers can’t act against former client but less clear for a firm’s other lawyers * STRONG INFERENCE that lawyers who work together share confidences   + UNLESS ct satisfied, on the basis of **clear and convincing evidence** that all reasonable measures have been taken to ensure that no disclosure will occur by “tainted” lawyer to those members of the firm engaged against former client     - Measures like walls; cones of silence may be enough but wait to see what CBA says…undertakings/conclusory statements by the lawyers in affidavits, w/o more, is insufficient b/c they’re not objectively verifiable (∴ won’t assure public) |
| **A** | 1. Danger actively worked on case ∴ obv had confidential info 2. Nothing beyond Danger’s and Thompson’s sworn statements ∴ disqualifying interest exists |
| **Dis** | Would have imposed higher standard by imputing (irrebuttably) knowledge from “tainted” lawyer to new firm. Necessarily strict standard for protecting public interest. Mergers and mobility are not >assuring public. Inst’l safeguards are likely to be just as suspicious to public as sworn statements. |
| **ETC** | * In many other circs, ct + public accept undertakings and sworn statements from lawyers w/o requiring objective confirmation * Possibly trying to guard against people using COI disqualification as a strategic tool? * Perhaps a more rigorous standard = hardship on lawyers and clients w/o concomitant increase in public interest |

### Duties to current clients

#### R v Neil (2002) SCC

***Rule 3.4-1:*** A lawyer must not act or continue to act for a client where there is a COI, except as permitted in the code – SEE COMMENTARY

***Rule 3.4-2:*** Cannot rep client where there is COI UNLESS there is express or implied consent from all clients and the lawyer **reasonably believed** that they are able to rep each w/o having **material adverse effect** on representation or loyalty to the other client

Not just about confidentiality; also about effective representation (o/s bare confidentiality obligations)

|  |  |
| --- | --- |
| **F** | * Neil was a paralegal + Lambert was his assistant * N Occasionally referred clts to V firm and sought their assistance * Lazin was lawyer @V * N accused of unauth’d practice of law + V rep’d N * Lazin then took on Lambert’s defence * Lazin attended some consults w/ N for the purpose of gaining info that he could use in a cut-throat defence of Lambert (portraying Lambert as innocent dupe and N as mastermind) * Lazin also took on a new client, Doblanko, (one of N’s alleged victims) for whom N had prepared a false affidavit   + Lazin had D report this to the same police officer investigating N’s other matters in the hopes of multiplying the allegations of dishonesty against N and bolstering Lambert’s defence * V later withdrew from N’s representation |
| **I** | 1. Did Vfirm and Lazin breath DoL to N? 2. Did the breach create unfairness that should result in a stay of proceedings for N |
| **D** | 1. Yes. 2 conflicts:    1. Attempting to act for N+L concurrently and undercutting N’s defence in favour of L    2. Accepting Doblanko retainer + requiring him to put before a divorce ct judge evidence of N’s illegal conduct while purportedly defending N in other crim charges (strategic linkage) 2. Firm’s conduct did not affect fairness ∴ no SOP |
| **RA** | **BRIGHT LINE RULE:** A lawyer may not represent one client whose interests are **directly adverse** to the **immediate interests** of a current client, even in the 2 matters are **factually unrelated.** Only permitted if both clients **consent after full disclosure (+ preferably independent legal advice)** AND the lawyer reasonably believes s/he is able to represent each client w/o adverse effect on either. |
| **RE** | * VFirm as a wholeowed duty of loyalty to N ∴ should not have taken up cause of Doblanko at the same time, despite the Doblanko matter being factually and legally unrelated b/c it was adverse to N’s immediate legal interests * Litigants must be assured of undivided loyalty; o/w the public will not have confidence that the legal system is a reliable means of resolving their disputes * Duty of loyalty intertwined w/ fiduciary nature of L-C relationship; Along w/ confidentiality, DOI engages 3 other dimensions:   1. Duty to avoid conflicting interests   2. Duty of candour   3. Duty of commitment to clt’s cause |

**2 APPROACHES TO INCORPORATING THE BRIGHT LINE RULE**

|  |  |
| --- | --- |
| **FLSC:** proposed to incorporate the bright line test from ***Neil*** (BC did this); but b/c of CBA opposition, it was not incorp’d into the model code | **CBA:** strongly opposed bright line; argued the unrelated matter test was irrelevant. Various conflicting legal opinions followed. |

#### Strother v 3464920 Canada Inc (2007) SCC

|  |  |
| --- | --- |
| **F** | * Monarch = film co that profited from a tax loophole * Strother = senior tax partner @ Davis&Co.; responsible for M’s tax advice * Canada closed tax loophole + S informed M they had no other options available so M started winding biz down * Darc = Former employee of M; approached S w/ the idea of a new tax loophole + they went into business together, in a new corp (Scorp) to carry on a business, competing in the same market as M + exploiting the new loophole * S eventually left Davis + M learned much later about the whole thing |
| **RE** | **1997 Retainer:** M req’d exclusivity from Davis in their area of business  **1998 Retainer:** after loophole closed, there was a new retainer, the scope of which was unclear (unwritten; no explicit exclusions set out)   * But, source of FD is not the retainer → FD includes obligation which may exceed the life + limits of the retainer * S was still M’s tax lawyer + as such, M was entitled to be told at least that S’s previous advice was subject to reconsideration * Continuation relationship of trust + confidence   + Not updating M after no longer retained ≠ breach but M was an ongoing client and was entitled to continuing loyalty from Davis and by extension, S. * No legal dispute between M and Scorp   + Retainer from Scorp not directly adverse to any immediate legal interests of M – Scorp actually created a business opportunity which would have been good for M if they had known   + Just the mandates of tax-assisted business opportunities in film production ≠ adversity (i.e. commercial competition between clients that don’t impair lawyer’s ability to properly rep both clients’ legal interests generally won’t = COI)   + However, S had a **personal undisclosed financial interest** in another client (Scorp) in circs where his prospects of personal profit were enhanced by not disclosing info to M * Impact on M’s representation: **material + adverse** * The test is whether there is a possibility of adverse impact; once S’s financial interest in Scorp est’d, S had onus of demonstrating absence of material adverse effect on M’s interest in receiving proper + timerly advice |
| **D** | Davis didn’t know; conflict arose b/c of S’s actions – no reasons for Davis to think Scorp retainer would jeopardize M. S liable for $ earned from the beginning to the end. Davis liable for being duped by Darc. |
| **RA** | By acquiring a substantial and direct financial interest in one client (Scorp) seeking to enter a v. restricted market in which a previous client (M) had a major presence, S put his personal financial interests into conflict w/ his duty to M. The conflict compromised S’s duty to represent M’s interests, compounded by the lack of candour w/ M on matters relevant to the retainer (i.e. the new loophole), even though S couldn’t reveal confidential info from Scorp. |
| **DIS** | >specialized field = >likelihood the lawyer will be acting for competing clients. S’s obligations were lowered b/c of the ltd. retainer begun in 1998 ∴no violation of duty to M. |

