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# Overview/Introduction

## What are ethics; types of reasoning

* Study of morals, duties, values and virtues – our attempts to order human conduct towards the right and good
* **Professional ethics** – rules worked out by members of a profession to govern themselves
* **Deontological reasoning:** reasoning from rules
  + *Reasoning from religious rules, legal rules, group norms*
  + This reasoning is *non-consequentialist* – doesn’t matter what the consequence is/are
* **Teleological reasoning:** Reasoning from consequences*:*
  + - Consideration of harm caused
    - Weighing of competing harms
      * E.g. “I think the harm caused by keeping this secret would be worse than telling, so I will tell it even though it will cause negative consequences”
* **Ontological reasoning:** reasoning from virtue or character
  + - Decision-making motivated by desire to be a good person
    - Ideals of conduct and character that you aspire to; determine which actions to take based on those ideals
    - May conflict; e.g. honesty, loyalty, privacy, equality
* **Role Morality**
  + Ethical rules or norms of the role occupied
    - Lawyers are governed by additional and separate duties than the average person (e.g. confidentiality)
    - Is confidentiality a rule, a good end, or a virtue?
    - Legal ethics is a mixture of all three – rules, virtues, and consequences
    - The requirements of role morality may conflict with personal morality, or they may interact/require input from both

## **Tanovic Article**: Ethical Code for Law Students

* Why have an ethical code of conduct for law students?
  + **1) Gap between university code of conduct** (usually involving academic misconduct, maybe residence/campus behaviour) **and what it means to be an ethical law student** (where there should be more responsibilities)
    - University discipline processes/codes inadequate:
      * Ethical requirement for lawyers to provide pro bono services should be applied to law students
      * Cultural competence – have skills to represent clients from diverse backgrounds and communities (not required by uni codes but should be required for law students)
      * Univ code of conduct usually only regulates only on-campus activities; do not regulate online or off campus activities – law student code of conduct should cover all activities
  + **2) Use as a teaching tool to teach students what it means to be an ethical lawyer once they are called**
    - Entering law school is like entering the legal profession – it is artificial to think of law school as anything but entry into the profession (almost all students graduate and are called)
    - So the ethical requirements for lawyers should apply to students as well
* How would this code of conduct be upheld?
  + Through the law school and also the general university to create/maintain code and set out discipline
* Why haven’t we created such a code already?
  + Social conditioning already does a good job of it – we pick up on the values of the profession pretty quickly and social pressure constrains us sufficiently already
  + Unnecessary to impose a code on students not intending to become lawyers; we are not really that close to being lawyers
  + Takes resources for a purpose that is not really that necessary
  + Practically, there may be better ways to achieve the goals he has than a code of conduct (e.g. having an ethics class)
* **Example of student dishonesty:**
  + U of T example: students lie about their 1L December exam mark grades for 1L OCI’s
    - Penalty – they were given an “academic dishonesty” flag on their transcript for 3 years
    - Class discussion regarding lying in academic contexts – what is the right form of punishment

# The Lawyer’s Role – Traditional and New Approaches

## As a Resolute Advocate - Woolley

* **Resolute advocacy is a morally legitimate role for a lawyer**
  + Resolute advocacy is the right approach because the law, in and of itself, is worthy of our respect and attention
* **Law’s key function is to resolve disagreement through advocacy on each side – nobody should get in the way of that (lawyer should not get in client’s way)**
  + Any action required by a lawyer’s role is also morally justified
* **Two features**:
  + **Places decision**-making about what is to be done in a legal representation with the client – lawyer acts to facilitate client’s wishes
  + **Requires the lawyer to interpret and work through the law to achieve the client’s goals**
* Arguments against lawyer as resolute advocate she rejects:
  + **Personal Morality Objection**: if your personal morality strongly conflicts with legal morality, personal morality should take precedence
    - **Rejected because:**
      * Places too much trust on lawyers’ morality and little trust on the legal system
      * Does not account for the possibility of moral disagreement between people
      * Does not give credit to possibility that law is a compromise on how different people can live together, so might be more legitimate than an individual’s moral commitments
      * Goes against rule of law
  + **Morality-of-Law Objection:** lawyers should take action to promote justice, not use tricks to get the best result for clients
    - Justice = the correct resolution of legal disputes or problems in a fair, responsible, and non-discriminatory manner
    - **Rejected because**
      * Can cause serious moral conflicts for a lawyers between doing his duty to the client vs getting the right legal result
      * These decisions should be given to the client, not the lawyer

#### See also: R v Neil (Duty of Loyalty) – resolute advocate

In that case, a conflict of interest arose between two firms. The court considered the duty of loyalty in finding a conflict of interest.

**Court identifies “zealous representation” – the duty of commitment to a client’s cause as one of the aspects of the duty of loyalty** (note contrast with BC Code which requires “resolute advocacy”)

Also discusses fiduciary duty –see the judgment in conflicts section

## Non-resolute advocate: **David Luban**

* **Challenges the traditional justification given for the lawyer as a resolute advocate**
* **Lawyers are morally responsible for the results of their actions, and the advocacy system is not necessarily the best system** in all cases

Justifications for advocacy system (of the “Popperian” type – similar to Popper’s model of scientific dialectic of assertation and refutation) **which he rejects:**

* **Best way to get at the truth**
* Not necessarily in all cases (appellate context yes, other contexts no)
* **Problems:**
  + **Encourages deceptive tactics** in order to try to get best result for client
    - The reasoning is that the two sides will somehow ‘cancel out’ leaving the truth; no logical reason to think this will actually work that way; they may “simply pile up the confusion”
    - Particularly likely in cases involving things like mental health and experts
  + Can also **lead to motivation for procedural delays** such as SLAPP suits, intimidation tactics, procedural delays, etc.
    - Eg. **Dalkon Shield** case, causes miscarriages and sterilization of women by faulty inter-uterine device
      * In their defence tactics was the ‘dirty questions’ list where they asked women inappropriately sexual questions to intimidate them into dropping the suits
    - Basically, you can’t support the adversary system on the basis of its truth-finding function when it encourages behaviour designed to ensure that the truth never comes out
* **Ethical Division of Labour**
* This argument goes that lawyers occupy a special position in society and this justifies them acting in ways that in other contexts might seem unethical
  + “the other side had a lawyer too”, so even though your side might act somewhat badly, it is all fair game in the legal sphere
  + “checks and balances theory”
* He **rejects this justification because it only covers a small number of evenly-matched cases**
  + Does not cover cases where **one party is legally weaker**
  + Or where counsel advises a corporation to fire employees in order to get federal authorities to approve a merger – this is not justified based on equally matched counsel
  + **There are checks and balances in the system**, but the attorney as adversary will actively be trying to get around them, which undermines the system
* Addresses two other arguments:
  + Traditional lawyer-client relation is an intrinsic moral good
  + That the adversary adjudication system is a valuable tradition that we consent to and is integral to our social fabric
  + These are both bad arguments

## Sustainable Professionalism: alternative to advocate - Trevor CW Farrow

* Two competing modes of professionalism: resolute advocate or working for justice
* **He thinks the ‘justice-seeking ethic’, or alternative model, best fits the latest trends**
* He proposes **sustainability** as the new ideal model for lawyer ethics
  + **In terms of being practically useable**
  + **Lawyer should try to balance all interests inherent in their role – public, client, lawyer, justice**
* **Balancing**
  + **Client interests**
    - Still places importance on client interests, however, we must consider the other interests at stake as informing how best to act within the context of clients needs
  + **Lawyer interests**
    - Numerous interests engaged
      * Want to get paid: so model must take into account the desire to make a fair living
      * Want to have full life: so should expect to have balance of time between home and work
    - Celebrate the diversity and multiplicity of the bar, encourage more voices to be heard
    - Should have space to pursue just causes
  + **Public interest**
    - Many interests engaged,

# Self-governance and its limits

## Characteristics: Professional Self-Regulation

**Characteristics of Legal Profession**

* Qualification
* Admission
* Education
* Self regulation
  + By statute
* Codes of ethics
* Monopoly over the provision of legal services
  + This raises some ethical issues, particularly around access to justice
    - Limited supply drives prices up and some areas lack real access
    - Until recently, number of law school spots did not change since the 70s; this has changed as TRU and Lakehead opened programs, as well as the addition of international schools teaching Canadian law
* Also subject to market and other laws

**Regulation of Lawyer Conduct**

* Self-regulation primarily
* Suits against lawyers for malpractice or breach of fiduciary duties
* Criminal prosecutions for fraud
* Cultural practices and norms of particular firms or communities and market standards

### Arguments in Defence of Self-regulation

**1) Historical:** draws on the alleged connection between the original law guilds in England, which grew independently from government – the long history of independence in the public interest

* Links the **maintenance of an independent and self-regulating profession with the protection of individual rights and liberties from the state** (**rule of law**)
* ***Canada (AG) v Law Society of BC: (Estey J)***: “independence of the bar from the state…is one of the hallmarks of a free society…regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense…
  + “The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of members of the Bar…”
* ***Law Society of Manitoba v Savino*** – example of courts accepting this argument as underlying basis for self-regulation
  + **“**No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body”
* **Arguments against:**
  + The underlying asymmetry about the appropriateness of lawyer conduct is a product of the lawyer’s monopoly over legal knowledge
  + Experience shows effective government or third party regulation in many fields does not depend on the regulator possessing the same knowledge as the regulated

**2) Forms part of a social contract with the state**

* This is just an attempt to provide an ideological basis for the fact that a monopoly exists

**3) More efficient and cost effective than external regulation**

* Cost of admin and enforcement are covered by members of the profession rather than taxpayers
* However, licensing schemes limit market choices and the ultimate cost to the consumer of allowing a self-regulating and limiting monopoly is probably higher

**4) Protection of the public**

* Ensure quality of service
* Irreparable harm from poor service
* Note that these are justifications for regulation, but not necessarily self-regulation by lawyers themselves

**5) Promote confidence in the legal system**

* Knowing it is independent/self-regulating promotes confidence
* Contrast with corrupt systems, where the system seem stacked, lawyers are not independent or are threatened into certain behaviour, and there is little public confidence in the efficacy/legitimacy of the system

**6) Ensure market is not over- or under- supplied**

## Critical Discussion of Self-regulation (Devlin and Heffernan)

Many European countries have shifted away from self-regulated models; there is also some pressure in Canada to reform

**Current model:**

* Legal services provided by lawyers to consumers
  + If consumers are dissatisfied with the conduct of the lawyer (not living up to standards of the profession), they can make a complaint to the law society
  + Law society has role of both:
    - Creating rules
    - Enforcing rules, disciplining lawyers
  + Consumers also have the option to sue in court (professional negligence)
    - Claim on professional liability insurance of lawyers
  + Consumers can also go to police if conduct seemed illegal

**England and Wales**

* Reforms have provided an interesting example; Law Society has restructure its complaints handling procedures, making it more independent from the rest of the Law Society
* Most recent round of reform would establish a Legal Services Board to oversee regulation of legal practitioners and would separate complaints handling process completely from the law society

**Scotland**

* Similar reforms providing for independent regulatory agency with lay representation which would take over some authority from Law Society

**Other Jurisdictions**

* Ireland: reforms providing **more lay involvement** in professional regulatory bodies
  + Creation of legal ombudsperson to review claims of those dissatisfied with the professional bodies’ handling of complaints
* **NZ:** reforms requiring LS to split representative and regulatory functions
  + Already have Lay Observer who reviews the handling of complaints by the LS
* **South Africa**: debate about more independent national regulatory body

### Arguments Pro and Con self-Regulation (Devlin & Heffernan)

* **Pro:**
  + **Independence of the bar**
    - Unqualified social good that should be protected
    - Independence requires self-governance
      * ***Jabour*** (Estey): “Independence of the bar…is one of the hallmarks of a free society…regulation..(see above)
      * ***Pearlman*** (Iacobucci): “Regulation of professional practice through the creation and operation of a licensing system…is a matter of public policy…where the legislature sees fit to delegate authority to professional bodies…it must respect the self-governign status of these bodies”
  + **Independence of the judiciary**
  + **Democracy, freedom, rule of law**
  + **Public confidence in legal profession**
  + **Tradition**
  + **Expertise**
  + **Efficiency**
  + Higher standards
  + Commitment to public good
* **Against:**
  + **Conflict of interest**
  + **Monopoly/market control**
  + **Independence? Really…and from whom?**
  + **Undemocratic**
  + **Protection Racket**
  + **Reactive and Inefficient Institutional Culture**
  + **Psychological critique**
    - **“bid up the value of their intellectual capital”**
  + **Public relations exercise**

## Alternative models: qualified self-regulation

* **Keep current system, but add an ‘ombudsperson’ who sits separately from the law society and acts as an independent regulatory body** 
  + - This would address the issue of the law society being the final say
      * Law society can appeal, but you as a client cannot appeal your case –the law society takes care of it for you
      * Gives client more active role in the case against the lawyer, provides more human contact
    - **Could provide additional support and give more confidence in the system by making it look less ‘inside job’-is**
  + Issues with this model:
    - **Adds another layer of bureaucracy** without necessarily gaining someone independent
    - **Ensuring independence is difficult** – choosing candidates without political partisanship etc. is problematic
    - **Qualifications**: who do we choose for ombudsperson? Someone with legal training or no knowledge of legal system? Both have issues
* **Remove power of discipline from law society**
  + **LS will still make code of professional conduct, other rules**
  + If consumer has a complaint, **they will complain to an outside, objective agency**
    - This agency will investigate and discipline
  + **Pros/cons**
    - May give credibility
    - May also make it look like lawyers are ‘ungovernable’ or something similar

# Composition and Challenges

## Women in the Profession

**Exodus of Women from the Profession**

* Of lawyers called in the past 20 years, significantly more men are still practicing compared to women
  + Distinction is even more significant in private practice compared to firms
* **Key reasons identified for departure of women**
  + Work environment
  + Dissatisfaction with practice of law: adversarial culture, hierarchical, not collaborative
  + Lack of mentorship & support
  + Facing sexual discrimination (e.g. lack of mentorship for women)

### Gender and Race in the Construction of Legal Professionalism: Constance Backhouse

**Reflects on professionalism as a tool of power and exclusion**; frequently resorted to as a way to exclude based on gender, race, class, and religion

**Historically:**

* LSUC established entrance exams with goal of **screening out candidates who did not possess ‘gentlemanly’ qualities** and required training in the classics, which was primarily restricted to white boys of means
* **Women:**
  + **Early** **attempts** by women to access the profession were met with stonewalling, criticism, and accusations that admission of women would undermine the functionality and credibility of the system and society
  + First judges also harassed – doubts about women’s ability to be judges because of emotionality etc., Justices refusing to work with Wilson
* **Aboriginal:**
  + Barriers were just as bad as for women
  + Aboriginal student Paull has experience working at a law office and seeks admission to the bar, but was denied based on lack of Latin knowledge, eventually became advocate but never lawyer
  + Provision enacted in 1951 that if Aboriginal person became a lawyer, they were no longer aboriginal officially
* **Black**
  + Madam Justice Corinne Sparks subjected to critique based on bias towards black people despite no evidence to support it

**Costs of a white male legal profession:**

* Restricts the ability of lawyers to properly represent the diverse clients and backgrounds and perspectives
  + Especially in Aboriginal communities – difficulty with white male lawyers attempting to understand culture and traditions
* Encourages racist and sexist arguments, with less likelihood of them being called out
* Results in biased judgements by courts with homogenous make-up and upbringings

### Canadian Bar Association: business arguments for retaining women

**“How to retain top female talent”**

* **Argues that retaining women in the profession is beneficial from a financial/business point of view**
  + Statistically, **half of the pool from law school is women,** so if more are leaving you are losing valuable talent
    - Women are often more successful in school and work
  + Studies show **boards make better decisions with equal representation**
    - **Different perspectives and opinions, also potentially more appeal for female clients**
* **Why women leave**
  + Dissatisfied with culture, lifestyle
  + Lack of mentors
  + Exclusion from informal networks, golf games, etc.
  + Motherhood and lifestyle
  + Sexual harassment and discrimination
* **How to keep women at a firm**
  + Provide flexible work options, more control over workflow
  + Exit interviews to find out what is going wrong
  + Get input from employees regarding culture and complaints
  + Functional internal sexual harassment procedure

### Sexual Harassment

#### Benchers’ Bulletin, “Milestones for BC women in law”, “We’ve come a long way, baby… or have we?”, “Sexual harassment, not yet a relic” (p S-67)

* Still a serious problem, not reported well but still an issue for women in the workplace

#### Nova Scotia Barristers’ Society, It will be Our Little Secret (p S-52)

* Idea that women should “laugh it off” when sexually harassed in the workplace should not be encouraged by society
* Need to change the law firm environment and step up to defend colleagues and discourage these issues being hidden

## Substance Abuse

### High-functioning Alcoholics: Lawyers are not Above the “Bar” – Sarah Benton

* **High functioning alcoholics are able to maintain professional or personal life while drinking alcoholically**; probably between 75-90% of alcoholics are high-functioning
* International Journal of Law and Psychiatry: 18% of lawyers practicing 2-20 years, and 25% for 20+ years of practice
* **Characteristics of HFA:**
  + Denial mechanisms
  + Seem to function well
  + Compartmentalize
  + Often drink with others

### Guest Speaker – LAP (Lawyers’ Assistance Program) – Doug Eastwood

* **Preventing substance issues:**
  + Importance of sustainable practice
  + Duty to take care of self so that you are able to fulfil your duty to serve clients
  + Becoming lost in the results can lead to unethical behaviour and unhealthiness
  + His observation is that consistently among his clients they were unaware why they became lawyers and not sure what their values really were

### Lawyers Assistance Program BC

#### Some tips on Warning Signs of Addiction

**Attendance:**

• Comes to work late and/or leaves early on a regular basis.

