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# INTRODUCTION TO ETHICS

*Lawyers’ Ethics and Professional Regulation, 2d ed.* (7-11)

* Ethical obligations of lawyers both as individuals and as members of organizations
* Ethical issues include what lawyers *may not do*, or what they are *required to do*
* Ethical constraints are largely set through self-regulation (lawyers set the rules themselves)

## SOURCES FOR GUIDANCE

1) Case law and Legislation

* Law of negligence/fiduciary duties/contract/taxation/evidence/solicitor-client privilege – the cases interpreting those rules deal in part with lawyer ethics.

2) Rules of Professional Conduct

* Law society has been granted legislative authority to regulate the legal profession
* **Federation of Law Societies of Canada** (FLSC) is an umbrella organization to which all provincial law societies belong. They attempt to create high degree of **uniformity** amongst provincial law societies through the **Model Code**. However, the Model Code provides general and discretionary guidelines rather than specific mandatory obligations.

3) Law Society Disciplinary Decisions

* Disciplinary decisions set out the standard of proof for establishing that a lawyer has committed professional misconduct and the sorts of sanctions that may be imposed
	+ *Professional misconduct* (misconduct by the lawyer when practising)
	+ *Conduct unbecoming* (misconduct by the lawyer outside of his/her practice)

**Note:** Limited use since focused upon narrow range of conduct, concentrating mostly on clear legal violations (i.e. stealing funds from client).

4) Principles or “Norms”

* Differing emphasis placed upon:
	+ Important society role that lawyers fulfill
	+ Requirements of ordinary morality
	+ Foundational morality of the legal system
	+ **No right answer**

**THREE QUESTIONS**

1. What do we mean by legal ethics?
2. Are legal ethics different than regular ethics?
3. What is the relationship between legal ethics and the legal profession?

**Ethics**

The study of morals, duties, values and virtues - our attempts to order human conduct toward the right and the good.

**Deontological Reasoning**

Reasoning from rules.

**Teleological Reasoning**

Reasoning from consequences.

**Ontological Reasoning**

Reasoning from virtues or character.

**Note**: Text recognizes postmodernism and pluralism as another method of ethical decision making, however these are actually more problematic.

**Role Morality**

Ethical rules or norms of the role occupied. Lawyers have a specific role and are therefore bound by the particular rules applying to that role. **Legal ethics is really a mix of all three**, and uses rule-, virtue-, and consequence-based reasoning. The requirements of role morality may conflict with personal morality. One of the primary elements of a lawyer’s role morality is the duty of lawyer-client confidentiality – but even this has exceptions.

### SMITH v JONES [1999] SCC

Recognized a future harm exception to lawyer-client confidentiality.

Rules of Professional Conduct - BC Code

**FUTURE HARM / PUBLIC SAFETY EXCEPTION**

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

It is also allowed to seek advice from another lawyer, so long as confidentiality is minimally impacted.

### R v BUTT [2012] ONSC

**A** was convicted of sexual interference against a 12 year old boy whom he lured off the street (oral sexual assault). Defence counsel learned **A** was HIV+ between sentence and appeal, and disclosed this to Crown and the court (Code J), **who commended defence counsel.**

LEARNING TO ACT LIKE A LAWYER

David Tanovich

**Arguments in favor of a law student’s code of conduct:**

1. There is a **gap** between professional codes of conduct and the academic codes of conduct that most universities rely upon - the latter are not broad enough to encompass the full professional obligations of the legal profession. Lawyers should have cultural competence as well, in order to effectively represent clients from a range of backgrounds. University codes of conduct are also limited to activities on campus - professional obligations, ideally, are broader. University codes of conduct often also set basic requirements, whereas professional codes of conduct are aspirational.
2. When people enter law school, they are essentially entering the legal profession. Over 90% of students who begin law school will ultimately be called to the bar, so we ought to see **professionalism training** as essential at the opening of the legal career.

**Arguments against a law student’s code of conduct:**

1. It would be redundant - social conventions already do a good job of constraining behaviours
2. Not all law students will become lawyers
3. Law students are often quite young
4. Public/private sphere distinction. It seems likely, however, that you cannot separate law school experience from your “private” life at social events.

**EXAMPLE OF LAW STUDENT MISCONDUCT**

U of T students inflated the reporting of their midterm grades in order to secure 1L summer positions. The students ended up with notation stating academic misconduct which was purged after 3 years. It was hard to find a balanced punishment between nothing or a bar to ever entering the profession.

# 2. THE LAWYER’S ROLE

## IN DEFENCE OF THE LAWYER AS RESOLUTE ADVOCATE

**Resolute Trial Advocacy**

Two central features of resolute trial advocacy:

1. Places decision-making about what is to be done in a legal representation with the client.The lawyer facilitates client’s accomplishments, but the client determines those ends.
2. Requires the lawyer to interpret and work through the law to achieve the client’s goal.
	1. If the lawyer decides what the client may, must, or should do, instead of simply assisting the client determine what the law permits or requires the client to do, the lawyer will have similarly usurped the law’s function in resolving disagreement.
	2. The resolute advocate is directed by the client – the job of the lawyer is to provide access to the legal system.

The role of the lawyer is morally justified because of the importance of the law’s civil compromise, and because of the necessity of the lawyer in achieving that civil compromise. As a result, **any action that is required by the lawyer’s role is also morally justified.**

IN DEFENCE OF ZEALOUS ADVOCACY

Alice Woolley

Law is something that can make an authoritative claim against our actions, not simply by virtue of the power of the state to enforce it, but because the law, in and of itself, is worthy of our respect and attention. It is through the law that we achieve a civil society, one in which our disagreements are resolved through politics and adjudication, not through violence and discord.

The resolute advocate is directed by the client and exists within the legal system – the lawyer's job is to provide access to the legal system to advance the client's goals, whatever they may be. The lawyer cannot go beyond the bounds of the system in furtherance of the client's interests, as this would undermine the system itself. The system is one that has both room for interpretation but with some boundaries. The ordinarily competent lawyer can interpret what these boundaries are, and thereby advise their client what their options are.

This doesn't mean there is no moral complexity, but not so much that lawyers can't manage it. Lawyers have the following three tools to manage this moral complexity:

 1. Discretion in choosing their clients (not in the UK – **cab rank rule**)

 2. Discussions about viable courses of actions with their clients

 3. Withdrawal from representing their clients

**PROBLEMS WITH THIS ARGUMENT:**

These tools may not be adequate, and are a bit distanced from the reality of working as a lawyer, particularly in the large firm scenario where a great number of countervailing pressures are present. Furthermore, withdrawal seems to contradict the underlying assumptions of the lawyer as friend/zealous advocate model. Finally, the statement that people would resort to violence in absence of the law is arguable. There are definitely other means of resolving disputes (for instance, families often do so without legal intervention).

###

### R v NEIL [2002] SCC

|  |  |
| --- | --- |
| ***FACTS*** | Appellant brought an application for a stay of proceedings in his criminal trial on the basis that there had been an **abuse of process.** The abuse arose from a **conflict of interest** of the law firm that initially represented him and ultimately represented a co-accused. |
| ***RULING*** | A lawyer’s duty of loyalty is crucial, because unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor litigant will have confidence in the legal system. This duty is intertwined with the **fiduciary nature** of the lawyer-client relationship. The **duty of loyalty** includes:1. **Duty to avoid conflicting interests** (including the lawyer’s personal interest
2. **Duty of commitment** to the client’s cause (“zealous representation” from beginning to end)
3. **Duty of candor** (with the client on matters relevant to the retainer – if a conflict emerges, the client should be among the first to hear about it)

Quote of classical resolute advocate: “An advocate in the discharge of his duty knows but one person in the world… his client. … Does not matter what the cost is to others or yourself.” |

GENERAL ARGUMENTS IN FAVOR OF RESOLUTE ADVOCACY

CONSEQUENTIALIST

1. **Truth** (Adversary system of fact-finding)
	* Conventionally, the argument has been that the best way to get at the truth is to have two sides fight over it.

**PROBLEMS WITH THIS ARGUMENT:**

**“**The two adversary attorneys are each under an obligation to present the facts in the manner most consistent with their client’s position to prevent the introduction of unfavorable evidence, to undermine the credibility of opposing witnesses, to set unfavorable facts in a context in which their importance is minimized, to attempt to provoke inferences in their clients favor. The assumption is that two such accounts will cancel out, leaving the truth of the matter. But there is no earthly reason to think this is so; they may simply pile up the confusion.” – David Luban

1. **Ethical Division of Labour**
* Behavior that looks morally wrong can be justified by the fact that other social roles exist whose purpose is to counteract the excesses resulting from role’s behavior. Different aspects of public morality are therefore in the hands of different officials.
* The “checks-and-balances” notion is desirable because if other parts of the system exist to rectify one’s excesses, one will be able to devote undivided energy to the job at hand and do it better

**PROBLEM:** The adversary advocate attempts to evade the system of checks and balances

NON-CONSEQUENTIALIST

1. **The traditional lawyer-client relation is an intrinsic moral good, because providing services is inherently good.**
	* Mellinkoff’s paradigm of the client as the “man-in-trouble”:

“The lawyer, as lawyer, is no sweet kind loving moralizer. He assumes he is needed, and that no one comes to see him to pass the time of day. He is a prober, an analyzer, a scrapper, a man with a strange devotion to his client. Beautifully strange, or so it seems to the man-in-trouble; ugly strange to the untroubled onlooker.”

**PROBLEM:** This makes clients look **more vulnerable than they really are in most cases.**

* + Fried argues that a lawyer is a “special-purpose friend” and that a lawyer’s activity – enhancing the client’s autonomy and individuality – is an intrinsic moral good (even when that “friendship” consists in assisting the profiteering slumlord in evicting an indigent tenant).

**PROBLEM:** Fried’s analogy does not vindicate the adversary system in particular. It also discounts the extent to which the lawyer has had a creative hand in advocating the outcome. The system is not an abstract structure of impersonal role-descriptions but a social structure of interacting human beings, so that the actions of its agents *are* the system. The lawyer is indeed acting *in propria persona* by “pulling the levers of the legal machinery”.

1. **Adversary adjudication is a valued and valuable tradition that enjoys the consent of the governed, and is thus an integral part of our social fabric.**
* **Pragmatic Justification:** the adversarial system seems to do a good job at finding truth and protecting legal rights despite its imperfections. *Some* adjudicatory system is necessary and it’s the way we have done things for a long time.

**PROBLEM:** A pragmatic argument only shows that an institution is not much more mediocre than its rivals. But the dilemma is that:

* + 1. The institution is a morally good one, and
		2. The institution imposes role-obligations on its officers some of which may mandate morally bad role-acts

So if the institution can only be justified pragmatically, the first half of the dilemma collapses, as does the institutional excuse. Pragmatic arguments do not really praise institutions; they merely give reason for not burying them. Since their force is more inertial than moral, they create an insufficient counterweight to resolve dilemmas in favor of the role-obligation.

## AGAINST RESOLUTE ADVOCACY

THE ADVERSARY SYSTEM EXCUSE

David Luban

There is no evidence that the adversarial system is any better at getting to the truth than other systems, like inquisitorial systems. If this justification for the zealous advocate model, it is a weak one. **EXAMPLES**:

* In the Dalkon Shield lawsuit, where women sued the company for pelvic inflammatory disease, infertility, etc. Dalkon pursued a strategy of aggressively cross-examining each woman in order to discourage the lawsuits and encourage settlements. This was not a truth-seeking kind of advocacy, but a truth-suppressor.
* Strategic lawsuits against public participation (SLAPPs) which large companies use to suppress the speech of weaker individuals.

**Lawyers are moral agents.** Just because you're a lawyer doesn't mean you abandon your individual morality. Luban is not attacking the adversary system itself, but an ideology consisting of the following ideas:

1. The adversary system is the most powerful engine of justice ever devised.
2. It is a delicately poised instrument in which the generation of just outcome depends on the regular functioning of each of its parts.
3. Hence the pursuit of justice morally obligates an attorney to assume a one-sided Broughamesque role.
4. The adversary system, in consequence, institutionally excuses lawyers from ordinary moral obligations conflicting with their professional obligations.
5. Broughamesque advocacy is, moreover, a cornerstone of our system of political liberties, for it is the last defense of the hapless criminal-accused against the awesome power of the state. To restrict the advocate is to invite totalitarianism.

Luban argues against 1 through 4. Luban allows for 5 based on a distinction in the criminal context, as every accused is a "little guy" compared to state, and there the resolute advocate model is most justifiable – political reasons dictate the handicapping of the government in its role as enforcer.

**In conclusion**, when professional and personal morality conflict, lawyers should follow personal ethics and not hide behind the resolute advocate model. A possible extension of this idea would be expanding definition of competence to require some degree of loyalty to the client and their cause, as divided loyalty would undermine professional performance.

**GENERAL ARGUMENTS AGAINST RESOLUTE ADVOCACY**

1. **The Postmodern Objection**
	* Resolute advocacy allows the lawyer, and society generally, to duck the difficult questions about what we, as a society, think the right thing is for lawyers to do
2. **The Personal Morality Objection**
	* Starts from the premise that legality and morality are not coterminous. There are some things that the law permits, and some that it even requires that are immoral (i.e. landlord evicts tenant who has nowhere else to go) –argued that is it immoral for the lawyer who helps the landlord to accomplish that eviction
	* A lawyer is a moral agent and does not lose their moral agency by virtue of being a lawyer. While a lawyer may operate under a “presumption in favor of professional obligation”, that presumption can be rebutted by a conflict with a serious personal moral obligation. When such conflicts arise, the lawyer must be civilly disobedient to professional rules.

**PROBLEMS WITH THIS OBJECTION:**

* Places enormous trust in lawyer morality and none at all in the morality of the laws and legal system within which lawyers work.
* It does not properly account for the possibility of deep moral disagreement amongst people, nor acknowledge the extent to which the law exists as a way of allowing people with deep moral disagreements to live in peace together.
	+ Philosopher Jeremy Waldron identifies the law as something in and of itself worthy of our attention and respect. The whole point of law is to provide both an actual settlement to controversies over the right way to live, and to allow people the freedom, under and through the law, to live as they like. To ignore the authority of the law based on a personal assessment that a different moral answer is required, is to undermine legality altogether!
1. **The Morality-of-Law Objection**
	* Lawyers are properly advocates for clients, but they are advocates within the context of ensuring that, in each case, the lawyer take those “actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.”

