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# 

# INTODUCTION

**Sources of Ethics**

1. Case law and Legislation:

* Negligence, FD, Rules of evidence, authority of the court

1. Rules of professional conduct

* BC code

1. Law society disciplinary decisions

* Interpretation of code

1. Principles and Norms

* Fills gaps between codes and personal morals

## Reasoning frameworks

1. Deontological

* Reasoning from rules or principles (i.e. religion, group norms, etc)
* Non-Consequentialist

1. Teleological

* Reasoning from consequences
* Consider harm caused, weigh competing harms

1. Ontological

* Reasoning from virtue or character
* Motivated by desire to be a ‘good person’
* At times these ideals may conflict

***Tankovich* : Learning to Act like a Lawyer**

* Advocates for the adoption of a uniform code for law students to prepare for the ethical standard required by lawyers
  + Disciplinary sanctions
* **WHY:** Students are an integral part of the legal system, do legal type work while in school, response to unethical incidents

## Governance of the Profession: Self-Regulation

* ***Legal Profession Act***
  + Creates law society and ability to self-regulate
  + Creates a discipline process (power to disbar)
  + Limit supply, monopoly to legal services
* Benchers
  + 25 lawyers elected for 2 year terms with a four term maximum
    - Try to get geographical distribution and diversity
    - Four term maximum
* **Justifying self-regulation:**
  + Protecting the public
    - Ensure quality of service
    - Irreparable harm from poor service
  + Independence of the legal profession
    - Encourages ability to defend the rule of law
    - Promotes confidence in the legal system
  + Balances the market for lawyers
    - Prevent over or undersupply of a public good
* Requirements for Admission

## Discipline in BC

**Law society can hear professional complaints and complaints of behavior “unbecoming a lawyer”**

* Law societies have a fitness requirement and require good character (section 19(1))
* Must respect the rule of law, be honest, and financially responsible
* Complaint and investigation
  + Public and lawyers can complain
  + Screening by admin staff – if not enough evidence will get filtered out
* Hearing
  + Only a small number make it to this stage
  + Quasi-judicial and very formal
  + Burden of proof is on the law society
  + Subject to Charter scrutiny and judicial review
* Penalty or sanction
  + Purpose of sanction is to protect public and protect the reputation of the profession
  + Purpose is **not** punishing the lawyer

***Devlin and Heffernan –* The End of Self- Regulation**

* Many countries moving away from self-regulation
* Critiques of SR:
  + Market monopoly
  + Undemocratic
  + Reactive
  + Conflict between regulatory role and representation
* Solution
  + Keep system but add ombudsperson
  + Establish separate complaints process but keep LS

***Re Mohan* –** Cheated on exams, papers, biggest thing was lying on application. BCCA found that he had changed enough and allowed him to practice. Was evaluated by benchers on the balance of probabilities.

# LAWYER’S ROLE

## Lawyer’s Duties From the BC Code:

* **Owes duty to client**
* **Fiduciary relationship**

|  |  |
| --- | --- |
| **2.1 Standards of the Legal Profession** |  |
| **2.1 -1 To the state** | Maintain integrity and the law – Cannot aid people in breaking the law |
| **2.1 -2 To courts and tribunals** | Conduct should be characterized by candour and fairness – Must not attempt to deceive court |
| **2.1 -3 To the client** | Obtain any remedy or defence through fair and honourable means within the bounds of the law |
| **2.1-4 To Other Lawyers** | Courtesy and Good Faith – fulfill all undertakings |
| **2.1-5 To Oneself** | Assist in maintaining honour and integrity of the legal system |

**2.2 Integrity**

**1-** Trustworthiness

**2 –** Irresponsible conduct can erode public confidence in admin of justice

**3-** dishonorable conduct reflects poorly on the legal profession

***R V NEIL***

* Unless a client in convinced of the undivided loyalty of their lawyer neither the public or the litigant will have confidence in the justice system
* Too bad for everybody else
* It is a fiduciary relationship, special relationship of trust, and the lawyer must put the client relationship first

***Woolley –* In Defence of Zealous Advocacy**

* Resolute advocacy – law is worthy in and of itself
* Law is the basis of civil society and it is deserving of our respect and attention
* It is the system we have that allows people to resolve disputes without violence
* Resolute advocacy is a good thing because it is directed by the client and the lawyers provide access to the system in a way that is orderly and manageable
* Lawyer cannot go beyond the law anyway
* Two central features:
  + Places decision making in the hands of the client
  + Lawyers must interpret and work through law to achieve the goals of the client
* Any action required by the lawyers role is morally justified through the law
* Final say is left to the client