• Misses court.

• Frequently returns late or fails to return from lunch.

• Misses appointments and scheduled meetings.

• Frequently off work ill or unexplained absences, especially around weekends or holidays.

**Performance:**

• Procrastinates; misses deadlines.

• Failure to return phone calls or correspondence.

• Decrease in number of hours worked and/or billed over time.

• Overreacts to criticism; blames others.

• Erratic and variable performance or a noticeable deterioration of performance over time.

• Errors in judgment, memory lapses, confused thinking.

• Clients complain about performance/accessibility/communication.

• Sloppiness with clients' trust funds.

• Lack of organization, failure to complete necessary records.

• Appears under the influence and/or smells of alcohol in the office or during

• court appearances.

Behavior:

• Unable to get along with or withdraws from fellow lawyers and other staff.

• Deterioration of personal appearance and/or hygiene.

• Behavioural problems at social gatherings, even where professional decorum

• is expected.

• Tells lies, is dishonest or misleads others

• Finances in disarray, credit problems, tax problems, disorganization.

• Persistent health problems that are not being properly diagnosed or treated.

#### FAQ (Programs & Services)

**Are LAP services confidential?**

Absolutely. Each call we receive is confidential – we treat it as if it had solicitorclient privilege. We do not investigate or make inquiries about anyone, lest that inadvertently disseminates information. Confidentiality is a cornerstone of our program and has been since our inception in 1989.

**How can I get help for myself?**

Call us. We offer short term counseling, practical assistance, referrals, assessments, information and ongoing support. All our services are completely confidential.

**How can I get help for someone else?**

Once we receive two (2) independent calls/referrals about a person who is exhibiting behaviors that are causing concern to others, we approach the person.

Our approach involves presenting information (without identifying the source) to the individual, asking them what’s going on and offering assistance and/or information. This is all done in the strictest of confidence. We base our approach on empathy and compassion. We are non-disciplinary and respectful of each person. There is a lot of good will amongst members of the BC legal profession. And a lot of concern. LAP is not asking you to interfere in anyone’s life or to jeopardize anyone in any way.

We will not contribute in any way to gossip. We’ll provide the individual the opportunity to understand the impression they are making on others and offer information and assistance which can be life saving.

**Are you connected to the Law Society?**

The Law Society collects an amount from each lawyer that is assessed specifically to fund our services. We account to them for those funds. We are entirely independent and all inquiries and interactions with us are strictly confidential from the Law Society.

**Are other resources available?**

Yes. LAP has relationships throughout the legal, mental health and recovery communities. Phone the office for more information, or visit the links section of this site.

**Who will counsel me?**

Trained and experienced LAP Staff will provide outreach, education and support. As well, experienced volunteers are available to help and provide ongoing support, as desired. We have worked through our own difficulties and have compassion for the individual in distress.

We are non-judgmental. We do not prejudge or pre-assess the person. We are concerned with observations of behaviours, conduct, and consequences. We work with individuals to help them come up with solutions that work for that individual.

**Are LAP services only for lawyers?**

The LAPBC is for all members of the legal community, including judges, students, staff and families.

### Mental Health also an issue for lawyers

Especially depression, anxiety

# Law Society of BC

***Legal Profession Act*** creates Law Society of BC

* Power to:
  + Set credential for membership
  + Discipline members up to and including disbarment
  + Make rules of conduct
* Done through elected lawyer benchers and appointed lay benchers
* Generally has jurisdiction over lawyers, but not exclusively (see Wilder)

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

* The **new BC code is based off a model code** proposed for law societies across Canada
* There is a tension regarding whether the code should include “more aspirational things”
  + E.g. historical code – “in all cases, a lawyer shall be a gentleman”
  + Should it be aspirational, encouraging lawyers to be their best
  + Also arguments that a list of very specific rules may make it seem as if all other behaviour is acceptable

**The Benchers (BC)**

* 25 lawyers elected for two year terms
* Geographic distribution based on counties
* Four term maximum – volunteers
* Fewer women, visible minorities, first nations, young lawyers; solicitors
* 6 lay benchers appointed by the province

**Insurance Fund**

* Fund supported by lawyers which provides compensation to people who have been defrauded or otherwise wronged by lawyers
  + E.g. person steals a lot of client’s money (Martin Weirick?); a levy was placed on lawyers for a few years to raise enough money to compensate all of the victims
* Also regular insurance that compensates negligence on the part of lawyers causing losses that doesn’t meet the standard of misconduct

## Admission to practice

### Law Society Fitness Requirements

* Panel for discipline & credentials is now made up of both benchers and lawyers who are not benchers who apply to become involved
* Appeal can be both internal and go up to the BCCA

**Basic question is whether, at the time of admission, the applicant is qualified**

**Factors used in considering the answer:**

#### 1. Respect for the rule of law

* Includes having a criminal conviction (even if unrelated – shows lack of respect for the law), having failed to comply with a court order, being found in contempt of court, being involved in bribery of public official, perjury, acts of dishonesty in relation to the administration of justice, etc.
* The report also, interestingly, includes participation in an organization that encourages violence…or lack of respect for the law…?

#### 2. Honesty

* Goes a bit beyond the ‘criminal conviction’ type of stuff, to other kinds of acts of dishonesty
* Includes professional or academic misconduct
  + Academic misconduct is the most frequent subject to appear under this heading
* Ontario case – applicant lied in his applications to law firms
  + Inflated grades, lied about scholarship eligibility, lied about acceptance into LLM program, about firm offers, etc., then lied about what he had done after being caught
  + This behaviour is considered sufficient to deny admission to the bar
  + He later reapplied for admission, and at that point the law society allowed him to be admitted to practice
  + **Lapse of time between dishonesty and application can sometimes be an important factor**

**Big factor in admission is whether they are found to be completely candid and honest in the application and hearing or whether they try to cover it up**

* People who are denied almost always were found to have been lying or trying to cover up their indiscretions at or before the hearing
* The law society really seems to want remorse and contrition

#### 3. Governability

* Whether you have been subjected to professional regulation in a different discipline or jurisdiction
  + E.g. have you been disciplined in another province?
  + They want to know whether you have accepted your penalty and the authority of the regulator
    - If you were bringing unmeritorious appeals, being uncooperative, or disobeying the penalty then it is relevant
* Also will consider whether you accept the processes subjected on you and you accept you were wrong **(remorse is often a focus)**

#### 4. Financial responsibility

* Questions asked about filing for bankruptcy, etc.
  + These can be quite broad
* Federation suggests: evidence of financial problems, neglect of financial responsibilities such as failure to pay child support, etc.
* These things ‘raise questions’ – do not mean necessarily you won’t be admitted but might trigger investigation or credentials hearing
* Too broad? Should the law society be making a distinction between someone guilty of deliberate financial mismanagement or someone who is an honest but unfortunate debtor?
* Character references
  + Generally at the hearings the applicant is required to provide letters of reference attesting to their good character
  + Can be generally everyone who knows them
  + One interesting thing is that we don’t usually ask for bad character references
    - Worth considering whether it produces a lopsided view of the candidate
    - Witnesses might be called to testify on the circumstances of the misconduct, but the law society will not put out a general call looking for insight into someone’s character

#### 5. Mental Health: Ability to screen restricted

##### Gichuru v Law Society of British Columbia: cannot discriminate based on mental illness; question modified

**Background**

* LSBC form used in processing articling admission applications included question:
  + Have you ever been treated for schizophrenia, paranoia, or a mood disorder described as a major effective illness, bipolar mood disorder, or manic depressive illness?
* Gichuru applied for temporary articles and said he had a history of depression, provides letter from doctor stating he took antidepressants and his condition was stable
  + Granted temp articles with condition to provide update when applying for permanent articles
* Applies for permanent articles, said he no longer had depression, provides letter from doctor stating that; given admission with condition that he provide update report before bar admission
  + He is terminated from articles due to his personality problems, later finds new articles, has to go through various steps getting doctors notes, etc. for law society
* **Files human rights complaint against the LSBC** for discriminating against him with regards to his membership on basis of mental disability
  + **Process** followed by LSBC discriminated against him
* Tribunal finds discrimination

**Judgment (BCHRT)**

* The question does systematically discriminate against those with mental illnesses: the Question and the process that follows an affirmative answer create a barrier that affects those with mental illnesses in a disproportionately negative way
* It cannot be justified based on its goals and purposes – it is not reasonably necessary to accomplish its goal

**[Current question]**

Schedule A - Medical Fitness

4. Based on your personal history, your current circumstances or any professional opinion or advice you have received, **do you have any existing condition that is reasonably likely to impair your ability to function** as an articled student?

### Mohan (or Re: Applicant 5): Cheating, denied admission (reversed)

**Facts:**

* Cheated on math exam in 1995 – tried to change answers afterwards and asking for more marks
  + He maintains it was a misunderstanding and he wasn’t asking for re-grading
  + He was suspended for a period of time due to the misconduct
  + (he was later allowed to apply to have it removed)
* Plagiarizes in law school, is again suspended and eventually returns to school
* Completes law degree and master’s of law
* Applies for admission to law society (articles)
  + They find out the thesis for his undergrad on file is significantly plagiarized through a freedom of information request by the law society

**Jurisprudential History:**

* **Credentials committee original admits him (2 to 1)**
  + Glowing **reference from his professor** and significant work in the field, plus
  + No real evidence either way - they sort of give him the benefit of the doubt since they can’t prove the dishonesty
  + Time lapse – 7 years since it happened
* **Benchers reverse the decision**
  + **Error of law:** the committee had not made a finding of credibility, which is critical to the determination of character
    - **Without** this finding the judgement is not valid
  + The applicant has the responsibility of proving his good character, and his explanation did not meet that standard
  + They do not buy the elaborate explanation: he did not discharge the onus of proof for good character
* **SCC has just reversed it again:**
  + Benchers said no finding of credibility, but there was an implicit finding that he was credible, so that should not have been reviewable
  + **Admitted**

#### Character screening (my notes)

* Protecting reputation of the legal profession & people’s trust in the system
* No real correlation evidenced between past misconduct and future misconduct
* Can be abused for discriminatory purposes
* So few people screen out, so little predictive power, that it’s basically pointless
* Being punished again for something they’ve already been punished for once

## Discipline Proceedings

**Three stages:**

### 1. Complaints & Investigation

(1,100 received annually)

* Relies mostly on complaints from **clients or other lawyers**
  + Issues with this: most lawyers unwilling to report misconduct as it disrupts collegiality; clients limited by information asymmetry and lack of knowledge about what justifies complaint
* **Initial assessment:** **complain assessed to ensure it is within Law Society jurisdiction**
  + Or, declared no jurisdiction (12% of complaints)
* **Investigation: More information and documents are gathered, interviews and audits may be conducted** (88% dealt with that way)
  + **Closed** – complain has no legal merit or can be resolved, can’t be proven, or not serious enough for action (81%)
  + **Sent to discipline committee** (16%)
    - Assessed for further action in cases where there is evidence of misconduct or breaches of rules
  + **Referred to practice standards** (3%)
    - Situation where they decide lawyer needs help getting practice in order
    - Work with lawyers who may have competency problems
* In general, relatively few complaints go forward and of those that do, very few lawyers are disbarred

### 2. Hearings

* **Adversarial hearings** conducted before a panel of the discipline or conduct committee
* Proceedings conducted by counsel for law society; burden of proof is borne by the law society who must provide clear and convincing evidence of misconduct
* Lawyer is **entitled to full disclosure from law society counsel**, and is compellable as a witness
* “**Judicial” or “quasi-judicial**” due to their potential to impact the lawyers livelihood

**Appeal**

* Findings can be appealed **by law society** to another body, standard of review is reasonableness
* Can go up to higher courts if necessary (BCCA)
* Can also be challenged under the Charter – section 7 applies but 11 does not
* Generally subject to review on reasonableness standard

### 3. Penalty/Sanction

**Purpose of a sanction is either the protection of the public or the profession’s reputation, and not punishment of the lawyer**

* Typically have **power to impose penalties ranging from a reprimand (fine, suspension, may or may not be public) to imposition of practice conditions, to disbarment**
  + May also be ordered to pay costs of the investigation
  + Incompetence
    - Could get remedial training, education, restrictions on practice or requirement for supervision by another lawyer
* **Considerations for determining penalty**
  + General reputation or character
  + Attitude towards discipline
  + Whether or not lawyer as made restitution
  + Whether situation was isolated or re-occurring
  + Lawyer’s prior discipline records
  + Need for deterrence
  + Lawyer’s mental state
  + Weight accorded to factors will vary depending on circumstances
* **Disbarment**
  + Infrequently imposed, usually in cases of
    - Deliberate flagrant or unlawful misconduct
    - Misappropriation of client funds
    - Fraud
    - Conviction of serious criminal offence
    - Cases of ungovernabiltiy
* **Suspensions**
  + Imposed for things often of an isolated nature, such as
    - Sexual harassment
    - Making false submissions to courts
    - Assisting clients in hiding assets
    - Lying to clients
    - Failing to account for retainers or disbursement payments
    - Falsifying documents

# Conduct Unbecoming

* ***Legal Professions Act***
  + 1…”conduct unbecoming a member of the Society” includes any matter, conduct, or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or the legal profession, or that tends to harm the standing of the profession

## Advertising

- There are mixed views in the legal profession on the question of lawyer advertising:

a) **Detracts from professionalism**

- Advocacy is a calling and advertising debases it

b) **Access to justice**

- It is in the public interest not to have an absolute ban

- Ban can become a barrier to entry if there are too many restrictions

c) **Free market**

- Necessary to allow young lawyers to get established

### BC Code of Conduct

***Chapter 4 of the BC Code of Conduct***

Content and format of marketing activities

4.2-5 Any marketing activity undertaken or authorized by a lawyer must not be:

(a) false,

(b) inaccurate,

(c) unverifiable,

(d) reasonably capable of misleading the recipient or intended recipient, or

(e) contrary to the best interests of the public.