**PROBLEM:**  This gives the lawyer the privilege of determining what can be done through the law.

## SUSTAINABLE PROFESSIONALISM

SUSTAINABLE PROFESSIONALISM

Trevor Farrow

In some ways, the most opaque of the three, but also perhaps the most innovative.

**Critique of Woolley:** The zealous advocate model undermines respect for the legal system by employing the lawyer as hired gun mentality. Lawyers have a whole web of obligations beyond those to their client (to the court, to society, etc.).

**Critique of Luban:** What's good? There are many different conceptions of what’s morally desirable, so encouraging individual pursuit of the good is not particularly helpful without broader agreement.

Farrow argues that there needs to be a balancing of interests in a sustainable way. Possible interests include equality, access to justice, loyalty to clients, and obligations to the community, families and oneself.

**PROBLEM:** What is Farrow's structure for balancing these interests in a sustainable way? Otherwise, it could be argued that this is excessively aspirational. **Obviously**, different interests need to balanced – the

DEREK LACROIX, Q.C.

Lawyers Assistance Program

* We have a duty to our client
* We have a duty to the court system (tell the truth, etc.)
* We have a duty to our community
* We have a duty to ourselves and our family

With privilege comes **duty**! Resolving ethical dilemmas requires not only skill, but also self-knowledge. To have a healthy practice you must be a healthy person and be able to be spiritually healthy.

HIGH-FUNCTIONING ALCOHOLICS: LAWYERS ARE NOT ABOVE THE BAR

Sarah Allen Benton

* 18% of lawyer who practised for 2-20 years and 25% that practiced 20 years or longer display problem drinking (national average is 9%)
* This is perhaps due to the personality traits of lawyer’s: workaholics, high personal standards, competitive, and a strong physical constitution
* Often high functioning alcoholics, don’t realize when they have hit bottom
* Risks to not only self and family, but to clients
* WE need to break the stigma so lawyers feel comfortable reaching out for help

SOME TIPS ON WARNING SIGNS FOR ADDICTION

Lawyers Assistance Program BC

* Four factors to look for: Attendance, Performance, Behaviour and High Risk Situations

#  GOVERNANCE AND THE LEGAL PROFESSION

## SELF-REGULATION IN GENERAL

**Self-regulation** refers to the control, direction or governance of an identifiable group by rules and regulations determined by the members of the group. In this context, it means that control and direction of lawyers as an occupational group is managed through rules and regulations made by lawyers acting collectively, in the form of autonomous governing bodies (**law societies**).

Self-regulation is (ostensibly) undertaken in the public interest to ensure that legal services are provided to the public ethically and competently by only those persons qualified to do so. **Self-regulation is seen as a social contract with the state, carried out by the profession in return for state sanctioned market dominance.**

**Professions** are differentiated from mere jobs because of several factors:

* self-governance by other professionals
* existence of a code of conduct
* heightened social prestige due to intellectual nature of the work
* mastery of a specialized field of knowledge acquired through extensive formal education and practical training
* restriction of admission
* monopoly over services
* importance of the service, not only dealing with self but the public interest

JUSTIFICATIONS FOR SELF-REGULATION IN THE PUBLIC INTEREST

**Autonomy + Expertise = Independence from state regulation and market forces**

1. **Protection of the public**
	1. Ensure quality of service
	2. Irreparable harm from poor service

**PROBLEM:** These are reasons for regulation, yes, but not necessarily self-regulation.

1. **Independence of the legal profession**
	1. Defend the rule of law

As soon as we let the government get involved it provides an opportunity for the state to undermine the legal system (eg. **Pakistan Lawyers' Movement**: popular mass protest movement started by the lawyers of Pakistan in response to the country's dictator General Musharraf unconstitutionally sacking the Chief Justice)

* 1. Promote confidence in the legal system
1. **Balance the market and prevent over or undersupply of a public good**

**PROBLEM:** Centralized control is generally worse than the market at managing supply.

SOCIOLOGICAL CRITIQUE OF SELF-REGULATION

* Looks at the “profession” from the perspective of the market. It offers a critical account of professions acting out of self interest in the pursuit of greater wealth and social status.
* **The profession must construct a market** monopoly– **then the market must be designed to limit or control the number of producers** and control their production.
* Entry is controlled and requires co-operation between profession-state-university.
* Regulatory restraints on entry to the profession and on competition are detrimental to consumers in the form of increased costs. It is also unfair to competitors who could also provide some form of legal services (ie. paralegals).

STRUCTURAL-FUNCTIONAL APPROACH

* More positive. Professions are seen as a tool for a society consisting of self-interested individuals to create cohesion. Self-regulation is the defining characteristic of a profession.
* Rather than challenge society from without, individuals can compete for rewards and greater social status through structures such as those offered by professions which typically rank at the top or near the top of the hierarchy of social classes.
* Professions offer an important source of community in societies marked by individualism, due to the belief that independent professions will put client and public interests over their own self-interest, and will propose regulation based on common norms or professional culture (**problematic** because law is diverse in its norms and practice areas).
	+ Why members of the profession alone must exercise regulatory control:
1. Only the members of a profession possess the knowledge and expertise necessary to assess each other’s conduct.

**PROBLEM:** Is the law that much more complicated than state-regulated jobs?

1. Only the profession possesses the necessary independence or autonomy from the state to regulate its members, in a disinterested fashion, in the public interest.

**PROBLEM:** We trust the state to regulate in the public interest in other fields.

CONTEMPORARY MODEL OF LEGAL PROFESSIONALISM

1. Rigorous, university-centered model for legal education
2. New and expanded roles for law societies in the ethical regulation, admission, education and discipline of lawyers
3. The assertion and attainment of a state-sanctioned monopoly on legal services which prevents non-lawyers from practicing law or acting as lawyers.

DEFENCES OF SELF-REGULATION

1. Historical argument linking the independence of law as a self-regulating profession with the **protection of individual rights and liberties from the pervasive threat posed by the state** (CANADA (AG) v LAW SOCIETY OF BC [1982]**,** Estey J.)
2. **Only lawyers are equipped by education and experience to understand the technical complexity involved** (LAW SOCIETY OF MANITOBA v SAVINO)

**PROBLEM:** the lawyer’s monopoly over legal knowledge is one of the primary causes of the underlying information asymmetry.

1. **Forms a part of a social contract with the state (that the profession will regulate itself in return for a “monopoly”)**

**PROBLEM:** This has been challenged as baseless and selfishly motivated.

1. **Self-regulation by profession is more efficient and cost-effective than external regulation**

**PROBLEM:** Challenged on the basis that “administrative costs” pale by comparison with the costs imposed on society by the disruption of market efficiencies caused by the monopoly.

## SELF-REGULATION IN BC

The Legal Profession Act creates the Law Society of BC. The LSBC has the power to set the credentials for membership, to discipline members up to and including disbarment and to make rules of conduct. The LSBC does so through elected lawyer benchers and appointed lay benchers. The LSBC is governed by the **Member's Manual**, which contains the Legal Professions Act, the Law Society Rules and the Code of Professional Conduct for BC (which is modeled on the federal Law Society standards).

*CODE OF PROFESSIONAL CONDUCT FOR BRITISH COLUMBIA*

The Code is torn between aspirational and prescriptive tendencies. **Prescriptivists** argue that strict rules are clearer and more powerful. **Aspirationalists** (like Benedet) argue that there will be uncharted areas of behavior which have to be bound by broader principles, which will necessarily be aspirational. In part as a result of that tension, the model Federal Code and its children are a bit of a mish-mash of general principles and more specific and detailed rules, with annotations detailing disciplinary decisions as interpretative aids.

Despite the large number of rules, the vast majority of complaints deal with a small number of rules. There are many rules which are never the subject of disciplinary proceedings (this is because this is a complaint-driven process). Furthermore, there are very few disciplinary results.

THE BENCHERS (BC)

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

DISCIPLINE PROCEEDINGS

Discipline proceedings can be divided into 3 distinct stages:

**1. Complaint/Investigation Stage**

* Once a complaint is received, it is reviewed and assessed by a member of the law society’s administrative staff.
* Chief concern is the **under-reporting** of lawyers’ ethical violations or misconduct.
* Formal complaints require lawyer to answer any questions/provide any records as requested by the law society.

**2. Hearing Stage**

* Discipline hearings are adversarial in nature, conducted before a panel of the discipline or conduct committee.
* Burden of proof is on the law society, whose counsel must provide clear and convincing evidence of misconduct.

**3. Penalty/Sanction Stage**

* The purpose of any sanction is either the protection of the public or the profession’s reputation and NOT the punishment of the lawyer, even though the sanction imposed has a severe effect on the lawyer’s reputation and livelihood.
* **Note**: Lawyers have an “insurance fund” – if a client loses money as a result of fraudulent conduct the fund will pay (and insurance fees for all lawyers rise accordingly).

CRITICISMS:

* **System is also seen to be unresponsive to a large number of client complaints about the quality of the legal services they received**
	+ Nearly 40% of complaints are service related, including general dissatisfaction with legal instructions and concerns about fees, rudeness and sloppy practice. These are typical screened out as “not appropriate for formal discipline” as fees are not within the Law Society’s jurisdiction generally speaking.
* **Disproportionate number of small firm, small town lawyers find themselves disciplined**
	+ Big firms may be better at keeping lawyers educated, benchers at the Law Society are generally city-centered and may watch each other’s back more.
	+ Small firms are dealing with wider areas of law and may overstep rules they aren’t aware of, often dealing personally with client’s money.
	+ **The addition of “lay benchers” to discipline panels is an attempt to enhance public confidence in the system**

## ALTERNATIVES TO SELF-REGULATION

THE END(S) OF SELF REGULATION(?)

R. Devlin & P. Heffernan, 726

This article outlines the arguments for and against (same as above) and the alternatives to self-regulation.

CURRENT MODEL

Breakdown of how law societies promote and sanction conduct is on page 737.

**Lawyers** supply legal services to **consumers**. If the consumer is dissatisfied with the quality of service of the lawyer, consumers can make a complaint to the **law society. Law society** is charged with both making **rules** and **disciplining** **lawyers** when those rules are broken.

|  |  |
| --- | --- |
| ADVANTAGES | DISADVANTAGES |
| Independence of the Bar as an unqualified social good (see JABOUR and PEARLMAN v MANITOBA LAW SOCIETY JUDICIAL COMMITTEE **– Iaccobucci)** | Conflicts of interest (Law societies cannot be both representative of lawyers and regulate lawyers). **ALEX**: you wouldn’t let oil sands companies regulate the environment. Self-regulation is just an exercise in public relations. |
| Independence of the Judiciary (rule of law and freedom arguments) | Self-regulation does not equal independence (there is no present threat from the state) |
| Public confidence in the legal profession (as opposed to agents of the state) | Undemocratic (no connection between self-regulation and democracy) |
| Tradition | Protection Racket: promotes lawyer protection and discourages whistle blowers. PILZMAKER case: fraudulent immigration lawyer. When he was discovered, the Law Society lost the documents for 19 months, the eventual penalties were too lenient, and the complaint process was not consumer friendly. |
| Expertise and efficiency | Psychological Critique: not just about the economic monopoly but also to bid up the value of their intellectual cultural capital. |
| Higher and more adaptable standards |  |
| Commitment to the Public Good (psychological argument that self-regulated lawyers as individuals and as a group seek high standards and to promote the public good) | Most of the advantages are just asserted – is there sufficient evidence to back them up? |

**Canada is the only country in the commonwealth where the legal profession is still self-regulated**.

* **AUSTRALIA**: Qualified regulation model at the state (not federal) level. There is a government-appointed independent body to handle complaints and discipline with some supervised involvement by the Law Society. Law society still sets rules for practice but is subject to supervision in this regard.
* **ENGLAND AND WALES:** in the process of reforming, moving towards a completely separate complaints board from the Law Society.
* **IRELAND**: currently considering a legal ombudsperson model.

ALTERNATIVE 1: LEGAL OMBUDSPERSON

Add an **ombudsperson** who sits separate and apart from the **law society** – i.e. we have created a separate agency to which consumers could appeal/complain.

ADVANTAGE: Provides an independent avenue for complaints about the Law Society itself, offering more protection for consumers dissatisfied with the Law Society’s operation.

DISADVANTAGE: This just adds another layer of bureaucracy for consumers to navigate.

ALTERNATIVE 2: QUALIFIED REGULATION

Another regulatory body, but the **law society** no longer holds the power of discipline. The law society will still create the **rules**, but if consumers have a complaint, they will complain to this **agency** will discipline lawyers. This splits up the rule-making/disciplining function of the law society.

ADVANTAGE: Eliminating the conflict of interest – real or perceived – in lawyers judging their own for compliance with ethical and competency standards.

DISADVANTAGE: Legal expertise is necessary not only for setting standards, but also for determining whether lawyers have complied with these standards.

There are other models (*G739*), but basically they reflect this dichotomy. Some variant of one of these models is probably on the horizon - if the Law Society wants to preserve the current model, they will need better justification than platitudes about the independence of the bar, as these arguments were plainly insufficient in other jurisdictions away from self-regulation.

# THE CONTEMPORARY LEGAL PROFESSION

## CURRENT COMPOSITION AND CHALLENGES

WHO ACTUALLY MAKES UP THE LEGAL PROFESSION

* + - 10,000 lawyers in BC
		- 2/3 are male
		- 80% practicing
		- Of the non-practicing lawyers, more are female than male
		- 57% of lawyers practice in Vancouver county
		- 60% barristers work, 40% solicitors work
		- 24% are sole practitioners
		- More stats in the Supplement (***About the Profession, Law Society of BC*,** S-29)

CURRENT CHALLENGES

Current challenges faced by the legal profession include: articling shortage/shortage of rural lawyers; women disproportionately leave the legal profession; sexual harassment; addictions issues; and work-life balance.