***Luban –* The adversary system of Excuse**

* Lawyers retain responsibility for moral choices and are not absolved because choice was made “for the client”
* Professional obligation is not absolute but is a rebuttable presumption
* **When professionalism and morality conflict – morality should win**
* Adversary system provides institutional excuses for lawyers from personal morals
* Lawyer shouldn’t do something that a normal person wouldn’t do
* Neither party is working towards the end foal if they are so resolute and zealous
* He gives some exception to criminal defense lawyers

***Farrow -* Sustainable professionalism**

* Professionalism that focuses on sustainability
* Lawyer as a moral agent is sort of a turn off
* Plurality of interests
  + Getting paid, justice system, own beliefs, public interest
* Law students want a job that is personally fulfilling, one that is balances
* Diversity

# GOOD CHARACTER

***Legal Profession Act***

**Section 19(1)**

* Articled student, called, admitted or reinstated to bar unless the benchers are satisfied that the person is of good character and repute and is fit to become a barrister and a solicitor of the Supreme court

## Fitness to Practice

* Law Society of BC requires Fitness to practice
* **Schedule A: Medical Fitness**
  + Substance abuse, counseling for substance abuse, based on personal history or professional opinion do you have a condition that will impair ability to function?
  + Cannot ask questions about SPECIFIC disorders (against human rights code in ***Gichuru***)
  + Those who have received treatment for SA have to answer in affirmative

## Good Character

**Good character Questionnaire**

* Assessing character at that point in time
* Burden of proof is on the applicant to prove they are of good character

1. **Respect for the Rule of law and the Admin of Justice**

* Criminal charges, violation of court orders, etc.

1. **Honesty**

* Academic, professional, or employment misconduct or sanction

1. **Governability**

* Have they been disciplined by a professional organization, regulatory advisory, refused a license etc.

1. **Financial Responsibility**

* Personal bankruptcy, corporate insolvency, default of loans, misused position for financial gain, etc

# LAWYER-CLIENT RELATIONSHIP

**3.7-1 WITHDRAWAL FROM REP** lawyer must not withdraw except for good cause and with reasonable notice to the client

**3.7-2 OPTIONAL WITHDRAWAL** serious loss of confidence b/w lawyer & client (ex/ deceit; unreasonable; repeated failure to follow instructions)

**3.7-3 NON-PAYMENT** lawyer may withdraw after non-payment on reasonable notice BUT if matter is criminal, court may not allow

**3.7-7 OBLIGATORY WITHDRAWAL** discharge by client // not competent to act // client persists in instructing lawyer to act in unethical manner

**3.7-8 MANNER OF WITHDRAWAL** minimize expense & prejudice to client + facilitate orderly transfer to the successor lawyer

**3.7-9.1 CONFIDENTIALITY** can’t disclose reason for withdrawal if result of confidential communication (ltd. exception for crim non-pay)

## Formulating and Terminating Relationship

**Formulation**

* When is relationship formed?
* Generally- when there has been an offer and acceptance of the retainer contract
  + *Descoteaux* suggests the lawyer-client relationship is triggered at an earlier moment, during conversations such as fees and first dealings
  + First dealings doctrine –
    - When client first deals with lawyer to obtain legal advice
    - This is when FD and confidentiality begins
  + Phantom client
    - When people think you are their lawyer but you’re not
      * Must be clear about using the word retainer
* Once the lawyer client relationship is formed there are a lot of triggered duties
  + Confidentiality and fiduciary duties

**Termination**

* Chapter 3.7
* Can be explicit or implicit
* Client can end the relationship at any time for any reason
* Clients have absolute discretion to terminate -- lawyer’s are limited
* Explicit is better at preventing future Conflicts but in layer’s economic interest to retain

## Withdrawal

* **Optional withdrawal:**
  + Serious loss of confidence (**Chapter** **3.7-2)**
  + Breakdown between lawyer can client
  + Failure to pay fees after reasonable notice (**Chapter 3.7-3**)
    - Court may not allow withdrawal in criminal case unless lawyer has **ethical** reason for withdrawal (**Chapter 3.7-4) (*Cunningham***)
  + Lawyer must have good cause and reasonable notice and little prejudice to client (**Chapter 3.7-1)**
* **Obligatory withdrawal**
  + **Chapter 3.7-7**
    - If discharged by client
    - Client persists in instructing lawyer to act contrary to professional ethics
    - Lawyer is not competent