***Rule 3.01(1) and (2) of the Federation of Law Societies of Canada Model Code of Professional Conduct:***

3.01 (1) A lawyer must make legal services available to the public efficiently and conveniently and, subject to rule 3.01(2) may offer legal services to a prospective client by any means

3.01(2) In offering legal services, a lawyer must not use means that:

(a) are false or misleading

(b) amount to coercion, duress, or harassment

(c) take advantage of a person who is vulnerable or who has suffered a traumatic experience and has not yet recovered

(d) otherwise bring the profession or the admin of justice into disrepute

**Advertising, Fee Sharing, and Solicitation**

3.02: Marketing

(1) a lawyer may market professional services, provided that the marketing is:

(a) demonstrably true, accurate and verifiable

(b) neither misleading, confusing, or deceptive, nor likely to mislead, confuse or deceive

(c) in the best interest of the public and consistent with a high standard of professionalism

3.02(2): Advertising of fees

A lawyer may advertise fees charged for services provided that:

(a) the advertising is reasonably precise as to services offered for each fee quoted

(b) advertising states whether other amounts, such as disbursements and taxes, will be charged in addition to the fee

(c) the lawyer strictly adheres to the advertised fee in every applicable case

### Law Society of British Columbia v Jabour: Broad power of the benchers to restrict advertising, example of bad ad

**🡪 Found LS had right to restrict free speech for purpose of lawyer advertising,**

**🡪 After this decision it was found by the SCC that broad advertising restrictions are a violation of the Charter*****(Rocket v Royal College of Dental Surgeons)* so the requirements were somewhat relaxed**

**Background**

* Jabour is a lawyer, found guilty of ‘conduct unbecoming’ by the LSBC for his law firm’s ads
  + Published four ads in newspapers reading:
    - Legal services at prices middle income families can afford…[list of services – buying a home, writing a will, accidents, landlord/tenant, family, incorporation, estates, court appearances]…Now it is available at moderate cost, with pre-set fees for many services
    - Simple will …$35
    - List of other stuff with prices
  + Also erected a large illuminated sign reading “north shore neighbourhood legal clinic”
* Challenges L ability to regulate advertising was challenged based on the federal competition legislation
* Challenge fails – powers of LS to regulate

**Judgment**

* **Definition of conduct unbecoming: *Legal Professions Act***
  + 1…”conduct unbecoming a member of the Society” includes any matter, conduct, or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or the legal profession, or that tends to harm the standing of the profession
* **Power of benchers has been interpreted broadly**
  + ***Prescott v Law Society of BC*** 
    - Benchers are the guardians of the proper moral standards of professional and ethical conduct
    - They are of good standing and their duty is important, so they should be given wide discretion
  + **Section 48(b) (ii) and (iii) suggests that Legislature’s intention was to vest broad powers in Benchers to prohibit any conduct that is contrary to interest of public or profession**
    - They have the power to determine whether the conduct was bad enough, and they fairly exercised that power
  + **After this decision it was found by the SCC that broad advertising restrictions are a violation of the Charter*****(Rocket v Royal College of Dental Surgeons)***
    - **Restrictions** on advertising were subsequently loosened though some remain

### EXAMPLES of potentially problematic advertising

* **Commentary on *BC Code* s4.2-5:**
  + **Will violate if:**
    - **(a) is calculated or likely to take advantage of the vulnerability, either physical or emotional, of the recipient**
    - **(b) is likely to create in the mind of the recipient or intended recipient an unjustified expectationabout the results that the lawyer can achieve, or**
    - **(c) otherwise brings thea dminsitration of justice into disrepute**
* **Commentary of model code rule 3.01/02**
  + **Examples of marketing which may contravene the rule:**
    - Stating an amount of money a lawyer has recovered for a client or referring to degree of success in past cases unless accompanied by statement that past results are not indicative of future results and amount will vary according to facts in individual cases
    - Suggesting qualitative superiority to other lawyers
    - Raising expectations unjustifiably
    - Suggesting or implying the lawyer is aggressive
    - Disparaging or demeaning other persons, groups, organizations, or institutions
    - Taking advantage of a vulnerable person or group
    - Using testimonials or endorsements that contain emotional appeals
* 3.03: Advertising nature of practice
  + (1) a lawyer must not advertise that the lawyer is a specialist in a specified filed unless the lawyer has been so certified by the society

Example of bad ads:

* **Heenan Blakie with Bastarache, suggesting he had some special insights into the judiciary = not ok**

**Note:**

**Few Law societies have actually disciplined for inappropriate advertisement**

## Solicitation of Business

### Law Society of Saskatchewan v Merchant (Law society hearing cttee 2000)

**Background**

* Members of the Merchant Law Group wrote letters to survivors of residential schools soliciting business when it became apparent that big cases might come out of the abuses at those schools
  + In the letter: “We believe the compensation we can achieve for you will be significant and you have nothing to lose. If we do not recover anything, you will pay nothing. If we recover, we receive a percentage…”, and included approx. estimates you could receive including sexual assault…$50,000, 75, or 150k…
  + Also included a copy of retainer agreement, which included the provision that the Law Group could decide not to pursue a claim after investigation they could withdraw, as could the client but would have to pay for services rendered
* Discipline complaint to Sask law society

**Conduct Unbecoming?**

* **First aspect:** **was the letter likely to create an unjustified expectation in the mind of the recipient about the results that the writer may achieve?**
  + The complainant testified these expectations were not created for her personally, though they seem to be suggestive
  + The amounts suggested are reasonable and presented as speculation
  + **Committee finds that the letter was not “likely” to create an unjustified expectation** about results
* **Second aspect: subsequent misleading correspondence with other aboriginal people**
  + **Guilty of conduct unbecoming** for subsequent correspondence
  + **Aspects** of these letters:
    - Disregards possibility that recipient may not have a sustainable cause of action
    - Gives impression that the process will be relatively simple and the recipient will have ‘nothing to lose’ (time, energy, emotional), also will have to pay if decide to withdraw before judgment
    - Things in the retainer seem to contradict the more readable letter in terms of arrangements and risks etc.
  + Even though no evidence anyone was actually misled, It is still guilty
* Third aspect: marketing activity in bad taste or offensive
  + **Mailing one letter is enough to constitute marketing activity**
  + **Guilty:** the letters are undignified offensive or in bad taste because:
    - Assume the recipient is First Nation
    - Assume recipient attended residential school
    - Assume many or most of persons meeting criteria 1 and 2 were likely to have been victims of cultural, physical, and/or sexual abuse
    - Based on these assumptions, suggests compensation might be significant

## Use of Media for Self-Promotion

* **Rule 6.06 of *Code of Conduct*** of the Law Society of Upper Canada: “Public Appearances and Public Statements”
  + **Public communications** about a client’s affairs should not be used for the purpose of publicizing the lawyer…and free from suggestion that the real purpose is self-promotion…”

### Stewart v Canadian Broadcasting Corp (1997 OJ)

**Background**

* Greenspan served as counsel during the sentencing and appeal for Stewart’s charge and conviction of criminal negligence causing death
* Ten years after acting as his lawyer, Greenspan acted as host and narrator in a televised law show (Scales of Justice) which revisited the crime, trial, and public fascination with the case
* Stewart was upset that Greenspan had participated and rekindled interest in the case, and brings claim against Greenspan for **breach of implied terms of contract and breach of fiduciary duty of loyalty**

**Judgment**

* MacDonald J:
  + **In context of public media attention at former client, lawyers must not engage in behaviour that is motivated by self-aggrandizement or promotion**
    - Greenspan’s decision to get involved in the show despite Stewart’s objections was motivated by self interest and not public education
    - He re-visited and undermined the future benefits and protections which he had provided to Stewart as his counsel, for personal gain
  + **Rule 6.06 of *Code of Conduct*** of the Law Society of Upper Canada: “Public Appearances and Public Statements”
    - **Public communications** about a client’s affairs should not be used for the purpose of publicizing the lawyer…and free from suggestion that the real purpose is self-promotion…”
* Ordered to pay $2.5k for distress and all profits he made from the program

# The Client Relationship (forming/ending)

## Choice of Client

#### BC Code 2.1-5(c)

“A lawyer should make legal services available to the public in an efficient and convenient manner that will command respect and confidence. A lawyer’s best advertisement is the establishment of a well-merited reputation for competence and trustworthiness.”

***Model Code: 3.01(1)***

* A lawyer must make legal services available to the public efficiently and conveniently…
* **Commentary: Right to decline representation** – A lawyer has a general right to decline a particular representation, but it is a right to be exercised prudently, particularly if the probable result would make it difficult for the person to obtain representation. Generally, lawyer should not exercise this right merely because the person has an unpopular case, power interest or allegations of misfeasance are involved, or because of lawyer’s private opinion of accused

### Acceptable to reject client if:

* **Competence (BC Code 3.1-2 commentary [ 6]: should decline to act if not competent)**
  + You have a duty to decline to help a client if you are truly not competent either in terms of knowledge of the area, time, or personal issues
* **Conflict of interest (BC Code 2.1-3; 3.4-1)**
* **Client already has continuing retainer with another lawyer**
* **Witness**
  + Lawyer realizes s/he may become a witness in the matter and thus you can no longer represent the client
* **Illegality (BC Code 5.1-2(e))**
  + If client wants help doing something illegal or will not follow your advice and will go do something illegal instead

(basically if you cannot perform your key duties – see “ethics in advising” section)

### Where client or cause is unpopular but lawyer can still reasonably represent, must consider (Proulx & Layton – crim context):

* Lawyer should hold a **sincere belief in the immorality of the representation**
* **Repugnance should relate to concerns intimately connected to the representation** at hand and not merely the personality of the client
* **Counsel should be slow to allow public opinion to shape her decision**
* Lawyer must **take into account importance of representation** for the client
* Further factor – **likelihood of client getting representation elsewhere**
* Lawyer’s private opinion about the guilt of the person should not constitute the basis of the decision
* **Client cannot be turned away based on ethically prohibited ground of discrim**ination
* While it is not ideal, it is ethically acceptable for a lawyer to refuse to take on certain types of representation (e.g. sexual assault)

### Two perspectives on client selection

**Moral non-accountability**

* Emphasis on the structural dimensions of a lawyer’s role, the adversary system and importance of legal representation for everyone in the system, it is the task of the judge to make a determination, etc
* Lawyer is seen as a neutral agent which can protect client interest without necessarily having regard to the morality of the client’s conduct in deciding whether to take on that client
* We are ‘guardians’ of the rule of law and no matter how unlikeable or difficult a client or case may be, they have the right to due process and the access to representation
* You have an obligation to fulfil your function within the legal system

**Vs Taking it personally**

* Emphasis on the importance of human agency and accountability – the larger structures are important too, but there need to be limits
* Lawyers should try to avoid being involved in morally dubious work and they should take responsibility for their choice of clients and the subsequent work that will be required of them

Can also be an issue if you are too passionate about your client’s case

* + Could lead you to substitute your own advice for your client’s wishes, or do something unethical because it’s for the sake of the cause
  + On the other hand, some great lawyers were working for personal causes

### Criminal defence context:

* No **cab-rank** rule in Canada: in UK, Barristers are theoretically required to ‘take the next person in line’ as long as barrister is competent and client can pay
  + Benedet knows a female lawyer who refuses to take sexual assault defence cases as she can’t personally handle them and doesn’t feel she can be at her best in those cases
  + This is controversial, but what about if you felt there would be health consequences (anxiety, depression),etc?
* **Proulx and Layton**: suggested approach - the “**middle path”** for deciding whether to take a client in crim
  + Lawyer should have some discretion
  + An overriding ethical imperative is that lawyer must reject a retainer where personal distaste concerning the client is so strong that lawyer concludes his ability to represent would suffer as a result

## Forming the Relationship

* ***Model Code***: client is the person who
  + (a) consults the lawyer and on whose behalf the lawyer renders or agrees to render legal services or
  + (b) having consulted the lawyer, has reasonably concluded that the lawyer has agreed to render legal servies

### Descoteaux v Mierzwinski: S-C relationship established before retainer signed - first dealings

**Background:**

* Client fills out legal aid office form “Application for Legal Aid”; when police presented themselves at the legal aid office and sought certain documents, including the form, the issue arose: was it protected by privilege?

**Judgment:**

* **When dealing with the right to confidentiality it is necessary** to distinguish between the moment when the retainer is established and the moment when the solicitor-client relationship arises
  + **The s-c relationship arises** as soon as the potential client has his first dealings with the lawyer’s office in order to obtain legal advice (**before retainer is established**)
  + **Thus** confidentiality applies to all documents and information provided in order to obtain legal advice or in the context of obtaining advice, as soon as initial contact has taken place - including their ability to pay

## Terminating the Relationship

* Since the relationship is mostly contractual, termination does not usually raise ethical problems but **cannot be on capricious or arbitrary grounds (BC Code 3.7)**
* **Should withdraw to avoid conflict:**
  + **However, courts have emphasized that lawyers have a duty of loyalty** and an obligation to avoid conflicts of interest
    - **E.g.** if you have two business clients who are competing, this may not be a legal conflict of interest but it is a conflict of loyalty and can be an issue
* Best way to avoid issues is to send **an explicit termination letter**
  + Lawyers are reluctant to do this: it is awkward, and lawyers like to maintain relationships in case of future business
* So the dilemma is that terminating when client business is finished prevents conflicts of interest, but it is in lawyers interest to keep clients ‘on the back burner’ so they will come back to you with future problems

#### BC Code s3.7-1

3.7-1 A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client

(see commentary)

### Withdrawal from Criminal Proceedings

#### BC Code 3.7-4

If a lawyer has agreed to act in a criminal case…sets out conditions (see excerpt)

#### Factors for court to consider in allowing withdrawal:

Overarching question: would withdrawal cause serious harm to the admin of justice?

* Whether it is feasible for A to rep self
* Other means of obtaining rep
* Impact on accused of delay in proceedings, particularly if in custody
* Conduct of counsel, e.g. reasonable notice to A, etc.
* Impact on crown or co-accused
* Impact on complainants, witnesses, jurors
* Fairness to defence, including consideration of expected length and complexity of proceedings
* History of proceedings, e.g. A changes lawyer repeatedly

#### R v Cunningham (2010 SCC): Cannot terminate if it will put client rights in jeopardy

**Background**

* Cunningham was employee at Yukon Legal Services Society, retained as defence counsel for Mr. Morgan; Morgan needed to update financial info in order to continue to receive legal aid funding, but didn’t do it
* Cunningham applies to withdraw services because he could not pay
  + Note that it was ok for her to say it here because it was impossible to use the non-payment fact to speculate about accused’s activities
  + But should be careful to give away this information as it can be a violation

**Judgment**

* Can the court refuse to grant defence counsel’s request to withdraw?
* **Fiduciary relationship**
  + Solicitor-client relationship means that counsel is constrained in ability to withdraw once he or she has chosen to represent an accused; these constraints are outlined in law society Codes
* ***Guidelines on when to refuse withdrawal of defence:***
  + **If counsel seeks withdrawal far enough in advance that adjournment will not be necessary, then it is ok**
  + Assuming timing is an issue, court should enquire further for reasons
    - Court should not enquire further once answer is given in order to avoid violating privilege
    - **Ethical reasons = withdrawal (*C (DD) and Deschamps)***
    - **Non-payment**
      * Court can refuse to grant withdrawal and may enforce by court’s contempt power

# Duty of Loyalty

* **Aspects of the Duty of Loyalty *(R v Neil, McKercher)***
  + **1) duty to avoid conflicting interests: including lawyer’s personal interest (see BC code 3.4)**
  + **2) Duty of commitment to the client’s cause: “zealous representation” (US), from the time counsel is retained, not just at trial**
  + **3) Duty of candour: tell client all relevant matters, tell client immediately if a conflict emerges**

## Conflicts of Interest & Consent

**BC Code:**

**3.4-1: A lawyer must not continue to act for a client where there is a conflict of interest, except as permitted under this code**

**3.4-2 A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.**

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

(b) Consent may be inferred and need not be in writing where all of the following apply

(i) the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

(ii) the matters are unrelated

(iii) the lawyer has no relevant confidential information from one client that might reasonably affect the other; and

(iv) the client has commonly consented to lawyers acting for and against it in unrelated matters.