#### LSBC v Strother [2015] Hearing Panel

|  |  |
| --- | --- |
| **F** | S was lawyer for M, until M severed the rel’nship in 1999. At no time did S advise M of his financial interest in a potential competitor, of the fact that previous tax advice should be reconsidered, or the success of a new loophole. |
| **I** | Was S’s conduct a breach of fiduciary + ethical obligations; → Yes.  Whether that = professional conduct → Yes. |
| **RA** | M paid for and was entitled to expect better advice and representation from S. M was entitled to undivided loyalty, full disclosure and candid advice. There are no exceptions to the duty to act w/ utmost good faith towards their clients. A fiduciary can’t allow his own interests to conflict w/ the beneficiary’s interests. |
| **RE** | * S argued he didn’t have a financial interest in Scorp after being told by Davis that he couldn’t   + But Scorp gave S significant loans while he was @ Davis despite not actually being a SH until 1999 ∴ S always had a financial interest in Scorp’s success * M was entitled to be informed of tax-assisted business opportunities + S had a continuing obligation to advise M of such opportunities   + But he kept it secret + did so in order to advance his own interests * Confidentiality obligs to Scorp ≠ defence to breaching FD to M |

#### CNR v McKercher (2013) SCC

|  |  |
| --- | --- |
| **F** | * McKercher LLP acted for CN in 4 (fairly minor) matters * W/o CN’s consent/knowledge, M accepted a retainer to act for a Π in a class action against CN (valued @$1.7Bil) * M dumped CN – didn’t seek consent from parties; didn’t advise CN of conflicting retainer * Class action = legally + factually unrelated to M’s ongoing retainers |
| **I** | Can a firm accept a lawsuit on behalf of a client against a current client if the matters are not directly related? |
| **D** | No. Falls w/in bright line rule: adverse in legal interest ∴ duty of loyalty breached. |
| **RA** | Bright line rule: lawyer may not represent one client whose interests are directly adverse to the immediate interests of another client – even if the two mandates are unrelated **UNLESS** both clients consent after receiving full disclosure (and preferably independent legal advice) AND lawyer reasonably believes s/he can rep each w/o adversely affecting the other.  This is not a rebuttable presumption – it just applies. The only limits are where: immediate interests must be directly adverse; must be *legal* interests; cannot be a tactical move; and won’t apply if it’s unreasonable for client to expect firm not to act against it (e.g. gov’t; large industry) |
| **RE** | A lawyer and law firm owe a duty of loyalty to clients; this has 3 salient dimensions:   1. **Avoid COI:**    1. BLR → If a firm is asked to act against CC in unrelated matter, it must determine whether accepting will breach BLR by asking: 2. Are immediate legal interests directly adverse? 3. Has CC sought to exploit BLR in a tactical manner? 4. Can CC reasonably expect firm not to act against it in unrelated matters?    1. if BLR does not apply, need to ask whether concurrent representation creates a substantial risk that the lawyer’s representation would be **materially + adversely affected** by the lawyer’s own interests, duties to another current clt, former clt, or 3P.   → If firm decides to act + CC disagrees, CC can bring action + they will have onus of proving on BOP   1. **Commitment:** Closely related to 1.; prevents L from undermining L-C relationship // can’t summarily and unexpectedly drop a client in order to avoid COI 2. **Candour:** L must disclose any factors relevant to their ability to provide effective representation; (Even if L thinks it’s o/s the scope of the BLR)  * L asks prospective clt (PC): can I tell current clt (CC) that we’re planning to do an action against them? * If PC says no → L can’t accept retainer * If PC says yes → L has to advise CC of existence, nature, and scope of new retainer   REMEDY: usually, disqualification will be necessary where there’s been any violation of DoL, in order to:   * 1. Avoid risk of disclosing confidential info   2. Avoid risk of impaired representation   3. Maintain public confidence in admin of justice   Factors militating against disqualification?   * Behaviour disentitling complainant from seeking remedy (e.g. delay) * Significant prejudice to new client’s interests in retaining counsel of choice + their ability to retain new counsel * Whether firm accepted retainer in good faith, reasonably believing concurrent rep to be okay. |
| **A** | 1. COI: directly adverse legal interests ∴ falls under BLR. 2. Commitment: desire to obtain potentially lucrative new retainer ≠sufficient reason to dump a client 3. CN should’ve been given opportunity to assess M’s intention to pursue new retainer and make an informed decision   REMEDY: only (c) is applicable; appropriateness of disqualification remitted to ct for reconsideration |

## Lawyer-Client Conflicts

* COI have potential to undermine L’s ability to represent the client properly OR creates such a perception
* **QUESTION:** Has the conflict interfered w/ L’s duty of loyalty to the clt and with L’s ability to provide uncompromised representation?
* Circumstances where L-C conflicts arise:
  + Taking possession of clt assets
  + Not being respectful of clt’s circumstances/ reputation while L engaged in another activity
  + Personal relationships w/ clients