***Cunningham***

* Criminal defence lawyer wanted to withdraw after client failed to fill out forms for legal aid
* Counsel allowed to withdraw for ethical reasons
* Too much prejudice to client in this case

**Choice of Client**

* Lawyers can refuse to take a client
* Choosing client triggers ethical obligations (***Hutchinson***)
* When to refuse a client
  + If representation would suffer
  + There is a continuing retainer with a previous lawyer
  + Must have sincere belief – not discriminatory
  + Must not be influenced by public opinion
  + Criminal lawyers cannot decided based on guilt
  + When there is a conflict on interest
  + Lawyer lack competence
  + Illegal purpose
  + Lawyer has potential to become a witness
* Rule 5.03(5) a lawyer must not discriminate against any person
* English approach – cab rank rule – a lawyer taking a client is alike a cab driver in a taxi stand, they take who’s next

**NOTE:**

* **Keeping property for clients**
  + **Chapter 3.5-2**
    - Care for property as a careful and prudent owner would

## Advertising and Solicitation

* **BC CODE Chapter 4 – Marketing of Legal services**
* **Advertising**
  + Law society has the very broad power to protect the reputation of the profession and to regulate advertising
  + Must not be (**Chapter 4.2-5)**
    - False, inaccurate of unverifiable
    - Reasonably capable of misleading the recipient
    - Contrary to the best interests of the public
  + Can advertise an area of practice if they practice regularly in that field (**Chapter 4.3.01)**
* **Fees in ads (*Jabour)***
  + Not appropriate for lawyers to advertise price
  + Include all related charges
  + Advertised fee must be strictly adhered to in practice
* **Solicitation**
  + ***Merchant***
    - Sent out letters to residential schools victims
    - Listed amounts that could be received
    - Ruled as **conduct becoming a lawyer**
      * Likely to create unreasonable expectations
      * Reasonable capable of misleading
      * Undignified marketing
    - Gives impression the recipients have a claim when really no idea

**Sexual Relationships and “Cause Lawyering”**

* No absolute rule against, but real possibility of sexual harassment or exploitation
* Client may feel compelled to continue the relationship
  + If they stop, they may lose their lawyer
* Advises caution and suggests you avoid it
* ***Hunter***
  + Was senior lawyer working on divorce – had relationship with client
  + Complaint of professional misconduct
    - Conflict of interest
    - Failure to recognize issues arising form conflict
    - Tried to pressure client after break up to confirm she knew of the conflict
  + 60 day suspension

# DUTY OF COMPETENCE

**Chapter 3.1**

* **Must perform all legal services to the standard of a competent lawyer**
* **Negligence is different from incompetence – can have one without the other**
  + **3.1-2**
    - Competence is founded in ethical and legal principles
  + **3.1-5**
    - Lawyer should feel honestly competent or able to become so without delay
  + **3.1-6**
    - If not competent you must
      * Decline to act
      * Obtain consent to collaborate or consent to become competent
  + **3.1-7**
    - You may require advice or collaboration with non-legal experts
  + **3.1-8**
    - Lawyer should be clearly specific on facts, circumstances and assumptions on which their opinion is based
  + **3.1-10**
    - When giving advice on non-legal matter distinguish form legal
  + **3.1-12**
    - Timely service
  + **3.1-15**
    - Standard of perfection is not required

# ETHICS OF ADVISING AND NEGOTIATON

## Counseling Clients

* Duty to client in **Chapter 2.1-3**
  + Lawyer must be honest and candid
  + Must be competent to provide advice
  + Must have sufficient knowledge of the relevant facts
  + Indicate assumptions
  + Avoid over-confident assurances
  + Distinguish non-legal advice
* Cannot advise to break the law (see illegality below)
* Test from *Luban*
  + Your description of the law should be the same even if your client wanted the opposite response
  + If your best understanding of the law is outside of the main stream must let your client know
* **Cannot coach**

***Luban –* Tales of Terror for Lawyers**

* Torture memos
* Lawyers failed ethical duties
  + Distorted law to reach certain outcome
  + Interpretation was outside the mainstream of law
* **Test**
  + Your description of the law should be the same even if your client wanted the opposite response
  + If your best understanding of the law is outside of the main stream must let your client know

## Illegal Conduct

**Chapter 2.1-1(a)**

* Lawyers cannot give advice on how to break the law

**Chapter 3.2-7**

* Lawyer must not engage in any activity they know or ought to know assist or encourages any dishonesty, crime, or fraud