GENDER AND RACE IN THE CONSTRUCTION OF LEGAL PROFESSIONALISM

Backhouse (S-34)

Outlines some of the history of discrimination against women, Jewish people, Black people, Aboriginal people, etc. by Law Societies in Canada. Sex discrimination, in particular, continues to plague the profession, though physical harassment has shifted to verbal harassment.

IT WILL BE OUR LITTLE SECRET

Nova Scotia Barristers’ Society (S-52)

The NSBS invited women lawyers in Nova Scotia to send them their stories of recent sexual harassment anonymously. This resulted in a series of newsletters/pamphlets talking about different facets of sexism in the profession. **EXAMPLE:**

*“Come on, honey, just laugh it off”*

* Senior partner takes the opportunity to ask counsel about her genitalia and complains about the firm policy prohibiting sex with associates. Given the power dynamics that exist between senior partners and associates, this young woman reacted as many of us would in her shoes – she “just laughed it off.”
* **Joke aspect** is very troubling (not unique to sexism or racism) – turns the issue onto the victim, demonizing them especially if they complain about it.

The article argues the onus should be placed on others in the profession, instead of the victim, to stand up and challenge the comment.

HOW TO RETAIN TOP FEMALE TALENT

CBA (S-61)

Women end up leaving because they do not want the burden of changing big law’s male-centric culture. Harassment is present and is internalized. **This article recommends that firms make adjustment**s like accounting firms have (because they were losing women) to try to advance work-life balance. Argues for specific practices firms can do to improve the retention of females (see list on 65 – almost all relate to work-life/family balance). **ALEX:** firms are unlikely to do this voluntarily, likely LS need to step in. Article points out the high cost of associate attrition, so this could be beneficial to firms too.

**CRITIQUE:** Assumption is women cannot juggle demands of child care and practice. However we forget the fact that women leave due to discrimination and being barred by a “glass ceiling”.

WE’VE COME A LONG WAY BABY… OR HAVE WE?

Benchers’ Bulletin (S-67)

Firms should seek to retain women for 3 reasons: market demand for diversity; getting the best and the brightest; and associate retention. It costs the firm $300,000 for every lawyer who leaves. Everyone’s responsibility to change the culture not just the Law Society who released recommendations in 2009 for how to retain females.

SEXUAL HARASSMENT, NOT YET A RELIC

Anne Chopra

Points out that sexual harassment is still present and has significant costs to the firm’s reputation, to employees’ job satisfaction and productivity, and the firm’s ability to retain talent.

## FITNESS TO PRACTICE STANDARDS

Two categories of credential programs

1. **Fitness**: No reflection upon character, but rather about whether you have some kind of medical condition/diagnosis that would mean you put your clients at risk if you are allowed to practice law in an unrestricted fashion
2. **Character**: criminal records, academic misconduct, etc.

Should the law society be able to evaluate your “fitness” to practice law? What should they ask? What are areas of legitimate concern? What about those who have no identifiable mental/physical health concern but who become unable to effectively practice? There is a serious risk that such standards will become discriminatory if too broad, but ineffective if too narrow.

This problem emerged in GICHURU***.*** **Prior to 1993**, the questions were “do you now have, or have you ever had, a dependency on an alcohol or drug…”; “ever received counseling from a mental health professional”

CRITICISMS:

* + These questions might discourage people from getting help because it would identify them
	+ Inappropriate by not targeting specific issues – instead identifies in a broad way
	+ Some people need more help than others
	+ Assumes correlation between people who have gone through counseling and their ability to practice law

**Law society was concerned about exposing itself to human rights complaints** – contacted Isabel Grant who is a specialist in mental health law at UBC Law to ask how to craft a useful and non-discriminatory question. Grant identified some of the problematic assumptions of the original question:

* By identifying those who have seen a therapist in the past, you will bring in persons who have seen therapists for reasons that have no relationship to their ability to practice law
* Time limit on the question

**Revised question:** Have you ever been treated for schizophrenia, paranoia, or a mood disorder described as a major affective illness, bipolar mood disorder or manic depressive illness?

**Note:** Answering this question is technically only on admission – once you are accepted into the profession there is no requirement that if you are a later diagnosed to report to the Law Society.

### GICHURU v LAW SOCIETY OF BC [2009] BCHRT 360

|  |  |
| --- | --- |
| ***FACTS*** | Gichuru was a unique candidate, as he had an MD, a Master's in Speech Pathology, and took his time finishing his law degree. He was diagnosed with depression during this time, received treatment and then answered in the affirmative to the new LSBC mental fitness question crafted by Grant. The LSBC request letter from doctor and minor reporting conditions. Gichuru eventually secures articles, then withdraws due to poor personal skills. Gichuru secures a second article, and is forced to provide all this documentation again and LSBC requests that he undergo psychological testing for mental illness. Mr. Gichuru then files a human rights complaint against the LSBC, arguing that he was discriminated against by the demand for documentation **AND** that the question was discriminatory. |
| ***RULING*** | Held for Gichuru. There was both systemic discrimination and individual discrimination, and the tribunal awards $100,000 to Mr. Gichuru - 25% for damages, 75% for compensation for delay. The tribunal member finds a number of problems with the question:* There's no time limit (Have you **ever** been treated?)
* It focuses only on mental illness, to the exclusion of other conditions which might impede one in the practice of law (this is based on prejudice against mental disorders)
* As a result, at least 77% of those who answer the LSBC question in the affirmative suffer some kind of negative consequence, and this is discriminatory

The LSBC doesn't appeal this decision, but decides to **change the question** to:“Based on your personal history, your current circumstances or any professional opinion or advice you have received, do you have any existing condition that is reasonably likely to impair your ability to function as an articled student?”Improvements: Specific timeframe; deals with connection between condition and ability to practice; relies on self-assessment.Downsides: Too watered down; self-assessment can be abused.Lying on your form will count against your **character**, but this is too open ended of a question |
| ***NOTES*** | Law Society would say that the whole point is trying to create **credentials** (pre-emptive qualifications) and so we are trying to identify the most risky and problematic scenarios for people entering the profession. Gichuru had a checkered history – the New Westminster firm terminated his articles (which is very rare) and he was also found to be a “professional litigant” following a variety of “unmeritorious legal claims”.Does this provide more sympathy to the Law Society’s side of things? Not really, as the depression was found not to be connected to his “friction causing personality” – the question would not have even weeded him out! |

**Disciplines and Credentials Committee** is composed of Lawyer Benchers and non-lawyer benchers (new in BC). Whatever the decision, it can be appealed to a full body of benchers (~20) who will vote as to whether or not the person should be able to practice, which can be appealed to the BCSC.

LAWYERS OF SOUND MIND

NY Times (S-127)

 “Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia or any other psychotic disorder?”

Although statistically speaking, few of the applicants who answer “yes” are denied admission to the bar, it does happen. To get caught lying on your fitness application is an easy way to be denied admission. **Not only are such mental health inquiries irrelevant, unethical, and humiliating, but they are also illegal.** The regulations implementing Title II of the Americans with Disabilities Act forbid public entities to administer licensing programs without discriminating against qualified candidates on the basis of disability. There is no evidence to suggest those with mental disorders are any less ethical or capable than other lawyers.

Ms. Flaherty was appointed to the Sandy Hook Advisory Commission because of her personal experience with mental illness – far from disgracing the profession, Ms. Flaherty has elevated it - both despite and because of her disorder.

## CHARACTER STANDARDS

NATIONAL SUITABILITY TO PRACTICE STANDARD CONSULTATION PAPER

FLSC (S-130)

Rejects proposal to do away with the character standards for a few reasons. Canadian law societies are mandated by statute to regulate the legal profession in the public interest – take reasonable measures to protect the public by ensuring members of the profession are suitable to practice and will conduct themselves in a manner expected of them. Law societies must maintain **public confidence** in the legal profession and the effective administration of justice. The purpose of good character assessments, as with licensing examinations, is to assess an applicant’s suitability to practice at the time of application, not to predict the applicant’s future conduct. It is a **baseline** – but is by no means the end of the law society’s monitoring of the member’s character and competence.

Instead, the report recommends a **move away from “character” and towards “suitability to practice”.** This is a shift away from personal attributes which are a poor predictor of future behavior, towards the behavior that is required of all members of the legal profession.

ELEMENTS OF A COMMON “SUITABILITY TO PRACTISE” STANDARD

1. **Respect for the rule of law and the administration of justice**
* Being found in contempt of court, perjury, bribery, dishonesty in the administration of court proceedings, etc.
	+ In determining the relevance of past misconduct to the applicant’s current suitability, law societies should consider the following:
* The nature and seriousness of the misconduct including its relevance to the practice of law;
* The age of the applicant at the time of the conduct;
* Number of offences or incidents of the misconduct
* The length of time between the conduct in question and the application;
* Evidence of remorse;
* Evidence of rehabilitation including but not limited to acknowledgments that the conduct was wrong and acceptance of responsibility for the conduct; treatment and/or counseling; compliance with any disciplinary sanctions, sentences, or court orders; conduct since the offences or misconduct, including evidence of positive social contributions through employment, community or civic service;
* Evidence of the applicant’s current understanding that the conduct was wrong
1. **Honesty**
	* Professional/academic misconduct and fraudulent behavior
	* Matters relevant to an assessment:
		+ The applicant’s age at the time of the conduct;
		+ Whether the dishonest acts were committed to achieve personal gain or advantage;
		+ **The impact on others of the dishonest behavior;**
		+ Evidence of the applicant’s understanding of the matter and acceptance of responsibility;
		+ Compliance with any sanctions for the dishonest conduct;
		+ Evidence of rehabilitation;
		+ The passage of time since the dishonest acts and applicant’s conduct in the interim
		+ Whether the applicant has deliberately provided false or misleading information, or has demonstrated recklessness or wilful blindness in relation to the information provided;
		+ Whether the information in question is material to the application for admission
2. **Governability**
* Whether you have accepted the authority of regulators, particularly those in other jurisdictions if you have re-located
	+ Matters relevant to an assessment:
		- When the sanction or other action or the refusal to license occurred;
		- Whether the applicant accepted responsibility for the underlying conduct;
		- The seriousness of the underlying conduct;
		- Evidence of rehabilitation;
		- Evidence of subsequent compliance with regulatory authority
1. **Financial responsibility**
	* Defaulting on debts, failure to pay childcare obligations, etc.
	* Matters relevant to an assessment:
		+ The circumstances surrounding any bankruptcy or other financial problems, including, in particular, any evidence of wilful financial mismanagement or exceptional circumstances beyond the control of the applicant that could not have reasonably been foreseen;
		+ The nature of the debt at the time of bankruptcy or other financial difficulty;
		+ Actions, if any, taken to discharge debts;
		+ The applicant’s financial situation since the bankruptcy or other financial problems including the applicant’s recent credit history;
		+ The passage of time since the bankruptcy or other financial difficulty; and
		+ Evidence, if any, of the handling of funds for others since the bankruptcy or other financial problems

Question is whether you are a person of good character **at the time of admission** (not before and not after). That means the lapse of time between transgressions is very important. Furthermore, once an applicant has been dinged, there **is a presumption of unsuitability. The onus is on the applicant to prove on a balance of probabilities that they have sufficient suitability to practise.** Character references are often used for this purpose, attesting to the good character of the applicant. Interestingly, we don’t typically ask for “bad character” references – perhaps this is a lopsided view. Are character references valid? **Not really.**

GUIDELINES FOR APPLYING THE STANDARD

The FLSC Report makes a few alterations to the *status quo* in terms of standardization across jurisdictions and publishing decisions, but largely keeps things the same. This raises a number of concerns regarding procedural fairness (WOOLLEY) – law societies are able to rely on hearsay evidence and the onus on the applicant is excessive.

**Note:** the LSBC only began to publish their decisions recently. This is problematic since the application of the character standard has not been sufficiently transparent, historically.

### MOHAN (RE) [2012] LSBC

### APPLICANT 5 [2013] LSBC

|  |  |
| --- | --- |
| ***FACTS*** | Initially used his own name (Mohan); now called “Applicant 5” (when not admitted). The following were things that Applicant 5 was alleged to have done that call his character into question:* + - Cheated on math exam and denied it but still suspended (first year of university). He altered some answers, asked for re-grading; found guilty of academic misconduct.
		- Plagiarizes in law school, again guilty of academic misconduct, suspended from law school. He serves suspension then returns, where he completes law degree and LLM as well. At this time, develops close relationship w/faculty member who writes character reference on his behalf.
		- Applies for admission to LSBC. During the hearing, the LSBC finds out that significant portions of his honors thesis in undergrad were plagiarized.
		- He takes a few months to get back to investigators. Eventually he claims he went through his files and gave UBC the wrong copy (which he kept for posterity), and that he was graded on his own work.

The main issue is allegations of not admitting to the dishonesty regarding the honors thesis, given the (im)plausibility of his story. |
| ***RULING*** | In MOHAN (RE), the credentials committee decided to admit him based on the fact that the applicant had done much work in the legal field and had glowing personal references. While the thesis issue was a mess, the applicant had an explanation and the committee decides not to go there. The original decision also focused on the time lapse and the fact that the applicant produced a lot of significant work in that time. The LSBC appeals.In APPLICANT 5, the Benchers split 2-1, and the majority reverse the original decision. They are convinced third incidence was cheating and therefore the applicant is not of good character. **Benchers hold there was an error of law** in the finding of credibility which was critical to determination of character. The sociology thesis “smelled” and the committee had to make a decision whether his explanation was credible. Failing to do so was an error of law. |
| ***NOTES*** | This decision was recently reversed by the BCSC, which found that the LSBC erred in holding that the original decision hadn’t made a finding of credibility. |

## LAW DISCIPLINARY PANELS

DAVID LAYTON

Defence Counsel

* Benchers had sat on all the panels; however, starting last year the panels are now chaired by Benchers and also includes a non-Bencher lawyer and a member of the public
* He is one of those non-Bencher lawyers – he has sat on panels for over a year and a half
* Argues against having the government take over regulation of the law society
* **Introduction of public members is important for increasing transparency**
* Suitability screening goes to the ability of the profession to maintain public confidence
* “Good character” is a good idea in that lawyers should be held to a high moral standard, however the application of this standard and its ability to exclude minorities and the types of decisions that have been made are problematic

**Q:** Instrumentally, why do we want these **threshold standards?**

* Pre-emptive step of screening (somewhat)
* An important consideration is to ask to what extent one can extrapolate a “wrong” prior to admission to predict the future. Drawing a correlation between past events and future “fitness” as a lawyer is exceedingly difficult (evidence suggests not possible).
* This approach does prevent some from getting the chance to “prove” themselves as a lawyer – this is warranted because the potential for abuse is high as a lawyer.