The rule does not **expressly preclude** acting for parties with conflicting interests, but the lawyer **should not take cases if he/she has confidential information that would impact his/her ability to effectively represent both sides**

* Common to rep both sides in, e.g. real estate transaction

### Bright line rule (R v Neil 2002 SCC – cited in McKercher)

* **1) A lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without obtaining their consent – regardless of whether client matters are related or unrelated; and that the lawyer believes he can act without adversely affecting either client** 
  + **A) Applies only where *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting** 
    - *Neil*: lawyer represented Neil in crim proceedings and his wife in divorce proceedings, when it was foreseeable that wife would eventually be involved in the criminal proceedings – they wanted info against him to paint her as innocent dupe
      * Rule not applicable in Neil because the interests were not directly adverse
  + **B) Applies only when clients are adverse in legal interest**
    - In *Neil*, the interests were strategic, not legal
    - In *Strother*, they were commercial: conflicting business interests
      * It is ok to act for competing businesses
  + **C) Cannot be evoked by a party that seeks to abuse it: cannot use for “tactical reasons”**
    - Clients cannot intentionally create situations to engage bright line rule in order to deprive adversaries of their choice of counsel (esp institutional clients)
  + **D) Does not apply in situations where it would be unreasonable for a client to expect its law firm not to act against it in unrelated matters**
    - *Neil*: “professional litigants” (chartered banks, etc.) qualify for implied consent to concurrent representation of adverse interests – no confidentiality etc usually involved; governments generally accept firms acting for other parties
* 2) When rule is inapplicable, question is **whether the concurrent representation creates a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interest or by the lawyers’ duties to another current client, former client, or a third person**

### R v Neil (2002 SCC) – Advocate’s Duty of Loyalty

**Background**

* Abuse of process alleged through conflict of interest at law firm initially representing Neil then representing co-accused

**Judgment**

* **Advocate’s duty of loyalty**
  + “An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client…”
  + Duty of loyalty is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained
  + Relates to the fiduciary nature of the lawyer-client relationship
* **Aspects of the Duty of Loyalty**
  + **1) duty to avoid conflicting interests: including lawyer’s personal interest**
  + **2) Duty of commitment to the client’s cause: “zealous representation” (US), from the time counsel is retained, not just at trial**
  + **3) Duty of candour: tell client all relevant matters, tell client immediately if a conflict emerges**
* Note: Canadian law societies require that the lawyer be a “resolute advocate”

### CNR v McKercher (SCC 2013) – Conflict b/c adverse interests

**Background:**

* McKercher LLP retained McKercher to act for it on several matters; acting for CN on three ongoing matters
* At the same time, McKercher LLP accepted a retainer from Wallace to act against CN in a class action lawsuit about over-charging for grain
  + This was legally and factually unrelated to the ongoing CN retainers
* Firm did not inform CN that it was going to accept the Wallace retainer; they later terminated their retainers with CN
* CN applied for order to remove McKercher as solicitor of record for Wallace on grounds that it had breached its duty of loyalty to CN by creating a conflict of interest

**Issue:**

* Can a law firm accept a retainer to act against a current client on a matter unrelated to the client’s existing files?
  + Can a firm bring a lawsuit against a current client on behalf of another client?

#### Bright line rule (R v Neil 2002 SCC)

* **1) A lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without obtaining their consent – regardless of whether client matters are related or unrelated; and that the lawyer believes he can act without adversely affecting either client** 
  + **A) Applies only where *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting** 
    - *Neil*: lawyer represented Neil in crim proceedings and his wife in divorce proceedings, when it was foreseeable that wife would eventually be involved in the criminal proceedings – they wanted info against him to paint her as innocent dupe
      * Rule not applicable in Neil because the interests were not directly adverse
  + **B) Applies only when clients are adverse in legal interest**
    - In *Neil*, the interests were strategic, not legal
    - In *Strother*, they were commercial: conflicting business interests
      * It is ok to act for competing businesses
  + **C) Cannot be evoked by a party that seeks to abuse it: cannot use for “tactical reasons”**
    - Clients cannot intentionally create situations to engage bright line rule in order to deprive adversaries of their choice of counsel (esp institutional clients)
  + **D) Does not apply in situations where it would be unreasonable for a client to expect its law firm not to act against it in unrelated matters**
    - *Neil*: “professional litigants” (chartered banks, etc.) qualify for implied consent to concurrent representation of adverse interests – no confidentiality etc usually involved; governments generally accept firms acting for other parties
* 2) When rule is inapplicable, question is **whether the concurrent representation creates a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interest or by the lawyers’ duties to another current client, former client, or a third person**

**Judgment**

* **Violated conflict of interest:**
  + McKercher did violate the bright line rule
  + Interests were directly adverse, interests were legal in nature, no evidence CN engaged bright line intentionally , and it was reasonable for them to expect them not to act for Wallace
  + However, not a situation where there is risk of misuse of confidential information; they got some idea of litigation strategy, but nothing that could assist the client in a tangible way
* **Violated duty of loyalty**
  + Should not terminate retainers as a way to circumvent conflict of interest rules; this is withdrawal without good cause (violates professional code)
* **Violated duty of candour** by not disclosing that they would accept Wallace retainer

**Remedies**

* **Disqualification**: purposes
  + Avoid risk of improper use of confidential information (*Martin*)
    - Where the relationship has been terminated, this risk no longer really exists
  + Avoid risk of impaired representation
    - Also not a risk here since they terminated
  + Maintain repute of admin of justice

## Sexual Relationships with Clients

**BC Code - 3.4-1 Conflicts of interest**

**[Commentary8(e)(i)]**

**Conflicts of interest may arise where…**

**(e) A lawyer has a sexual or close personal relationship with a client.**

**(i) Such a relationship may conflict with the lawyer’s duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client’s right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer’s firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client’s work.**

### Law Society of Upper Canada v Hunter (2007 LSUC Hearing Panel) – Sexual relationship with client not per se prohibited

(but in this case it was inappropriate)

**Background**

* Complaint of professional misconduct against George Hunter, a very prominent lawyer who was involved in a lot of community and Law Society work represented “XY” in custody and commenced a sexual/romantic relationship
* Relationship was consensual; however partway through he ended things (and told her he’d been cheating) and was going to get her to sign a copy of Rule 2.04 to acknowledge that he had complied regarding advising her about the conflict and getting alternative legal advice but he never did
* **He admitted to professional misconduct for the conflict of interest,** resigned from Law Society, and informed his firm; it was damaging on his practice and life

**CURRENT EQUIVALENT legislation (he was in Ontario)**

**BC Code - 3.4-1 Conflicts of interest**

**[Commentary8(e)(i)]**

**Conflicts of interest may arise where…**

**(e) A lawyer has a sexual or close personal relationship with a client.**

**(i) Such a relationship may conflict with the lawyer’s duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client’s right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer’s firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client’s work.**

* Rules about sexual relationships
  + At the time of Hunter the rules in Ontario were a bit more detailed than they are in the model code but we can at least look at the model code for now
  + 8(e): might conflict with ability to provide objective advice…may jeopardize confidentiality…etc.

**Judgment**

* ***Rules of Professional Conduct (*Ontario)do not create an absolute prohibition on initiating or continuing a sexual/romantic relationship with a client**
  + *But these* relationships obviously raise significant issues about conflict of interest
  + In these situations, **the lawyer is obligated to discuss whether he should continue to act on her behalf at the outset of the romantic relationship**
    - **Factors indicated in 2.04(3) commentary**
* Do not need client to obtain independent legal advice in all cases, but where client is unsophisticated or vulnerable, lawyer should recommend it in order to ensure client’s consent is informed, genuine, and uncoerced
  + Here, client was vulnerable as result of family law dispute
* **Dangers in sexual relationships with client**
  + Clients need lawyer’s independent and objective judgement, unaffected by conflict of interest
  + In a serious relationship it may be difficult for a lawyer to be dispassionate about a client’s legal issues
  + Danger of exploiting client through power position
  + Difficult to evaluate consent of client in vulnerable position
* Mitigating factors:
  + His excellent record
  + Remorse
  + Self-reported
  + Has cooperated, is in good standing
  + Had good statements of support

**He received a 60-day suspension and a fine**

## Personal relationships between lawyers

* Is my ability to meet my duties (confidentiality, loyalty, etc.) to my client compromised in some way by my relationship?
  + If answer is any form of ‘yes’, then it should be disclosed

# Duty of Confidentiality

**Rationale for the duty summarized in:**

**S 3.3-3 Commentary** [1] “Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers”

## BC Code: S 3.3

**Confidential information**

3.3-1 A lawyer at all times must hold in strict confidence **all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:**

(a) expressly or impliedly **authorized by the client**;

(b) **required by law** or a court to do so;

(c) **required to deliver the information to the Law Society**, or

(d) **otherwise permitted by this rule**.

[SEE commentary]

3.3-2 A lawyer **must not use or disclose a client’s or former client’s confidential information to the disadvantage of the client or former client**, or for the benefit of the lawyer or a third person without the consent of the client or former client.

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

* **Duty of confidentiality is different from the** **legal concept of solicitor-client privilege**
  + That only extends to *legal proceedings and communications for the purpose of legal representation* (does not extend to physical evidence)
* **Confidentiality is much broader and is an** **ethical duty**
  + Covers *everything the client tells you, gives you, shows you, etc*.
    - This isn’t just a legal duty in the courtroom but extends to the broader world
  + Rests in the client and the client can give permission for information to be released
    - Can be part of retainer agreement, eg. allowing certain information to be disclosed to experts etc.
  + Not just during but also applies even after the lawyer-client relationship is over

Related to conflicts of interest because those conflicts relate to the fear the confidentiality will be compromised

* **Theoretical basis for a strong duty of confidentiality (broad & robust)** 
  + Trust relationship
    - Increases the efficacy of a lawyer when the client can trust them with all information
    - Crucial for the trust relationship we need for legal advice to function
* **Some situations that will allow confidential information to be disclosed**
  + Order by a court
  + Retainer allowing it
  + Certain kinds of statutory exceptions
  + Social harm exception
* Rule 3.3 – 1:
  + Lawyer must hold at all times information in strict confidence…

### Examples

* **JK Rowling case:** she writes a book under a pseudonym, a lawyer at the firm told a friend about it and she sued them for a lot of moneys
  + Ethical and negligence dimensions – the ethical is the law society issue we are studying; the negligence is what you get sued for
* **Public exchange between Conrad Black and Edward Greenspan**
  + Greenspan (a Canadian lawyer) was one of his lawyers in the criminal charges brought against Black in the states
  + Black was charged with fraud offences in the US and convicted; he believed he was wrongly convicted and he published a book in order to complain about these injustices and particularly about Greenspan and his representation at trial
  + The Globe & Mail gave Greenspan some space to rebut what Black said in his book; Greenspan took a different view of what had happened between them
    - He talks about how hard he was pushed to take it on by Black, despite the fact that he was a Canadian lawyer
    - He took the case on the condition that he could hire an American lawyer to join the team
  + After this exchange, the question arose whether he was allowed to write that article
    - Was it a violation of confidentiality and duty to client? He describes in detail his tactics, conversations, etc in the article – is that a violation?
    - Should he have stayed silent about the charges levied by Black? Is it ok if he is careful enough in what he says about their relationship as lawyer and client?

## Descoteaux v Mierzwinski: duty created at first contact

SEE ABOVE in section “forming the relationship”

## Exceptions to the Duty of Confidentiality

### Authorization by the client (BC Code 3.3-1(a))

### Public Safety Exception

#### Test for public safety exception

**Rule 3.3-3 commentary**

**[3] In assessing whether disclosure of confidential information is justified, a lawyer should consider a number of factors, including:**

**(a) the seriousness of the potential injury to others if the prospective harm occurs;**

**(b) the likelihood that it will occur and its imminence;**

**(c) the apparent absence of any other feasible way to prevent the potential injury; and**

**(d) the circumstances under which the lawyer acquired the information of the client’s intent or prospective course of action.**

**Example of reasoning in Smith v Jones below:**

* **1) Clarity**
  + Must have clear risk to identifiable person or group
  + Can consider:
    - Evidence of long-term planning
    - Method for effecting the specific attack suggested
    - Prior history of violence or threats
    - Prior assaults or threats similar to that planned
    - History of violence increasing in severity
    - Group **as a general rule**  must be ascertainable – cannot be a broad or undirected threat
* **2) Risk of serious bodily harm or death**
  + Serious psychological harm may constitute serious bodily harm **(*R v McCraw 1991 SCC)*** so long as the harm interferes substantially with the health or well-being of the complainant
* **3) Danger must be imminent**
  + Must create a sense of urgency, which may be applicable to some time in the future
  + May not need a particular time limit, but must be imminent in some sense (e.g. could be “I will kill you in three years” but if really believable could qualify
  + **This was the tricky aspect of this case**
    - The other two were clearly met, but this one was less clear; ultimately met though
    - He kept going to the DT East Side despite bail conditions not to, and this suggests he was drawn there despite knowing it was a bad idea (on bail)
* **Must not disclose more information than is really necessary**

#### BC Code 3.3-3

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

* **Does not require disclosure, but *permits it***

Commentary

[1] Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, **in some very exceptional situations identified in this rule, disclosure without the client’s permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented**. **These situations will be extremely rare.**

[2] The Supreme Court of Canada has considered the meaning of the words “**serious bodily harm**” in certain contexts, which may inform a lawyer in assessing whether disclosure of confidential information is warranted. In Smith v. Jones, [1999] 1 SCR 455 at paragraph 83, the Court also observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.

[Public safety exception test here]

[4] How and when disclosure should be made under this rule will **depend upon the circumstances**. A lawyer who believes that disclosure may be warranted should contact the Law Society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.

[5] **If confidential information is disclosed under this rule, the lawyer should prepare a written note as soon as possible, which should include**:

(a) the date and time of the communication;

(b) the grounds in support of the lawyer’s decision to communicate the information, including the harm he or she intended to prevent, the identity of the person who prompted him to communicate the information as well as the identity of the person or group of persons exposed to the harm; and

(c) the content of the communication, the method of communication used and the

identity of the person to whom the communication was made.

#### Smith v Jones: Illustrates public safety exception

**Background:**

* Solicitor-client privilege claimed on a doctor’s report produced by a psychiatrist hired by defence; the report was negative so they decide not to use it
* Psychiatrist seeks the court’s permission to disclose information provided to him during the assessment
  + Psychiatrist believes the client is a serious threat to public security
    - He set out specific plans to abduct and kill prostitutes; he was being charged with assault on a prostitute which was a failed first attempt to abduct
  + Lawyer decides the client will plead guilty, and they are going to sentencing
  + The doctor finds out that the report will not be disclosed (there is no duty to do so by the defence) and he is concerned

**Reasoning:**

* The court examines the ability to disclose – if the lawyer is permitted to disclose, then so is the doctor
* **Solicitor-client privilege**
  + Fundamental aspect of the judicial system which must be protected except in extremely narrow cases
  + This privilege is one which “the law has been most zealous to protect and most reluctant to water down by exceptions” – fundamentally important to the administration of justice
  + Must have clear risk to identifiable person or group
  + Can consider:
    - Evidence of long-term planning
    - Method for effecting the specific attack suggested
    - Prior history of violence or threats
    - Prior assaults or threats similar to that planned
    - History of violence increasing in severity
    - Group **as a general rule**  must be ascertainable – cannot be a broad or undirected threat
* **2) Risk of serious bodily harm or death**
  + Serious psychological harm may constitute serious bodily harm (*R v McCraw 1991 SCC)* so long as the harm interferes substantially with the health or well-being of the complainant
* **3) Danger must be imminent**
  + Must create a sense of urgency, which may be applicable to some time in the future
  + May not need a particular time limit, but must be imminent in some sense (e.g. could be “I will kill you in three years” but if really believable could qualify
  + **This was the tricky aspect of this case**
    - The other two were clearly met, but this one was less clear; ultimately met though
    - He kept going to the DT East Side despite bail conditions not to, and this suggests he was drawn there despite knowing it was a bad idea (on bail)
* **Must not disclose more information than is really necessary**

BREACH ALLOWED

**Note: Major J dissenting in this case**

* The breach of privilege is too severe and not worth it, it will discourage people from seeking treatment

#### Solosky: Public interest can outweigh s-c privilege for inmates

* Inmate in federal penitentiary asks Court to declare that all solicitor-client correspondence would be delivered unopened by prison staff (allowed to open mail under Penitentiary Act)
* Dickson J: inmate’s privilege must yield when the safety of members of the institution is at risk
  + Court must balance public interest in maintaining safety and security of penal institution with the interests of s-c privilege, but public interest wins

## Breaching Confidentiality to Protect Reputation

**There is implied consent in to breach the duty only to the extent necessary to defend yourself from charges of professional misconduct**

**BC Code 3.3-4** If it is alleged that a lawyer or the lawyer’s associates or employees:

(a) have committed a criminal offence involving a client’s affairs;

(b) are civilly liable with respect to a matter involving a client’s affairs;

(c) have committed acts of professional negligence; or

(d) have engaged in acts of professional misconduct or conduct unbecoming a lawyer, the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required.

E.g. If accused appeals on basis of ineffective assistance from council, typically this requires an affidavit from the trial council explaining what happened

## Collecting Legal Fees

3.3-5 A lawyer may disclose confidential information in order to establish or collect the lawyer’s fees, but must not disclose more information than is required.