**Test Cases**

* A *bone fide* test case may be exempt from the rule against counseling or illegality (**Chapter 3.2-7)**
* Conditions
  + No one harmed
  + Good faith challenge of the law
  + Reasonable grounds to make challenge
  + Only a technical breach
  + Client understands consequences

**Counseling a Client to Breach a court order**

* ***LS Upper Canada v Sussman***
  + **Child custody order – must be clear harm to child**
  + Lawyer must have reasonable grounds to believe there is imminent risk and danger
  + Must bring an order to the court immediately to vary the order
  + Cannot undermine the court or tarnish the reputation of the court
  + Guilty of professional misconduct – did not file order for 7 months

**Negotiations**

* When a dispute can end in a fair settlement, lawyer should advise client to end the litigation (**Chapter 2.1-3(c))**
* Advise and encourage settlement where it is reasonably possible and discourage useless proceedings (**Chapter 3.2-4)**
* **Misleading info in negotiations**
  + No rule in BC
  + Alberta code has taken stricter view
    - Lawyer must not lie or mislead
    - Lawyer must correct misapprehension if they discover they have misled

***Pitel –* Lawyer or Liar**

* Statements of fact vs statements of position
  + Blurring the line makes people perceive lawyers as liars
  + Lawyer conduct during nego contributes
* Sources
  + Telling lies
  + Statements of position – media
  + Nego
  + Non-disclosure

***LS of NFLD v Regular***

* Counsel for oil company
* Misled counsel for a minor SH by denying that sale of company was happening
* Disciplined for failure to act with integrity, failure to uphold responsibilities to other counsel and questionable conduct

# DUTY OF CONFIDENTIATLITY

* Extends to chit chat and is applies more broadly than solicitor-client relationship

**Chapter 3.3-1**

* Lawyer must keep in **strict confidence** all information concerning clients’ business and affair and must not divulge unless:

1. Expressly or impliedly authorized by client
2. Required by law or a court
3. Required to deliver info to law society
4. Otherwise permitted by the rules

* **3.3-2 Use of Confidential Info**
  + Must not used or disclose confidential info for the lawyer’s benefit or for third parties without consent of client (***Greenspan***)
* **3.3-2.1**
  + Lawyer must claim privilege if asked to produce documents and if required to disclose must keep disclosure limited
* Duty of confidentiality and unreserved communication is essential for legal system (**3.3-1)**
* **IDENTITY of your client counts as confidential**

**Public Safety Exception – Chapter 3.3-3**

***Smith v Jones***

* Lawyer may disclose if they have reasonable grounds to believe there is imminent risk of death or serious bodily harm and disclosure is necessary to prevent it
  + Must only disclosure amount of information required
* **Bodily harm –** means violence but SCC says it includes psychological harm if it substantially interferes with health or well-being
* **Factors**
  + Clear risk to identifiable group or person
  + Risk of serious bodily harm or death
  + Danger is imminent
* If you believe disclosure is necessary contact LSBC
* Before Code – rule was when there was grounds to believe a crime was going to be committed

**Other Exceptions**

* If lawyer is exposed to criminal actions can disclose limited info to defend allegations against them (Chapter 3.3-4)
* May disclosure in order to collect fees - but only so far is as necessary (Chapter 3.3-5)
* May disclose to another lawyer to secure legal or ethic advice (Chapter 3.3-6)
* If reason for withdrawal results from confidential communications lawyer must not disclose (Chapter 3.7-9.1)

**Confidentiality vs Privelge**

* Privilege is more narrow – based on rules of evidence
* Privilege belongs to client not to lawyer
* Duty of Confidentiality is wider and applies without regard to what the source or nature of information is

**Money Laundering**

* Federal regulation requires disclosure of information that would breach duty of confidentiality – potential conflict
* Law society **Chapter 3.51-1**
  + No cash rule
* Government legislation
* **Chapter 3-91**
  + Have to keep records, identify clients, verify identity

***FLSC v Canada***

* Requires reporting of suspicious transactions and large cross-border movements
* New regulations require that lawyers who effect transactions on behalf of a client must
  + Perform client identification
  + Keep records of transaction
  + Establish internal programs to promote compliance with anti-money laundering regime
* Violates privacy rights of lawyers and deemed invalid FOR THE TIME BEING

## Lawyer’s Possession of Physical Evidence

* Lawyer shouldn’t be involved in the gathering of physical evidence
* Once you come into contact with the evidence there is a conflict between suppressing information and concealing evidence and solicitor-client privilege
* Should advise the client that it is an offence to conceal evidence
* A lawyer is never required to take or keep property relative to a crime or offence
* Generally, a lawyer should, as soon as reasonably possible, deposit evidence anonymously
* Rule leans towards the idea that you should turn over the evidence
* Lawyer cannot violate law or obstruct justice