**Q:** Another approach: ask **what factors lead to misconduct?**

* Stress of profession lead to substance abuse and inappropriate conduct?
* Financial considerations resulting in dishonesty
* Competitiveness, pressure to succeed, etc.

**Q:** Is this really about screening or about **the public reputation of the profession**?

**A:** Since it is a point in time analysis that is not founded on its predictive value, it is clearly the latter. All denials involve application have included the applicant **lying and trying to cover up what they had done** – LSBC really wants remorse and contrition.

### MANGAT (RE) 2013 LSBC

A past **drug dealer/gang member** was admitted. Someone from a very different socio-economic background from most law students, and who had overcome tremendous adversity. There is inherent value in allowing that sort of diversity into the profession.

The fact is that so few applicants actually get screened out and the predictive ability of the test is so low that **we should probably just get rid of the whole thing** (though the LSBC will never do that).

**Q:** Is the current onus on the applicant fair?

* These are tremendously important decisions, certainly for the applicants – could argue that the onus should be on the LSBC or maybe even the LSBC has to prove on a civil standard all of the misconduct that is said to have happened.
* The flipping of the onus is interesting – if the onus is on the applicant to prove then it is saying that acceptance is a privilege – if onus is on the LSBC, then entrance is a right for the applicant that the LSBC is trying to disqualify.

**“Character” Problems for Discussion**

* Are some things too **fundamental** – is some behaviour too fundamental to change?
* Also there is a **moral judgment** here – is change required/demanded by society or not?
* How much do we value **punishment** vs. **rehabilitation** in terms of admission?

# LAWYERS AND CLIENTS

## COMPETENCE

Most basic duty to client is competence (extensive commentary).

#### COMPETENCE

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

## PUBLIC STATEMENTS

### STEWART v CBC [1997] OnCJ

|  |  |
| --- | --- |
| ***FACTS*** | Defence counsel (Greenspan) participated in a CBC documentary (and was paid) about his client’s case ten years after the crime. The client (Stewart) brought suit claiming a breach of implied terms and a breach of the fiduciary duty to loyalty.  |
| ***RULING*** | Held for Stewart. Greenspan to pay Stewart $2,500 and to disgorge the $3,250 he made from the documentary. Greenspan’s primary motivation was self-promotion. |
| RATIO | When appearing in media regarding a former client or case a lawyer must not engage in behavior that is motivated by self-promotion of self-aggrandizement. |
| *NOTES* | An appearance for public education would be fine. This was based on Rule 6.06 of LSUC Code of Conduct (which is identical to Commentary 3 below). |

#### COMMUNICATION WITH THE PUBLIC

|  |
| --- |
| **7.5-1** Provided that there is no infringement of the lawyer’s obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements. |
| COMMENTARYAny statements must be in the best interest of the client. [3] Public communications about a client’s affairs should not be used for the purpose of publicizing the lawyer and should be free from any suggestion that a lawyer’s real purpose is self-promotion or self-aggrandizement. |

## ADVERTISING

#### MARKETING REGULATIONS

|  |
| --- |
| **4.2-5** Any marketing activity undertaken or authorized by a lawyer must not be:1. false,
2. inaccurate,
3. unverifiable,
4. reasonably capable of misleading the recipient or intended recipient, or
5. contrary to the best interests of the public.
 |
| COMMENTARY For example, a marketing activity violates this rule if it:1. is calculated or likely to take advantage of the vulnerability, either physical or emotional, of the recipient,
2. is likely to create in the mind of the recipient or intended recipient an unjustified expectation about the results that the lawyer can achieve, or otherwise brings the administration of justice into disrepute.
 |

#### SPECIALIZATION

Lawyers cannot represent themselves as specialists or experts without authorization under the **Legal Profession Act**.

|  |
| --- |
| **4.3-1** Unless otherwise authorized by the Legal Profession Act, the Law Society Rules, or this Code or by the Benchers, a lawyer must:1. not use the title “specialist” or any similar designation suggesting a recognized special status or accreditation in any other marketing activity, and
2. take all reasonable steps to discourage use, in relation to the lawyer by another person, of the title “specialist” or any similar designation suggesting a recognized special status or accreditation in any marketing activity
 |

#### REFERRALS

Lawyers can pay lawyers from lawyers, but cannot pay for a referral from a non-lawyer.

|  |
| --- |
| **3.6-6** If a lawyer refers a matter to another lawyer because of the expertise and ability of the other lawyer to handle the matter, and the referral was not made because of a conflict of interest, the referring lawyer may accept, and the other lawyer may pay, a referral fee, provided that:1. the fee is reasonable and does not increase the total amount of the fee charged to the client; and
2. the client is informed and consents.
 |
| **3.6-6.1** In rule 3.6-7, “another lawyer” includes a person who is:1. a member of a recognized legal profession in any other jurisdiction; and
2. acting in compliance with the law and any rules of the legal profession of the other jurisdiction
 |
| * + 1. A lawyer must not:
1. directly or indirectly share, split or divide his or her fees with any person other than another lawyer; or
2. give any financial or other reward for the referral of clients or client matters to any person other than another lawyer.
 |
| COMMENTARY[1] This rule prohibits lawyers from entering into arrangements to compensate or reward non-lawyers for the referral of clients. It does not prevent a lawyer from engaging in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients generally by a non-lawyer. Accordingly, this rule does not prohibit a lawyer from:1. making an arrangement respecting the purchase and sale of a law practice when the consideration payable includes a percentage of revenues generated from the practice sold;
2. entering into a lease under which a landlord directly or indirectly shares in the fees or

revenues generated by the law practice;1. paying an employee for services, other than for referring clients, based on the revenue of the lawyer’s firm or practice; or
2. occasionally entertaining potential referral sources by purchasing meals providing tickets to, or attending at, sporting or other activities or sponsoring client functions.
 |

### LAW SOCIETY OF BC v JABOUR [1980] BCCA

|  |  |
| --- | --- |
| ***FACTS*** | The decision revolved around the power of the Law Society to discipline lawyers for advertising, under the broad heading of "Conduct Unbecoming" – the Law Society didn't rely upon any specific advertising provisions. Jabour was a fairly experienced lawyer who rebranded his practice to appeal to middle income clients. He was disciplined for advertising the price of his services. The Law Society also held that his advertising was tacky, and that advertising was a waste of money, and competition over advertising would drive fees up. At issue is not the substance of the decision, but rather the power of the benchers to discipline lawyers for this type of conduct. |
| ***RULING*** | The power to prohibit commercial advertising is granted as part of the broad regulatory power conferred by the Act – but it is not unlimited. “Conduct unbecoming a member of the Society includes any matter, conduct, or thing that is deemed in the judgment of the Benchers to be contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession”. It was the intention of the Legislature to vest in the Benchers very broad powers – they may prohibit any conduct that is contrary to the best interest of the public or the profession. There are few specific powers – most are general and broad. |
| RATIO | The Benchers are given a general power to determine what conduct is to be acceptable in the practice of law. |
| ***NOTES*** | Today, Jabour’s marketing activity would not have been as frowned upon. However, does calling his practice the “North Shore Neighborhood Legal Clinic” mislead? Does it associate the practice with the government, or imply that it is a non-profit enterprise?Smaller practitioners are exactly the type of lawyer most accessible to the general public. They are less intimidating, and provide a starting point for costs. Jabour’s advertising of prices demonstrated an awareness of clients not having unlimited funds to be paid for this transaction. |

EXAMPLES OF LAWYER ADVERTISING

RYAN DALZIEL

UBC grad who has been lawyer for 9 years. Mostly academic type of lawyer (generalist)

Favors freedom of expression and is skeptical of a standard as subjective and impressionistic as “will this bring profession into disrepute” – potential to reduce ability for lawyers to promote access to justice and awareness of lower income individuals what their options are.

The **BC Code** is mainly concerned with regulating market activity which is false, misleading, and has the potential to bring the practice into disrepute.

INSURANCE LAW ADS

Example: “You call, I hammer!”

* Why do we hope that lawyers in BC are not advertising in that way
* Too much focus on money, not enough on justice/fairness (though your client may only care about values)
* Promising more cash despite not knowing the merits of the case! Implied promise that may be a bit misleading – almost a guarantee of recovery

FAMILY LAW ADS

* “Hate each other like poison” – “piece of crap three piece suit downtown” – “illiterate goob at the Court house” – “pay us a little and get a lot”
* Disrespectful, attacks others in the system
* DALZIEL: Family law – context sensitive – not in public interest to aggravate the situation
* Click here and pay up! Does not go over the expectations of both parties, obligations, etc. – don’t ask questions and we’ll take care of it! Well, isn’t the client supposed to be instructing the lawyer?
* Interesting argument: Allow the market to decide instead of lying about their real
* Fact that it is embedded in a website change the nature of the advertisement? Can the Law Society engage with it in the same way?

CRIMINAL LAW ADS (124-125)

“The Thug’s Lawyer”

* + Freedom of expression argument: diversity of ads for a diverse range of clients – just because it is not tasteful does not mean it should be prohibited.
* If it is inaccurate, misleading, predatory, those are the forms of marketing activity we should target – but there’s an argument to be made that the profession is being injured.
* DALZIEL: Would be interesting to see how people in that community feel about it?
	+ Appropriation discussion: is it appropriate for him to use the language of “the thug’s lawyer”? “Thug Life” degrades women.

HEENAN BLAIKIE AD (125)

* “Unique experience for the highest court” – big picture of Michel Bastarache (former SCC J)
* “Let Heenan Blaikie” maximize your chances lead by Michel Bastarache and former clerks – group will enhance your strengths
* DALZIEL: This is definitely a problem because the perception is that Bastarache has special insight into what buttons you should push and that if you pay the price you will get the winning ticket to Ottawa.
* In reality, all he can offer is here are the do’s and don’ts, here is how the Court works, here is some basic advice on how to improve your arguments.
* The advertisement is very misleading – some things are not for sale, like the perception that you will get an expensive unfair advantage (i.e. a Supreme Court judge!)
* There are rules that prevent judges from appearing in courts at different levels.

## SOLICITATION

There are heightened ethical concerns in situations where lawyers solicit business directly from prospective clients (ambulance-chasing!). This is especially true where the lawyer is acting on a contingency-based arrangement, as these arrangements can appear to be "free" to the client. These arrangements can actually involve significant costs to the client, especially if the client attempts to change counsel, as the original lawyer will charge for the work they did on the contingency basis.

### LAW SOCIETY OF SASKATCHEWAN v MERCHANT [2000] L.SaskD.D

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| ***FACTS*** | Merchant is a class-action litigator in Saskatchewan who solicited business from residential schools survivors to pursue class action claims against both the Church and the federal government. Merchant was offering to work on a contingency-fee arrangement of 30%. Merchant sent letters to former students of residential schools **directly soliciting** work, and some of the recipients of these letters complained to the Law Society. Differences between the fees referred to in the letter and the fee structure outlined in the Assignment & Retainer Agreement, were argued to be misleading. |
| ***RULING*** | Held against Merchant, letters were conduct unbecoming under a marketing rule very similar to current BC rule – the letter was “reasonably capable” of misleading, even if it didn’t do so in fact. Three key issues with the letter were: **(1)** it assumed that the recipient likely has a valid cause of action; **(2)** it failed to disclose to the recipient the rigors, potential length, and uncertainties of litigation, not to mention the personal toll; and **(3)** it failed to disclose that the prospective client has something to lose from an economic perspective and indeed may well pay something, even if the firm recovers nothing based on the contingency fee agreement.Other problematic aspects of the letter included asking for the names of other people who attended residential schools and promising to keep that disclosure confidential (not possible) and not being clear about the importance of signing the retainer agreement. |
| ***NOTES*** | In 2012 Merchant was suspended for professional misconduct.What if there was an incentive system put in place for referrals? |

## FORMATION OF THE LAWYER-CLIENT RELATIONSHIP

The moment the relationship is formed is important because that’s when: (1) solicitor-client privilege begins; and (2) a lawyer’s ethical and fiduciary obligations to the client are triggered.

TAKING ON CLIENTS

When dealing with unrepresented individuals, especially on the other side, it is essential that lawyers are clear with these individuals that they are not representing them. In casual conversations about legal issues, it is crucial that lawyers are clear that they are not entering into a solicitor-client relationship and steer conversations to the general, rather than the specific.

**First Dealings Doctrine**

As soon as a potential client has dealings with your office (even if it very minor), a lawyer-client relationship is formed (even if you are not yet retained by the client).

* It creates problems down the road if there are other obligations the person assumes flows from the initial meeting. Because of this it is important to make it very clear the obligations assumed up to that point and when they have ended.
* DO NOT let the client leave your office with any uncertainty as to where things are going/not going, otherwise…

THE PHANTOM CLIENT

* This is when a client assumes based on the initial consultation that counsel are **their** lawyer when the lawyer is under no such impression because there has been no formal assumption of representation (no retainer, etc.)
* This mistaken assumption can prejudice the client enormously (i.e. deadlines passing, limitations periods expiring, etc.)
* Can be avoided by being explicit: “Today we have discussed your problem, it is covered by confidentiality, but until you formally retain me you have not yet agreed to have me as your lawyer and I have not agreed to be your lawyer.”
* **EXAMPLE:** In taxi you say you are a lawyer and they immediately launch into criminal activity they were engaged in – you can end up with a phantom client! Someone who you think you are having a casual conversation and they think they now have a lawyer

REASONS NOT TO TAKE ON A FILE

* **Competence**: Lack of competence due to subject matter, time constraints, etc.
* **Conflict:** Conflict of interest, may become a witness in the matter
* **Because you don’t want to:** Canada does not have a cab rank rule, so the issue is when, if ever, ought lawyers to exercise their power to decline clients?
	+ On one hand you have an obligation to access to justice, while on the other you have personal moral values (i.e. representing tobacco companies).
	+ Emotional burnout may also be a reason to decline clients – getting too close to clients can lead to the lawyer losing perspective.
	+ **Arguments in favor** of helping someone who has an **unpopular cause**:
		- Lawyers have a role as guardians of the rule of law
		- Legal representation is necessary to make sure the system is running properly (opposition, the police, etc.)
		- Just because someone has committed terrible crimes does not mean they do not deserve legal representation and access to the justice system. COUNTER: A lawyer can agree that a client needs representation, but may just not be the person to do it based on personal morals.

