

# ETHICS & PROFESSIONALISM

LAW 468 – BENEDET // FALL 2013 // ANDREA FRASER

TABLE OF CONTENTS	
<b>INTRODUCTION</b>	<b>2</b>
<b>THE LAWYER'S ROLE</b>	<b>2</b>
<b>GOVERNANCE OF THE PROFESSION</b>	<b>3</b>
<b>THE CONTEMPORARY LEGAL PROFESSION</b>	<b>3</b>
<b>CHARACTER</b>	<b>4</b>
<b>LAWYER &amp; CLIENT</b>	<b>5</b>
• FORMATION / TERMINATION OF THE RELATIONSHIP	<b>6</b>
• COMPETENCE	<b>6</b>
• ADVERTISING & SOLICITATION	<b>6</b>
<b>ETHICS IN NEGOTIATION &amp; ADVISING</b>	<b>7</b>
• COUNSELING CLIENTS	<b>7</b>
• ILLEGAL CONDUCT	<b>7</b>
• NEGOTIATIONS	<b>7</b>
<b>DUTY OF LOYALTY</b>	<b>9</b>
• CONFLICTS OF INTEREST	<b>10</b>
• SEXUAL RELATIONSHIPS WITH CLIENTS	<b>10</b>
<b>DUTY OF CONFIDENTIALITY</b>	<b>11</b>
<b>ADVOCACY &amp; CIVILITY</b>	<b>12</b>
• ETHICAL DUTIES - OFFICERS OF THE COURT	<b>12</b>
• CIVILITY IN ADVOCACY	<b>12</b>
<b>ETHICS IN CRIMINAL LAW PRACTICE</b>	<b>14</b>
• ROLE OF THE CROWN	<b>14</b>
• ETHICAL DUTIES OF DEFENCE COUNSEL	<b>14</b>
<b>CORPORATE COUNSEL</b>	<b>16</b>
<b>ACCESS TO JUSTICE</b>	<b>17</b>

## INTRODUCTION

*Legal Ethics – Can You, Must You, Should You?*

### SOURCES

- I. CASE LAW & LEGISLATION -- negligence // fiduciary duty // rules of E (ex/ privilege) // inherent authority of the court
- II. RULES OF PROFESSIONAL CONDUCT -- provincial law societies codes // CBA's *Model Code of Professional Conduct*
- III. LAW SOCIETY DISCIPLINARY DECISIONS -- insight into interpretation of Codes and clear violations – less helpful for grey areas
- IV. PRINCIPLES & NORMS -- help fill gap b/w clear conduct rules & personal morals // ex/ consult a Bencher to field their opinion

### REASONING FRAMEWORKS

1. DEONTOLOGICAL – reasoning from rules/principles – non-consequentialist
2. TELEOLOGICAL – reasoning from consequences
3. ONTOLOGICAL – reasoning from virtue or character – ex/ desire to be a good person

### TANOVICH – LEARNING TO ACT LIKE A LAWYER

- advocates adoption of a uniform code of conduct for law students (distinct from university policy) to prepare for ethical standard req'd for lawyers -- standard expected of students could be lower than that expected of lawyers
- WHY : students are an integral part of the law community // inspire students to be ethical // response to “unethical” incidents
- WHAT: disciplinary offences for both academic misconduct AND violations of the relevant code of conduct
  - service / competence / confidentiality / duty to report misconduct / civility / etc etc *ad infinitum*
- T is worked up about “a number of high profile incidents of professional misconduct” in profession & at law schools – attributed to immaturity; anonymity of technology; and “consumer culture” -- doesn't provide any data that these type of events are on the rise

## THE LAWYER'S ROLE

<b>2.1-1 TO THE STATE</b>	maintain integrity & law // don't help people to break law
<b>2.1-2 TO COURTS &amp; TRIBUNALS</b>	conduct characterized by candour & fairness // don't attempt to deceive court or try to improperly influence
<b>2.1-3 TO THE CLIENT</b>	obtain any remedy/defence via fair & honorable means within bounds of law
<b>2.1-4 TO OTHER LAWYERS</b>	conduct characterized by courtesy & good-faith // avoid all sharp practice // fulfill undertakings
<b>2.1-5 TO ONESELF</b>	
<b>2.2 INTEGRITY</b>	<ul style="list-style-type: none"> <li>[1] trustworthiness of lawyer key to the lawyer-client relationship</li> <li>[2] irresponsible conduct can erode public confidence in the admin of justice</li> <li>[3] dishonorable/questionable conduct by lawyer in private OR professional life reflects adversely on profession</li> </ul>

### WOOLLEY – IN DEFENCE OF ZEALOUS ADVOCACY

- proponent of **resolute advocacy** – law worthy in & of itself – a “civil compromise” for dispute resolution (W declines to say law is moral in & of itself)
- 2 CENTRAL FEATURES -- (1) places decision-making in the hands of the client (2) lawyers must interpret & work through law to achieve client goals
- lawyers engage in good-faith interpretation of the law & work within the letter of the law to provide clients with access to system of justice
- therefore, any action required by the lawyer's role is morally justified
- if law permits a course of action & legal merit is contentious, the final say should be left to the client – law facilitates self-determination

### LUBAN – THE ADVERSARY SYSTEM OF EXCUSE

- lawyers retain responsibility for their moral choices – not absolved because the choice was made “for the client”
- adversarial system forces lawyers into one-sided roles, and thereby “institutionally excuses” lawyers from their personal morals that may conflict
- premise that morality & legality are not the same – professional obligation isn't an absolute, but a **rebuttable presumption**
- where professionalism and morality conflict, morality should win – **personal morality objection** – law does NOT equal morality

### FARROW – SUSTAINABLE PROFESSIONALISM

- different people & groups have divergent views of morality – F would like to see concept of professionalism that focuses on sustainability
- plurality of interests include -- client interests // lawyer interests (personal & financial) // ethical & professional interests, which are advanced by diversity // and public interest

## GOVERNANCE OF THE PROFESSION

### PROFESSIONAL SELF-REGULATION

#### GENERAL

- lawyers are both credentialed (law degrees) AND regulated (licensed to practice)
- regulation in the public interest – ensure that legal services are provided ethically & competently by qualified persons
- law societies AND courts have role to play in regulation of lawyer conduct (*Cunningham*)

#### JUSTIFICATIONS FOR SELF-REGULATION

1. independence of the bar (and by extension the judiciary) – public confidence in legal system that lawyers will pursue client's interests above state's
2. lawyers best equipped to understand technical complexity involved in lawyer regulation – more efficient, by extension – higher standards
3. balancing the “market” for lawyers – in essence, professional self-regulation creates a monopoly over services

#### LAW SOCIETY OF BRITISH COLUMBIA

- creature of statute – *Legal Profession Act* – lays out the basic organizational structure of the LSBC
- LSBC has power to set credentials for membership // discipline & disbar members // make rules of conduct