***Murray***

* Lawyer for Bernardo went to the house and got video tapes
  + Got copies made – didn’t charge to legal aid
  + Limited who can see it
  + Say he was going to use the, at trial to cross-examine Homolka
* Said he didn’t intend to have them forever
* There were junior lawyers involved - Murray told them they had to make a pact not to tell anyone
* Murray is ultimately acquitted
  + Mens rea is questionable
* **Lawyer is never required to keep evidence relevant to a crime**
* ***Cannot violate law or obstruct justice***

# CONFLICTS OF INTEREST

**Chapter 3.4 Duty to Avoid Conflicts**

* **3.4-1 –** Lawyer must not continue to act when there is a conflict except as permitted
* **3.4-2 –** Lawyer can get consent
  + Consent can be express of implied and lawyer must have belief they can represent client without adverse effects
    - Express consent requires the client be fully informed and voluntary
    - Implied occurs in certain circumstances
* **3.4-4 –** Concurrent representation
  + two or more lawyers at the same firm can represent clients with competing interests on other matter – circumstantial

**Policy for Regulating Conflicts**

* Possible misuse of confidential information
* Effective representation
* Based on the duty of loyatlty

## Test for Conflict

1. **Bright-Line Rule (*Neil, McKertcher*)**

* Law firm cannot concurrently represent client who are **adverse in legal interest***without first obtaining informed consent*
  + Rule applies to related and unrelatedmatters
  + Applies only when **immediate interests** are **directly adverse**
    - Interests must be **legal** in nature (i.e. real estate transaction doesn’t count)
  + Cannot be relied upon by a party who seeks to abuse it (cannot use as a tactical advantage)
  + Does not apply if it would be unreasonable for the party to expect the law firm not to act for others
  + Cannot go against a former client if you have relevant confidential info

1. **Substantial Risk**

* Even if it does not fall under the bright-line rule, there may be a conflict
* **Would concurrent representation create a substantial risk of impaired representation? (*Neil, MCKertcher*)**
  + Substantial risk is more than a mere possibility – must be serious risk of prejudice to clients’ interests (**Chapter 3.4-1)**
* Onus on the applicant to show substantial risk exists

1. **If passes bright-line and substantial risk test**

* **Lawyer must advise existing clients before accepting new retainer that may conflict (***Duty of Candour*)
* Must have full disclosure and get informed consent from both parties
* Must put in place a system to ensure no one gets confidential info that should not have access to it

## Implied Consent

* Consent can be implied and need not be in writing when:
  + Client is government, financial institution, publicly traded entity, or an entity with in-house counsel
  + Matters are unrelated
  + Lawyer has no relevant confidential information from one client that **might** **reasonably** affect the other
  + **AND** Client has consented in the past
* Exceptional cases only

## Concurrent Representation

* Lawyers can represent both sides of a transaction as long as interests are aligned
* Clients must be informed and give consent
* If there are **different matters or competing interests**:
  + Two or more lawyers at a firm can represent different clients so long as they treat each clients info as confidential (**Chapter 3.4-1)**
  + Must obtain consent and give full disclosure
  + Put in systems to protect confidential info

## Joint Retainers

* Lawyer obtained by two parties in a transaction
* Parties must be advised that (**Chapter 3.4-5)**
  + No info will be confidential form the other
  + Lawyer will have to withdraw if conflict develops
* If new client wants to join existing client (**Chapter 3.4-6)**:
  + Lawyer must advise new client of the existing client and advice them both to seek independent advice
* Consent for joint retainers should be obtained in writing (**Chapter 3.4-7)**

***R v Neil***

* Fiduciary nature of lawyer-client relationship
* Duty of loyalty has three dimensions
  + Duty to avoid conflicting interests
  + Duty of commitment to client’s cause
  + Duty of candour

# WOMEN IN LAW

* Retention in private practice is poor
  + Women more likely to leave the profession and more likely to leave private practice
  + Will likely take until 2080 for women to be properly represented in private practice
* Sexual harassment in the workplace a serious issue

***Backhouse –* Gender and Race in the Legal Profession**

* Structures used to keep some people out of law
* Cost, dress code, self0regulation as a way of replicating make-up of profession, articling, class and gender biased questions on exams, etc.
* Diversity of the judiciary especially concerning at the SCC