**Q:** Do lawyers have an obligation to put the brakes on things monetarily?

**A:** Absolutely, especially in the civil context. Where the criminal lawyer makes all the calls for the client except two (guilty and evidence providing), the commercial lawyer’s goal is the make the client happy! Lots of money is on the line, and preventing overspending is crucial.

TERMINATION

Just because the relationship is over, doesn't mean it's over – for example, privileged communications remain privileged. The client has the right to terminate their lawyer at any time, for any reason. The lawyer, as a fiduciary, does not have a corresponding right. The general principle is that the lawyer must not withdraw from representation without good reason. There are some circumstances where lawyers **are required to withdraw** from representation:

* Conflict of interest
* Client’s persistent breaking of the law

There are also circumstances where withdrawal is optional:

* + Client’s failure to pay legal fees
	+ Repeated failure of the client to follow your instructions/advice

Usually courts accept lawyer’s withdrawal and do not question it, as such information could prejudice the client or others (especially in the context of criminal proceedings).

#### WITHDRAWAL FROM REPRESENTATION

*(SEE ALL SECTIONS – lots of rules for criminal cases)*

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| **3.7-1** A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client. |
| **3.7-3** If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw. |
| **3.7-7** A lawyer must withdraw if:1. discharged by a client;
2. a client persists in instructing the lawyer to act contrary to professional ethics; or
3. the lawyer is not competent to continue to handle a matter.
 |

**Q:** What about withdrawing for non-payment of fees?

**A:** Allowed under 3.7-3, but courts will examine this as per CUNNINGHAM.

### R v CUNNINGHAM [2010] SCC

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| ***FACTS*** | Ms. Cunningham was an employee of the Yukon Legal Services Society. Through Legal Aid, she was retained as defence counsel for an accused, Mr. Morgan, charged with three sexual offences against a young child. In order for Mr. Morgan to continue receiving Legal Aid funding, Legal Aid instructed him to update his financial information. He failed to do so. After two weeks Ms. Cunningham applied to the Territorial Court of Yukon to withdraw from the case as counsel. She provided one reason for her withdrawal: Mr. Morgan, because of the suspension from legal aid and own limited resources, was unable to pay for legal services. **Issue** was whether counsel should be allowed to get off the record for the non-payment of fees? |
| ***RULING*** | Held against Cunningham. The SCC held that the courts have the power to force the lawyer to stay on the record to prevent harm to the administration of justice, particularly if they are withdrawing for non-payment. There was a high probability in this case that the client would be prejudiced. If a lawyer says they are withdrawing for ethical reasons, however, the SCC said the courts must respect that and must not go behind it, even if this will prejudice the client. The lawyer will have to tell the client what the ethical reason for their withdrawal is. |
| RATIO | If a lawyer attempts to withdraw for non-payment of fees, courts will consider whether this withdrawal harms the client or the administration of justice. If a lawyer attempts to withdraw for ethical reasons, the courts will generally not investigate further.  |

SUMMARY OF WITHDRAWAL FROM REPRESENTATION (*G205*)

PROULX and LAYTON summarize the conceptual framework and practical reality of withdrawal:

1. The fiduciary nature of the client-lawyer relationship (including duties to competence, loyalty and communication) requires that counsel acts in a client’s best interest. Which means wherever possible, the lawyer should continue to represent client.
2. However ethical obligations may require a lawyer to withdraw.
3. Society and the participants in the criminal justice system (apart from the accused) have an interest in ensuring a reasoning efficient and prompt proceedings that promote a fair and just outcome.
4. In light of these competing interests, counsel can only withdraw for good cause and with notice to the client.
5. Where withdrawal is required counsel must extricate themselves with as little prejudice as possible to the former client.
6. It could be argued convincingly that, despite the occasional judicial comment (**ALEX**: such as CUNNINGHAM) to the contrary, that Codes and case law give lawyers wide discretion to withdraw (as long as you do not wait to the last minute, important to think ahead about possible difficulties).

# ETHICS IN NEGOTIATION & ADVISING

**Offering advice to a client**

A client may want to know likely amount of recovery if successful, how to draft a will, how to structure their finances most beneficially, or the likelihood of success for any given actions. The most basic ethical duty is the **duty to be competent** (having the knowledge/skills you need, having the time to devote sufficient attention to a client’s matter).

#### COMPETENCE

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| **3.1-2** A lawyer must perform all legal services undertaken on a client’s behalf to the standard of a competent lawyer. |
| COMMENTARY **[1]** As a member of the legal profession, a lawyer is held out as knowledgeable, skilled and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client’s behalf.**[2]** Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more than an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied. To accomplish this, the lawyer should keep abreast of developments in all areas of law in which the lawyer practises.**[3]** In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter**, relevant factors will include**:* 1. the complexity and specialized nature of the matter;
	2. the lawyer’s general experience;
	3. the lawyer’s training and experience in the field;
	4. the preparation and study the lawyer is able to give the matter; and
	5. whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.

**[4]** In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.**[5]** A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk or expense to the client. The lawyer who proceeds on any other basis is not being honest with the client. **This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.****[6]** A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should: 1. decline to act;
2. obtain the client’s instructions to retain, consult or collaborate with a lawyer who is competent for that task; or
3. obtain the client’s consent for the lawyer to become competent without undue delay, risk or expense to the client.

**(continued on 11)** |

#### REASONABLE FEES AND DISBURSEMENTS

Lawyers commonly **lie** to their client regarding time (either time they have to give or time something will take), **BUT**

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| **3.6-1** A lawyer must not charge or accept a fee or disbursement, including interest, unless it is **fair and reasonable and has been disclosed in a timely fashion.** |
| COMMENTARY **[1]**  What is a fair and reasonable fee depends on such factors as:1. the time and effort required and spent;
2. the difficulty of the matter and the importance of the matter to the client;
3. whether special skill or service has been required and provided;
4. the results obtained;
5. fees authorized by statute or regulation;
6. special circumstances, such as the postponement of payment, uncertainty of reward, or urgency;
7. the likelihood, if made known to the client, that acceptance of the retainer will result in the lawyer’s inability to accept other employment;
8. any relevant agreement between the lawyer and the client;
9. the experience and ability of the lawyer;
10. any estimate or range of fees given by the lawyer; and
11. the client’s prior consent to the fee.

**(continued on 45)** |

ADVICE WITHIN THE LIMITS OF THE LAW

A lawyer cannot recommend or condone illegal activity – they are there to provide legal advice within the limits of the law. **The general principle:** if you’ve advised them not to pursue illegal activity and tried to dissuade them not to and they proceed anyway, then you are **required to withdraw.** If you have an ethical reason for withdrawal, court will not question you further, per CUNNINGHAM.

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| 3.7-7 A lawyer must withdraw if: ….1. a client persists in instructing the lawyer to act contrary to professional ethics; or
 |

### LAW SOCIETY OF UPPER CANADA v SUSSMAN [1995] LSDD

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| ***FACTS*** | Complaint against Sussman regarding his representation of Jaqueline Joubarne in family law matter. Sussman criticizes behavior of opposing client to his counsel, and advises own client not to allow access. He wrote an aggressive letter to the ex's counsel bluffing that he was going to bring an application to limit the ex's access. A few months later, Sussman has done nothing to bring a variation application and writes again, and the ex reports him to the Law Society. Sussman was charged for: “while acting for a wife in a matrimonial proceeding, he counseled his client to breach the terms of the Court Order respecting access”. |
| ***RULING*** | **Held for Law Society.** The Law Society was not convinced by Sussman's reasons for why he didn't follow through on the application. What if he had followed through? The court says there are very limited circumstances in which a lawyer can give advice to disobey a court order, requiring a reasonable belief in the imminent risk to a child, as well as the immediate application for a variation in the order. If the application fails, then the duty of the client is to trust in the efficacy of the justice system and has to try again in a proper hearing.  |
| RATIO | The circumstances in which a solicitor may counsel his client to ignore the terms of a mandatory order are extremely confined, and require:1. reasonable and honest belief of there being imminent risk or danger to a child AND
2. that there be an immediate application to a court to have the issues determined forthwith.
 |
| *NOTES* | What about the client – could she disobey the court order and rely on her counsel's advice as a defence? Very dependent on the factual circumstances, and a judge would be likely to exercise their discretion generously if the client had a reasonable belief in the imminent risk and a reasonable belief in their solicitor's advice. |

#### DISHONESTY, FRAUD BY CLIENT & TEST CASES

**Q:** What if a client asks you about the chances of getting caught?

**A:** Don't do it.

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| **3.2-7** A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud. |

If a client comes to you and asks “I’ve done X, what are the consequences?” you can definitely answer that question. But if a client speaks “hypothetically” about possible illegal activity, you cannot answer any of their questions!

**Q:** What if a client believes a law is unconstitutional, plans to challenge it through civil disobedience and test case litigation and comes to you for advice?

**A: A *bona fide* test case** is allowed so long as there is a reasonable belief that the law being challenged was unconstitutional and no one is hurt. In all situations, the lawyer should ensure the client appreciates the consequences of bringing a test case, which can range up to jail time!

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| COMMENTARY**3.2-7[4]** A *bona fide* test case is not necessarily precluded by this rule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case. |

Must be careful to make it clear to your client when you are both their lawyer and in business with them, when you are giving legal advice and non-legal advice.

TALES OF TERROR: LESSONS FOR LAWYERS FROM THE ‘WAR ON TERRORISM’

David Luban (G418)

Essay on the torture memos written by the Justice Department OLC on whether certain kinds of interrogation were torture, which concluded that interrogation techniques are not torture if they don't risk organ failure. These opinions have since been discredited as having significantly overreached the legitimate interpretations of what constitutes torture and they were ultimately disavowed by the U.S. Office of Legal Counsel in 2009.

Luban argues that lawyers must adopt a different moral role as an adviser than as an advocate. **When advising, lawyers should give advice that is as independent as possible, rather than giving the client the answer they want to hear**. Even an advocate has an obligation to the court to be more than a zealous advocate, and can't take advantage of opposing counsel.

Two general criticisms of the **counselor**:

1. Stretching and distorting the law to reach the outcome desired by the client
2. Not indicating that its interpretations are outside the mainstream (disguising the “stretching”)

The counselor is to provide objective, independent, and candid advice (while the litigator/advocate’s pro-client tilt is acceptable since whatever exaggerations a lawyer introduces in presenting the law can be countered by the lawyer on the other side, and an impartial decision-maker will choose between the arguments). I**n the counseling situation it is just the lawyer and their client, with no adversary and no impartial adjudicator.**

**Litmus test:** Is the counselor’s description of the law more or less the same as it would be if their client wanted the opposite result from the one they actually desire?

The OLC memos clearly fail this test.

### LAW SOCIETY OF NEWFOUNDLAND AND LABRADOR v REGULAR [2005] N.L.C.A (424)

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| ***FACTS*** | Regular represented Petroleum Services Ltd. and Barrie James (held 75% of shares). Hughes represented Randy Spurrell (held 25% of shares). Hughes writes a letter to Regular about rumor that the company is being sold. Regular writes back and says that the rumor is not true and company is not sold. Turns out the company is sold to Comstock! At issue is the **regulation of negotiations**: was it acceptable for Regular to respond with such absolute clarity that “the rumor” that Petroleum Services Ltd. was being sold was absolutely untrue? |
| ***RULING*** | **Held for Law Society.** On a qualitative basis substantially all the assets of Petroleum Services Ltd. were sold. Evidence of misconduct:* Regular received instructions from his client that Hughes was not to be told about the sale of assets to Comstock in case Hughes’ client would somehow interfere with the sale
* The steps taken by Regular to retroactively, and without notice, remove Hughes’ client as a director of the company
* Confirmation by Regular to the solicitor for Comstock, on closing the sale, that Hughes’ client was not a shareholder of Petroleum Services Ltd.
* The recital in the Escrow Agreement, one of the documents closing the sale, signed by Mr. Regular, stating, “AND WHEREAS the Assets and Contracts comprise all or a significant portion of the assets of Petroleum Services Ltd.”
* The inclusion of a “non-competition” clause as part of the sale agreement

Considering the above evidence as a whole, the inescapable inference is that Regular’s response to Hughes’ letter **was deliberately intended to mislead**. Regular could have just chosen to rely on solicitor client privilege and declined to answer. |
| RATIO | Example of misconduct judged on a qualitative basis. |
| *NOTES* | **Question:** What would Regular’s punishment be?**Question:** For business purposes, can lawyers be the weak link in confidential/secretive dealings if they are expected to answer truthfully the questions of other lawyers? (**Answer**: See below *Code of Conduct*) |

#### [DUTY] TO OTHER LAWYERS

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| **2.1-4 (a) A lawyer’s conduct toward other lawyers should be characterized by courtesy and good faith**. Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. Personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers that cause delay and promote unseemly wrangling.**(b) A lawyer should neither give nor request an undertaking that cannot be fulfilled and should fulfil every undertaking given**. A lawyer should never communicate upon orattempt to negotiate or compromise a matter directly with any party who the lawyerknows is represented therein by another lawyer, except through or with the consent ofthat other lawyer. **(c) A lawyer should avoid all sharp practice** and should take no paltry advantage when an opponent has made a slip or overlooked some technical matter. A lawyer should accede to reasonable requests that do not prejudice the rights of the client or the interests of justice. |

#### INTEGRITY

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| **2.2-1** A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity. |
| COMMENTARY**[1]** Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer’s trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer’s usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be. **[2]** Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer’s irresponsible conduct. Accordingly, a lawyer’s conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety. |

This provision will mostly be concerned with public sphere, not private life.