### Stewart v CBC [1997] Ont. Gen. Div.

|  |  |
| --- | --- |
| **F** | * Greenspan = Π’s counsel during Π’s sentencing for crim negligence causing death * Media coverage @ the time was v harsh and G had worked v hard to protect Π * 10 years later, G was host/narrator of an episode on CBC about Π’s case   + Π upset and had told G not to do it but G did it anyways   + TV episode rekindled interest in Π’s case   + Episode left out details, the omission of which made Π and crime look more culpable |
| **I** | Π brought claim against G for breaching implied contractual terms and breach of fiduciary duty of loyalty |
| **D** | G’s participation in the episode was motivated by self-interest, not public education about the justice system. He breached the fiduciary DOL in 3 ways:   1. Put his financial interests above Π’s interests 2. Put his own self-promotion above Π’s interests 3. Undercut the protection + benefit he provided as counsel and ∴ increased the adverse public effect of the trial + sentencing on Π   G ordered to pay Π $2,500 in damages and disgorge $3250 profit he rec’d from the episode. |
| **RA** | In the context of public media attention directed at a former client/case, lawyers must not engage in behaviour motivated by self-promotion or self-aggrandizement (**SEE BC RULE 7.5**)  FD can restrain L from speaking about clt’s case which was the subject of a concluded retainer. |
| **RE** | Confidentiality breach? → No  Loyalty:   * G portrayed Π’s former lawyer w/ civility + dignity and could have done same for Π * G not bound to be Π’s lawyer forever, but end to S/C rel’nship does not end fiduciary relationship * FD can restrain L from speaking about clt’s case which was the subject of a concluded retainer. * Duty inoperative for 10 years while G and Π independent but G involving himself again in the subject matter of the concluded retainer triggered the fiduciary duty of loyalty:   + Duty not to take advantage of Π + not to undo the benefits and protections provided by his professional services   + Duty not defeated b/c of others’ actions before G took conduct of Π’s case * Duty necessary to preserve public confidence * Reciprocates the faith clients put in the lawyer to safeguard their information and interests   Educational value > DOL?   * Program was educational but would have been just as educational w/o G’s involvement. * G made certain changes to the proposed script, which arguably improved Π’s appearance in the show – but that does not justify G’s participation (i.e. his input there not > the overall negative effect on Π) |

### LSUC v Hunter (2007) Hearing Panel

|  |  |
| --- | --- |
| **F** | H disciplined for sexual rel’nship with client and the resulting COI |
| **RA** | **Inherent dangers with sexual relationships between lawyers and clients:**   * Clt’s right to independent and objective advice * If relationship serious, it raises the issue that the lawyer may no longer be objective * If it’s not serious (at least in the lawyer’s mind), it raises the issue that the lawyer is exploiting the clt * Difficult to determine whether a vulnerable clt’s consent is actually rooted, in whole or in part, in their dependence on the lawyer’s representation and support. |
| **RE** | * + - * 1. Relationship created COI: * Undermined his duty to provide objective, disintererested, professional advice * Undermined clt’s ability to question/challenge his advice * Working on a contentious family law matter ∴ vulnerable + he ignored her vulnerability * She thought it was a serious rel’nship, he did not ∴ possible exploitation * He was obliged to discuss COI w/ her **at the outset** and **should have recommended** she get **independent legal advice**   + This obligation is ongoing (i.e. even if he got informed consent @ the start, new circumstances may have arisen which would have required him to revisit)     - * 1. Ending the Relationship: * Pressuring her to sign a false acknowledgment that he had complied w/ his ethical and professional obligations * Solely advanced his interests – does not count as informed consent * He was exerting a lot of pressure on her, which was emotionally damaging * Compounded the inappropriateness of the whole thing |

## Joint Retainers

Different from conflict situations b/c all of the clients purportedly have the same legal interests; **SEE RULE 3.4-5**

# Ethics and Conduct in Corporate law

## Fees *– Legal PRofession Act, ss. 64-68*

**64 (1) DEFINITIONS AND INTERPRETATION**

**"agreement"** means a written contract respecting the fees, charges and disbursements to be paid to a lawyer or law firm for services provided or to be provided and includes a contingent fee agreement;

**"bill"** means a lawyer's written statement of fees, charges and disbursements;

**"charges"** includes taxes on fees and disbursements and interest on fees and disbursements;

**"contingent fee agreement**" means an agreement that provides that payment to the lawyer or law firm for services provided depends, at least in part, on the happening of an event;

**"court"** means the Supreme Court;

**"person charged"** includes a person who has agreed to pay for legal services, whether or not the services were provided on the person's behalf;

**"registrar"** means the registrar of the court.

(2) Unless otherwise ordered by the court, this Part, except sections 65, 66 (1), 68, 77, 78 and 79 (1), (2), (3), (6) and (7), does not apply to a class proceeding within the meaning of the Class Proceedings Act.

(3) This Part applies to a lawyer's bill or agreement even though the lawyer has ceased to be a member of the society, if the lawyer was a member when the legal services were provided.

**65 AGREEMENT FOR LEGAL SERVICES**

(1) A lawyer or law firm may enter into an agreement with any other person, requiring payment for services provided or to be provided by the lawyer or law firm.

(2) Subsection (1) applies despite any law or usage to the contrary.

(3) A provision in an agreement that the lawyer is not liable for negligence, or that the lawyer is relieved from responsibility to which the lawyer would otherwise be subject as a lawyer, is void.

(4) An agreement under this section may be signed on behalf of a lawyer or law firm by an authorized agent who is a practising lawyer.

**66 CONTINGENT FEE AGREEMENT**

(1) Section 65 applies to contingent fee agreements.

(2) The benchers may make rules respecting contingent fee agreements, including, but not limited to, rules that do any of the following:

(a) limit the amount that lawyers or law firms may charge for services provided under contingent fee agreements;

(b) regulate the form and content of contingent fee agreements;

(c) set conditions to be met by lawyers and law firms making contingent fee agreements.

(3) Rules under subsection (2) apply only to contingent fee agreements made after the rules come into force and, if those rules are amended, the amendments apply only to contingent fee agreements made after the amendments come into force.