#### THE BENCHERS

- 25 benchers are elected for 2 year terms – 4 term maximum – serve on a volunteer basis PLUS 6 “lay benchers” appointed by the province
- elected on the basis of geographic distribution & population – diversity is an issue – far fewer minorities, solicitors, young lawyers

#### DISCIPLINARY PROCESS

- I. COMPLAINT & INVESTIGATION -- initial screening by admin staff – most are filtered out at this stage
  - II. HEARING -- quasi-judicial and highly formal // burden of proof on the LS // subject to *Charter* scrutiny and CL judicial review
  - III. PENALTY / SANCTION -- purpose is protection of the public & the profession's reputation, not punishment of the lawyer
- LSBC can hear complaints on (un)professional conduct AND about lawyer's conduct outside the profession – “conduct unbecoming a lawyer”
  - both LSBC & lawyer can apply for review of discipline hearing decisions – lawyer can also appeal the determination and/or any sanctions to the BCCA
  - CRITIQUES – system is reactionary // low levels of lawyer-on-lawyer reporting (probably not a bad thing, IMO) // doesn't deal with complaints about the quality of legal service received (1-800-COMPLAIN)

#### DEVLIN & HEFFERNAN – THE END(S) OF SELF-REGULATION?

- many Commonwealth countries moving away from self-regulation --> government or independent regulatory agencies; separate complaints process
- CRITIQUES – conflict of interests b/w representation & regulatory role of law societies // market monopoly // undemocratic // reactive
- Alternative #1 – keep system, but add an ombudsperson who sits separately from LS
- Alternative #2 – qualified regulation – keep LS, but remove its disciplinary powers – establish separate complaints process

## THE CONTEMPORARY LEGAL PROFESSION

*in a nutshell, the legal profession lacks diversity*

#### SOME STATISTICS

- roughly 10,000 lawyers in BC – 80% of which are practicing // 60% barristers and 40% solicitors
- 2/3 of practicing lawyers are men // majority of non-practicing lawyers are women
- BC law firms -- 75% sole practitioners while only 0.4% large firms with more than 50 lawyers

#### IMPACT OF LACK OF DIVERSITY

- homogenous nature of profession affects services offered, arguments made by lawyers & decisions rendered by judges (*Backhouse*)
- many women encounter instances of sexual harassment, bullying, and assault at work – “It will be our little secret” postcard campaign

#### WOMEN & PRACTICE

- attrition rate of women affects firms financially and socially – lose top-quality people
- women leave for a variety of reasons: firm culture // lack of mentors // family consideration // sexual harassment

## CHARACTER

**s.19(1) Legal Profession Act** – No person may be enrolled as an articled student, called and admitted or reinstated as a member 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

#### GENERAL

- **SCHEDULE A: MEDICAL FITNESS** – do you have a substance abuse disorder // have you ever received counseling or treatment for a substance use disorder // based on personal history or professional opinion do you have any existing condition reasonably likely to impair your ability to function?
- LSBC used to ask questions targeted to specific disorders (schizophrenia, bipolar, etc) -- found to be in violation of the BC Human Rights Code
- questions wrt substance abuse seem to punish those who have sought treatment -- have to answer in the affirmative

<b>Gichuru v LSBC, 2009 BCHRT</b>	<p>G had history of depression // applied for admission – answered in affirmative to a question that asked about specific disorders // G's application was held up, although he was finally admitted // files a complaint with the BCHRT – alleging individual &amp; systemic discrimination // BCHRT – upheld the complaint</p> <ul style="list-style-type: none"> <li>• question had no limit on how far in the past the condition was – no connection to the present</li> <li>• question focused on mental health issues to the exclusion of other disorders</li> <li>• 77% of applicants who answered in the affirmative experience some sort of negative sanction</li> </ul>
-----------------------------------	---

### GOOD CHARACTER

#### GENERAL

- FLSC GOOD CHARACTER QUESTIONNAIRE – 4 categories
  1. respect for the rule of law and the administration of justice (ex/ criminal charges, violation of court orders)
  2. honesty (ex/ academic, professional, or employment misconduct or sanction)
  3. governability (discipline by professional organization, regulatory advisory, refused license on basis of character)
  4. financial responsibility (ex/ personal bankruptcy, corporate insolvency, default of loans, misused position for financial gain)
- emphasis – the good character assessment is to gauge applicant's suitability to practice at that point in time
- the burden of proof is on the applicant to establish (on the balance of probabilities) that they are of good character

<b>Mohan (Re), 2012 LSBC</b> <ul style="list-style-type: none"> <li>• <b>admit past transgressions</b></li> <li>• <b>period of time passed</b></li> <li>• <b>remorse</b></li> </ul>	<p>M first applied to the LS in 2005 – withdrew application // history of academic dishonesty – cheated on a math exam during undergrad; plagiarized essay in law school; failed to accurately answer questions on the law society application &amp; possible plagiarism of honors thesis // re-applied in 2012 after obtaining LLM // M presented character reference letters &amp; fully admitted past transgressions // LSBC – admitted – M was now of good character</p> <p><b>Re Applicant 5, 2013 LSBC</b> – reversed – no explicit finding was made wrt M's credibility</p> <p><b>Mohan v LSBC, 2013 BCCA</b> – reversed – implicit finding of credibility is sufficient – M will be admitted</p>
---	--

## LAWYER & CLIENT

### FORMATION / TERMINATION OF THE RELATIONSHIP

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

#### FORMATION

- when relationship is formed is key, as this is the point from which a lawyer's ethical & legal duties to a client begin -- solicitor/client privilege
- start may be very clear -- formal offer & acceptance of the retainer contract BUT relationship can form without a formal retainer
- **first dealings doctrine** -- S/C relationship forms when the client first deals with lawyer's office to obtain legal advice - initial discussion & preliminary items of information lawyer requires in order to decide whether to represent client are privileged (*Descôteaux*)
  - be careful when receiving **confidential information** during informal dealings - can later lead to a conflict of interest -- 3.3-1[4]
- **phantom client** -- people who think you're their lawyer, when in fact you're not -- can be the result of casual conversations -- make it clear to people that they need to sign a formal retainer agreement -- phantom clients sometimes sue the lawyer if their limitation period runs out!