# ADDICTION AND MENTAL HEALTH

**BC Code Chapter 7.1-3** Duty to Report

* Lawyer’s must report the mental instability of a lawyer that ay cause a client to be prejudiced
* Required to report yourself or other lawyers **unless it breaches confidentiality**
* Proposed changes by FLSC
  + Will remove language that stigmatizes mental disorders
  + Omits mental instability and replaces with
    - *conduct that raises a substantial question about the lawyer’s capacity to provide professional services because of mental, physical or emotional conditions, disorders or addiction*

**Alcoholism**

* There exists an ‘alcohol culture’ in law
* Many lawyers are highly functioning alcoholics
* **Lawyer’s Assistance Program BC**
  + Very helpful
  + Can call yourself or colleagues can call

***Gichuru v LSBC* (2009) BCHRT**

* History of depression, applied for admission answered in affirmative to question about specific disorder
* His application was held up – applied to BCHRT
* The question did not look at how severe the disorder was ad focused only on mental health
* 77% of applicants who answered in the affirmative had som esort of negative sanction
* **Since, the approach to fitness has been improved**
  + Confidential, expert panels
  + Can be found fit with restrictions
    - This usually applies to addiction
      * Go to rehab, quit use of substance, etc.

***R v Lessing***

* Raised mental state as a defence to infractions
* Mental health should be looked at as an explanation not an excuse
* He got disbarred but probably wouldn’t have if he didn’t have a mental health problem

**Guest Speaker: Douglas Eastwood, QC from AG office**

* 15-24% of lawyers struggle with addiction
* 60% of claims against lawyers relate to addiction issues
* Lawyers Assistance Program created by LSBC
  + Very helpful
  + People get sent there
  + No firm has held it against a lawyer

# CIVILITY AND ETHICAL ADVOCACY

**Ethical Duties as Officers of the Court**

1. Goal of the court is truth seeking
2. Lawyer conduct should be characterized by candour and fairness

* Lawyers should maintain courteous and respectful attitudes (**Chapter 2.1-2(a))**

1. Lawyers cannot mislead the court

## Witness Preparation

* Lawyers can prepare witnesses but cannot **coach** witnesses
* Criminal offence and breach of duty to court to coach witnesses
* Sanctions include coasts against client or lawyer personally or other discipline or sanctions
* Ch. 5.3-5.4

## Cross-Examination

* Protected under section 7 and 11(d) right to make full answer and defence

Cross of Witnesses

* Duty to ask every question that will help your clients case and obtain benefit of all available defences (**Chapter5.1—1**)
* **Can** ask leading questions, put forward a scenario without evidence, advance questions on reasonable suspicion, experience or intuition
* **Cannot:**
  + Harass, deceive, mislead put forward a knowingly false or reckless scenario (**Chapter 5.1-2)**
* Must have a good faith basis- low threshold, matters need not be proved independently

***R v Lyttle***

* Defence theory was that Lyttle was identified to shield the drug associates of the victim
* Was prevented from this line of questioning because they did not have **substantive evidence** of their drug debt theory

## Cross of Accused

* Crown must be mindful to not be abusive

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

* Cross of appellant found to be abusive
  + Sarcastic tone, editorial content in questions, demeaning and humiliating

## Duty to Inform the Court

***General Motors Acceptance Corp***

* + Must inform the court of any relevant authorities
  + Cannot discharge duty by being **willfully ignorant**
  + May be exceptions for cases that are unreported or similar only on fact (not law)
* Cannot deliberately refrain from informing court of binding authority (**Chapter 5.1-1)**

## Civility in Advocacy (See Chapter 5.1-1 and 5.1-5, 7.2-1)

* Responsibility to be civil in proceedings
* Breach of civility has two components (***Woolley)***
  + Rudeness
  + Preventing admin of justice
* **Four ways Incivility undermines the Administration of justice (*Groia)***
  + Lawyers focus on defending themselves from personal attacks
  + Trier of fact preoccupied with managing personal conflicts
  + Serious personal disputes lengthen and delay court proceedings
  + Unfounded or irrelevant personal attacks on opposing counsel diminish public respect and undermine legitimacy

**Allegations of Misconduct (*Groia*)**

* Defence can make allegation against Crown during proceedings when
  + Some foundation in record
  + Possibility that accusations could lead to remedy
  + Only appropriate time to do so is in the proceedings
* Consistent patter of rude, provocative or disruptive conduct may be sanctioned (**Chapter 5.1-5)**