(4) A contingent fee agreement that exceeds the limits established by the rules is void unless approved by the court under subsection (6).

(5) If a contingent fee agreement is void under subsection (4), the lawyer may charge the fees that could have been charged had there been no contingent fee agreement, but only if the event that would have allowed payment under the void agreement occurs.

(6) A lawyer may apply to the court for approval of a fee higher than the rule permits, only

(a) before entering into a contingent fee agreement, and

(b) after serving the client with at least 5 days' written notice.

(7) The court may approve an application under subsection (6) if

(a) the lawyer and the client agree on the amount of the lawyer's proposed fee, and

(b) the court is satisfied that the proposed fee is reasonable.

(8) The following rules apply to an application under subsection (6) to preserve solicitor client privilege:

(a) the hearing must be held in private;

(b) the style of proceeding must not disclose the identity of the lawyer or the client;

(c) if the lawyer or the client requests that the court records relating to the application be kept confidential,

(i) the records must be kept confidential, and

(ii) no person other than the lawyer or the client or a person authorized by either of them may search the records unless the court otherwise orders.

(9) Despite subsection (8), reasons for judgment relating to an application under subsection (6) may be published if the names of the lawyer and client are not disclosed and any information that may identify the lawyer or the client is not disclosed.

**67 RESTRICTIONS ON CONTINGENT FEE AGREEMENTS**

(1) This section does not apply to contingent fee agreements entered into before June 1, 1988.

(2) A contingent fee agreement must not provide that a lawyer is entitled to receive both a fee based on a proportion of the amount recovered and any portion of an amount awarded as costs in a proceeding or paid as costs in the settlement of a proceeding or an anticipated proceeding.

(3) A contingent fee agreement for services relating to a child guardianship or custody matter, or a matter respecting parenting time of, contact with or access to a child, is void.

(4) A contingent fee agreement for services relating to a matrimonial dispute is void unless approved by the court.

(5) A lawyer may apply to the court for approval of a contingent fee agreement for services relating to a matrimonial dispute and section 66 (7) to (9) applies.

**68 EXAMINATION OF AN AGREEMENT**

(1) This section does not apply to agreements entered into before June 1, 1988.

(2) A person who has entered into an agreement with a lawyer or law firm may apply to the registrar to have the agreement examined.

(3) An application under subsection (2) may only be made within 3 months after

(a) the agreement was made, or

(b) the termination of the solicitor client relationship.

(4) Subject to subsection (3), a person may make an application under subsection (2) even if the person has made payment under the agreement.

(5) On an application under subsection (2), the registrar must confirm the agreement unless the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into.

(6) If the registrar considers that the agreement is unfair or unreasonable under the circumstances existing at the time the agreement was entered into, the registrar may modify or cancel the agreement.

(7) If an agreement is cancelled under subsection (6), a registrar

(a) may require the lawyer to prepare a bill for review, and

(b) must review the fees, charges and disbursements for the services provided as though there were no agreement.

(8) A party may appeal a decision of the registrar under subsection (5) or (6) to the court.

(9) The procedure under the Supreme Court Civil Rules for the assessment of costs, review of bills and examination of agreements applies to the examination of an agreement.

**69 LAWYER'S BILL**

(1) A lawyer must deliver a bill to the person charged.

(2) A bill may be delivered under subsection (1) by mailing the bill to the last known business or residential address of the person charged.

(3) The bill must be signed by or on behalf of the lawyer or accompanied by a letter, signed by or on behalf of the lawyer, that refers to the bill.

(4) A bill under subsection (1) is sufficient in form if it contains a reasonably descriptive statement of the services with a lump sum charge and a detailed statement of disbursements.

(5) A lawyer must not sue to collect money owed on a bill until 30 days after the bill was delivered to the person charged.

(6) The court may permit a lawyer to sue to collect money owed on a bill before the end of the 30 day period if the court finds that

(a) the bill has been delivered as provided in subsection (1), and

(b) there is probable cause to believe that the person charged is about to leave British Columbia other than temporarily.

### Other Issues:

* Exaggerating complexity of work to justify fees; exaggerating knowledge and skill to gain trust; overstating how much time the lawyer has to spend on the issue; how much work has been done; availability to meet with clients
* If lawyer asked to give non-legal business/financial/strategic advice, and they choose to do so, they should make sure that the client is aware of any limitations on their ability to provide such advice and clearly differentiate this advice from the legal advice they are/have given
* If a lawyer notes an error that could damage the client’s position, they should promptly notify the client and discuss how to proceed, including candidly discussing the possibility of a claim against the lawyer (and should insist the client get independent legal advice on this matter)
* Should insist on independent legal advice in connection w/ any of the client’s transactions in which the lawyer has an interest
* Lawyer should also try and encourage a client to settle or negotiate/compromise whenever it’s possible to do so reasonably and should discourage client from commencing/continuing useless legal proceedings

## Counselling

* Giving clients information about that the law is (where its content is clear), giving their opinion (where there is uncertainty/ambiguity), and giving their advice (by applying the law to their specific factual situation and perhaps how the client should proceed)
* Unlike barristers, whose representation is highly formalized and rules-based, solicitors must set the boundaries of their own practice to maintain independence and ethical footing
* Distinction between presenting analysis of legal aspects of questionable conduct + recommending means to commit crime/fraud
  + Does the law prohibit conduct or provide a consequence?
  + Is the law freq’ly/infreq’ly enforced?
  + What is the likelihood of client using the info to commit unlawful conduct?