#### TERMINATION

- can be explicit (letter of termination) or implicit (resolution of the action) // clients have absolute discretion to terminate -- lawyer's ability limited
- explicit termination prevents future conflicts of interest (courts increasingly interpreted broadly) BUT in lawyer's economic interest to retain rel's

#### OPTIONAL WITHDRAWAL

1. serious loss of confidence -- 3.7.2
2. failure to pay fees after reasonable notice -- 3.7-3
  - NOTE - court may not allow withdrawal in criminal case, unless lawyer has ethical reason for withdrawal (*Cunningham*) -- 3.7-4
3. to withdraw, lawyer must have **good cause + reasonable notice + minimum amount of prejudice to former client** -- 3.7-1

#### OBLIGATORY WITHDRAWAL -- 3.7-7

1. discharged by client
2. client persists in instructing lawyer to act contrary to professional ethics
3. lawyer is not competent to continue to handle the matter

#### *R v Cunningham, 2010 SCC*

- **court approval of withdrawal**

criminal defence lawyer applied for withdrawal after client failed to fill out the documents req'd by legal aid // COURT - has inherent jurisdiction to refuse defence requests to withdraw based on non-payment alone // will be used as a remedy of last resort -- counsel allowed to withdraw for genuine ethical reasons

#### CHOICE OF CLIENT

- lawyers can refuse to take a client, but there's serious debate about the ethics of this -- not allowed in England, where the "cab rank" rule is in place
- choice of client is very important decision - relationship triggers whole host of ethical & moral obligations (*Hutchinson*)
- the unpopular client - entitled to representation when liberty interests are at stake, yet criminal defendants can raise ethical issues
- GUIDELINES: representation would suffer // sincere belief - not personal against the client or discriminatory // not overly influenced by public opinion // mindful of the importance of representation & whether another option is available // unacceptable for criminal lawyers to decide whether or not to take a client on the likelihood of guilt (*Proulx & Layton*)

#### REFUSING A CLIENT

- REASONS -- conflict of interest // lawyer lacks competence in the matter // continuing retainer with a previous lawyer // lawyer has potential to become a witness in the matter // illegal purpose

#### PRESERVATION OF CLIENTS' PROPERTY

- lawyers often responsible for storing client property - ex/ money, securities, wills, title deeds, certificates
- duties surrounding client's property are closely related to those regarding confidential information
- DUTY -- care for property as a **careful & prudent owner** would observing all relevant rules and laws (3.5-2)

## COMPETENCE

### GENERAL

- SKILLS -- substantive law + investigating facts + identifying issues + legal research & analysis + communication + timely + advocacy/negotiation + writing + problem solving + CLE -- **3.1-1**
- negligence is NOT the same as incompetency -- need not have one to have the other

### MISCELLANEOUS

- for judges, competency also involves appreciating the social context of legal issues – “lived reality” of those affected by their decisions (*CJC McLachlin*)
- family law context – lawyer has duty under code & statute (*Family Law Act*) to determine “relevant facts” before negotiating any settlement – this includes whether violence (psychological or physical) within the family that could impact whether agreement can be fairly negotiated

<b>3.7-1 COMPETENCE</b>	lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer
<p><b>[2]</b> competence is founded on both legal and ethical principles including knowledge of current practice and procedure</p> <p><b>[5]</b> lawyer should feel honestly competent OR able to become so without delay</p> <p><b>[6]</b> if NOT competent --&gt; decline to act / obtain consent to collaborate / obtain client's consent to become competent</p> <p><b>[7]</b> may require advice or collaboration with experts in non-legal fields</p> <p><b>[8]</b> lawyer should clearly specify facts, circumstances, and assumptions upon which their opinion is based</p> <p><b>[10]</b> can give advice on non-legal matters, but should clearly distinguish legal from non-legal advice</p> <p><b>[12]</b> timely service – if delay is anticipated, client should be informed</p> <p><b>[15]</b> standard of <u>perfection not required</u> – negligence not tied to lack of professional standard – even without negligence, disciplinary action may arise</p>	

## ADVERTISING / SOLICITATION

### ADVERTISING

- “marketing activity” has very broad definition under BC Code – “or any other means”
- CON -- vulgar // lessen the professional status of lawyers // invasive // commodification // contributes to litigious culture
- PRO -- lawyers should be allowed to brand in highly-competitive free-market // proponents of consumer choice // ads as access to justice
- MUST NOT BE (**4.2-5**)
  1. false, inaccurate or unverifiable
  2. reasonably capable of misleading the recipient or intended recipient
  3. contrary to the best interests of the public
- FEES (*Jabour*) – **still valid post Charter???**
  1. reasonably precise
  2. includes all related charges
  3. advertised fee strictly adhered to in all applicable cases
- lawyer can advertise preferred area of practice if the lawyer regularly practices in that field (**4.3-0.1**)
- but unless otherwise authorized, lawyer must NOT use title “specialist” or something similar (**4.3-1(a)**)
- AND will take reasonable steps to discourage others from doing so (**4.3-1(b)**)

### SOLICITATION & REFERRAL

- solicitation is a grey area -- can be seen as invasive or informative // taking advantage or the vulnerable of aiding progressive causes (*Merchant*)
- LAWYER REFERRAL – generally acceptable to provide other lawyers with a fee for client referral -- **FLSC MC 2.06(6)**
  - fee is reasonable
  - fee doesn't raise the cost to the client
  - client is informed
- FEE SHARING with non-lawyers -- not permitted by Model Code (although reasonable expenditures on promotional items allowed) – **FLSC MC 2.06(7)**

<p><b><i>LS Sask. v Merchant, 2000 LSDD</i></b></p> <ul style="list-style-type: none"> <li>• <b>solicitation</b></li> <li>• <b>conduct unbecoming wrt lawyer advertising</b></li> </ul>	<p>Solicitation of clients for residential school claims -- sent letter -- “nothing to lose”, listed \$\$ amounts, sign “authorization”, promised confidential referral // <b>conduct unbecoming a lawyer</b> -- (1) <u>likely</u> to create unjustified expectations (2) <u>reasonably capable</u> of misleading -- YES -- assumes that the client has a valid cause of action, failed to disclose the cons of litigation &amp; that the client may indeed “lose” something financially (3) undignified marketing -- YES -- mass mail is marketing, assumed that recipients were First Nations, had attended residential schools, &amp; had suffered abuse</p>
<p><b><i>LSBC v Jabour, 1980 BCCA, aff'd SCC</i></b></p> <ul style="list-style-type: none"> <li>• <b>LS can regulate advertising</b></li> </ul>	<p>Lawyer sets up “North Shore Neighborhood Legal Clinic”, offers flat fees, large illuminated sign // disciplined for conduct unbecoming // J challenged LS's jurisdiction to regulate advertising – claimed contrary to federal competition legislation // COURT – LS allowed to regulate advertising // J given 6 month suspension – <i>harsh</i> // <b>NOTE:</b> advertising regulations relaxed considerably since 2(b) <i>Charter</i> came into play</p>
<p><b><i>Stewart v CBC, 1997</i></b></p> <ul style="list-style-type: none"> <li>• <b>communication w/ the public</b></li> </ul>	<p>Greenspan was S's lawyer during trial &amp; sentencing // 10 years later, he hosted &amp; narrated a TV show on the case // S brought claim against G for breach of implied terms of K &amp; breach of FD // COURT – in the context of media attention surrounding former client's case --&gt; lawyer must not engage in behavior motivated by self-promotion or self-aggrandizement</p>