### R v Cunningham – Duty of confidentiality in withdrawal from rep (non payment)

🡪 **Privilege:** Disclosure of non-payment of fees in cases where it is unrelated to the merits and will not cause prejudice to the accused is not an exception **to privilege**; rather it does not attract the protection of solicitor-client privilege in the first place

🡪 **Confidentiality:** **Payment or non-payment of fees does attract confidentiality**, but in this judgement the court found no violation (but the judgment shouldn’t be taken to say that it wouldn’t attract the duty in other contexts)

--> Also confirms that **oversight of withdrawal** can be **reviewed by courts**, not just law societies

**Background:**

* Lawyer sought to withdraw because of non-payment of feeds
* Issue was whether she should be allowed to withdraw, and whether the reason for withdrawal must be disclosed, and how much
* Her arguments: two possibilities of violating solicitor-client privilege:
  + Disclosure of the fact that A has not paid fees
  + Inadvertent disclosure of privileged information while engaged in discussion with court about reasons for withdrawal
  + **Arguments rejected**

**Judgment**

* **Revealing that an accused has not paid his or her fees (to a court) does not normally touch on the rationale for solicitor-client *privilege in the criminal context*** 
  + The rationale is confidentiality and the ability of a client to tell the lawyer what is necessary for him to do his job; here, that wouldn’t be compromised since non-payment was unrelated to the case itself
  + Distinguished from: ***Maranda v Richer***where the court held that in the context of a law office search an accused’s financial and fee information may be privileged
    - In that case, the concern was that the fee information might disclose where the client was at certain points in time, when he had money to pay the lawyer, what the meeting schedule was, etc.
    - **Fee information is prima facie privileged for the purposes of a search**
    - **Distinguished** from that case:
      * Content of the information disclosed by counsel will be significantly less than full fee records in *Maranda*
      * Hard to see how simple fact of non-payment could be used against someone
* ***Court should* not press for reasons for withdrawal if ‘ethical reasons’ cited, should not encourage lawyer to give privileged information**

### In order to get advice about proposed conduct

3.3-6 A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer’s proposed conduct

# Ethics in Advising & Negotiation: Key Duties

## 1: Competency

* **You must have the competency to provide the advice**
* **The time to put forth a real effort in working on their case**
* **And no other conflicts or impeding factors that may prevent you from doing your best work**
* **You have a duty to be honest with the client about your time and availability**
  + One of the more frequent lies told by lawyers is about their availability
    - Either by over-exaggerating the amount of time they will have to spend on a client’s file
    - Or lying about why they cannot meet a client or why they can’t have something done by a specific date

## 2: No illegality

1. **You cannot recommend or condone illegality** 
   * **Your advice must be within the law – you cannot give advice to your client on how to break the law**
2. **You also have a duty to dissuade your client from doing illegal activities**
   * If a client comes to you with a plan that you realize is illegal, you have a responsibility to tell them not to do it
   * In corporate law, **if you realize your client is planning illegal activity, you have a duty to work your way up the chain of command at the company to advise higher-ups that someone at the company is planning illegal activity**
3. If, after you have advised them to stop doing illegal things and they keep doing it, you have a **duty to withdraw**
   * ***Cunningham*** – **court must accept your statement that for ethical reasons you are withdrawing**
     + Non-payment of fees is discretionary, but withdrawing due to client illegality is an obligation

### Dishonesty, Fraud by Client (BC Code 3.2-7)

3.2-7 When acting for a client, a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

Commentary

**[1] A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client**.

**[2] A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities** such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.

**[3] Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information** about the client and about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear. The lawyer should make a record of the results of these inquiries.

**[4] A bona fide test** **case** is not necessarily precluded by this rule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

### Test Cases

* Where client says they are planning to break a law because they intend to challenge its constitutional validity, the lawyer may advise the client of his or her rights in a **limited capacity**

**Commentary [4] on 3.2-7 BC Code** (rules against illegality)

[4] **A bona fide test case is not necessarily precluded by this rule** and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, **the lawyer should ensure that the client appreciates the consequences of bringing a test case.**

If you are voicing a non-mainstream opinion or interpretation of what the law is, you should inform the client about it

### Law Society of Upper Canada v Sussman (1995 LSUC Disc. Cttee) – Counseling to Disobey a Court Order (Sanctioned)

**Background**

* Client has a court order allowing spousal access to children, but is worried that the spouse is abusing the children, is not a fit parent, etc. and they cannot in good faith hand over their kids
* He counsels her to breach the terms of the Court Order
  + Writes to the spouse’s attorney stating plans to prepare a motion for a restraining order on multiple occasions
  + He advises the client not to allow access to the children and she does so
  + Never makes the application for the order but sends another letter advising the spouse of no further access to the child
  + Husband reports the lawyer to the law society as a result of the second letter

**Judgment**

* Rejects arguments that he had intended to bring the order – this is not acceptable and he had lots of time to do so; if he was unable to act as a fit lawyer he should have withdrawn
* **He is guilty of professional misconduct**

### Circumstances in which you can counsel a client to disobey a court order:

**Reasonable and honest belief** of there being *an imminent risk or danger to a child* and that there be an immediate application to a court to have the issues determined forthwith

* If the court refuses to change an outstanding order, then the lawyer is obliged to advise the client to ‘trust in the justice system’ and adhere to the court order
* What, if anything, should happen to the client if she follows the lawyer’s advice and disobeys the court order?
  + Can she rely on his advice as a defence if she is later charged with contempt of court?
    - Not a defence but potentially a mitigating factor? Did she have a reasonable & honest belief that the lawyer was acting ethically
    - Example of not understanding consequences: logging protests back in the day

## Money Laundering and other Fraudulent Activities

**Options for dealing with issue of lawyers unwittingly assisting money laundering:**

1) Ban certain transactions using a specific rule, e.g. transactions with more than a certain amount of cash involved

* + - This type of rule is not necessarily problematic – lawyers may not like it since it limits their business, but
    - There are some such rules
      * In BC, the “no cash rule” says that you can’t accept more than $7500 cash from a client except if the money is going towards paying your fees, expenses, or bail
      * The rule also says that when you accept cash from a client, refunds of $1000 or more have to also be made in cash

2) Money laundering disclosure legislation

* + - Requirement to report transactions over a certain amount to or if they are suspicious to some tracking unit FINtrac or whatever

3) Tracking legislation

* + - Requires lawyers to track certain types of transactions in order to help with investigations if they happen
    - The legislation requires that the lawyer record certain details of financial transactions
    - FINTRAC can, under the legislation, do a warrantless search of a law office and search files etc. in order to get that information
    - Law society has some requirements (in BC code based on federation rules) regarding tracking and keeping proper records about clients

### No-cash rule (really a low-cash rule) – Law Society Rules 3-51.1

**Designed to prevent lawyers being used for money laundering**

3-51.1

(1) This Rule applies to a lawyer when engaged in any of the following activities on behalf of a client, including giving instructions on behalf of a client in respect of those activities:

(a) receiving or paying funds;

(b) purchasing or selling securities, real property or business assets or entities;

(c) transferring funds or securities by any means.

(2) This Rule does not apply to a lawyer when

(a) engaged in activities referred to in subrule (1) on behalf of his or her employer, or

(b) receiving or accepting cash

(i) from a peace officer, law enforcement agency or other agent of the Crown acting in an official capacity,

(ii) pursuant to the order of a court or other tribunal,

(iii) to pay a fine or penalty, or

(iv) from a savings institution or public body.

(3) While engaged in an activity referred to in subrule (1), a lawyer must not accept an aggregate amount in cash of $7,500 or more in respect of any one client matter or transaction.

(3.1) Despite subrule (3), a lawyer may accept an aggregate amount in cash of $7,500 or more in respect of a client matter or transaction for professional fees, disbursements, expenses or bail.

(3.2) A lawyer who accepts an aggregate amount in cash of $7,500 or more under subrule (3.1), must make any refund greater than $1,000 out of such money in cash.

**(SUMMARY: cash rules currently in play from FLSC v C below)**

[19]        In 2004, the Law Society of British Columbia adopted a rule, subject to certain exceptions, prohibiting British Columbia’s lawyers from receiving or accepting $7,500 or more in currency in the course of a single transaction. The same year, the FLSC developed a so-called “no-cash model rule”, also subject to exceptions, prohibiting the receipt of cash in an aggregate amount of $7,500 or more in respect of any one matter where the lawyer is engaged on behalf of a client in respect of receiving or paying funds; purchasing or selling securities, real property or business assets or entities; or transferring funds or securities by any means. The rule permits a lawyer to accept or receive an amount of $7,500 or more in cash for professional fees, disbursements, expenses or bail, but requires that any refund greater than $1,000 out of such money must be made in cash. I will refer to these rules collectively as the “No-Cash Rule”.

### Client Identification Rules (FLSC model rule)

**From FLSC v Canada**

[22] In 2008, the FLSC adopted a model rule on client identification and verification which has been adopted by all member law societies (the “Model Rule”). **This rule, which is subject to exceptions, requires lawyers to identify all clients who retain them to provide legal services by recording basic information, such as the client’s name, address, telephone number and occupation (for an individual) or business activities (for a corporation or other entity).** The Model Rule also requires that when providing legal services in respect of the receiving, paying or transferring of funds, lawyers must obtain independent source documents such as a driver’s licence, birth certificate, passport or other government-issued identification that verifies the client’s identity.

### Federation of Law Societies of Canada v Canada (AG) BCCA (on appeal)

**Background**

* Federal government introduced legislation aiming to combat money laundering activities by requiring lawyers to collect certain information about clients and report or disclose if they reasonably expect money laundering activities
  + Lawyers failing to carry out could have fine or imprisonment

**The Act & Requirements at issue:**

[21]        On December 13, 2007, the *Regulations Amending Certain Regulations Made Under the Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SOR/2007-293, were published, although they did not come into force until December 30, 2008. Notwithstanding s. 10.1 of the*Act*, **the effect of these regulations was to subject lawyers to the client identification and verification, record keeping, internal compliance program and external monitoring requirements as set out in the*Act*.** In order to effect certain financial transactions on behalf of their clients**, s. 33.1 of the *Regulations* requires that those lawyers who receive or pay funds on behalf of their clients, other than funds received or paid in respect of professional fees, disbursements, expenses or bail, to:**

**(a)      perform client identification and verification;**

**(b)      keep records of financial transactions; and**

**(c)       establish internal programs to promote compliance with the federal anti-money laundering regime.**

**Arguments**

Federation argues:

* + These requirements, and in particular the requirement to collect information and keep it so FINTRAC can do warrantless searches and the requirement to **disclose violate s7 of the charter (liberty and PoFJ)**
  + Has to be a Charter argument in order to get it struck down – the duty of confidentiality is just a common law concept but it can be limited by statute; the legislation can only be struck down if it is challenged on charter grounds
* Two **liberty interest**s
  + **Client** could go to jail based on information that was gathered through this process
    - BCCA found this interest was at risk indirectly as well (dissent said this was too indirect of an interest)
  + **Lawyers** could face prison for non-compliance
    - The government concedes that this is a liberty interest
* **PoFJ**: two principles engaged here (one successful at trial, one at BCCA)
  + **Independence of the bar**
    - **The new legislation interferes unjustifiable with the PoFJ of independence of the bar and cannot be justified**
    - The argument is made that lawyers sort of become agents for FINTRAC which compromises the independence of the legal profession
    - Rule of law depends on independent bar, and that requires that you can’t work as a rep for your client while also acting as an agent for a regulatory body
  + **Solicitor-client privilege** 
    - This has been recognized in other cases, so government concedes that it is a principle
    - Trial judge relies on this one
      * The principle is important and it is violated here
    - **BCCA says no: there are provisions in the money laundering laws that try to preserve solicitor-client privilege**
      * E.g. lawyer can assert right of s-c privilege over the documents being obtained
      * So they say it is sufficiently protected
      * Note: this is not the duty of confidentiality – it just means the stuff can’t be used against them in court, not that it can’t be disclosed (as in the case of confidentiality)
* **BCCA says the s1 analysis fails at the minimal impairment stage: the rules already in place (no cash rule etc) are better and less intrusive**

Judgment: legislation struck down because independent of bar is PoFJ and the Regime interferes to an unacceptable degree; also violates liberty interests of lawyers and clients

## Counselling vs Advocating - David Luban: Risks for In-House Lawyers

Luban, “Tales of Terror: Lessons for Lawyers from the ‘War on Terrorism’”(see also: corporate counsel Section)

* Discussing the ethical failures of the lawyers (justice department) involved in counseling the US government that interrogative techniques do not constitute torture unless they pose a threat of organ failure
* **Special risks and obligations for ‘in-house’ lawyers in a counseling role**
  + Why do they have a **different obligation?**
    - Heightened pressure to tell the client what they want to hear
    - No ‘other side’ to argue against you, and no impartial judge to play a determinative role
  + **Key failings of the government lawyers**
    - **1) Stretched and distorted the law to reach the outcome that the client wanted**
    - **2) Nowhere indicated that its interpretations were outside the mainstream**
  + **Rule of thumb** for counsellors: your advice should be *more or less the same as it would be if your client wanted the opposite result from the one you know your client wants* **and if it goes against the mainstream, must make that completely clear**
    - This helps to ensure your advice is truly independent rather than results-driven
* You also need to be careful that client (and you) understands when you are giving legal advice and when you are doing something else if you are involved in business as a lawyer etc.
  + Very complicated and tricky that you ensure it is clear when you are acting as a lawyer and not (because professional liability insurance only covers cilents if you are being a lawyer)

## 3. Honesty

***BC Code:***

**CLIENTS**

**3.2-2:** must be honest with **client** and inform of all relevant info

**LAWYERS**

**2.1:** In these several capacities, it is a lawyer’s duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, **be candid and courteous in relations with other lawyers and demonstrate personal integrity.**

**JUDICIARY**

[see below]

### Lying - Stephen Pitel

* Context: three areas where people perceive lawyers to lie
  + **Negotiation**:
    - Lying is usually a normal part of negotiations among non-lawyers (bluffing about how much they’d agree to settle for, leaving out key facts, etc.)
      * Only material misrepresentation of facts would usually result in penalties
    - So being involved in this makes it look like lawyers are involved in the deception
  + **To clients/opposing counsel**
    - Lawyers actually lie quite a lot:
    - To their clients on issues such as time, amount of work done, whether work has been completed, their skills and expertise, etc.
    - To opposing counsel (probably, hard to prove) about things like having a conflict in hearings, not being able to make a meeting, etc.
  + **In statements of position**
    - Difference between statement of position and statement of fact – often conflated which makes lawyer look more ‘liarly’ than they are
      * E.g. lawyer says ‘my client is innocent’ as a statement of position during the trial, when really he is guilty
      * He thinks that people can’t make this distinction as well as lawyers can
  + **Non-disclosure**
    - Not technically lying, but some people might find it ethically problematic
    - Essentially, withholding critical information or staying silent rather than revealing it

#### Lying in Negotiations

* Theoretical issues:
  + **What if lawyers are barred from lies in negotiations?**
    - **Con**
      * Discourages people from using lawyers; one side might opt not to get one so they can lie
    - **Pro**
      * Could lead to an improvement in the image of lawyers
      * Patel: people believe lawyers lie which is part of their bad reputation – this isn’t good so we want to limit the situations in which lawyers can lie
      * Also may lead to a more just and fair result if people can’t lie in negotiations
  + **What if they can lie?**
    - **Con:**
      * Can lead to damage in professional reputation
      * Seems to contradict other aspects of the code and introduce complex situational ethical codes for lawyers
    - **Pro:**
      * Lawyer has obligation to protect client interests, so negotiation with as much efficacy as possible is part of that
      * If client can lie, why shouldn’t lawyer be able to lie?
      * Practical difficulties with drafting a rule or trying to actually prohibit lying
* **Current situation**:
  + **No real prohibition on lying in the model code, just broad regulations on conduct (see Mr. regular case)**
  + Some codes, e.g. **ON** say you must be honest with client, but no mention of other parties; mentions acting with ‘good faith’ to other parties, but not specifically honesty
  + **US:** has ‘relaxed’ standards around making false statements of fact for the negotiation context
  + **Alberta**
    - More broad, requires lawyers to be ‘candid’ in their dealings with others and to refrain from dishonest conduct
      * Patel likes this rule and thinks it is better for image of profession to stick with this
  + Some provincial codes also require lawyers to maintain ‘integrity’ of the profession, but this is not very clear
  + **Specific rules on lying**
    - Cannot knowingly offer false evidence, misstate facts or law, or assert a fact to be true when its truth cannot reasonably be supported by the evidence

### BC Code 5.1-2: lying to tribunals, judiciary

5.1-2 When acting as an advocate, a lawyer must not:

(a) abuse the process of the tribunal by **instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice** on the part of the client and are brought solely for the purpose of injuring the other party;

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

(c) appear before a judicial officer when the lawyer, the lawyer’s associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;

(d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;

(e) **knowingly attempt to deceive a tribunal** or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;

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

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

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

(i) **deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;**

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

(k) **knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;**

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

### Law Society of Newfoundland and Labrador v Regular – lying to other legal counsel

***BC CODE:******2*.1:** In these several capacities, it is a lawyer’s duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, **be candid and courteous in relations with other lawyers and demonstrate personal integrity.**

**Background**

* He is representing a guy named Barry James and a company named Petroleum Services
* Mr. James has 75% of shares in the company; Hughes’ client has 25% and a different lawyer
* Hughes writes to Regular saying he heard a rumour that Petroleum Services is being sold, please remind your client that even as a minority shareholder his client should have a say due to s19 of their agreement
  + The letter doesn’t actually ask for response or confirmation, so he could have just not responded
  + Mr. Regular chose to respond: **he says that the ‘rumour’ of the sale is untrue** and his client is committed to resolving the issues
* Two days later Mr. regular files a notice to remove the other guy as a director of the company, without notice and without following the corporations act proedures, and the name of the company is changed, and then the assets are sold
* Mr. Regular’s claims that the company wasn’t really sold because only 50-60% of the assets were sold, but a substantial amount needs to be sold to count as a sale (90%)
  + Panel says his defence is bs; he basically just lied about the sale – if this were true, he would have just told Hughes that

**Judgment**

* A substantial portion of the assets were sold, enough that his statement is rejected
* **It seems reasonable based on the evidence to infer that he lied deliberately**
  + His client told him to keep Hughes in the dark
  + It benefitted his client to keep the other shareholder in the dark about it so he couldn’t get involved in disrupting the sale
  + It was intended to deceive and cloak the sale of assets
* **He is guilty of professional misconduct** 
  + Deliberately misled counsel for the opposing party
* Do you have an obligation to answer letters from opposing counsel like the one above?
  + Unless there is some special agreement or obligation, you can usually say that due to confidentiality you are precluded from discussing things

### Law Society of Alberta Code of Conduct 6.02(2)

**6.02 (2) A lawyer must not lie to or mislead another lawyer.**

Commentary

**This rule expresses an obvious aspect of integrity and a fundamental principle. In no situation, including negotiation, is a lawyer entitled to deliberately mislead a colleague. When a lawyer (in response to a question, for example) is prevented by rules of confidentiality from actively disclosing the truth, a falsehood is not justified. The lawyer has other alternatives, such as declining to answer. If this approach would in itself be misleading, the lawyer must seek the client’s consent to such disclosure of confidential information as is necessary to prevent the other lawyer from being misled. The concept of "misleading" includes creating a misconception through oral or written statements, other communications, actions or conduct, failure to act, or silence (See Rule 6.02(5), Correcting Misinformation).**

# Court: Advocacy and civility

**Key balance is between the duty to the client and the duty to the court** (or overall administration of justice)

## Ethics at Trial

***BC Code: 5.1-1***

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

***Commentary***

[1] Role in adversarial proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer’s duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties’ right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

Must balance responsibility to the client with the requirements of civility and the duty not to mislead or act dishonestly at court.

## Witness Preparation

***BC Code 5.1-2:***

Lawyer must not: (h) make suggestions to a witness recklessly or knowing them to be false; (k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;

**General aspects include**

* Instruction to tell the truth
* Review of parties’ theories of the case
* Basic issues in the case
* What the judge might say, etc

**Witness preparation vs witness ‘coaching’**

* Coaching is unethical and unprofessional; can be evidence and witness tampering, obstruction of justice

### R v Sweezey: Sanctions for improperly counseling witness

**Background:**

* Newfoundland Court of Appeal considered appeal by lawyer from sentence on a conviction for attempted obstruction of justice
  + **Lawyer counselled a witness to be forgetful and evasive when testifying**
* Court upheld the conviction but reduced the sentence
* **“Every lawyer is made an officer of the Courts…A lawyer who attempts to obstruct justice by wilfully counselling evasive evidence not only commits an offence contrary to…the Criminal Code but also breaches his solemn duty as an officer of the Court**

**Possible sanctions:**

* Costs against a client
* Costs against lawyer personally
* Negative order under a given rule of civil procedure
* Law society disciple
* Criminal sanctions
* Negative reputation

## Cross-Examination

### R v Lyttle (SCC): Scope of Cross-Examination – good faith basis

**Background:**

* A was part of a group that beat a man with baseball bats, said to be the only one unmasked
* The defence had a theory that A was targeted in order to conceal the real fact that the assailants were part of the victim’s drug ring and he was protecting them from prosecution
* Judge ruled that defence could only cross Crown witnesses if she had substantive evidence of the drug debt theory; this resulted in having to call them as her own witnesses so lost right to address jury last

**Judgment:**

* ***R v Osolin****:* “no question of the **importance of cross-examination**… [It] must be permitted so that an accused can make full answer and defence. The opportunity to cross-examin witnesses is fundamental to providing a fair trial to an accused
  + Right to cross is protected by ss 7 and 11(d) of Charter
* **A question can be put to a witness in cross-examination regarding matters that need not be proved independently, provided that counsel has a good faith basis for putting the question**
  + Counsel may believe something to be true but have no way to prove it save through cross-examination
* **Good faith basis =** 
  + **Based on information available to the lawyer**
  + **Her belief that it is likely accurate**
  + **And the purpose for which it is used**
* **May be prevented from cross-examining if**
  + Asking unrelated questions in order to take a shot at the reputation of the person
  + Although can resort to some innuendo and unproven assumptions

### R v R (AJ): Content of cross-examination

**Background**

* A charged with incest and sexual assault against daughter and granddaughter
* The appellant submits that the cross-examination was improper and prejudicial to the applicant

**Judgment**

* Accused is in a special place with regards to cross-examining: it is particularly in crossing A that lawyers can cross the line into inappropriate conduct and miscarriage of justice
* **Cross-examination in this case was abusive and unfair**
  + Counsel had **sarcastic tone and inserted editorial commentary** into questions
    - E.g. referring to answers as ‘incredible’ and asking appellant if he ‘wanted the jury to believe that one too’
  + Approach was **calculated to demean and humiliate the applicant**
  + Used **pretence of questioning to demonstrate contempt** for the accused
    - Counsel cannot be allowed to abuse witnesses
  + Repeatedly **gave evidence** and stated her opinion during cross
  + **Engaged in extensive argument** with the appellant
    - A gives contradictory explanations and counsel states that ‘you were lying’ and accused him of playing games
* **Crown is guilty of tipping the balance of justice and disrupting the case enough to undermine the fairness of the trial**

## Bring All Relevant Case Law to Judge

### General Motors Acceptance Corp of Canada v Isaac Estate – Failure to Bring Relevant Decision to Judge

**SEE: BC Code 5.1-2 Lawyer must not:** (i) **deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;**

**Background**

* Competing applications for summary judgment
* Issue was a ‘scheme’ for the Isaac Estate to get the parent’s car after their death and then also sue for purchase price

**Failure to bring relevant case law to judge’s attention**

* Plaintiff failed to bring a relevant – almost identical – decision in which he himself had acted for the same client, on almost the same matter, and had lost at the Court of Appeal (rejected on appeal)
  + He obviously knew about the decision since he acted as counsel, but didn’t bring to judge’s attention in written or oral arguments
* **It was Mr. W’s responsibility as an officer of the Court to bring *Sherwood* to my attention, Silence about a relevant decision, especially a binding one, is not acceptable (even if unhelpful to your case)** 
  + Cannot argue that the case is distinguishable and thus not relevant – it is up to the court to determine what is distinguishable; counsel must at least bring it forward and try to distinguish
* **Conflict of two principles:**
  + **Adversarial system**; however, **every judge is in the hands of every counsel**, on the points to be raised and decided
  + Judge has an overriding duty to administer justice, and ensure law is applied fairly
    - The concept of judicial self-restraint is founded in part upon the assumption that counsel will do their duty and bring forth all relevant case law
* **Expectations on counsel:**
  + Counsel has a duty to be aware of all cases in point decided within the judicial hierarchy of BC (SCC, BCCA, BCSC, County Court, etc.)
  + Not required to produce cases outside BC, but can
  + Do not expect counsel to search out unreported cases, although if he knows of an unreported but relevant case, he must bring it to the attention
  + “On point” does not mean cases whose resemblance is in the facts, but rather in the point of law decided
  + Counsel cannot discharge his duty by not bothering to determine if there is any relevant authority
    - **Ignorance is no excuse**

## Does Civility Matter? – Alice Woolley (she says not really)

**To the extent that civility seeks to enforce ‘good manners’ amongst lawyers, it is not a proper subject for professional regulation**

### Definition: Civility

* **Two areas of concern**
  + **Requirement that you treat others with courtesy, manners, and politeness**
    - Law Societies all have some rules or guidelines
      * LS of Alb has defined incivility as “sharp conduct r shoddy treatment of other lawyers, opposing parties and independent witnesses”
      * Nova Scotia Barrister Task Force “akin to notions of courtesy, politeness, good manners and respect”
      * CBA and Advocates’ Society also has rules encouraging civility and courtesy
    - Every provincial law society decision reported on Quicklaw involving civility has the allegation stemming from use of strong, profane and/or flatly rude language towards another person
      * Justifications for sanctions all seemed to involve the lack of courtesy or politeness
  + **Conduct that is essential to ensure the proper functioning of the judicial process, with a specific focus on advocacy**

Note that although civility is recommended, it is not a binding requirement

* However, this can still be problematic because we still see discipline cases which seem to turn on the incivility of lawyer conduct and thus the civility movement has *some disciplinary force*

### Civility in the Legal Context: Negative Consequences

**1) Has potential to undermine the ability of law societies to fulfil their obligations to regulate lawyer ethics**; key criticisms

* **Lawyers need to be able to be critical** and penalizing incivility may disincentivize lawyers from speaking out
  + Evidenced by sanctions in several decision against lawyers speaking out about competence or ethics of other lawyers
  + Remarks appeared largely unfounded but if they were true, it would be bad to have discouraged future reporting of this type
* **Lawyers should not have to be civil where it undermines their ability to advocate for their client** 
  + Client’s legal interests should be paramount over maintaining civility
* **Civility is largely subjective**
  + May result in self-censorship by lawyers which may even undermine the best interests of the client
  + Particularly problematic given the historical context of civility and its use as a exclusionary device
  + A diverse bar may have a range of ideas about what constitutes civility and this should be respected
* In cases were incivility was found, they may still be valid because the incivility impacted other ethical or legal obligations

**2) The movement serves to obfuscate what is really going on**

* ***Ontario Court of Appeal*** in two recent cases has declined to find trials unfair despite a demonstrated lack of civility by counsel, suggesting reluctance to enforce civility
  + ***R v Felderhof***
  + ***Marchand v Public General Hospital Society of Chatham***
  + Both cases where incivility was at play but the other wrongs were more important, wouldn’t want to detract from that

## Gender, Diversity, and Civility – Amy Salyzyn: gendered nature of civility debate

* Growing movement emphasizing the importance of lawyer civility
  + Some critiques of civility:
    - Core concept is inherently vague
    - Irreconcilable tension between civility and role as zealous advocate
    - Most critiques focus on the *enforcement* of civility standards
* Paper discusses the discourse of the civility movement and the assumptions about professionalism that are inherent in it
  + **Inherently gendered: the very concept of ‘professionalism’ is inextricably linked to masculinity, whiteness, class privilege, Protestantism**
* Two competing ‘masculinities’ reflected in the dominant narrative of the civility discourse **are hostile** to inclusive understandings of lawyer professionalism
  + The way in which we talk about lawyer professionalism is limited and limiting
  + Atticus finch – civility ideal vs Rambo – the conflict or advocacy approach
  + This discourse functions to:
    - **1) Render women ‘outsiders’ or other, always largely invisible**
    - **2) Romanticizes past discriminatory concepts of lawyer professionalism**
    - **3) Reflects anxieties about the destabilisation of traditional, exclusionary claims or modes of authority in the legal profession**
* **“Rambo” lawyering**
  + Frequent references to this concept, including in *Black’s law dictionary* and in many sources suggest it is a fundamental part of the discourse
  + Not exactly clear what is being referred to, often described as “you’ll know it when you see it”
    - Scorched earth strategy
    - Win-at-all-costs attitude
    - Lack of restraint
    - Terrorizes, obfuscates, and intimidates the way to victory
    - Zealous representation used to justify all behaviour
  + Imagery = aggressive, heterosexual male
* **Atticus lawyering**
  + Represents the civility movement ideal
  + Similarly somewhat unclear on what exactly is being evoked, but things like ‘grace and dignity’, ‘courtesy’, etc.
  + “gentleman’s ethic” – the ideal of professional gentlemanliness is inherently masculine and patriarchal
    - The virtues of a gentlemen professional exist ‘only as embodied virtues’ and these embodied virtues are ‘embodied’ in stories about men
    - This becomes apparent if you image in female Atticus Finch…
* **Problems with having these ideals**
  + Rejecting the Rambo model at first seems like a good step for women’s position in the legal profession
    - That model embodies many things that contributed to a male-oriented and problematic legal culture that in part currently exists in law firms and can be linked to the departure of women from the profession
  + **Main issue is that the denouncement of Rambo takes place in the context of valorizing Finch**
    - This is problematic because it promotes the historical conception of ‘professional gentlemanliness’ which is actually problematic
* **Professional gentlemanliness: issues**
  + Historically used as tool for discrimination against other races, classes, and women
    - E.g. requirement for proficiency in Latin
  + Evokes the “good old days”, when in fact the good old days were basically characterized by discrimination for all but those privileged to be white well-off males
  + Inextricable connection to “maleness” (e.g. historically “could not be a profession if it was filled with women”)
  + Also, the very idea of having these two masculine models renders the female lawyer as an ‘outsider’ and conceals the actual spectrum of models that exist or could exist in reality
  + Discourse impacts the way we behave and our subconscious thinking as well, so important to pay attention to it
* Solutions
  + Graft female characters onto the ideals, e.g. Portia from Shakespeare’ *The Merchant of Venice* 
    - Does little to disrupt the underlying narrative which idealizes a highly exclusionary professional ideology from new/different entrants

## R v Felderhof (2003 CR): High threshold for incivility between counsel

**🡪 Proving incivility disrupted fair trial is difficult – only if it is so bad it likely led to an unjust result**

**Background**

* A facing eight counts of violating the Securities Act while working for Bre-X Minerals
  + Insider training and authorizing misleading press statements
* Prosecution has asked that the proceedings be stopped and started with a new judge
  + Alleges that trial judge made errors that deprived him of jurisdiction to proceed and undermined the fair trial by **failing to curb the uncivil conduct of A’s counsel**
* **Allegations** of **uncivil conduct stemmed from issues of disclosure**
  + **A’s counsel** wrote a letter to prosecution accusing them of failure to properly disclose and that the prosecution had been carried out with a ‘win at all costs’ mentality
    - **A** seemed to misunderstand exactly what needed to be disclosed; there were tons of documents involved, not all of which were relevant
  + Prosecution also cross-examined a junior lawyer not really involved basically with no point for a really long time
  + The parties became increasingly hostile and cooperation became basically impossible
  + Allegations of prosecutorial misconduct
* **Conduct of counsel** is also an issue
  + A’s counsel made uncivil attacks on prosecutors, sarcasm, belittling efforts of prosecutors, accusing them of laziness, accused them of breaching promises and misleading judge
  + Prosecution accused A’s counsel of filing a misleading affidavit and wasting court’s time with abuse of process motion

**Reasoning:**

* It is improper for D counsel to accuse the Prosecutor of trying to get a conviction – this is basically his job
* Emphasizes **importance of promoting civility** to the functioning of the justice system and maintenance of the profession
* Judge does not have to listen to abuse of process allegations every time they are made, if they are being made unreasonably or with no substance to delay the trial
  + These allegations are very serious and should only be made with foundation and good faith
* **Law Society code requires counsel treat everyone with civility and respect, and this is a serious and high standard**
* **Trial judge does not have a responsibility to stop the uncivil behaviour, although he can**
  + **Failure to stop the behaviour is not sufficient for a finding that the trial was jeopardized**