### LSUC v Sussman (1995) Discipline Committee

|  |  |
| --- | --- |
| **F** | * S was a lawyer representing client J in a matrimonial dispute * Wife given custody of 2 kids; husband to be given weekend access to both kids * S sent a letter to Husband’s solicitor saying that as soon as he can get an affidavit from J, he would be looking for an interim restraining order * Sent another letter 10 days later stating “I have instructed my client not to permit your client access to the children this coming weekend” → as a result of S’s advice, J barred access that weekend * Admitted in evidence that he counselled his client to do this |
| **I** | Whether S counselled J to breach the terms of the Court Order respecting access. |
| **D** | Professional misconduct. 1 month suspension. |
| **RA** | The circumstances in which the counselling of the disobedience of a court order are v narrow, have implicit in them the elements of reasonable and honest belief of there being imminent risk or danger to a child, and coexist with the req’ment that there be an immediate application to a ct to have the issues determined forthwith. |
| **RE** | * Client followed his instrux * He said he asked her to do it so that he could apply to vary the existing order but the only document he filed in support of variation was done 7 months after the access thing * Solicitor never actually intended to make an application so long as his assertions w/ respect to his client’s decision not to follow the order had the intended effect on the husband * No more disruptive behaviour than a lawyer counselling a client to disobey the clear, unequivocal terms of a court order |

### David Luban on “Terror Memos”

What to do when it is obvious your client wants to be advised that a particular course of action is acceptable?

* After 9/11 gov’t wanted to interrogate detainees as forcefully as possible w/o violating int’l laws on torture so sought opinions from senior lawyers in the office of legal counsel of the justice dept. These opinions concluded that interrogative techniques did not amount to torture unless they posed a threat of organ failure to the detainee
* Obvs they wanted as much leeway as possible
* Opinions since discredited as having significantly overreached the legit interpretations of what constitutes torture; disavowed by OL in 2009
* Luban critiqued the lawyers for failing in their ethical duties as counsellors and advisors
  + Stretched and distorted the law to reach the outcome the client wanted
  + Nowhere did it indicate that the interpretations were o/s the mainstream
    - Applies to both gov’t and private lawyers
* Idea that the role of the counsellor and advocate are different (advocates are always stretching the law in the courtroom, and trying to disguise the fact that they’re doing it)
  + In a counselling situation, it’s private w/ no adversary or impartial adjudicator – institutional setting justifying partisan role in court is absent in counselling
    - Litmus test: is the advice you’re giving the same as it would be if your client wanted the **opposite outcome**?
* What should you do if you think the mainstream is wrong?
  + If your view is outside the mainstream, but you think you’re right, you need to tell your client **both of those things:** what the law, on your best understanding, requires **and** the fact that your own best understanding is not that the legal interpretive community would accept

## Negotiation

Subject to minimal legal restrictions imposed by the law on FD, deceit, and misrepresentation, people can act in their own best interests and are free to negotiate unethically if they choose.

* Able to withhold material facts, make untruthful statements
* Seen as a game in which deception and bluffing are key tactics
* Negotiating parties often employ lawyers for negotiating
  + To what extent does the lawyer have to be skilled in negotiation? How do you determine competency?
  + Are the expectations different when lawyers are the ones negotiating?

**Regulation of negotiation**

* Although the code states that lawyers are always obliged to act with integrity and good faith towards opposing parties and other lawyers, the orthodoxy is that the usual degree of allowable deception is still there when lawyers are involved
  + Rules will dictate your conduct
  + Don’t misstate facts; decline to answer
  + Negotiate **for** the client, not with them
  + To maintain plausible deniability: “I am not aware”//”I do not have instructions”
  + Establish negotiating parameters in writing

Arguments for allowable aggression in negotiating:

* Respecting the lawyer’s obligation to promote their client’s interests
* If lawyers are more restricted in their negotiation tactics, clients will be tempted to go it alone
* Misrep and non-disclosure are better left to other areas of law like tort and K
* Drafting a good rule about what’s allowable in negotiation would be hard and wouldn’t get a lot of consensus

Arguments against:

* No compelling reason to differentiate this situation from all the others where lawyers are req’d to balance interests
* No evidence that clients would go it alone or hire other professionals
* Other areas of law do not fully cover problematic negotiating conduct and are impractical given the difficulties of litigating such claims

***Law Society of Newfoundland and Labrador v Regular* [2005] NLCA**

* Regular represented Petroleum services Ltd and Barrie James who held 75% of the shares in the company.
* James Hughes rep’d Randy Spurrell who owned the remaining 25%
* Regular and Hughes in negotiation on behalf of their clients to ascertain the value of Spurrell’s interests
* Basically, R’s communication to H’s letter was deliberately intended to mislead
* R’s response was calculated to deceive and conceal the sale of the assets
* R failed to act w/ integrity, failed in his responsibility to an individual lawyer (H), and failed to avoid questionable conduct

## The Organizational Setting

### Milton C. Regan Jr: “Professional Responsibility & the Corporate Lawyer”

* Complexities come w/ representing an organization rather than an individual
* First, Organization is an abstraction – client is a corporate entity rather than any individual acting on its behalf
  + Presumption of deference evaporates when the lawyer knows that a corporate official is violating a duty to the entity/acting illegally so as to threaten the corporation w/ serious harm
* Second, ethical rules were developed w/ litigators in mind – but the traditional frameworks don’t quite fit
* Third, many corporate lawyers not only represent the companies, but are employed by them
  + Can you preserve a sense of ID with a distinct professional legal culture while immersed in an organizational culture too?
  + Lawyers might even be doing stuff not really legal in nature
* Fourth, no common set of ethical provisions applying to lawyers engaged in cross-border practice, but the practice is increasingly global
* Also, corporate lawyers are well as gatekeepers who restrain misconduct or whistleblowers who report it – this is in tension w/ the notion that the lawyer’s sole obligation is to the client

**Organization as Client:**

***Rule 3.2-3***: Although a lawyer may receive instructions from an officer, employee, agent, or representative, the lawyer must act for the organization in exercising his or her duties.