## ETHICS IN NEGOTIATION & ADVISING

### COUNSELING CLIENTS

#### GENERAL

- one of the most important services a lawyer provides is to communicate what the law is to the client
- CANONS – knowledge of facts + applicable law + open & undisguised opinion of case's merit & probable result – **2.1-3(a)**
- counseling should ideally provide a neutral, comprehensive view of the law -- not just there to tell client what they want to hear (*Luban*) – **2.1-3(a)**
- tension can arise b/w client autonomy & what decisions the lawyer thinks best
- DUTIES
  1. lawyer must be honest & candid
  2. must be competent to provide the advice
  3. must have sufficient knowledge of relevant facts
  4. should indicate any assumptions being made
  5. avoid bold or over-confident assurances
  6. if giving non-legal advice, be sure to differentiate (also be aware that your insurance may not cover negligence for non-legal advice)

#### LUBAN – TALES OF TERROR: LESSONS FOR LAWYERS

- government lawyer asked to write memos on the legality of torture -- govnt basically wanted a legal justification for the practice
- lawyers produced opinion that has since been discredited (it's not torture unless there's threat of organ failure!)
- lawyers failed in their ethical duties as counselors and advisors -- **(1)** distorted law to reach desired outcome **(2)** interpretation far outside mainstream
- **TEST** -- your description of the law will be more or less the same, even if the client wanted the opposite result
- **RULE OF THUMB** -- if your best understanding of the law is outside of mainstream legal views, then you should let your client know

### ILLEGAL CONDUCT

#### GENERAL

- lawyers should not give clients advice on how to break the law -- **2.1-1(a)**
- lawyers must not engage in activity they know, or ought to know, assists in or encourages any dishonesty, crime, or fraud -- **3.2-7**

#### TEST CASES

- *bona fide* test case may be exempt from rule against counseling or participating in illegality -- **3.2-7[4]**
- CONDITIONS -- no one harmed // good faith challenge, reasonable grounds // technical breach – best way // client understands risks & consequences

#### COUNSELING CLIENT TO BREACH COURT ORDER

1. lawyer must have reasonable & honest belief of imminent risk or danger
2. must bring an immediate application to vary the order to court

#### *LS Upper Canada v Sussman, 1995*

S (senior lawyer) counseled client to breach terms of custody order // S then sent note to the spouse saying he'd instructed his client to not comply // did not file application to vary order until 7 months later // complaint filed // S found guilty of professional misconduct // where lawyers counsel clients to disregard court orders, they

- undermine the effectiveness of the court
- tarnish the reputation of the court
- foment the law of the jungle

### NEGOTIATIONS

#### GENERAL

- negotiations occur outside the traditional courtroom, absent disclosure requirements
- CANON – where a dispute can end in a fair settlement, lawyer should advise client to end the litigation -- **2.1-3(c)**
- must advise & encourage settlement where reasonably possible AND discourage client from commencing/continuing useless proceedings -- **3.2-4**

#### MISLEADING INFORMATION IN NEGOTIATIONS

- ethical debate -- Is it okay for lawyers to misrepresent or conceal information during negotiations?
- **LAW SOCIETY OF ALBERTA** -- has taken stricter view of this type of scenario
  - **6.02(5)** – lawyer must not lie to or mislead another lawyer (“misleading” includes acts of omission such as failure to act, or silence)
  - **6.02(5)** – if lawyer becomes aware during course of representation that they (or the client, or someone allied with the client) has misled the other party OR made a material representation that has subsequently become inaccurate, then -- subject to confidentiality -- lawyer must immediately correct the misapprehension

#### PITEL – LAWYER OR LIAR

- statements of FACT vs statements of POSITION – blurring of the distinction b/w the two leads contributes to perception that lawyers lie
- lawyer conduct during negotiations also contributes – view that some level of deception is permissible

*LS of Nfld & Labrador v Regular, 2005*

R was counsel for Petroleum Services // mislead counsel for the minor shareholder by outright denying sale of company (even though sale was going ahead) // R disciplined for (1) failure to act with integrity (2) failed to uphold responsibilities to other counsel (3) questionable conduct



## THE DUTY OF LOYALTY

<b>3.4-1 DUTY TO AVOID CONFLICTS</b>	lawyer must not continue to act where there's a conflict, except as permitted
<b>3.4-2 CONSENT</b>	express / implied consent AND reasonable belief in ability to represent client w/out adverse effect (a) express C must be fully informed + voluntary after disclosure (b) implied C may be inferred under certain circumstance (see <i>McKercher</i> )
<b>3.4-3 DISPUTE</b>	where <b>legal interests</b> are <b>adverse</b> , lawyer can't represent opposing parties, even with consent
<b>3.4-4 CONCURRENT REP</b>	2 or more lawyers at the same law firm can represent clients w/ competing interests on matters not the subject of the proposed representation ---> allowed under certain circumstances
<b>3.4-5 - 3.4-9 JOINT RETAINERS</b> - see below	
<b>3.4-10 - 3.4-11 ACTING AGAINST FORMER CLIENTS</b>	

## CONFLICTS OF INTEREST

### RATIONALE FOR REGULATING CONFLICTS

- effective representation - fiduciary duty requires that lawyer place client's interests above all others
- potential misuse of confidential information

### DOES A CONFLICT EXIST? -- 3.4-1[7]

- legal interests -- are they immediate // are they adverse?
- the issue -- is it substantive or procedural // temporal relationship // significance of issue to immediate & long-term interest of the clients
- client's **reasonable expectation** in retaining the lawyer

### BRIGHT-LINE RULE - CLIENTS ADVERSE IN LEGAL INTEREST

- lawyer (or law firm) can't concurrently represent clients adverse in interest w/out first obtaining the client's informed consent (*R v Neill, McKercher*)
- SCOPE
  - rule applies to both related and unrelated matters
  - only applies where **immediate** interests (those the firm is representing) of clients are **directly adverse**
  - only applies where clients are adverse in **legal interests** - not strategic or commercial
  - cannot be relied upon by party who seeks to abuse it
  - doesn't apply where it would be unreasonable for party to expect law firm not to act for others

### SUBSTANTIAL RISK - USE WHEN BRIGHT-LINE RULE DOESN'T APPLY

- would concurrent representation create a substantial risk of impaired representation (*R v Neill, McKercher*)
  - substantial risk = more than mere possibility - there must be genuine & serious risk of prejudice to the client's interests -- 3.4-1[1]
- onus of establishing that a substantial risk exists, and that a lawyer should be removed, is on the party alleging the conflict

### IN PRACTICE...

- lawyer/firm must first determine if new retainer would breach BLR - if it does, must obtain client's informed consent
- if BLR inapplicable, lawyer/firm must consider if new retainer will create substantial risk of impaired representation
- if NO, lawyer/firm may accept the new retainer
- if client disagrees, they can bring motion to have lawyer/firm taken off the record
- regardless - **duty of candour** decrees that lawyer/firm should advise existing client before accepting possibly conflicting retainer