Contrast these provisions with the old Alberta Code of Conduct, which held:

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

Could argue that the actual result attained (by not lying) is more satisfactory to both parties (however a Prisoner’s Dilemma situation would result in which it is in the best interest of the parties to lie).

#### INADVERTENT COMMUNICATIONS

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| **7.2-10** PARAPHRASE: Don’t read documents not intended for you to see – delete or return them. If you do read them (by accident of course), in addition to returning/deleting them, you have to advise the other lawyer how much you read and what you plan to do with that knowledge. |

CORRECTING MISINFORMATION – Old Alberta Code

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| **6.02(5)** If a lawyer becomes aware during the course of a representation that:1. The lawyer has inadvertently mislead an opposing party, or
2. The client, or someone allied with the client or the client’s matter, has misled an opposing party, intentionally or otherwise, or
3. The lawyer or the client, or someone allied with the client or the client’s matter, has made a material representation to an opposing party that was accurate when made but has since become inaccurate,

then, subject to confidentiality, the lawyer must immediately correct the resulting misapprehension on the part of the opposing party.  |

**NOTE:** The FLSC Uniform Model Code does **NOT** have 6.02(2). Is it better to have specific rules (like Alberta Code) or do we want broad principles to allow wiggle-room?

TAKE-AWAY RULES

* In no situation, including negotiation, is a lawyer entitled to deliberately mislead a colleague.
* When a lawyer is prevented by rules of confidentiality from actively disclosing the truth, a falsehood is not justified. The lawyer has alternatives, such as declining to answer.
* If declining to answer would in itself be misleading, the lawyer must seek the client’s consent to such disclosure of confidential information as is necessary to prevent the other lawyer from being misled.

Does this encourage lawyers to want to know less information? That way they can try to negotiate with the limited information and just prolong negotiations!

LAWYER OR LIAR? BREAKING DOWN PUBLIC PERCEPTION

Stephen Pitel

Law profession has a significant image problem, as it is perceived as: uncommunicative, expensive, rude, and ubiquitous liars (see: *Liar Liar*).

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| SOURCES OF THE IMAGE PROBLEM | POSSIBLE SOLUTIONS |
| ***Telling Lies:***Common lies relate to the amount of work done for a client, whether certain work has been completed, the lawyer’s availability to meet with the client or work on the matter, and the lawyer’s degree of experience and competence. | ***Telling Lies:*** Lawyers are a self-regulating profession, and each law society requires its members to abide by a code of conduct. **Code of Conduct should unequivocally preclude lying to clients. Rules of professionalism should be strengthened** to more squarely deal with lying – “role morality” should not be legitimate justification as it frequently amounts to a failure to take personal responsibility for one’s conduct. |
| ***Statements of Position:***Blur the important distinction between statements of fact and statements of position. E.g.: public statement “my client is innocent” and then client subsequently pleads guilty – sense will be that the lawyer’s statement, which was meant as a statement of opinion/position, was untrue and that the lawyer lied. | ***Statements of Position*:** Lawyers must make it clear that a statement of position is not a definitive statement of fact. E.g.: “My client has proclaimed his innocence in the strongest terms.”  |
| ***Negotiations:*** Widespread notion that negotiation is something of a “game” with its own rules, where deception through bluffing and lying is just part of the process.Ex. A negotiator may claim that his client will not agree to pay out more than $50,000 when in truth he already has authority to pay out twice that much. | ***Negotiations:*** Law Society of Alberta expressly precludes a lawyer from misrepresenting the monetary limits of his authority in settlement negotiations. If asked he must respond truthfully or decline to answer. The Alberta approach is very different from other provinces. However, “while there may be a few cases where the lawyer’s honesty and fairness deny the client the benefit of a bargain, **such losses are a small sacrifice for preserving the honor and integrity of the profession**.” |
| ***Non-disclosure*:** In several situations, a lawyer will not lie in the sense of making a representation that is false, but will instead stay silent rather than reveal certain relevant information. Does not amount to lying, but it contributes to the public’s perception of lawyers as liars. | ***Non-disclosure:*** Confidentiality and loyalty are at the heart of the relationship between lawyer and client. That relationship would be seriously impaired if the lawyer, in the interests of truth, could choose to reveal solicitor-client privileged communications and information provided in confidence. **Explaining the importance of non-disclosure** to clients and the public could serve to lessen the perception that lawyers lie. |

**Reasons to support deception by lawyers in negotiations:**

1) Lawyer has an obligation to promote his client’s interests – aim is not to reach the fairest bargain, but rather the best bargain for the client.

2) If the client is allowed to lie in negotiations, why should the lawyer be under any higher obligation – if that were the case, some clients might choose to be unrepresented rather than use a lawyer who is bound to tell the truth.

3) There are practical difficulties in regulating negotiations.

# DUTY OF LOYALTY

The duty of loyalty is composed of three dimensions:

1. Duty to avoid conflicting interests
2. Duty of commitment to a client’s cause
3. Duty of candor

As per NEIL [2002] SCC, affirmed in MCKERCHER [2013] SCC.

## CONFLICTS OF INTEREST

This area is the most heavily litigated, has the greatest number of rules and engenders great amount of debate. When FLSC put forward the model code for adoption, the conflicts rule engendered greatest amount of debate, modification, objections, etc.

WHY IS THIS SUCH A CONTENTIOUS TOPIC?

* Great amount of money at stake; huge financial consequences
* Increasing amount of interprovincial practice also has an impact
* Mobility of lawyers can also suddenly trigger a potential conflict
* **Therefore**, a system is needed to deal with these problems

ASIDE FROM MONEY…

* E.g. conflict between personal and client’s interests (if you have personal financial stake in outcome of litigation, for example)
* Personal connections (e.g. closely identified with people identified in the proceedings, so can no longer offer fair/objective advice)
* E.g. sexual relationships 🡪 just seen as a conflict, or are there other rules/principles applied and / or triggered by this behaviour as well?

REGULATION OF CONFLICTS OF INTEREST HAPPENING ON TWO TRACTS

* + - 1. Law Society Rules (if violated, then subject to discipline)
			2. Courts – subject to common law jurisdiction, are setting out rules re: conflicts of interest. Can only get other party’s lawyers disqualified/removed as counsel for opposing party.

#### CONFLICTS OF INTERESTS

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| **3.4-1** A lawyer must not act or continue to act for a client where there is a conflict of information, except as permitted by this Code. |
| COMMENTARY[0.1] Property transactions can be exempt under certain circumstances (Appendix C).**[1]** A **conflict of interest** exists when there is a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person. **The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.** **[5]**Fiduciary relationship is a relationship of trust. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client’s cause, the duty of confidentiality, the duty of candour and the duty not to act in a conflict of interest. This obligation is premised on an established or ongoing lawyer client relationship in which the client must be assured of the lawyer’s undivided loyalty, free from any material impairment of the lawyer and client relationship. **A lawyer and their client are not just contracting parties.** |

#### CONSENT

Clients may consent to proceed notwithstanding that there’s a conflict (or potential for conflict). This consent must be fully informed, and often involves encouraging client to seek independent legal advice so that they’re fully aware of risks and consequences, if the conflict actually manifests itself (e.g. might have to withdraw as their counsel).

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| **3.4-2** A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client. * + 1. Express consent must be fully informed and voluntary after disclosure.
		2. Consent may be inferred and need not be in writing where all of the following apply:
	1. the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;
	2. the matters are unrelated;
	3. the lawyer has no relevant confidential information from one client that might reasonably affect the other; and
	4. the client has commonly consented to lawyers acting for and against it in unrelated matters.
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#### DISPUTES

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| **3.4-3** Despite rule 3.4-2, a lawyer must not represent opposing parties in a dispute. |

BASIC RULES/PRINCIPLES

* Avoid conflicts = General
* Potential conflicts require consent before going further = Secondary
* Notwithstanding all these principles, you can’t act for opposing parties in a dispute = Subsequent

### R v NEIL [2002] SCC

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| ***FACTS*** | Neil was accused of having committed certain criminal offenses. He claimed that his lawyer had failed to adequately represent him and had sold him out to the interests of another client of the firm. He argued that the case against him should therefore be stayed.Neil was an independent paralegal with an office in Edmonton. He had an assistant, Lambert. He sometimes referred clients to the law firm Venkatraman where Lazin was a lawyer. Neil did some work that the Law Society of Alberta regarded as the practice of law (without a license). A complaint led to a police investigation. In one indictment, Neil and Lambert were alleged to have defrauded Canada Trust. Lazin took on the representation of Lambert, while Venkatraman took on the representation of Neil in this matter. Lazin attended some consultations with Neil with the aim of obtaining information that would help him defend Lambert. Some time later, Venkatraman withdrew from the representation of Neil due to Lazin’s representation of Lambert.In the second indictment, Lazin learned through the representation of one of his clients, Mr. Doblanko, that Ms. Doblanko had obtained a divorce with Neil’s assistance, allegedly on the basis of false affidavits that he had prepared. Lazin arranged for Doblanko to report this information to the police investigating Neil on the Canada Trust matter. This was done to multiply the allegations of dishonesty against Neil and so help in the defense of Lambert. Ultimately, the charges against Lambert were dropped in exchange for her testimony against Neil. **Issue:** What is the rule about representing opposing interests? |
| ***RULING*** | Duty of loyalty is composed of three dimensions:1. Duty to avoid conflicting interests
2. Duty of commitment to a client’s cause
3. Duty of candor

GENERAL BRIGHT LINE RULE: A lawyer may not represent a client whose **legal** interests are **directly adverse** to the interests of another current client, even if they are unrelated, unless both clients provide their informed consent (preferably independent legal advice) and the lawyer reasonably believes they are able to represent each client without adversely affecting the other.When the bright line rule is inapplicable the question becomes whether the concurrent representation of clients creates a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client or a third person.**In this case**, the rule does not apply as the clients’ opposing interests were indirect (stemmed from the strategic linkage between the matters). |
| RATIO | Outlines duty of loyalty and general bright line rule. |

### CNR v MCKERCHER LLP [2013] SCC (S-194)

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| ***FACTS*** | Sophisticated corporate client (CN Rail) retains McKercher – huge firm in Saskatchewan – to act on their behalf on some matters (personal injury lawsuit; transaction/property CN looking to acquire; commercial arrangements). McKercher then approached to act against CN in a class action related to over-charging farmers for how much they pay to transport grain. $1.75 billion class action is much larger than the disparate matters undertaken on CN’s behalf. McKercher accepts offer to represent against CNR, then terminates two of the three retainer agreements with CNR. CNR applies for McKercher to be disqualified for acting as lawyers for the plaintiffs in this case as they had **breached the duty of loyalty** by placing itself in a conflict. TJ holds for CNR, but this overturned on appeal based on holding that implied consent was present as CNR was a large corporate client that was not in a position of dependency or vulnerability to McKercher.**Issues:** What is the scope of the NEIL bright line rule? Is there a conflict of interest when a client accepts a case against a current client, if it is unrelated to the firm’s representation of the client? |
| ***RULING*** | Held for CNR. This case falls within the bright line rule and thus there was a conflict. Reason is the third point, maintaining the repute of the justice system as there was no risk of confidential information or of effective representation being compromised. **However, the immediate interests are directly adverse, and are legal in nature as it involved** 2 parties on opposite sides of a piece of litigation. None of the other exceptions to the bright line rule apply.**Duty of candor:** the lawyer should always advise the client of “the conflict” even if they think it does qualify as a conflict according to the above test. Lawyer has duty to advise client of all relevant matters to a retainer.McKercher was wrong to drop two of the CNR retainers and broke its duty of candor by not informing CNR until statement of claim stage.A firm cannot terminate a relationship purely in an attempt to circumvent the duty of loyalty to the client.Sent back to TJ to order a remedy. Bright line rule violation supports disqualification, but it will not always occur.  |
| RATIO | **The conflicts of interest rule protects ALL three:*** + - 1. **Protection of confidential information (of past and present clients). TEST** on S-196:

Did lawyer receive confidential information attributable to solicitor-client relationship relevant to the matter at hand and * + - * Is there a risk that the information will be used to the prejudice of that client?
			* If the lawyer’s new retainer is sufficiently related to the past matters, a rebuttable presumption arises that the possession of the confidential information raises a risk of prejudice.

You are always disqualified if there is a need to prevent the misuse of confidential information.1. **Risk of not providing effective representation of current clients**: lawyer must refrain from being in a position where “it will be systematically unclear whether he performed his fiduciary duty to act in what he perceived to be the best interests of his client”. **Normally results in disqualification.**
2. **Maintaining the repute of the justice system:** factors that will lead to dismissal (S-203): whether new retainer was accepted in good faith, significant prejudice to new client’s choice and ability to get new counsel, conduct of the firm (such as delaying motion so that client cannot remove them)

Adoption of two part **NEIL** test above. Law firms must consider this when accepting a client:**Bright line rule scope*** + - 1. It applies only where the immediate legal interests of the clients – and not their commercial or strategic interests – are **directly** adverse.
			2. It may not be raised for reasons of a tactical nature. The bright line rule will not apply where the party raising it seeks to abuse it.
			3. It does not apply in circumstances where it is unreasonable for a client to expect that a law firm will not act against it in unrelated matters (e.g. governments, banks). This is a contextual analysis (relationship between firm and client, type of matters involved, the terms of the retainer).

The burden on is on the client claiming conflict to prove **the concurrent representation of clients creates a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests.** |
| *NOTES* | What is the role of the courts vs. the law society in resolving conflicts issues? The court’s role sets up new rules in thorny areas and addresses past fuck ups. (CUNNINGHAM)Here there was no risk confidential information would be misused, other than the general sense of CNR’s litigation strategy – but this isn’t truly confidential. |

## PERSONAL RELATIONSHIPS BETWEEN LAWYERS AND CLIENTS

RELATIONSHIPS (of any kind)

Relationships raise the specter of issues concerning effective representation, misuse of confidential information and undivided loyalty. Emotion can cloud objective judgment and make removed representation difficult. Questions arise over whether the lawyer is giving dispassionate advice, or always acting in the client’s best interests.