* Interests of corporate constituents/stakeholders and organization will blur, shift, diverge and conflict
  + when that happens, be a corporate actor not a tool
  + Verify that the person giving instructions for the org is acting within their authority
  + You have an ongoing duty of due diligence to reveal conflicts of interest
  + When accepting joint retainers with related parties, adopt withdrawal procedures

**Ensuring Ethical Organizational Conduct:**

* Establish relationships across the organization
* Be a conduit for communication amongst mgmt., board, and affiliates
* Build consensus
* Develop and implement codes of conduct to avoid conflicts of interest
  + This helps ensure you’ve satisfied your own ethical obligations and also that the organization as a whole is meeting theirs
  + The best lawyers, if finances permit, have a real opportunity to steer the ship – i.e. being the conscience of the organization
* Implement governance procedures to formalize decision-making

**Corporate Dishonesty and Fraud:**

***Rule 3.2-8:*** When retained or employed by an organization engaged or likely to engage in dishonest, criminal, or fraudulent behaviour, a lawyer must report up the corporate ladder until action is taken

* Includes acts of omission – failure to disclose
* Duty to withdraw if advice is ultimately ignored or if inadequate action is taken
  + It’s especially onerous on in-house counsel b/c that means leaving your job entirely
  + In House lawyer now occupies a privileged position in the corridors of power
  + When you’re IHC, your role extends beyond providing legal services and litigating management, going into the heart of proper governance of organizations

### Canadian response

* LSUC amended their code and FLSC adopted the same language in the model code, w/o the inclusion of the ‘crime-fraud’ exception to confidentiality
* What role should securities regulators have in regulating lawyer conduct?

***CASE: Wilder v Ontario (Securities Commission) [ONCA 2001]***

|  |  |
| --- | --- |
| **F** | * Wilder a solicitor and partner in the cassels firm; YBM was a client of that firm & Wilder acted as YBM counsel re: filing preliminary prospectus w/ OSC   + Sent letter to OSC that in a material respect, were misleading or untrue ∴ acted contrary to public interest |
| **I** | 1. Jurisdiction of OSC to reprimand W, for alleged misconduct in connection w/ his representation of a client before the OSC 2. Jurisdiction of OSC to reprimand lawyers for their conduct as solicitors before the OSC? |
| **D** | Yes, OSC has the requisite jurisdiction as a matter of statutory construction and interpretation to reprimand Wilder for the alleged misconduct |
| **RE** | 1. Wilder   As a matter of statutory construction and interpretation, yes.   1. Solicitors generally  * Securities Act provides 3 methods of enforcement:   + Quasi-crim proceedings; application for declaration of non-compliance; holding its own administrative proceedings and making an order “in the public interest”     - Last option provided for a broad range of possible sanctions, including restrictions from participating in the market for securities * OSC’s exercise of jurisdiction of Wilder isn’t inconsistent w/ the role of the LS regulating the legal profession   + LS argued that allowing OSC to involve itself in regulating lawyer conduct would have a chilling effect on the ability of the public to obtain independent legal representation     - It’s not usurping the role of LS b/c the mandates of each body are different; both directed towards the public interest but the “public” imagined is different in each       * OSC’s objective was not to discipline lawyers for professional misconduct; rather, it’s to remedy a breach of its own act which violates the public interest in fair and efficient capital markets and to control its own processes * Members of the public engaged in activities in the capital markets and subject to the OSC’s authority need to be able to place unrestricted and unbounded confidence in their legal advisors   + BUT blanket preclusion preventing OSC from ever reprimanding lawyers is not necessary to protect S/C privilege, provided that OSC ensures on case-by-case basis that the substantive legal right of S/C privilege is respected * 2 important interests at stake where lawyer is threatened w/ OSC reprimand:   + lawyer’s entitlement to be able to make full answer and defence vs. client’s interest in confidentiality – the rules allowing lawyer to break confidence in order to defend himself against allegation of misconduct applies here   + Particular caution needed where action pursued against the client and their lawyer – in such cases it may not always be in the public interest to continue action against the lawyer |

### Privilege for Corporate Counsel

* How to manage divergent roles and responsibilities as both legal advisors and members of the mgmt. team?
  + Relied upon for both legal and business advice
* When does privilege arise?
  + “whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered.” – ***Pritchard v Ontario (Human Rights Commission)* [2004] SCC**
  + “When corporate counsel works in some other capacity, such as an executive or board secretary, information is not acquired in the course of the S/C relationship and no privilege attaches” – ***Potash Corp of Saskatchewan v Barton* [2002] Sask. QB**
* So, basically, legal advice provided by IHC still privileged, business stuff probs not – contra the Euro approach where IHC considered insufficiently independent to have privilege

# Access to Justice

* Nothing in the code which explicitly sets out a requirement to advance A2J but can be ‘teased out’ of the rules:
* 5.6-1 A lawyer must encourage public respect for and try to improve the administration of justice and rule 2.1-5: a lawyer should make legal services available in an efficient and convenient manner, etc.
* While we have this ethical obligation – there is no general right to counsel before tribunals or cts dealing with rights or benefits (BCAG v Christie)
* Ethical question of client selection inextricably linked w/ access to justice b/c allowing lawyers to choose for themselves who to represent means that those w/ the least financial resources are likely to be w/o representation
* Best justice system in the world is dysfunctional if it can’t be accessed by people who need it
* 2 ways that the code tends to look at A2J:
  + encouraging respect for the administration of justice
    - basic commitment to the concept of equal justice for all w/in an open, ordered, and impartial system
    - Constant efforts must be made to improve the administration of justice and ∴ to maintain public respect for it
      * Does this impose any concrete obligations for lawyers? What would constitute a violation from this?

OR

* + pro bono:
    - It’s in keeping with the best traditions to provide services pro bono or low bono. LS encourages members to do so.
      * Is this effective, given the right lawyers have to decline to represent someone? What would a violation of this rule look like?

## What is the access to justice problem?

Making a number of important assumptions when stating there is an A2J problem:

* 1. Accessing the justice system is important – that individuals need to appear before cts and admin tribunals to ensure their rights are respected and protected by other individuals and the state
  2. In order to access the system effectively, individuals need or could benefit from the assistance of legal counsel
  3. Lawyers are not accessible to everyone – they cost more than at least some people can afford

∴ the problem is that there are individuals in society that need a lawyer to protect their legal rights but who cannot afford one.