### Marchand v Public General Hospital Society of Chatham (2000 ONCA): Cited for high threshold for incivility

* Leading case on civility
* “Even if the counsel’s litigation style, as alleged by the prosecution, is abusive and sometimes personally nasty, the judge does not lose jurisdiction unless it prevents a fair trial”

**Judgment**

* **Dismissed: no jurisdictional error**
  + **Although the conduct was uncivil, it did not ultimately prevent a fair trial**

# Role of Crown Counsel

**Guest Speaker – Trevor Shaw, Prosecution Support for Crown**

**Crown’s dual role of “partisan neutrality”: adversarial but also upholding justice**

## Ethical Duties of Crown & Areas of Scrutiny

***SEE ALSO: Officers of the court below***

**By crown (Internal)**

* Manual on conduct – quotes from *Boucher*: role of crown as minister of justice, not a total advocate
* Kreiger: fails to disclose a blood test and is reprimanded within the crown office

**By law society:**

* 5.1-3: When acting as a prosecutor, **a lawyer must act for the public** and **the administration of justice** resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy and respect.
  + Commentary
    - **[1] When engaged as a prosecutor, the lawyer’s primary duty is not to seek to convict but to see that justice is done through a fair trial on the merits.** The prosecutor exercises a public function involving much discretion and power and must act fairly and dispassionately. The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should make timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.
* **Crown counsel should not prevent anyone from getting representation**
* **Must meet disclosure obligations – these are widely accepted and respected**
  + The debate usually turns on whether to disclose peripheral material (briefing notes, etc.) not key elements of a case (exculpatory and inculpatory)
  + When in doubt, put it before the court and have them rule on it

**Civil suits**

* Can be sued for malicious prosecution
  + Acquittal – can sue civilly for damages
  + High standard: need to show malicious intent and overcome the presumption of proper conduct

**Judicial**

* Cases of crown misconduct e.g. non-disclosure, judge can stay (stop) the entire prosecution or take other measures

This is a unique pattern of control: scrutiny from all sides

* Scrutiny internally, by self-regulating law society, by the accused, and by the courts
* These mechanism, however, have very high thresholds, and actual suits against crown counsel are very rare

## Actual role of the prosecutor

* Practical sense:
  + Help prepare the police prepare the case for court
  + Help defence prepare case (disclosure)
  + Help judges prepare their submissions
* Play a role in the chain of justice that leads from the crime scene, to court, to jail
  + Prosecution is an essential link in that chain
  + All links are required to reach the end – they play a crucial role in the criminal justice process
  + It is crucial that things be done consistently and effectively – that there is a system that allows for things like international extradition orders and stuff
  + Guatemala does not have an effective prosecutorial service, resulting in incredibly high crime and murder rates, and virtually no chance of being caught
    - This means each person carries guns and fears for their own security
    - Gangs and cartels have effectively caused enough fear among prosecutors that they can’t function effectively

## Ethical Duties of Crown Counsel

Key duty is to “seek justice in the public interest, which covers several related principles:

1. **Can seek conviction but must all the while strive to enure the defendant has a fair trial**
2. **Goal is not to obtain a conviction at any cost but to assist the court in eliciting truth without infringing upon the legit rights of the accused**
3. **At each stage of the justice process, the discretion vested in the prosecutor should be exercised with objectivity and impartiality, and not in a purely partisan way**

## Overzealous Advocacy

1. **Remarks cannot be personal opinion that accused is guilty expressed in inflammatory or vindictive language**
2. **Remarks cannot tend to leave the jury with the impression that the investigation by the Crown is such that they should find the accused guilty**

**In *Boucher*, rejected because:**

**1) The address made the crown into a witness, and one giving inadmissible evidence**

**2) Was an appeal to emotion**

### R v Boucher (1955): Inflammatory jury address = violates

**Background**

* Elderly shopkeeper (Jabour) is hit with an axe to the head after rumours circulated that he had lots of treasure
* When police go into the house after the murder, it was ransacked but the thief had failed to discover the stash of cash
* Boucher: hadn’t been at church, so no good alibi; also evidence of him having some debt
  + Crown relied on evidence sent by Boucher from jail

**Jurisprudence history:**

* Trial: He is convicted and an initial execution date is set
* Appeal: He appeals, saying the letter from jail used as evidence was improperly intercepted
  + This is successful – the evidence is inadmissible; new trial ordered
* Second trial ends in mistrial
* Third trial leads to another execution date
  + This trial leads to the issue that goes to the SCC

**Judgment**

* The problematic part of a charge:
  + “it is a revolting crime of a man in the prime of his life…against a 77-year-old who is not able to defend himself…I have no sympathy for these **cowards who strike men, friends**…**Jabour was perhaps not a friend**, **but he was a neighbor**, at least they knew each other. Cowardly, with blows of an ax. And if you bring in a verdict of guilty, for once it would almost make me happy to seek the death penalty against him”
* **Sufficiently problematic to disrupt the fair trial process; sent back for rehearing**
  + **1) made Crown into a witness, and one who was giving inadmissible evidence**
  + **2) Employed an appeal to emotion**
  + **Also used inflammatory language to assure them of the guilt of the accused, and suggests a crown investigation might have led to guilty**
* Interestingly, Mr. Miquelon (the prosecutor) was the crown on every case all the way through, including against his own charges of misconduct (this level of attachment and personal involvement would not be allowed by crown these days)

## Krieger v Law Society of Alberta (SCC 2002): Crown core functions not subject to Law Soc.

* ***Krieger v. Law Society of Alberta* (pp 442-446)**

**Background:**

* Battle between Attorneys General about **whether prosecutors are under law society control**

**Judgment:**

* **Law society does have jurisdiction over prosecutors**
  + “**To be a crown prosecutor in Alberta, you must be employed as such by AG office, and membership in law society”**
  + Given that their legislation requires crowns to be both lawyers and crowns, they must apply that legislation as written
* **However, core functions of a prosecutor are not under law society jurisdiction**
  + **Core functions of a prosecutor is not covered by the law society**, it is an independent function owning to the AG
  + **Court goes on to list** what the core functions of a prosecution is
    - **Discretion to bring charge**
    - **To stay charge**
    - **To accept guilty plea**
    - …something else
* Reflects the importance of **preserving crown discretion**

# Duty of Defence Counsel

## Officers of the Court – special duties in crim context (applies to CROWN too)

SEE BC CODE 5.1-2 (lawyer must not…)

* Duty not to knowingly lead false evidence, state facts known to be false
* Duty not to make frivolous arguments (unsubstantiated by evidence, etc.)
  + This can be a bit tricky, but usually you are given the benefit of the doubt unless it is a truly stupid argument that you obv don’t’ think is legit
  + SEE: R v Lyttel (scope of cross-examination)
* Bring all relevant case law to the attention of the court (do not hide authorities that are not to your favour)
  + SEE: General Motors
* Defence counsel has a duty to assist the court
* They do not have a duty to assist the crown, but they do have to assist the court

#### Must not mislead the court

* ***Rondel v Worsley:*** counsel “must not mislead the court, must not lend himself to casting aspersions on other party or witnesses for which there is no sufficient basis must not withhold authorities.”

#### Must point out irregularities in conduct of trial

* ***Giannarelli v Wraith*** (Australian): “if [counsel] notes an irregularity in the conduct of a criminal trial, he must take the point so that it can be remedied, instead of keeping the point up his sleeve and using it as a ground of appeal

#### Duty not to make frivolous arguments

Increasingly emphasized in judgments

* ***R v Samra***: “there is an erroneous premise…that defence counsel is but a mouthpiece for his client”
* ***Proulx and Layton*** (wrote “Ethics and Canadian Crim Law)
  + ***Ethical rule against frivolous arguments advanced***
    - **BUT HAS problems** in crim context where Crown has burden to prove guilt and creativity in defence may require novel arguments
  + ***Modern concern of lengthening crim trials***has led to some potential increase for this duty

##### Elliot: Judge inviting defence to make charter motions, acting crazy

**Background:**

* Long proceedings etc.
* **Judge took an irrational and clear dislike for all crown counsel involved, and constantly invited defence to make charter motions about the conduct of the crown**
* This eventually resulted in a stay of proceedings, during which Elliot fled Canada for her country of origin
* On appeal
  + Charter motions were found to be frivolous
  + The judge was disciplined by the Canadian Judicial Counsel and actually recommended that he be removed from office and he resigned

**Issue here: what about defence counsel?**

* **Judge is encouraging the charter motions etc.; what is the duty of the defence counsel in these circumstances?**
* The defence counsel was actually disciplined by the law society as a result of this case
* Cross-examination of sexual assault victims can cross the line into unethical behaviour as well
  + This a controversial and still developing area of law
  + E.g. cross-examining on sexual history, delay in disclosure, etc.
* **Must consider; at what point does zealous advocacy cross the line?**

#### Duty of civility

***R v Felderhof***

* “Unfair and demeaning comments by counsel…do not simply impact on the other counsel…diminishes public’s respect for the court and administration of criminal justice and undermines results of adjudication.”
* “It is very serious to make allegations of improper motives or bad faith against any counsel…”
* Primary manifestation of this argument is when counsel for one side **makes an unfounded or irrelevant personal attack against the honesty, integrity or motivation of counsel for the opposing part**

**Constrained because you are “officer of the court”; purpose of court is to seek justice and truth, which means they must abide by higher standards of conduct**

## Duties to the Client

#### Resolute Advocate

* Original conception in *Rondel v Worsley:* “fearlessly to raise every issues, advance every argument, and ask every question, however distasteful, which he thinks will help is client’s case”
* BC Code requires defence “resolutely” (5.1-1)

#### Confidentiality

SEE Duty of Confidentiality above!

## Defending a guilty client: don’t judge!

YOU ROLE IS NOT TO JUDGE THE CLIENT (Proulx and Layton)

***BC Code 5.5-1 Commentary:***

[9] Duty as defence counsel – When defending an accused person, a lawyer’s duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, ***and notwithstanding the lawyer's private opinion on credibility or the merits,*** a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent. (also in model code 4.01(1)

[10] **Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this**. For example, **if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false**. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

* Best approach is not to form any opinions on the guilt or innocence of the client in the first place
  + ***Boucher***: crown should never state his or her personal opinion as to the accused’s guilt in closing submissions at trial; defence counsel should similarly not form an opinion on guilt or innocence
  + ***If you do form an opinion it could result in you failing to carry out your broad partisan duty to resolutely defend the client (also could violate ethics codes)***
* **It is ethical for you to defend a guilty client, but your knowledge of the guilt might restrict the type of arguments you can make**
  + You cannot lie to the court and cannot call your client to the stand if you know they will lie
  + i.e you cannot call witnesses that will suggest the accused was not present at the scene or something
  + But you can question the crown’s case, police conduct, etc.
* But if it leads to a breakdown in the relationship – i.e. client wants to take the stand after telling you they are guilty
  + You will need to excuse yourself from the case

#### Marshall Inquiry: Belief in guilt compromises ability to mount defence

Inquiry heard evidence to suggest defence believed Marshall to be guilty, Commissioners asked whether those feelings influenced the effort they put into the defence.

The fact that they mounted a terrible defence suggests it did. The failed to:

* Carry out independent investigation of the facts
* Interviewing witnesses not called by crown
* Seeking production of crown witnesses’ prior inconsistent statements

## Custody and Control of Real Evidence (& duty to disclose)

Not much guidance on what to do if given real evidence:

**BC Code:** 5.1-2 Lawyer must not… (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, **suppressing what ought to be disclosed or otherwise assisting in any fraud**, crime or illegal conduct;

--> Can risk **criminal prosecution** under Crim Code s 139 for attempting to obstruct pervert or defeat course of justice, although it requires “wilfully” intending to obstruct the course of justice

***NO GENERAL DUTY TO DISCLOSE****:* ***Stinchcombe*** (consistent with purely adversarial role of defence counsel)

* Three exemptions:
  + 1) Alibi should be disclosed in sufficient time for proper investigation
  + 2) Psychiatric defence should be disclosed in time to allow Crown psychiatrist to examine accused
  + 3) Any expert opinion evidence should be disclosed 30 days before trial

### R v Murray

🡪 Defence can take possession of evidence and conceal it during pre-trial if counsel honestly believes it has exculpatory uses at trial and intends to use it as such, In such circumstances, counsel lacks the mens rea for obstruction of justice

🡪 Defence cannot take possession of evidence and conceal if he realizes it is inculpatory. In these cases, it will be obstruction of justice

🡪 Issue with this approach: mistake of fact defence as used in Murray – he had a reasonable argument for planning to use them at trial

**Background:**

* Charged with obstruction of justice for his actions in the case
  + **Issue arises due to his possession of videotaped evidence of the sexual assaults**
* While representing Bernardo, he is contacted and given the location of some tapes that were hidden in the house
* He sends some colleagues to go get them
* He views them and makes a copy, but doesn’t disclose, doesn’t turn over to police, etc.
* Seeks advice from senior lawyer John Rosen, but doesn’t really explain what he has exactly and is advised that he has no obligation to disclose, but it could be used to hammer Homolka at trial if it discredits her
  + As this is playing out the crown is striking a bargain with Homolka – if they’d had the tapes they never would have struck the deal with her
* Theory about why he really acted the way he did
  + The alternative theory of what really went on is that bernardo wanted the tapes found in order to hide it from the police, and that everyone knew they were incriminating – nobody involved actually believed that the tapes were excuplatory
  + One key aspect that suggests he did this was the fact that he didn’t charge the copies of the tapes to legal aid – this suggests he really was trying to hide what he was doing

**Judgment:**

**Says that he did not intend to obstruct justice, and he did intend to release the tapes at the proper moment – given benefit of the doubt that he just made a mistake**

**Murray is acquitted.**

* No disciple by the law society
  + Instead, they have a committee about what lawyers should do in this circumstance
  + The committee report almost condones his conduct, and ultimately no rule is ever passed about it
  + In Alberta, until they adopted the model code, they had a clear rule about lawyers taking in physical evidence
    - “a lawyer must not counsel or participate in the obtaining of evidence by illegal means…destruction of property having evidential value…concealment of property having potential evidentiary value in a criminal proceeding”
    - (gone now)

#### What should you do with real evidence?

Video tape - basic approach suggested in text:

* Review the material immediately
* Refuse to accept instructions from client not to review the material
* Advise client that accepting instructions not to review is unethical
* Advise client that if material turns out to be substantially or predominantly incriminatory, it is illegal and unethical for counsel to conceal it from authorities
* If exculpatory uses for material are not plain and obvious, or are not clearly predominant uses of the material, counsel must consult immediately with a panel of senior lawyers convened by relevant Law Society
* Do you go get the tapes?
  + No – ANYTHING that involves you going to actively seek out evidence, do not do it. Bad idea.
  + **Physical evidence is not subject to solicitor-client privilege, so taking in physical evidence is very problematic**
* If client gives it to you and you have no choice, then what?
  + Not totally clear in the case of a tape
  + **Bloody shirt example**
    - **Best option is to get a third party lawyer to deal with the shirt**
    - **Have them turn it over but don’t tell them where it came from**
    - Videotapes present a more complex situation: they can’t be so anonymously passed on since it will still be clearly linked to the client
* **Note: the new lawyer hired by Murray to deal with the issue ends up turning the tapes over to crown**
  + The evidence is not covered by privilege, and since it was more incriminating than helpful they had the ethical obligation to turn it over despite the breach of confidentiality there

#### Model Code Commentary (not adopted in BC)

**2.05:**

**Commentary**

A lawyer is never required to take or keep possession of property relevant to a crime or offence.  If a lawyer comes into possession of property relevant to a crime, either from a client or another person, the lawyer must act in keeping with the lawyer’s duty of loyalty and confidentiality to the client and the lawyer’s duty to the administration of justice, which requires, at a minimum, that the lawyer not violate the law, improperly impede a police investigation, or otherwise obstruct the course of justice.  Generally, a lawyer in such circumstances should, as soon as reasonably possible:

(a) turn over the property to the prosecution, either directly or anonymously;

(b) deposit the property with the trial judge in the relevant proceeding;

(c) deposit the property with the court to facilitate access by the prosecution or defence for testing or examination; or

(d) disclose the existence of the property to the prosecution and, if necessary, prepare to argue the issue of possession of the property.

When a lawyer discloses or delivers to the Crown or law enforcement authorities property relevant to a crime or offence, the lawyer has a duty to protect the client’s confidences, including the client’s identity, and to preserve solicitor and client privilege.  This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the ­property.