<b><i>R v Neil, 2002 SCC</i></b> • lawyer's duty of loyalty	fiduciary nature of lawyer-client relationship // lawyer's duty of loyalty to client has 3 salient dimensions: <b>1. duty to avoid conflicting interests</b> <b>2. duty of commitment to client's cause</b> <b>3. duty of candor</b>
<b><i>CNR v McKercher LLP, 2013 SCC</i></b> • concurrent representation	M counsel for CNR for many years // then, M took retainer to act for W in a class-action lawsuit against CNR // M terminated relationship with CNR // CNR applies to have M removed as counsel from the class action - worry that confidential information may be misused // COURT - M need not be removed //

### PROCESS TO DEAL WITH A CONFLICT

- lawyer must disclose the conflict to the client & explain the circumstances that led to its creation
- lawyer must inform the client of the dangers associated with conflicts of interest
- no req to advise client seek independent legal advice, but may be appropriate where client is unsophisticated / vulnerable to ensure that consent is informed, genuine, and uncoerced

**IMPLIED CONSENT**

- consent may be inferred & need not be in writing where:
  1. client is government / financial institution / publicly-traded entity / entity with in-house counsel
  2. matters are unrelated
  3. lawyer has no relevant confidential information from one client that might reasonably affect the other
  4. and – client has commonly consented to lawyers acting for & against it in unrelated matters
- implied consent for exceptional cases only – the more sophisticated the client, more likely consent is implied -- **3.4-2[6]**

**CONCURRENT REPRESENTATION**

- **Both sides of a transaction:** lawyers can represent so long as both parties consent & **interests are aligned** (ex/ a routine commercial transaction) // clients must be informed that information will be shared
- **Different matters – competing interests:** 2 or more lawyers at a firm can represent different clients & treat information received from each client as confidential and not disclose it to the other provided -- **3.4-4**
  - a. disclosure of the risks of the situation is made
  - b. each client consents after receiving independent legal advice
  - c. clients determine it's in their best interests to have the lawyers act
  - d. each client is represented by a different lawyer at the firm
  - e. screening mechanisms are in place to protect confidential information – **“walled off”**
  - f. all lawyers in the firm can withdraw from representation of all clients if a dispute that can't be resolved develops

**JOINT RETAINERS**

- before lawyer retained by two parties in a transaction, clients must be advised that -- **3.4-5**
  - lawyer has been asked to act for both parties // no info will be confidential from other // lawyer may have to withdraw if conflict develops
- where a **continuing relationship** exists & a 2nd client wants to enter into a joint retainer w/ the existing client -- **3.4-6**
  - lawyer must advise the “new” client of the previous, continuing relationship AND advise them to seek independent legal advice
- consent to joint retainers should be obtained **in writing** -- **3.4-7**

**SEXUAL RELATIONSHIPS W/ CLIENTS****GENERAL**

- no absolute bar to sexual relationships with clients -- but serious questions are raised wrt potential dangers – see **3.4-1[8(e)]**
  - lawyer's ability to provide objective, disinterested, dispassionate advice to client may be threatened
  - client's ability to objectively evaluate or challenge the advice received may be threatened
  - where a sexual relationship exists, and consent is received, it may be more apparent than real

**FACTORS**

1. emotional / financial vulnerability of the client
2. creation of a power imbalance against (or in favor of) the client?
3. will privilege be put in jeopardy? (ex/ confusion wrt what information was obtained under the lawyer/client relationship)
4. could the relationship require the lawyer to act as a witness at a future date?
5. interference w/ professional duties ---> fiduciary // officer of the court // admin of justice // independent judgment

<p><b><i>CNR v McKercher LLP, 2013 SCC</i></b></p> <ul style="list-style-type: none"> <li>• <b>conflict of interest</b></li> <li>• <b>“blurring” of the bright-line rule</b></li> </ul>	<p>M acted for CN // took client w/ claim against CN (legally &amp; factually unrelated) // CN applied to have M removed as counsel due to breach of loyalty &amp; possibility that privileged info may be misused // REMEDY -- where need to prevent misuse of confidential info is paramount, counsel would <u>have</u> to be disqualified -- not the case here, and so a balancing can occur &amp; Mck need not be disqualified</p>
<p><b><i>Law Society of Upper Canada v Hunter</i></b></p> <ul style="list-style-type: none"> <li>• <b>sexual relationship with client</b></li> </ul>	<p>H (distinguished, senior lawyer) had consensual sexual relationship with client // complaint of professional misconduct // <b>(1)</b> conflict of interest b/c of intimate rel <b>(2)</b> failure to recognize &amp; appropriately address issues arising from the conflict <b>(3)</b> upon “breakup” tried to pressure the client to confirm that she'd been informed of the conflict &amp; advised to seek independent legal advice [none of which happened] // RESULT -- 60 day suspension + fine ---&gt; geared towards general deterrence</p>

## THE DUTY OF CONFIDENTIALITY

<b>3.3-1 CONFIDENTIAL INFORMATION</b>	L must keep in <u>strict confidence</u> ALL information concerning client's business & affairs – do not divulge unless a) expressly or impliedly authorized by client b) required by law or a court c) required to deliver the information to the Law Society d) otherwise permitted by the rule
<b>3.3-2 USE OF CONFIDENTIAL INFO</b>	must not use/disclose for L's benefit or 3rd parties w/out consent of client // ( <i>Greenspan</i> case)
<b>3.3-2.1 REQ'D TO CLAIM PRIVILEGE</b>	L must claim privilege if asked to produce documents – If required to disclose, keep disclosure limited [1]

### GENERAL

- DOC and unreserved communication is vital to effective representation -- **3.3-1[1]**
- according to BC Code commentary, the identity of your client will generally fall into this category too -- **3.3-1[5]**

### PUBLIC SAFETY EXCEPTION (*Smith v Jones*) -- **3.3-3**

- reasonable grounds to believe imminent risk or death or serious bodily harm + disclosure is necessary to prevent (no other way)
- “bodily harm” -- requires an element of violence – but SCC also said psychological harm may constitute serious bodily harm if substantially interferes w/ health or well-being of an individual
- must only disclose the minimum of information required -- should be limited to portions relevant to the threatened harm
- FACTORS
  1. clear risk to identifiable group or person
  2. risk of serious bodily harm or death
  3. danger is imminent
- can consider -- evidence of long-range planning // specific method detailed// prior history of violence or threats // prior acts similar to what's currently being threatened
- NOTE: if you believe this kind of disclosure is warranted, you should contact the LSBC for advice -- **3.3-3[4]**

### OTHER EXCEPTIONS

1. if L (or employees) are exposed to criminal/civil/negligence/disciplinary actions – can disclose limited info to **defend against allegations** -- **3.3-4**
2. may disclose in order to **collect fees** – but no more than necessary -- **3.3-5**
  - but if reason for withdrawal results from confidential communications – lawyer must not disclose -- **3.7-9.1**
3. may disclose to another lawyer to **secure legal or ethical advice** wrt lawyer's proposed conduct -- **3.3-6**

### CONFIDENTIALITY vs PRIVILEGE

- privilege is a more narrow conception – rules of evidence // privilege belongs to the client – not to counsel
- DOC is wider than what is considered privileged – ethical rule applies without regard to the nature / source of the information -- **3.3-1[2]**