## Solving the a2J problem

**Brent Cotter: “Thoughts on a Coordinated and Comprehensive Approach to Access to Justice in Canada”**

1. Identifying the Problem:

Access to Justice = access to **knowledge, resources, or services** as needed, to address the individual’s particular circumstances. This will be across a spectrum from full scale legal representation to just providing information

1. 5 Assumptions:
2. not only justice but **access** to it is fundamental to how citizens live their lives in a respectful society governed by the rule of law
3. lack of A2J undermines our society and our confidence in tis essential fairness and justness, undermining our confidence in the ROFL itself
4. Ensuring A2J gets harder every day
5. No single person can solve the A2J problem but every single person has a responsibility to contribute to the solution, even when these solutions might be uncomfortable for us
6. Each of us associated with law has been given an opportunity and a ‘trust’ in relation to the justice system and we have an obligation to preserve and strengthen A2J as part of that trust.
7. Roles and Responsibilities of the ‘Legal Actors’ Involved:
8. **Legal education**

* Need to cultivate a greater public service orientation
  + Teach about the importance of A2J through law school courses from the beginning
    - In some ways, legal ed disguises A2J crisis by assuming access to justice
      * Don’t learn:
        + Who/what/where of parties
        + That 2% of cases form 100% of caselaw
  + Lack of clinical/experiential learning
  + Lack of ADR training
  + Lack of business/client service training

---

* + Mandate some kind of structured public service during law school
  + Put a greater emphasis on service: teach law less for its own sake and more as a set of tools to enable those who study it to make use of that learning to solve people’s problems
  + Start thinking of the ways that laws can be changed to facilitate A2J (e.g. mandating more early ADR) with concurrent assurance that legal education will be responsive (putting someone in law faculties to teach specifically about ADR)
  + Attract candidates for law school at least in part on the basis of their genuine inclination toward service and in their belief in and desire to foster A2J

1. **Lawyers and the legal profession**

* Those of us who make our living through the justice system and to whom a certain authority and public trust is granted in relation to the justice system, owe it to that system to help it when it’s struggling
  + Each lawyer should be req’d to provide a modest portion of our time or money’s worth of time to support a pro bono program
  + Contemplate a fund’l redesign of the ways in which we deliver legal services – not lawyer-centric conceptions
    - ∴ must contemplate the ways in which suitably qualified people who are not lawyers can deliver certain legal services competently and at a lower cost
    - If we don’t do this for ourselves, someone else is going to restructure us and it’s not going to be better than what we would have come up with.
* Few lawyers do pro bono work – 10-15%
* Resistance to change business model
* ABS, value-billing, unbundled services.
  + Much of the resistance to changing business model is the matrix of ethical requirements which make it hard to offer services in an alternative way
* Non-lawyer service providers
* Not a lot of effort to meaningfully change from within – focus on more legal aid $ as total solution
* Monopoly as disincentivizing reform

1. **The Judiciary**:

* Court processes and the explanation of these processes can be simplified; procedural fairness is important but mostly litigants just want timely, inexpensive, and accessible processes to resolve their problems and procedural perfection isn’t really important to them
* Be open to dispute resolution processes that are not focused on the legal framework of the dispute and more focused on addressing the interests of the parties
  + May mean we use judges less and other DR professionals more in resolving certain conflicts
* Judges should be mindful in the exercise of their authority to order that certain parties get gov’t-funded assistance/representation b/c that will be more costly than funding other bits of A2J (i.e. judges should do a CBA when thinking about whether to order gov’t funded representation)
* Reconsider the role of the judge in disputes involving unrepresented litigants

1. **Governments:**

* Greater funding is needed: the provision of essential legal services is a gov’t responsibility and the delivery of core services shouldn’t depend on donations
  + Gov’t should fund legal information and also court-based services that can assist unrepresented litigants in the basic ways and explanation of court processes
* Make a real commitments to the crafting of laws and procedures in clear, simple, and understandable ways
* Gov’ts should develop policy screen as a means of assessing whether any particular policy, law or admin practice facilitates or impedes access to justice for citizens – laws that would increase impediments to justice would have to make special justification

### What the profession as a whole needs to do to foster A2J

#### BC (AG) v Christie [2007] SCC

|  |  |
| --- | --- |
| **F** | * Christie provided pro and lo bono legal services and his practice started going under when new provincial legal services tax introduced * B/c his clients didn’t pay him, he wasn’t able to meet his tax obligations and so the gov’t seized funds from his bank acct * Christie brought const’l challenge to the tax |
| **I** | Christie’s claim is for effective access to the courts, which he says necessitates legal services – i.e. a particular type of access to justice: access aided by a lawyer where rights and obligations are at stake before a court or tribunal |
| **D** | Appeal allowed – no general right |
| **RA** | Does not foreclose the possibility that a right to counsel may be recognized in specific and varied situations but there is no general const’l right to counsel in proceedings before courts and tribunals dealing with rights and obligations. |
| **RE** | * Argued (pursuant to ***BCGEU***) that a tax, like a picket on a courthouse, prevents people from accessing courts ∴ it also violates the right to access the cts and justice   + No, the right affirmed in BCGEU Is not absolute; the leg’re has the power to pass laws in relation to the administration of justice in the province under s. 92(14) which implies the power of the province to impose at least some conditions on how and when people have a right to access the cts ∴ not every limit can be automatically unconstitutional * Argued that access to have a lawyer where individual rights are being decided before a ct is part of ROFL:   + No; the const’l text, the jurisprudence, and the hx of the concept does not support the respondent’s contention that there is a broad general right to legal counsel as an aspect of or precondition to ROFL * Charter text provides right to legal services in a specific situation: 10(b) says you’re to have counsel if you’re arrested or detained. If there was a general constitutional right to legal access, this specific reference would be redundant |

### What the Gov’t needs to do

Clear that society as a whole has accepted that we need to close the A2J gap but the question is how and whether we’ve done so sufficiently.