SEXUAL RELATIONSHIPS WITH CLIENTS (**HUNTER**)

Sexual relationships have an added dimension beyond the mere notion of conflict: **exploitation of vulnerability**. The client may unquestioningly follow the lawyer’s advice, or the relationship itself might not have been consensual to begin with. Lawyers are in an unequal position with their clients, as the client has disclosed personal information and put their trust in the lawyer as part of the fiduciary relationship. This is not that different from a therapist/client relationship, and there is a real concern in certain contexts that the relationship itself isn’t in client’s best interests, and that the lawyer is acting in an exploitative way.

#### SEXUAL & CLOSE RELATIONSHIPS

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| COMMENTARY[8] Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive. 1. A lawyer has a sexual or close personal relationship with a client.
	* + - 1. Such a relationship may conflict with the lawyer’s duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client’s right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer’s firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client’s work.
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### LAW SOCIETY OF UPPER CANADA v HUNTER [2007] ONLSHP (G194)

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| ***FACTS*** | Hunter was president of Law Society of Upper Canada and President of all Law Societies across Canada as well. He had lengthy sexual relationship with a client (where he was representing her in family matter against her husband); he’s married to another woman while having this relationship; then cheats on client with 2 more women, subsequently ending relationship with client. He had client initial a waiver saying that Hunter complied with Code regulation of conflicts (advised to get independent legal advice). Hunter did not actually comply with the Code.He follows up after break up and goes to the client’s house with his lawyer to try to get her to say he followed the code. Hunter does not deny sexual relationship and admits misconduct, but client is claiming that Hunter took advantage of confidential information.Hunter showed deep remorse. He self-reported to the Society, conduct had taken a significant toll by causing him to fall from grace.**Issues:** What is the scope of the duty to avoid conflicts of interest in sexual relationships? What should the punishment be? |
| ***RULING*** | The client was emotionally vulnerable and Hunter should have recommend independent legal advice. The waiver that was initialed was inaccurate, the circumstances did not permit for the client’s informed consent and Hunter stepped out of line by pressing the client to sign on multiple occasions.There is no need for specific deterrence (to other lawyers) given the acceptance and toll already suffered by Hunter. Favorably compared with Joseph decisions where lawyer took advantage of client that had history of sexual abuse and depression and lawyer misused confidential information. **Penalty:** 60 day suspension and $2,500 fine. |
| RATIO | * There is an obligation to discuss the conflict with client outside of their personal relationship (why it’s a conflict and the dangers of the conflict).
* When the client is uninformed and vulnerable, the lawyer should recommend the client to seek outside legal advice to ensure consent is informed, genuine and not coerced.
* If a profound conflict arises the lawyer must recommend that the client/sexual partner seek other representation.
 |
| *NOTES* | The rules in Ontario are a bit more detailed than those in the model code (and the BC Code).Court acknowledges that this situation can sometimes call into question the consensual nature of the sexual relationship |

QUESTIONS

* Is there value to a clear rule?
* Does value of clear rule prevent any exploitative element?
* Ought there to be zero-tolerance, similar to doctors and patients?

# DUTY OF CONFIDENTIALITY

The duty of confidentiality is very broad. Its purpose is to allow clients to trust lawyers by restricting their ability to divulge sensitive information. As such, this duty applies even after representation is over. It extends to any kind of information or conversation that lawyers and clients may share. There are exceptions:

* **Public safety exception**: can disclose information when there is an imminent risk to personal safety (SMITH v JONES).
* **Court order**
* **Acquiescence by client**

#### CONFIDENTIAL INFORMATION

Section 3 deals with confidentiality. The main rule is:

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| **3.3-1** A lawyer at all times must hold in strict confidence all information concerning the businessand affairs of a client acquired in the course of the professional relationship and must not divulgeany such information unless:1. expressly or impliedly authorized by the client;
2. required by law or a court to do so;
3. required to deliver the information to the Law Society, or
4. otherwise permitted by this rule.
 |

#### FUTURE HARM / PUBLIC SAFETY EXCEPTION

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

### SMITH v JONES [1999] SCC (G216)

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| ***FACTS*** | **A** was charged with aggravated sexual assault on a prostitute. Counsel referred him to a psychiatrist hoping that it would be of assistance in the preparation of the defence or with submissions on sentencing in the event of a guilty plea. Counsel informed the **A** that the consultation was privileged in the same way as a consultation with him would be. During his interview with the psychiatrist, the **A** described in considerable detail his plan to kidnap, rape and kill prostitutes in a certain area. The psychiatrist informed defence counsel that in his opinion the accused was a dangerous individual who would, more likely than not, commit future offences unless he received sufficient treatment. Doctor contacts counsel and finds out they will not disclose the information in sentencing and files an affidavit with his opinionTJ rules that public safety exception releases the doctor from both doctor-patient and solicitor-client duty of confidentiality and he was under a duty to disclose the information. BCCA rules the same, except that it was not a duty to disclose (permissive rather than mandatory).**Issue:** What’s the scope of the safety exception to solicitor-client privilege? |
| ***RULING*** | Held for the doctor. A reasonable observer, given all the facts for which solicitor‑client privilege is sought, would consider the potential danger posed by the accused to be clear, serious, and imminent. According to the psychiatrist’s affidavit, the **A** suffered from a paraphiliac disorder with multiple paraphilias, in particular sexual sadism and drug abuse difficulty. In his interview, the **A** clearly identified the potential group of victims (prostitutes in a specific area) and described, in considerable detail, his plan and the method for effecting the attack.The evidence of planning and the prior attack on a prostitute similar to that which was planned emphasize the potential risk of serious bodily harm or death to prostitutes in that area. **The combination of all these elements meets the factor of clarity, and the potential harm (a sexually sadistic murder) clearly meets the factor of seriousness.**Two important elements indicate that the threat of serious bodily harm was imminent: **first**, the accused breached his bail conditions by continuing to visit the specific area where he knew prostitutes could be found; and **second**, after his arrest and while awaiting sentencing, he would have been acutely aware of the consequences of his actions. |
| RATIO | Recognizes public safety exception to solicitor-client privilege, based on the following test:* 1. Is there a clear risk to an identifiable person or group of persons? The group at risk must be ascertainable (can be a general threat to public, but has to be severe if so).
	2. Is there a risk of serious bodily harm or death?  The intended victim is in danger of being killed or of suffering serious bodily harm.
	3. Is the danger imminent?  Must create a sense of urgency (can infer some urgency not only from time but also seriousness of threat).

If after considering all appropriate factors it is determined that the threat to public safety outweighs the need to preserve solicitor‑client privilege, then the privilege must be set aside.  |

## GETTING OFF THE RECORD

CUNNINGHAM: If counsel seeks to withdraw for ethical reasons court must allow withdrawal and should not force lawyer to break privilege (or as minimally as possible). For non-ethical matters (such as payment of fees) the court has the discretion to refuse counsel’s application to withdraw if **allowing withdrawal would cause serious harm to the administration of justice.**

### R v CUNNINGHAM [2010] SCC

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| ***FACTS*** | Same as before. |
| ***RULING*** | The court does not rule on the merits, but a court can refuse a lawyer’s application to withdraw. |
| RATIO | The court’s exercise of discretion to decide counsel’s application for withdrawal should be guided by the following principles:* If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, the court should allow the withdrawal.  If timing is an issue, the court is entitled to enquire into counsel’s reasons.
* In either the case of ethical reasons or non‑payment of fees, the court must accept counsel’s answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor‑client privilege.
* If withdrawal is sought for an ethical reason, the court must grant withdrawal; if it is sought because of non‑payment of legal fees, the court may exercise its discretion to refuse counsel’s request if it determines, after weighing all the relevant factors, that allowing withdrawal would cause serious harm to the administration of justice.
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## APPEALS ON THE BASIS OF “INEFFECTIVE ASSISTANCE OF COUNSEL”

When this is the grounds of appeal, typically an affidavit is solicited in which the lawyer must explain what went happened. This is a strange position for a lawyer because they are supposed to be acting in the client’s best interest but their reputation is being impugned, and they may not be able to defend themselves due to duty of confidentiality.

In FRASER, the **A** charged with sexually assaulting a student and sought representation. The **A** was black and the complainant was white, and jury members were screened for racism. The appeal was based upon lawyer never challenging racial dimensions of the case and using what tools may be available for mitigating potential racial bias. FRASER saw the lawyer disciplined by law society, but the lawyer resigned from practice before the discipline could be enacted. Regardless, this is a context in which duty of confidentiality is tested.

## MONEY LAUNDERING

Lawyers are often attractive to people who want to engage in illegal activity because solicitor-client privilege offers legitimacy and secrecy to fraudulent transactions. The Law Society is constantly publishing alerts on this issue. There is also the issue of criminals (and terrorists!) using lawyers to launder funds. There has been a collaborative international effort to deal with this problem (until the 1980s Canada had very few laws addressing money laundering). Now there is the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and associated regulations which address this issue.

Proceeds of Crime, Money Laundering, and Financing Terrorism Act

Regulations are quite complicated but there are three main heads

* 1. **Thou shalt not do X**
		1. E.g. Lawyers can’t assist clients in purchase of real estate using all cash
		2. The FLSC has introduced the **“**no cash rule**”** – you cannot accept more than $7,500 in cash, except if that money is going to pay your fees, expenses, or bail (i.e. cannot pay for a transaction with that cash). Rule also says that when you are accepting cash from a client, refunds of $1,000 or more have to also to not be made in cash.
	2. **If suspicious actions take place, you should report it**
		1. Cross-border movement of large sums of money, the transaction must be reported to FINTRAC (financial tracking unit)
		2. Legislation puts requirements on certain agencies to report transactions (including lawyers)
	3. **Hold information and allow it to be available to an investigatory body if needed**
		1. Legislation puts requirements on lawyers to keep information about clients identity, to record certain other kinds of details of financial transactions, and FINTRAC is given the power to do a warrantless search of a law office
		2. Obligation for all client-lawyer interactions – require clients name, address, occupation, etc.
		3. For financial transactions, reasonable steps must be taken to verify information associated with the transaction

### FLSC v CANADA (AG) [2013] BCCA (S174)

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| ***FACTS*** | Money laundering and terrorist financing involve disguising activities in order to make them appear legal, in order to mask financial resources and criminal conduct from state scrutiny. In December of 2008, Parliament introduced amendments to the Proceeds of Crime (Money Laundering) and Terrorist Financing Act and its regulations, making them applicable both to lawyers and law firms in all provinces/territories, and to notaries in QC. In response to the amendments, the FLSC filed a petition challenging the application of the regime to lawyers, and to notaries in the province of Québec. It conceded that requiring lawyers and notaries in Québec to take steps to deter criminals from employing them to launder money and finance terrorism is a valid societal goal. But FLSC argues that these requirements, in particular that of collecting information and keeping it for FINTRAC to do these warrantless searches is a breach of s 7 of the Charter, by violating the liberty of clients and lawyers in a manner which is inconsistent with:* 1. solicitor-client confidentiality and privilege;
	2. lawyers’ duty of loyalty to their clients; and
	3. the independence of the Bar

The TJ found that the regime offended the rights of lawyers and their clients in a manner that did not accord with solicitor-client privilege pursuant to s 7 of the Charter, and could not be justified under s 1. FLSC raised s 8 concerns at the trial level, but this was overridden by the national security/criminal purpose control of the legislation saving it under s 1, and only addresses the warrantless searches aspect of the legislation. |
| ***RULING*** | The principles of fundamental justice in play here are solicitor-client privilege and the independence of the bar.MAJORITYThe court largely agreed with the conclusions of the trial judge. However, they found that this is not a case which turns on solicitor-client privilege being the applicable principle of fundamental justice relevant to the s 7 Charter analysis. To the extent that the Regime may interfere with privilege, this is a secondary concern which Canada has attempted to address. There are lots of provisions in the money laundering legislation that aim to protect solicitor-client privilege, such as by allowing lawyers to assert that privilege in certain cases. **The court finds instead that the independence of the Bar is a principle of fundamental justice** with which the legislation interferes to an unacceptable degree, as it drafts lawyers as agents of FINTRAC by: requiring lawyers to keep a receipt of funds record containing confidential client information; authorizing the FINTRAC to examine these records by entry into the lawyer’s office at any time without a warrant; requiring lawyers to disclose their clients’ last known address to the FINTRAC where a claim of privilege is made; authorizing the FINTRAC to use any computer system when searching the lawyer’s office to examine any data therein; requiring the lawyer and others in the office to assist the FINTRAC’s search agents and to furnish “any information ... that they may reasonably require”; and authorizing FINTRAC to disclose this information to law enforcement agencies**. As a result, the Regime will turn at least some lawyers into agents of the state.**The court then finds that the legislation fails at the minimal impairment stage of the s 1 analysis. Independence of the bar is a new principle of fundamental justice.CONCURRENCEThe concurrence argues that the liberty interests of lawyers are at stake, not the clients, as these are too indirect. |
| *NOTES* | * Seems unlikely that the new PoFJ will make it through the SCC, as there are other ways of restricting this legislation.
* Benedet argues that whatever happens at the SCC, the warrantless search aspect of the Act is going to go.
* Law Society has imposed “no cash” and “obligation to collect information” and “avoidance of certain transaction” rules which still apply no matter what happens to the legislation as a whole.
 |

# ADVOCACY AND CIVILITY

ART VERTLIEB, QC

*President of the LSBC, MacKenzie Fujisawa LLP*

He conceptualizes civility in terms of being **“respectful”** of judges, clients, and the general public, as civility can be too broad at times. In his experience, young lawyers are respectful while more senior counsel tend to be more disrespectful, due to having more confidence. People expect more of lawyers than a regular citizen. In other words, don't wear your client's anger. Disrespect is harmful to the society we serve, and is also often counter-productive: what kind of relationship can you ever have with anybody where rudeness is part of the dynamic? “You catch more flies with honey than vinegar.”

When you have an ethical issue of any sort, don’t try to solve it by yourself – seek help from other lawyers.