<b><i>Smith v Jones, 1999 SCC</i></b> • <b>public safety exception</b>	lawyer sent client for psych evaluation // client revealed wanting to torture & murder sex workers // psychiatrist wants the info revealed, but it's covered by S/C privilege (b/c lawyer sent client to Dr) // COURT – recognizes public safety exception // here -- although imminence factor not clear, when combined with the other 2 factors, enough to provide basis for exception // <b>DISSENT</b> – may make people more hesitant to get help
<b><i>R v Cunningham, 2010 SCC</i></b> • <b>disclosure of fee information</b> • <b>withdrawal &amp; release of info</b>	criminal defence attorney sought to withdraw from the record due to non-payment of fees // <b>ISSUE</b> – will mere disclosure of non-payment constitute breach of S/C privilege? // COURT – revealing non-payment doesn't usually touch on <u>why</u> S/C privilege exists // but <u>may</u> attach where: 1. non-payment is relevant to the merits of the case 2. or disclosure would cause prejudice to the client

### MONEY LAUNDERING

- potential issue – federal regulation requires disclosure of information that would breach duty of confidentiality

<b><i>FLSC v Canada (AG), 2013 BCCA</i></b> • <b>public safety exception</b>	federal leg requires reporting of suspicious transactions & large cross-border movements of currency to FINTRAC // then, new regulations that required lawyers who effect certain financial transactions on behalf of client to: 1. perform client identification & verification 2. keep records of financial transactions 3. establish internal programs to promote compliance with federal anti-money laundering regime  FLSC files action – claim regime violates <b>s.7</b> and <b>s.8</b> of <i>Charter</i> (liberty rights of lawyers at risk if they violate regime) // S/C privilege, lawyer's duty of loyalty to client, and independence of the bar COURT – YES, rights violated & NO, not saved under s.1 // independence of the bar violated // regime invalid
---	--

## ADVOCACY & CIVILITY

A “difficult” balance exists between an advocate’s “duty to his client, and his duty to the court” – Lord Denning – *Rondel v Worsley*  
A lawyer is a minister of justice, an officer of the courts, a client’s advocate and a member of an ancient, honourable, and learned profession.” BC Code

### ETHICAL DUTIES – “OFFICERS OF THE COURT”

1. primary goal of court system is the **search for truth** -- adversarial system -- both sides are officers of court
2. lawyer’s conduct should be characterized by **candour & fairness** -- lawyers should maintain **courteous & respectful attitude** -- **2.1-2(a)**
3. DON’T mislead court – **2.1-2(c)** // withhold authorities – **5.1-2(g)** // make frivolous arguments // act with incivility

#### WITNESS PREPARATION

- lawyers are expected to prepare their W’s -- coaching of W’s is unethical, unprofessional, and illegal
- lawyers who counsel evasion and forgetfulness commit a criminal offence & breach their duty to the court (*R v Sweezy*)
- sanctions include: costs against client // costs against lawyer personally // LS discipline // criminal sanctions // negative reputation

#### CROSS-EXAMINATION OF WITNESSES

- cross-ex is the “ultimate means of testing truth and veracity” of E -- integral to the adversarial system -- constitutionally-protected right under s.7 and s.11(d) of the *Charter* to make **full answer and defence**
- duty to ask every question, no matter how distasteful, that will help client’s case & obtain benefit of all available defences & remedy -- **5.1-1[1]**
- **CANNOT**: harass (**5.1-2(m)**), deceive, mislead // attempt to solicit inadmissible responses // put a knowingly false or reckless scenario to a W // TJ can limit “manifestly tenuous or suspect” theories (*Lyttle*)
- **CAN**: ask leading questions // put a scenario to a W w/out admissible E to support, so long as question honestly advanced on strength of a reasonable inference, experience, or intuition (*Lyttle*) -- BC Code – **5.1-2[4]**
- if you plan to impeach (contradict) a W, you must give them notice -- direct W’s attention to the statement (*Brown v Dunn*) -- BC Code

#### *R v Lyttle, 2004 SCC*

- **cross-ex in criminal trial**
- **reasonable basis for theory**

L identified by victim of robbery // defence theory was that L was purposefully misidentified, so that the victim could shield their drug associates // at trial, defence counsel prevented from following this line of question absent “substantive evidence” of the drug-debt theory // appealed // COURT – defence is allowed to advance reasonable theories – at times, cross-ex is the only available means to uncover truth

#### CROSS-EXAMINATION OF ACCUSED

- improprieties in cross-ex of an A can have implications on appeal -- Crown must be particularly mindful not to be abusive
- CANNOT: extensively editorialize // argue with the A // convey your own opinions as to guilt (*R v R(A)*)

#### DUTY TO INFORM THE COURT

- as officers of the court, counsel must inform the court about any relevant authorities (*General Motors Acceptance Corp*)
- duty cannot be discharged by remaining willfully ignorant -- counsel has duty to make themselves aware of relevant cases
- EXCEPTIONS: unreported cases // cases only similar on fact, not law
- do not deliberately refrain from informing tribunal of binding authority lawyer considers to be on point & that has not been mentioned – **5.1-2(i)**

## CIVILITY IN ADVOCACY

<b>5.1-1 LAWYER AS ADVOCATE</b>	Lawyer must represent client resolutely and honourably within the limits of the law, while treating the tribunal with <b>candour, fairness, courtesy, and respect</b> .
<b>5.1-5 COURTESY</b>	Lawyer must be <b>courteous and civil and act in good faith</b> to the tribunal and all persons with whom the lawyer has dealings.

#### GENERAL

- court AND law societies have responsibility to ensure civility in proceedings
- breach of civility has 2 components -- rudeness AND prevents administration of justice (*Woolley*)
- BC Code Commentary – maintenance of “dignity, decorum and courtesy” more than empty formality – essential to protection of rights – **5.1-1[1]**

#### 4 WAYS INCIVILITY UNDERMINES THE ADMINISTRATION OF JUSTICE (*Felderhof*)

1. lawyers may focus on defending themselves from personal attack
2. trier of fact preoccupied with managing personal conflicts in the courtroom
3. serious personal disputes lengthen & delay court proceedings
4. unfounded or irrelevant personal attacks on opposing counsel diminish public respect & undermine legitimacy of system

**R v Felderhof, 2003 ONCA**

proceedings very contentious // counsel for F attacked integrity of the prosecutor – belittled efforts of the other side, called them lazy // Crown appeals – claims that TJ lost jurisdiction of courtroom b/c failed to restrain defence counsel's uncivil attacks // COURT – NO – although distasteful, the trial was still fair

**ALLEGATIONS OF MISCONDUCT (Felderhof)**

- allegations of improper motives or bad faith against any counsel is a very serious matter – should not arise as part of normal discourse
- defence has right to make accusations about prosecutorial misconduct where
  - there's some foundation in the record
  - some possibility that allegations will lead to a remedy
  - and only at the appropriate time in the proceedings

**CONSEQUENCES OF INCIVILITY**

- court can sanction lawyer for contempt of court – civil or criminal
- law society can sanction lawyer even if behavior falls short of contempt
- “consistent pattern of rude, provocative or disruptive conduct” may be sanctioned – 5.1-5(1)

**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
  1. renders women and other “outsider” lawyers largely invisible (can't fit the Rambo mold)
  2. romanticizes discriminatory concepts of professionalism (anti-Rambo, desire to return to time when profession was almost 100% white men)
  3. 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

## ETHICS IN CRIMINAL LAW PRACTICE

### ROLE OF THE CROWN

1. overriding duty ---> **SEEK JUSTICE IN THE PUBLIC INTEREST** -- elicit truth while respecting legitimate rights of the A
2. Crown counsel plays a dual role --> adversary (*R v Rose*) and quasi-judicial minister of justice
3. Crown can seek a conviction if they feel that is the legitimate result (*R v Cook*) -- but focus not solely on winning (*R v Boucher*)
- 4.