**Public Commission on Legal Aid in BC:**

Seven overarching findings:

1. Legal aid is failing needy individuals and families, the justice system, and communities
2. Legal info is not an adequate substitute for legal assistance and representation
3. Timing of accessing legal aid is key
4. There is a broad consensus concerning the need for innovative, client-focused legal aid services
5. Steps must be taken to meet legal aid needs in rural communities
6. More people should be eligible for legal aid
7. Legal aid should be fully funded as an essential public service

Specific issues:

* Legal aid is necessary in criminal cases because people’s liberty is at stake; >80% of crim cases that are set for trial are resolved before trial but it’s often impossible to expedite trials or to resolve matters w/o having a trial when unrepresented litigants are involved
* Child protection
* Involuntary mental health commitment
* Refugees
* Family law
* Poverty law matters: e.g. debt, access to social assistance and housing; worker’s comp; pension; other social welfare benefits

Nine recommendations:

1. Recognize legal aid as an essential public service: *Legal Services Society Act* should be amended to include a statement clearly recognizing this and entitling all individuals to legal aid where they have a legal problem that puts into jeopardy their or their family’s security (liberty, health, employment, housing, basic necessities) and they have no meaningful ability to pay
2. Develop a new approach to define core services and priorities: merging the current legal categories (family law, criminal law) approach with one that recognizes the fundamental interests of the least advantaged clients
3. Modernise and expand financial eligibility:
   1. Financial eligibility criteria should be modified so that more needy individuals qualify for legal aid – should be linked to a generally accepted measure of poverty
   2. Legal aid should be made available to the working poor through a sliding scale contribution system
   3. Basic legal aid services – like info and limited advice should available to all residents of B but only to the extent that (a) and (b) are already met
4. Establish regional legal aid centres and modernise service delivery: based on evidence-based, best practices
   1. Establishment of legal aid centres across the province to be a hub where all core services will be delivered in order to facilitliate early intervention in resolving legal problems
   2. Mobile outreach centres
   3. Team approach to delivery of legal aid services w/ greater emphasis on the role of community advocates
   4. Gradual expansion of the role of duty counsel and staff lawyers where necessary
   5. Greater integration of legal services with other support services needed to meet clients’ needs in a more holistic manner
   6. Enhanced case management of large crim cases and other circs, where warranted
   7. Targeted strategies to meet the needs of under-served communities
   8. Re-establishment of law-line
   9. Cautious expansion of information technology in delivering legal aid services, while bearing in mind the barriers to access such services for disadvantaged individuals
5. Expand public engagement and political dialogue
6. Increase long-term, stable funding: provincial and federal gov’ts must increase funding for legal aid and provide this through a stable, multi-year granting process
7. Legal aid system should be proactive, dynamic, and strategic: requires enhanced research, policy development, monitoring, and evaluation capacities
8. Greater collaboration between public and private legal aid service providers
9. Provide more support to legal aid providers: increased training and professional development opportunities, increased informational resources, quality assurance mechanism, ensuring sufficient remuneration

**“Pay or Play for A2J” – Maclaren’s proposal:**

* In exchange for monopoly lawyers need to contribute to public good
* Should either pay an additional $300 in fees OR volunteer 1 or more hours of pro bono service
* Only 10-15% of lawyers do pro bono service
* Should be a required ethical or professional duty for lawyers
* Notes that lawyers should not have to bear total cost of legal aid underfunding
* Makes them better advocates – keeps lawyers connected to what the average person w/ a legal problem actually looks like

## diversity

Rules:

* 6.3-3  A lawyer must not sexually harass any person.
* 6.3-4  A lawyer must not engage in any other form of harassment of any person.
* 6.3-5  A lawyer must not discriminate against any person.

Why does inclusivity matter?

* Pipeline: law is a pipeline of social mobility – politics; corporate positions; judiciary; economic success
  + If certain people don’t have access to these bits, then other areas of society will suffer from lack of inclusivity
* Gateway: Lawyers determine what arguments/causes are pursued; who gets their day in court and on what grounds
  + Those cases change the fundamental social fabric
* Public confidence; Rule of law; Fairness; Other

Areas where BC legal profession is underinclusive:

* Visible minority lawyers:
  + Problem of advancing to leadership in the legal profession
  + Conscious and systemic bias
* Suggested strategies:
  + Make evaluation criteria more objective/specific
    - Conducts client interviews with minimal supervision vs. “shows initiative”
  + Have all evaluations done by someone with cognitive bias training
  + More objective work assignment processes
  + Create more flexible work arrangements –recognizing intersecting pressures
  + Promoting mentoring and sponsoring
  + Other?

Underrepresentation of Indigenous Lawyers:

* Indigenous lawyers represent only 1.5 percent of the profession; Indigenous peoples represent 4.6 percent of the total population in BC.
* % of Indigenous lawyers did not increase from 1996 to 2006
* Issues may be related to social and economic conditions that may limit access to university education for Indigenous peoples
* Indigenous lawyers have spoken to the Law Society about the many systemic barriers they face, including racism and isolation and lack of mentors, role models and access to networks
* Incarceration rate for indigenous adults in Canada approx. 10 times higher than the incarceration rate of non-Indigenous adults. (source)
* TRC Report: causes include legacy of residential schools, systemic bias in legal system, and mandatory minimum sentences (source)

Women lawyers:

* Disproportionate retention issues – they leave private practice to join more flexible work arrangements

Possible causes of attrition:

* Hidden bias, stereotypes and assumptions about women and mothers
* Informal practices such as random free market and “Hey, you” work assignment systems (which allow partners to distribute work to those they know best or feel most comfortable with
* Conflict between 24/7 professional expectations and cultural norms that burden women with a disproportionate share of family and personal responsibilities
* Lack of mentors and champions; and
* Lack of access to business development opportunities

Strategies:

* High level commitment to inclusivity and equality
* Flexible work structures
* Objective evaluation and work assignment systems
* Meaningful work assignment
* Transparent partnership requirements/criteria
* Mentorship and support
* Business development opportunities

Maybe the problem is with the way we’re structuring and conceptualizing “success” as being a partner in the law firm…The hierarchal structure can’t do anything *other* than exclude.