***Woolley –* Does Civility Matter?**

* To the extent that “civility” regulates good manners amongst lawyers, it’s not the proper subject for professional regulation
* Civility can obscure real ethical principles at issue - ex/ respect & loyalty to clients; proper functioning of the legal system
* Lawyer’s ethical obligations are not those of a kindergarden student - many duties trump moral duty to “share and be nice”
* Lawyers should NOT be disciplined for incivility in context of protecting a client’s legal interests
* “Historic collegiality” connected to discrimination & intolerance for diversity
* Civility Initiatives

1. Are generally just restatements of rules already in place

2. Emphasis on civility obscures true nature of lawyer’s ethical misconduct

***Salyzyn –* John Rambo v Atticus Finch**

* How we talk about lawyering & ideal lawyers affects power distribution within the profession
* Currently, discourse of the civility movement is dominated by two competing masculinities -- “win at all costs” VS “gentleman’s ethic”
* Dichotomy leads to exclusionary understanding of professionalism
  + Renders women and other “outsider” lawyers largely invisible (can’t fit the Rambo mold)
  + Romanticizes discriminatory concepts of professionalism (anti-Rambo, desire to return to time when profession was almost 100% white men)
  + Reflects anxieties about the changing modes of authority w/in the profession
* Salyzyn would like to see more progressive narrative for the civility movement that incorporates female archetypes

# RETAINERS AND FEES – Chapter 3.6

* Lawyer’s hold clients’ money in trust until paid out
* Any interest earned on trust goes to Law Foundation
* Often tension between law as a business and access to justice
* If you interfere with a trust account at all you get disbarred, but this has been relaxed
* Should sit down with client at the beginning and have an open conversation about financial issues
* Retainer letter should include:
  + Billing plan, taxes, disbursements, trust account info, BE CLEAR
* Contingency fees are permissible but have to be in writing
  + Cannot use in custody case

***Aylward***

* Discovered partner had stolen $200,000 from two elderly woman
* Gave him a chance to pay it back
* Found guilty and given permission to resign
* Can get in trouble for actions of others

***Blott***

* Residential schools claims
* Individual assessment Process
* In these cases federal government would give lawyers 15% to offset fees
* Lawyers could also take 15% of settlement
* Blott fond ways to take more than that
  + Routinely charged an additional 15%
  + 45% total
* Class action against them

# ACCESS TO JUSTICE

* Many Canadians do not pursue their claims due to court expenses
* Tends to have an impact on people with disabilities and poor people
* They are disproportionately affected
* Family issues may have proceedings in different courts
* Increased pro bono for lawyers
* Also mandatory continuing education for lawyers
* Lawyers:
  + Have to charge tax on fees
  + Should be telling clients if there is interest on overdue accounts
    - If not specified beforehand lawyer cannot collect
  + Have to make client aware if they have to cover other sides costs
  + Can sue for breach of conduct to recover legal fees
  + Class action plaintiffs don’t have to pay costs
* **Guest Speaker Justice Martinson**
* Problem of access to justice
  + Pervasive in family law, child custody, and poverty law
    - Legal aid doesn’t cover all
    - Self-representation prevalent (50%)
  + Women disproportionately affected
  + Lack of adequate legal aid
    - Only certain issues and salaries qualify you
    - Big portion of those who need help missed
  + Children’s access to justice an issue
    - They have legal rights but often no one to advocate for them

***Trial lawyers assn. of b.c. v. British Columbia (AG)***

* Custody battle
* Spent a ton of money on lawyers and could not afford court fess ($3,600 – her monthly income)
* Superior court judge can order relief – waive the fee for people who are impoverished (Supreme Court Rules)
* The Superior court decided this should be read as **“order in need”** to further the purpose of the legislation
* Was appealed to the SCC
  + Said the fees are unconstitutional and the whole regime is *Ultra Vires*
  + To bar access to the courts for some individuals limits the jurisdiction of the courts
    - Hearing fees ought to be such that anyone can afford them

# ETHICS IN CRIMINAL LAW

## Role of the Crown

* 1. **Overriding Duty**
* Seek justice in the public interest while respecting rights of the accused
* Expected to be fair, objective and dispassionate in presenting the case for the Crown but is also expected to argue forcefully for a legitimate result
  1. **Crown Counsel plays a dual role**
* Quasi- judicial and adversary
  1. **Crown can seek a conviction is they think it is in the legitimate interest**
* Other duties: to help police prepare for court, approve police charges, disclosure to defence to help them prepare case