If a lawyer delivers the property to the court under paragraph (c), he or she should do so in accordance with the protocol established for such purposes, which permits the lawyer to deliver the property to the court without formal application or investigation, ensures that the property is available to both the Crown and defence counsel for testing and examination upon motion to the court, and ensures that the fact that property was received from the defence counsel will not be the subject of comment or argument at trial.

## Plea Bargaining

#### BC Code 5.1-7

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

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

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

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

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

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

**Commentary**

**[1] The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.**

#### Four Main Ethical Obligations of Defence in Plea Bargain

* **1) Duty to investigate and know the case well enough to know what a good plea would be: conduct an investigation to determine what the facts and law applicable would be**
  + Can’t just encourage client to take a plea because you are too busy to take on the full case
* **2) Duty to give competent advice regarding what will or won’t happen depending on how the client pleads**
  + **Prospects of acquittal or guilt if case proceeds to trial**
  + **Implications and possible consequences of guilty plea**
* **3) Client must be allowed to make a voluntary decision (no pressure, inducements, etc.)**
* **4) Cannot make a “plea of convenience”**
  + The plea must be based on admission of the “necessary factual and menatal elements of the offence charged”
  + This is the most contentious factor

#### R v(K)S: Must admit factual and mental elements of guilty plea

🡪 Lawyer must assure client is willing to admit them

**Background:**

* Charged with sexual offences, pleaded guilty
* Seeks to set aside the plea of guilty since he says he was innocent all along
  + New evidence at court suggests he actually was innocent
* Defence suggested to the client that they take the plea for non-custodial sentence despite his continued assertion of innocence; he pleads guilty to a few lesser charges to avoid going to trial on the more serious ones
  + Defence told him they might get a different sentence than what they got but the decision was still left to him
* He was not able to comply with probation terms because he refuse to admit his guilt and get ‘treatment’
* It was pretty clear to everyone throughout the trial that he was still asserting innocence, but defence explained that courts “work in evidence, not truth” and he should decide whether he wanted to take the plea
* Even if it is a really good deal, you can’t get your client to make a guilty plea if they do not really believe they are admitting to the guilt

**Judgment:**

* **The lawyer failed to assure that the client was prepared to admit the necessary factual and mental elements of the guilty plea**: when he later denied the facts after pleading guilty, the judge should have rejected the pleas and moved forward with trial
* Guilty pleas set aside
* Your client must be willing to **admit to the facts underlying the offence**
  + E.g. a woman who kills her abusive husband may plead guilty to manslaughter knowing the defence of self-defence won’t work and she will otherwise be found guilty of a greater charge

## Checks on defence counsel behaviour: less than crown

* Usually self-employed, so no “ministry” or employer oversight (although public defenders may be a slightly different case)
* Client can complain to law society, law society can sanction defence for acting unethically
* Client can sue lawyer for incompetence or negligence
  + Convictions can be overturned for negligent defence
* Unlikely that the judiciary will intervene unless something super bad happens

# Ethics for Corporate/Government Counsel

## Professional responsibility: Milton Regan, Jr.

**Legal issues raised in in-house corporate environment**

* **Complexities of representing organization rather than individual**
  + Not clear who decision maker and authority is
  + Not clear if official is actin in best interests of corporation
  + Usually defer to manager but will be an issue if manager is the one causing problems
  + Knowledge is fragmented, difficult to spot illegal activity
* **Ethical rules traditionally formulated with litigator in mind**
  + Corporate and transactional work does not really fit in here
  + Business negotiations take place outside court: should that require more or less disclosure requirements?
* **Representing an organization who also employs you**
  + Interferes with professional independence
  + Problems with clarity between business and legal roles
* **Global nature of law practice**
  + Legal requirements and ethical provisions may be unclear in cross-border practice
* **Role as ‘gatekeepers’ who should try to restrain or report misconduct; however, this is in tension with the client first model**
* **Corporations are not just private actors, but have authority over matters of social importance like employment, etc.**
  + They should be aware of this and their role in influencing society

Special challenges because have to play private and public roles not always easily reconciled

## “Corporate Counsel as Corporate Conscience” Paul Paton,

* Lots of lawyers involved in corporate scandals
* Emphasizes importance of legal ethics taking into account the unique roles and responsibilities of corporate lawyers
* Corporate lawyers particularly vulnerable because it is hard to tell employer “no”
* **Little regulatory response:**
  + **Public is no longer willing to let the profession screw around, and we should be careful or else self-regulation will be taken away** (comments made by US guys suggest this)

## BC Code of Conduct: Dishonesty when client is an organization

***BC Code 3.2-8 (same as FLSC Model Code2.02(8)***

Dishonesty, fraud when client an organization

3.2-8 A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows or ought to know that the organization has acted, is acting or intends to act dishonestly, criminally or fraudulently, must do the following, in addition to his or her obligations under rule 3.2-7:

(a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, criminal or fraudulent and should be stopped;

(b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, criminal or fraudulent and should be stopped; and

(c) if the organization, despite the lawyer’s advice, continues with or intends to pursue the proposed wrongful conduct, withdraw from acting in the matter in accordance with section 3.7.

Commentary

[1] The past, present, or proposed misconduct of an organization may have harmful and serious consequences, not only for the organization and its constituency, but also for the public who rely on organizations to provide a variety of goods and services. In particular, the misconduct of publicly traded commercial and financial corporations may have serious consequences for the public at large. This rule addresses some of the professional responsibilities of a lawyer acting for an organization, including a corporation, when he or she learns that the organization has acted, is acting, or proposes to act in a way that is dishonest, criminal or fraudulent. In addition to these rules, the lawyer may need to consider, for example, the rules and commentary about confidentiality (section 3.3).

[2] This rule speaks of conduct that is dishonest, criminal or fraudulent.

[3] Such conduct includes acts of omission. Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct inaccurate disclosures that constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes these rules.

[4] In considering his or her responsibilities under this section, a lawyer should consider whether it is feasible and appropriate to give any advice in writing.

[5] A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner, may advise the chief executive officer and must advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer must report the matter “up the ladder” of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer’s advice, continues with the wrongful conduct, the lawyer must withdraw from acting in the particular matter in accordance with rule 3.7-1. In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter.

[6] This rule recognizes that lawyers as the legal advisers to organizations are in a central position to encourage organizations to comply with the law and to advise that it is in the organization’s and the public’s interest that organizations do not violate the law. Lawyers acting for organizations are often in a position to advise the executive officers of the organization, not only about the technicalities of the law, but also about the public relations and public policy concerns that motivated the government or regulator to enact the law. Moreover, lawyers for organizations, particularly in-house counsel, may guide organizations to act in ways that are legal, ethical, reputable and consistent with the organization’s responsibilities to its constituents

and to the public.

## Wilder v Ontario (Securities Commission) (OJ): OSC has jurisdiction to make orders against lawyers

**Background:**

* Arguments:
  + Ontario Securities Commission (OSC) wants to reprimand solicitor for alleged misconduct in connection with his representation of a client before the OSC
  + Wilder and Cassels (Brock) supported by the LSUC argue that the OSC lacks a statutory mandate to reprimand Wilder for his conduct, and that allowing them to assert jurisdiction violates rule of law
* Facts:
  + YBM was a client of Cassels/Wilder with them acting as council for YBM at the OSC; he was never an officer or otherwise working for the company
  + OSC wants to determine whether orders should be made against him on claim that he provided false or misleading statements of fact regarding YBM

**Judgment:**

* **Nothing in** the relevant statute suggests it should not apply to lawyers
* **Law society does not have exclusive jurisdiction** to regulate professional conduct of lawyers
* **OSC’s proposed exercise of jurisdiction** is not inconsistent with the important role of the LS in regulating the legal profession; they both work in public interest
* **No infringement on rule of law**/independence of bar: OSC was seeking to ensure that lawyers do not mislead it, and in the exercise of that jurisdiction it will not interfere with ability of lawyers to continue to provide excellent representation to their clients
* **Solicitor-client privilege** is an important and fundamental right under the rule of law (litigation can only properly be conducted with privilege); however, does not require blanket provision on review of all lawyer action, provided it takes privilege into account
  + Two issues when lawyer comes before OSC
    - Lawyer wants to answer the allegations
    - Lawyer can’t answer if it reveals privileged/confidential information (although the law society code does provide exemption to defend self)
    - This exemption does not allow OSC to ignore privilege, must exercise caution in proceedings against lawyers

## HSBC: Tips and Situation

* Scandal:
* HSBC operates in many countries - has to deal with numerous legal standards, but with one brand and one organization
* Operating under a “deferred prosecution” agreement with the US government - didn’t have the appropriate controls in place to prevent dirty money from coming into the US; know who clients are; know where the funds come from....
* In the scandal, it wasn’t the businesspeople who got screwed, it was the lawyers - they fell on their swords
* If you become in-house counsel, you better have your finances in order and you had better be prepared to resign if shit hits the fan
* Be careful what information you receive from other employees - that information may be used by the corporation against them, or may not be kept in confidence
* What about if you receive information that indicates a legal risk to the organization? ex/ an executive with wandering hands
* Will you give business advice? people say no, but yes you do - not necessarily strategic or managerial
* When you are giving black-letter law advice - clearly mark the document as privileged, disable people’s ability to copy the email
* If you’re also serving as a director, your status as a lawyer will be taken into account when liability is being determined ---> your knowledge deemed to be higher
* \*\*\*if you’re concerned about a matter, it’s worthwhile to consult external counsel to see if your concern is shared\*\*\*

# Access to Justice

**Guest Speaker:** Donna Martinson QC

* Little progress from the past in terms of access to justice and equal representation in the legal profession
* Social contract of the legal profession
  + Monopoly on the provision of legal services – in return, the law profession is meant to be a representative of clients and a public citizen
  + Obligation to assist with quality and access to justice
  + If we fail to meet our obligations, society will change the contract and redefine access to the profession and its function
* Key topics
  + Recent ‘report cards’ on access to justice
  + Law Society Code on access to justice
  + What it takes to be a competent lawyer
  + Need for diversity in profession
  + Need for divers areas of practice
  + Need for effective court process
  + Access to justice for children

## Recent Reports on Access to Justice

* National action committee on access to justice
  + Failing in our responsibility to provide a justice system that is
    - Accessible
    - Responsible
    - And ...something focused
  + Improvements urgently needed
    - Should focus on the broad range of legal problems experienced by the public
      * Everyday problems from point of view of those who experience them
      * User-centered system
  + Critiques by court workers:
    - Civil justice system is…very much open to abuse by those with more money at their disposal
    - General public has very little idea about the procedures, requirements, language, and where to get help
  + Other comments:
    - Lack of faith in lawyers and the system
    - Language of justice is foreign to most people
    - Money = more access to justice
* Another recent report done by the CBA found that people think:
  + Justice system is not to be trusted
  + Only for people with money
  + Difficult to navigate
  + Arbitrary
  + Inaccessible to ordinary people
* BC Public Commission on Legal Aid (2011)
  + Legal aid system is failing and devastation is wreaked by the absence of adequate legal assistance and representation
  + Needs are greatest and have most serious consequences in family law, child protection, and in poverty law matters
  + Women are disproportionately impacted by lack of legal aid in family law
    - Relative economic disadvantage, and bear most of the negative consequences of the system
    - Even more problematic when woman is trying to leave abusive relationship

## Code of Professional Conduct

* Lawyer
  + Is a minister of justice
  + Duty to serve cause of justice
  + Duty to uphold standards and reputation of the legal profession
* Commentary:
  + Lawyers are encouraged to:
    - Participate in legal aid and community legal services programs
    - Provide legal services on a pro bono basis
  + …a few other things

## Criticizing courts and tribunals: a proper balance

* Lawyers have special responsibilities to
  + Avoid criticism that is
    - Petty
    - Intemperate
    - Unsupported by bona fide belief in real merit
    - Unjust
  + Know that if involved in a proceeding their comments can appear partisan rather than objective
    - Usually most problematic after a long and hard court case where lawyer expresses their disappointment or frustration at not winning the case
* Criticism is important but must be important not to undermine the justice system in the eyes of the public
  + Also judges can’t defend themselves so that should be kept in mind when critique is being made

## Competency and Access to Justice

* Just having “a” lawyer is not necessarily sufficient
  + Lawyer must be competent in order for their access to be meaningful
* Competence means
  + Having and applying relevant knowledge, skills, attributes; can investigate facts, identify issues, ascertain client objectives
  + Requires broad, equality-based understanding of relevancy
* **McLachlin CJ:** those engaged in legal analysis must not only understand the facts and the law, but also the **social context** from which they arise
  + They must appreciate the human beings and situations before them, and appreciate the lived reality of the men, women and children who will be affected by their decisions
  + This is not intuitive – requires ongoing legal education to learn more about social context and social conditions

### Assessing for Family Violence – example of contextual nature of judgments

* Example: division of property including corporate interests, in a family law case
  + You must know the law about the division of family property, and the discretion a judge has about equal sharing
  + You must investigate to find out:
    - How long the relationship lasted
    - What property there is
    - When it was acquired, by whom, what it’s worth, etc.
  + In addition, you will want to know *what, for this client, in this client’s circumstances, what resolution would be fair and whether an agreement can be fairly negotiated*
    - Code of Professional Conduct:
      * Duty to encourage out-of-court resolution, but only if the dispute will admit a fair settlement
      * This requires a broader understanding of the context of the relationship between this particular couple
  + Family law act requires a lawyer, in order to reach a fair resolution, even in a property case, to:
    - Assess whether family violence is present
    - And, if it is present
      * The extent to which it may adversely affect
        + Child
        + Ability to negotiate a fair agreement
    - Violence includes psychological or emotional abuse
      * Intimidation, harassment, coercion or threats respecting person or property, unreasonable restrictions on personal autonomy
  + In order to “investigate the facts” a broad enquiry into those issues is required
    - Includes an understanding of the gendered nature of family violence and its disproportionate impact on women and children
* Judges should also consider these things:
  + Strive to be aware of and understand the differences arising from gender, race, religious conviction, etc.
  + Need to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society

## Diversity in the Legal Profession

* Meaningful access to justice requires diversity within the profession
  + Repot suggests that society is best served when the institutions are representative of the people actually being served
  + Lack of female, aboriginal, and other minorities
* Currently we do not have a diverse judiciary or a diverse profession
  + Law society is taking some steps to address these issues
* Issue to think about: articling students in Ontario who cannot get articling jobs can take the training program instead
  + Has the potential to create a ‘two-tiered’ licensing system with those who did not complete articles seen as ‘second class’ lawyers

## Diversity of Areas of Practice

* Some lawyers consider some areas of law (family) to be undesirable, despite the fact that these areas are of most significance to, and will most benefit, vulnerable people in need of legal services
* The lack of focus and respect for these areas of practice is evident in law school as well
  + Many schools replacing full-time faculty with part-time, and de-emphasized with the focus instead being put on the type of law practiced in large firms and corporate practice

## Other considerations

* Complex, unaffordable, and inaccessible court processes
  + Report on Meaningful Change (SCC)
    - Family law in particular is problematic; complex, unaffordable, etc.
* Ineffective case management by courts also causes access issues
  + Multiple judges working on a case
  + Disconnection between cases in various areas (family, civil, criminal) which are actually all connected in significant ways

## Access to Justice and Children

* Most vulnerable but least access to justice
  + Children have rights to participate in proceedings that affect them
    - UN Convention on Rights of the Child, which is in effect here, says the have this right
  + But realistically this doesn’t usually happen
  + The majority of family cases involve vulnerable and unrepresented children who seldom participate in the process, despite the fact that their interests are central to the conflict
* Harm to children caused by court processes
  + Stakes for children are extremely high
    - Can be seriously harmed
    - Longer the problem continues, the more harmful the situation can become and the more difficult it will be to resolve
  + Not only is harm caused by the conflict, but the court process itself may be destructive to stability and development
* Charter rights
  + Children’s charter rights are often overlooked
  + Generally either disregarded or considered in a diminished form

🡪 Importance of informed impartiality – judges must recognize their own backgrounds and make sure their prejudices are not impacting their ability to judge; this is particularly true in family law as people generally have strong personal beliefs on these issues

**Why does access to justice matter?**

* Do not want to be part of a profession with a bad reputation for greed and part of a corrupt system
* Being aware of access to justice issues will help to inform the way you make decisions and act in your career
* Help to inform answer Bencher’s entrance questions
* Make you aware of the challenges of representing someone when the other side doesn’t have a lawyer
* Significant challenges when others are ‘under-represented’ (hack lawyer)