<b>5.1-3 DUTY AS PROSECUTOR</b>	When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honorably within the limits of the law while treating the tribunal with candor, fairness, courtesy, and respect.
[1] primary duty is to see that justice is done; discretion must be exercised fairly and dispassionately	

#### PROSECUTORIAL DISCRETION

- must be exercised prosecutorial discretion in an objective & impartial manner (*Proulx and Layton*)
- Crown can be regulated by law societies, although given deference in **core elements** of prosecutorial discretion (*Krieger*)
  - decision to lay charge // enter stay // accept guilty plea to lesser charge // withdraw from criminal proceedings

#### FULL DISCLOSURE

- Crown has an ethical and constitutional duty to provide full disclosure of all relevant information (*Stinchcombe*)
- failure to do so has contributed to wrongful convictions
- under **s.7** of the *Charter*, A has right to make full answer & defence -- disclosure is essential to this process
- exceptions = irrelevant E // privilege // confidential informants // delayed disclosure if investigation ongoing (this should be rare)

#### OVERZEALOUS ADVOCACY BY CROWN

- Crown is subject to legal and ethical limits when it comes to cross-examination of W's and jury addresses
- JURY ADDRESSES (*R v Boucher*)
  - cannot use inflammatory or vindictive language to express opinions as to guilt of A -- don't appeal to emotions
  - can't imply that Crown's investigation has found A guilty -- make statements of argument, not fact -- Crown isn't a W
- remedy for prosecutorial misconduct = civil action in malicious prosecution (*Nelles*)

<i>R v Stinchcombe, 1991 SCC</i> • <b>duty to provide full disclosure</b>	Lawyer charged with breach of trust // Crown decided key W wasn't credible & wouldn't be called to testify // A sought disclosure of W's statements but Crown refused to produce // COURT - "no practical reason" to oppose broad duty to disclose // A has constitutional right to make full answer & defence // limited exceptions -- subject to review by court
<i>Krieger v LS of Alberta, 2002 SCC</i> • <b>regulation of prosecutors</b> • <b>prosecutorial discretion</b>	Crown did not disclose exculpatory E in murder case, claimed he was "delaying" disclosure as per discretion under <i>Stinchcombe</i> // A complained to LS // LS starts discipline process // AG tries to stop -- claims actions of Crown immune from external disciplinary review // COURT -- <u>NO</u> -- Crown subject to LS except wrt certain <b>core elements</b>

### ETHICAL DUTIES OF DEFENCE COUNSEL

<b>5.1-1 ADVOCACY</b>	When acting as an advocate, a lawyer must represent the client <b>resolutely and honorably</b> within the limits of the law while treating the tribunal with candor, fairness, courtesy, and respect
[9] lawyer's duty is to protect the client as far as possible from being convicted, except by court upon sufficient evidence -- to that end, defence counsel can rely on <u>any</u> legal defence not known to be false or fraudulent -- including technicalities	

#### GENERAL

- CANON - lawyer has right to defend person (regardless of their personal opinion of guilt) using any defence that the law allows -- **2.1-3(f)**

#### DEFENDING THE GUILTY CLIENT // NOT MISLEADING THE COURT

- defence counsel should avoid forming opinions as to guilt or innocence of client -- not ethical & can impact performance
- if you become convinced of your client's guilt
  1. you can continue to represent the client
  2. but must not use any defence which involves knowingly misleading the court

### TAKING CUSTODY & CONTROL OF REAL EVIDENCE

- defence counsel is not under any general duty to disclose
- 3 EXCEPTIONS -- alibis // psychiatric defence // expert opinion E -- all require time for prosecutors to prepare a response
- S/C privilege only protects **communications** -- physical E turned over to defence counsel is not considered communication (*Murray*)
- hiding OR disposing of E exposes lawyers (and anyone else for that matter) to criminal prosecution

<p><i>R v Murray, 2000 ONSC</i></p> <ul style="list-style-type: none"> <li>• <b>obstruction of justice</b></li> <li>• <b>taking physical E of crime</b></li> </ul>	<p>M was defence counsel for Paul Bernardo // after police searched PB's home, M was instructed by his client to retrieve hidden video tapes // M didn't look at the tapes &amp; didn't turn them over to police // M planned to use them in PB's defence - M said disclosure of the tapes would've given PB's co-accused time to prep for cross-examination // M charged with obstruction of justice // COURT - M acquitted - his purported defence strategy to "use" the tapes was <b>reasonably feasible</b> - other people knew they existed // tapes themselves not subject to privilege</p>
--	---

### NEGOTIATING A 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 (through analysis of facts & law applicable to the case)
  1. lawyer must advise client about prospects of acquittal / finding of guilt
  2. advise client about implications & possible consequence of guilty plea
  3. client must be prepared to admit to the factual & mental elements of the offence
  4. 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)**

<p><i>R v K(S), 1995 ONCA</i></p> <ul style="list-style-type: none"> <li>• <b>plea of convenience</b></li> </ul>	<p>youth plead guilty to sexual offences due to convenience - constantly maintained innocence to defence counsel // new E speaks to his innocence // youth applies to have guilty plea set aside // COURT - protestations of innocence made it impossible for youth to successfully complete counseling provision of probation // plea set aside &amp; new trial ordered</p>
--	--

### WITHDRAWAL FROM REPRESENTATION

1. defense counsel may withdraw if there is sufficient time for the client to obtain alternate counsel AND for the new lawyer to prepare -- **3.7-4**
  - a. must notify the client in writing of withdrawal due to non-payment (or other adequate cause)
  - b. account to client for any monies received
  - c. notify Crown in writing of withdrawal (d) notify clerk or registrar (e) comply with applicable rules of court
2. if time is insufficient, but lawyer has good cause, lawyer should attempt to have the trial date adjourned -- **3.7-6**
3. lawyer may then apply for leave to withdraw from the record -- **3.7-6**
4. regardless, court may use its discretion to prevent withdrawal due to non-payment alone (*Cunningham*)