**Disclosure**

* Crown has an ethical and constitutional duty to provide **full disclosure** of all relevant information (***Stinchcombe***)
  + Failure to do so can contribute to wrongful convictions
* **Section 7**  \right to make full answer and defence

***Boucher***

* Overzealous advocacy
* Legal and ethical limits when it comes to cross-examination and jury address
* Jury address
  + Cannot use inflammatory or vindictive language to express opinions of guilt
  + Can’t imply that Crown’s investigation has found accused guilty
  + Must make statements of arguments, not fact

***Kreiger***

* Prosecutorial discretion
* Crown is subject to the law society except with respect to certain core elements of prosecutorial discretion
* Given deference in laying charges, entering stay of proceedings, accepting guilty please to lesser charge and withdrawal

## Role of Defence

**Chapter 5.1-1 Advoacy**

* Lawyer must represent the client **resolutely and honourably** within the limits of the law
* Expected to vigorously represent the interests of the accused but is also expected to remain independent of the client and to be mindful of various overriding duries to the court

**Duty not to Mislead the Court**

* Avoid forming opinions of guilt or innocence
* If you become convinced of guilt you can continue to represent but cannot use any defence that involved knowingly misleading the court
* Can defend using any defence that the law allows (**Chapter 2.1-3**)

**Custody of Real Evidence**

* Defence is not under general duty to disclose
* Three exceptions
  + Alibis
  + Psychiatric defence
  + Expert opinion
* **Privilege only protects communication (Murray**)

## Negotiating Guilty Plea

**WHY PLEA?**

* Client faces inevitable conviction - negotiate better sentence, save time & money & public exposure of trial, client wants to admit guilt
* Decision is entirely up to the client - pressuring client to plead guilty (ex/ to save the lawyer time) is highly improper

**BC RULES (5.1-8) -** **lawyer can enter into plea agreement if following investigation**:

* Lawyer must advise client about prospects of acquittal, finding of guilt
* Advise client about implications & possible consequence of guilty plea
* Client must be prepared to admit to the factual & mental elements of the offence
* Client voluntarily instructs lawyer to enter into plea
* Guilty plea + refusal to admit guilt can create problems for client while serving sentence & in trying to obtain or complete parole/probation (R v K(S))
  + BUT -- lawyer cannot give or offer “valuable consideration” (including settling of a related civil matter) to another person to influence Crown’s
* Conduct of criminal complaint -- unless the lawyer obtains the consent of the Crown -- 3.2-6(a)

**Withdrawal from Representation**

1. Defence can withdraw if there is **sufficient time** for the client to obtain alternate counsel to prepare (**Chapter 3.7-4)**

* Must notify client in writing of withdrawal due to non-payment
* Account to client for any monies received
* Notify Crown in writing

1. If time is insufficient, but lawyer has good cause, lawyer can try and get an adjournment (**Chapter 3.7-6**)

* Lawyer can then apply for leave to withdraw
* Regardless, court can use discretion to prevent withdrawal (***Cunningham***)

# ETHICS FOR CORPORATE AND IN-HOUSE COUNSEL

**Chapter 3.2-3 Organization as Client**

* Lawyer’s client is the **organization** even though people give them instructions

**Chapter 3.2-8 Dishonesty/Fraud with Organization as Client**

* When the client is an organization
  + Advise person giving instruction and chief legal officer that conduct should be stopped
  + If this fails, progressively advise those higher up in command
  + Last resort – withdraw

**Ethical Challenges**

* Organization is both client and employer
* Cognitive dissonance – conflict between professional norms of client loyalty and personal norms
* Organizations have own personalities

***Reagan –* Professional Responsibility and the corporate lawyer**

**I. Organization vs individual as client**

* Must act in organization’s interest
* Lines of authority w/in the company may not be clear -- may hold conflicting views
* Particularly problematic if lawyer has reason to believe instructing individual is not acting in the company’s best interests

**II. Nature of work**

* Adversarial mode doesn’t always port well to the business world
* Issues surrounding disclosure of info outside of courtroom setting could lead to sharp dealings

**III. Lawyer as corporate employee**

* Tension between role as advocate AND “gatekeeper” - restrain unethical/illegal conduct
  + “Whistleblower” - report misconduct
* “Quasi-public role” -- corporations are no longer simply private actors -- can influence public markets, employment, etc.

**Regulatory Issues**

* Corps have broader roles in society
* Other legislation developed – Securities, etc
* ***Wilder v Ontario***
  + Lawyers are subject to regulation by securities commissions
  + Can reprimand lawyers as individuals and in capacity as solicitors
  + Regulators must be mindful of solicitor-client privilege