## CORPORATE COUNSEL

<b>3.2-3 ORGANIZATION AS CLIENT</b>	Lawyer must act for the <b>organization</b> even though instructions come from individuals.
<p>[1] Lawyer should be satisfied that the person giving instructions is acting within their authority.</p> <p>[2] can act for a person <u>associated</u> with the organization at the same time, but must be alive to potential conflicts of interest</p>	

<b>3.2-8 DISHONESTY / FRAUD ORGANIZATION AS CLIENT</b>	<p>Under <b>3.2-7</b> lawyer must not engage in any activity the lawyer knows, or ought to know, assists in or encourages dishonesty, crime, or fraud. Where client is an <b>organization</b>:</p> <p><b>(a)</b> advise the person giving instruction &amp; chief legal officer that conduct should be stopped</p> <p><b>(b)</b> if this fails, progressively advise “up the ladder” of command</p> <p><b>(c)</b> last resort....withdraw</p>
<p>[5] in some cases withdrawal will mean resigning from your position and not simply from acting with in that particular matter</p> <p>[6] rule recognizes that lawyers are in central position to encourage organizations to comply with the law</p>	

## ETHICAL CHALLENGES

1. the organization is BOTH client AND employer -- may be difficult to maintain professional independence & integrity
2. “cognitive dissonance” -- conflict b/w professional norms of client loyalty & personal norms
  - may cause lawyer/employees to “discount” misconduct
  - can be compounded where lawyer blends into the organization & places high value on internal solidarity w/in company
3. organizations have their own distinct legal personalities -- lawyer must cognizant that they work in the organization’s interests

### REAGAN – “PROFESSIONAL RESPONSIBILITY & 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
  - ex/ in transactional work (merger, joint venture) do you treat other side as adversary or partner?
  - issues surrounding disclosure of info outside of courtroom setting could lead to sharp dealings
- III. **lawyer as corporate employee**
  - tension b/w 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

- corporations play broader role in society -- quasi-public entities -- influence markets, product availability, employment, etc
- because of this, legislation developed (often in the wake of scandals, ex/ Enron) to regulate corporations & their directors
- ex/ regulatory body = Ontario Securities Commission -- can discipline individuals for breach of legislation
- raises issues surrounding solicitor-client privilege -- lawyer must be able to be dealt w/ fairly and respond to allegations

<p><b>Wilder v Ontario (Securities Commission), 2001 ONCA</b></p> <ul style="list-style-type: none"> <li>• <b>lawyers subject to regulation by securities commissions</b></li> <li>• <b>importance of solicitor-client privilege</b></li> </ul>	<p>OSC tried to reprimand Wilder (lawyer) for misconduct while representing a client before the OSC // W claims that the OSC has no jurisdiction over lawyers -- matter for the LS or the courts // COURT – the OSC <u>can</u> reprimand lawyers both as individuals, and in their capacity as solicitors // nothing in the legislation precludes this BUT regulators must be mindful of solicitor-client privilege before deciding to proceed with reprimand</p>
---	---



## ACCESS TO JUSTICE

<b>2.2-2 INTEGRITY</b>	Lawyer has duty to uphold the standard of the legal profession & assist in the advancement of its goals, organizations, and institutions.
<b>[1](b)</b> Lawyer should participate in legal aid and community legal services or provide legal services pro bono	

<b>5.6-1 ENCOURAGING RESPECT</b>	A lawyer must encourage public respect for and try to improve the administration of justice.
<b>[2]</b> basic commitment to the concept of equal justice for all within an open, ordered, and impartial system	
<b>[4]</b> lead in seeking improvements to the legal system – criticisms & proposals should be <i>bona fide</i> and reasoned	

### ACCESS TO CIVIL & FAMILY JUSTICE – “ROADMAP FOR CHANGE” – FARROW

- pervasive issue -- 40% marriages end in divorce // poor especially vulnerable // legal problems multiply other problems // high social & economic cost -- many legal needs remain unmet
- critiques -- unable to provide just & proportional solutions to problems // not reflective of the people brought before it
- barriers to justice include -- cost (from \$195–\$380/hr) // delay (matters increasingly lengthy) // complex procedures
- legal aid -- unavailable for most problems // in BC, must be at risk of loss of liberty OR risk of children being apprehended
- self-representation -- 50% of people try to solve their issue w/ minimal or no legal assistance -- produces less favorable results
- early assistance, before problems escalate, is key to keeping costs down

### REPORT OF THE PUBLIC COMMISSION ON LEGAL AID IN BRITISH COLUMBIA

- most serious consequences in family law, child protection, and poverty law -- issue compounded for those outside Lower Mainland
- women are disproportionately affected -- frequently in position of economic and social disadvantage
- criminal law -- protects liberty interests of the individual & safeguards society’s interests in a fair & functioning system
- lack of adequate legal aid compounds problems, social and economic, and in the end leads to high costs for everyone

### DIVERSITY WITHIN THE LEGAL PROFESSION

- Law Society BC -- public best served by a “more representative and inclusive legal profession” -- ability to see multiple view leads to “enhanced creativity in problem solving”
- diversity of judiciary -- of 10 appointees in 2011 & 2012, none were female or members of a minority group! -- only 30% women -- >4% minority
- despite fact that substantial portion of BCSC cases involve family law, >5% judges have family law background

### CHANGING COURT PROCESSES

- traditional adversarial process doesn’t always work well in family law context -- steps made towards shifting energy into judicial case conferences & settlement conferences
- “continuing conflict” cases -- individuals seek to use the legal system for destructive purposes – early intervention key to preventing cases that drag on for year at high cost to both family (particularly children) & legal system
- potential change -- assign the same judge to see these cases through until their completion
- often a lack of coordination b/w separate yet concurrent proceedings – ex/ criminal, family, immigration

### INITIATIVES – ACTION COMMITTEE ON ACCESS TO JUSTICE IN CIVIL & FAMILY MATTERS

- access to justice initiatives must be promoted through the law societies as part of admission, continuing legal education, and codes of conduct
- development of a system that is timely, efficient, and responsive -- negotiation & dispute resolution; formal dispute resolution via tribunals & courts; public awareness of rights and responsibilities; increased public education to help effectively utilize alternative dispute resolution apparatus

### CHILDREN – DONNA MARTINSON

- majority of family law cases involve children -- their interests are at stake, yet they’re invariably vulnerable and under-represented
- legal issues can be harmful -- court process can exacerbate the problem by institutionalizing conflict & placing children in the middle

### CBA – ACCESS TO JUSTICE COMMITTEE

1. people -- system to focus on people’s needs vs those of legal professionals and institutions
2. participation -- empower individuals to manage their own affairs and have a voice
3. prevention -- direct energy to preventing problems from escalating to stage where legal intervention is necessary
4. paths to justice -- develop options and services that can help achieve justice
5. personalized -- access to justice requires solutions that fit the individual & their circumstances -- address many layers of issues
6. evidence-based practices -- direct energy to learning what methods actually achieve the goal of increasing access to justice