**Q:** What’s wrong with tactically using personal attacks?

**A:** Instead of planning and preparing the evidence and arguments as to the merits of the case, counsel who is under personal attack will become preoccupied with defending their own conduct, and the client’s case on the matter is likely to suffer. This is problematic because:

* 1. This is the win at all cost mentalities for those who cheat – everyone loses (really?)
	2. The trier of fact becomes pre-occupied with managing conflict between counsel

#### CONDUCT TO OTHER LAWYERS

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| CANONS OF LEGAL ETHICS**2.1-4. TO OTHER LAWYERS**1. **A lawyer's conduct toward other lawyers should be characterized by courtesy and good faith.** Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanor toward each other or the parties. Personal remarks or references between lawyers should be scrupulously avoided, as should quarrels between lawyers which cause delay and promote unseemly wrangling.
2. A lawyer should neither give nor request an undertaking that cannot be fulfilled and should fulfil every undertaking given. A lawyer should never communicate upon or attempt to negotiate or compromise a matter directly with any party who the lawyer knows is represented therein by another lawyer, except through or with the consent of that other lawyer.
3. **A lawyer should avoid all sharp practice** and should take no paltry advantage when an opponent has made a slip or overlooked some technical matter. A lawyer should accede to reasonable requests that do not prejudice the rights of the client or the interests of justice.
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## ETHICS AT TRIAL *(G373)*

Most ethical issues during the pre-trial and trial process engage the “difficult” balance that Lord Denning identified in RONDEL v WORSLEY between an advocate’s “duty to his client and his duty to the court” (or more broadly his duty to the overall administration of justice).

### R v FELDERHOF [2003] OCA (S246)

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| ***FACTS*** | Groia was defending Mr. Felderhof re: the collapse of the Bre-X Minerals Ltd.The proceedings became very contentious. In the first 70 days of trial, very little progress was made and the Crown argued that the failure of the trial judge to rein in the uncivil conduct of Groia resulted in a **loss of jurisdiction** (S250 has full list of conduct):* claims of prosecutorial misconduct – both in failing to disclose and attempting to mislead the judge
* Groia used sarcasm, called prosecutors lazy
* Cross-examined a junior lawyer who had filed an innocuous affidavit for a day and a half
* Frequent interruptions due to disputes amount admissibility of evidence (there were thousands of documents)
 |
| ***RULING*** | No loss of jurisdiction, trial judge tried to be fair and even-handed in dealing with both counsel - however behaviour of Mr. Groia was deplorable. Groia just had a misunderstanding of the rules of evidence, hence his claim of prosecutorial misconduct. |
| RATIO | * Even if counsel’s litigation style is abusive and personally nasty the judge does not lose jurisdiction unless it prevents a fair trial. It is important for everyone to encourage civility, lawyers included.
* Cannot make claims of prosecutorial misconduct without some basis.
* Cannot use motions (such as abuse of process) to circumvent the normal rules of evidence.
 |
| *NOTES* | After this case, the LSBC brought a citation against Mr. Groia. The 2012 decision resulted in 2 month suspension and $200,000 fine levied against him.Groia points to the fact that he won in the actual proceeding to suggest that his tactics were actually successful, and his client has great faith in his abilities as an advocate. |

MODEL CODE

**Rule 4.01(1):** “When acting as an advocate, a lawyer must represent the client resolutely and honorably within the limits of the law, while treating the tribunal with candor, fairness, courtesy, and respect.”

As seen in R v LYTTLE, the basis of determining whether the balance between where the balance between being a zealous advocate and the public interest is struck based on the conscience and good faith beliefs of the individual lawyer.

Aspects of the trial process where advocates must resist the urge to cross the line from vigorous adversarial representation to unethical conduct:

* Representing facts and evidence to a jury
* Preparing witnesses for testimony and taking him/her through their direct evidence
* Objecting to an opponent’s line of questioning during the cross-examination of your client
* Summarizing the law in a closing argument before a judge or jury

WITNESS PREPARATION

* There is difference between witness preparation and **witness coaching (unethical)**
* Witness coaching takes preparation beyond the purpose of getting the witness comfortable with the process and with his own knowledge of the facts of the case. It approaches evidence and witness tampering and obstruction of justice. For example, in R v SWEEZEY, the lawyer counseled witness to “be forgetful and evasive when testifying”.

CROSS-EXAMINATION

### R v LYTTLE [2004] SCC (G377)

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| ***FACTS*** | Defence counsel has theory that **A** was picked out of lineup by victim because he was instructed by criminal organization to pick the **A**. No evidence on the record of this. TJ says Defence can only cross-examine Crown witnesses if they furnish a substantial evidentiary basis. Defence calls officers as witnesses as a result of this and lost their right to final closing. OCA finds that TJ erred in requiring a substantial evidentiary basis for a line of cross examination to be presented to a witness. **Issue**: what are the limits on the nature of cross-examination by counsel? |
| ***RULING*** | Upheld the OCA decision. Court articulates the great importance of cross examination in our legal system (vital to credibility). A judge must balance the rights of an accused to receive a fair trial with the need to prevent unethical cross-examination. The court must ensure “counsel is not merely taking a random shot at a reputation imprudently exposed or asking a groundless question to waft an unwarranted innuendo into the jury box.” |
| RATIO | As long as counsel has a good faith basis for asking a question it is allowed on cross. Good faith: is it honestly advanced on a reasonable inference, experience or intuition? To assert or imply in a manner that is calculated to mislead is prohibited. |

ADVOCATE MISCONDUCT

### R v R(AJ) [1994] OCA (G380)

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| ***FACTS*** | Argument that Crown’s overall conduct during cross-examination of the accused resulted in a miscarriage of justice. **Issue**: did the Crown counsel’s cross examination of the accused cross the line from aggressive to abusive and bring the administration of justice into disrepute? |
| ***RULING*** | The cross-examination was abusive and unfair. Sarcastic tone from the outset, repeated editorializing (e.g. responding by saying “incredible” asking if “you want the jury to belief that”). Throughout Crown counsel’s approach was to demean and humiliate, and this prejudiced the **A**. |
| RATIO | No counsel can abuse a witness. “Statements of counsel’s personal opinion have no place in a cross-examination – nor is cross-examination of the appellant the time or place for argument.” |
| *NOTES* | This is a very high standard – abuse must bring administration of justice into disrepute. Seems like as long as the TJ permits the questioning this will rarely be questioned by appellate courts. |

Avenues for sanction for advocate misconduct:

* Costs against a client
* Costs against a lawyer personally
* A negative order under a given rule of civil procedure
* A law society disciplinary order
* Criminal sanctions
* Negative reputation in the eyes of fellow members of the bar and current/future clients

### GM ACCEPTANCE CORP v ISAAC ESTATE [1992] AB QB

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| ***FACTS*** | Simple little dispute over a car loan. Elderly couple takes out a car loan, but are incapable of using it because wife is diagnosed with terminal illness, husband is in elderly care home. Adult children go to the dealership and asks them to take the loan off their hands, dealer says fine, but the loan corporation says no. The parties go before the Master seeking summary judgment. **Counsel for GM knew of a case** that weighed heavily against GM but did not disclose it until they thought the court had knowledge of it. |
| ***RULING*** | At the end of the submissions, the Master realizes that there is an authority that is directly on point that neither side has brought it up. Master raises it, the side that it favors said that they didn't realize it (Isaac), while GM says they did know of it but didn't raise it. Decision for Isaac Estate, as well as large costs award against GM. Rules are very clear that GM’s counsel was in the wrong. |
| RATIO | It is the responsibility/duty of an officer of the court (lawyer) to bring relevant case law to the attention of the court. Silence about a relevant decision, especially a binding one is not acceptable. |
| *NOTES* | You must bring all relevant authorities to the court’s attention even if you think they are distinguishable.The consequences of misconduct in the advocacy process are not just borne out in the discipline process but can be borne out in something like a cost order against the client.There is tension between the adversarial process and the principle that the judge should apply the applicable law.  |

## COMMENTARY ON CIVILITY

DOES CIVILITY MATTER?

Alice Woolley, G391

Legal regulators and professional associations have undertaken initiatives to foster and encourage lawyer civility – and to discourage and even penalize lawyer incivility. Woolley argues that to the extent that civility means the enforcement of good manners amongst lawyers**, it is NOT a proper subject for professional regulation**, **as this is far too broad.**

1. Critiques attempts to regulate the manners of lawyers, focusing in particular on the risk that such attempts will undermine self-regulation and the pursuit of client interests.
2. Critiques the inclusion of other fundamental ethical values within the concept of “civility” arguing that rules directed at ensuring that lawyers appropriately balance and pursue honesty, loyalty, respectfulness, and justice should be identified as such.

Imposing a broadly defined obligation of “civility” **does not** meet the goal of principles of legal ethics and professional regulation: to guide counsel as to what is required of an ethical lawyer. The ethical obligations of a lawyer are not the same as those of a kindergarten student. The lawyer must ask unpleasant personal questions, argue for the guilty to be acquitted, and attempt to win even where victory imposes costs on others. Fostering civility may even have negative consequences:

* + Could dampen self-regulation and foster professional protectionism
	+ “If a strongly-worded criticism will subject a lawyer to discipline for incivility, she will, naturally, be less likely to make that criticism even if it is well-founded”
	+ “The Law Society [may be] dominated by considerations of professional courtesy and collegiality… that ultimately inhibits their truth seeking function”
	+ Law of defamation protects lawyers who are unfairly subject to criticism by colleagues

We have a diverse bar in which lawyers may have different senses of what constitutes “polite” behavior. Pursuing the impossible dream of a positive public image, or seeking to soften the discomfort of hearing unpalatable and uncivil truths is not required. The “civility” movement should be abandoned in favour of the more difficult task of determining how lawyers can and should be ethical.

JOHN RAMBO v ATTICUS FINCH

Amy Salyzyn S231

This paper focuses on the *discourse* of the civility movement: What assumptions and concepts about lawyer professionalism inhere in our conversation about civility? It is dominated by two competing **masculinities**: “Rambo and Finch”. Idea of Rambo lawyers versus gentlemanly finch lawyers. The very concept of professionalism is inextricably linked with maleness, whiteness, class privilege and Protestantism.

The “Rambo-Finch narrative” may be understood to be hostile to inclusive understandings of professionalism in three ways:

* 1. it renders women and other outsider lawyers largely invisible
	2. it romanticizes past discriminatory concepts of lawyer professionalism and
	3. it reflects the anxieties about the destabilization of traditional, exclusionary claims or modes of authority in the legal profession

Basically the way we frame civility currently is both limited and limiting. Should incorporate female narratives to a greater extent.

LYNDSAY SMITH

“You don’t have to be an asshole to be a good lawyer”

**Best litigators in the city are highly civil – they don’t even sink low**

* Lawyers and judges are gossips! Reputations are made and broken
* If you are having an ethical problem – ask for help! Call the Law Society and ask practice advisors! Or call a Bencher. **The only stupid question is the one you did not ask.**

**Re: Making Mistakes**

* Never try to be deceptive with a judge – be candid
* If you do not know the answer, say so and ask for time, “I would be more assistance to the Court if I could have a bit of time”

**Respect and professionalism go hand in hand**

* Take the emotion out of it, do the right thing, assume every letter that you write/email you send will end up in an affidavit

# ETHICS IN CRIMINAL LAW PRACTICE

Crown’s role is not non-adversarial where the facts support a conviction. It is a difficult balance for both sides: “neutral partisanship” vs “moral activism”.

There are multiple checks on Crown counsel behaviour: discipline from their employer, discipline from the law society, a malicious prosecution lawsuit from the accused, possibility of a judicial stay of proceedings where Crown's behaviour has been unethical. Conversely, most defence counsel are self-employed, and there won't be a large organizational apparatus such as the employment relationship between Crown counsel and the Ministry of Justice.

CHECKS ON MISCONDUCT

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| --- | --- |
| CROWN | DEFENCE |
| Large employer | X |
| Law Society | ✓ |
| Malicious prosecution lawsuit | Client can sue lawyer for negligence (rare) |
| Judicial stay | Judicial intervention that results in an appeal or a charge against defence counsel themselves (rare) |
|  |

## ROLE OF DEFENCE COUNSEL

*G456-464*

Criminal law is played out in adversarial trials (this is where ethical duties of both Crown and defence arise). Defence acts for someone accused of a crime, and as such the stakes are high. Their opponent is the state, with all the resources that implies. There is a legitimate fear of state abuse of power. The Charter comes into play far more in this context than in civil litigation. The onus is on the Crown to prove each element of the offence BARD – this is a very high standard. Generally, defence never has to prove anything, just show that there is a lack of proof.

All of these aspects uniquely inform ethical role of defence counsel**. Defence counsel have an ethical duty to be a resolute advocate**. MARSHALL is an example of failing to be a resolute advocate, and this resulted in a wrongful conviction.

One of the most important duties involved in the resolute advocacy of defence counsel is the **duty of confidentiality.**

#### ADVOCACY

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| **5.1-1** When acting as an advocate, a lawyer **must represent the client resolutely** and honourablywithin the limits of the law, while treating the tribunal with candour, fairness, courtesy, andrespect.COMMENTARY**[9]** **Duty as defence counsel** – When defending an accused person, a lawyer’s duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent. |

DEFENDING A GUILTY CLIENT

Ideally, lawyers should not form any opinions of guilt or innocence of their client. This requires developing the discipline not to judge. SEE ABOVE “**notwithstanding the lawyer's private opinion on credibility or the merits”.** MARSHALLInquiry suggested one of the reasons he failed to be properly represented was counsel’s opinion he was guilty. Because of this it is suggested that counsel failed to take even the most rudimentary steps on behalf of Marshall which would have revealed his innocence, such as independent investigation, interviewing witnesses not called by the Crown, seeking production of the Crown’s witnesses’ prior inconsistent statements, and so on.

**If a lawyer does end up believing in a client’s guilt,** the lawyer is subject to certain ethical constraints:

* 1. counsel can still defend client, but
	2. counsel can only use certain means of defence, namely those that do not knowingly mislead the court.

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| **5. 1-1** COMMENTARY**[10] Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this**. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, **if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false**. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. **Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution.** The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that. |

Above is based on Rule 4.01(1) of the Model Code.

TAKING CUSTODY OF PHYSICAL/REAL EVIDENCE *G469-474*

This is a very muddy area of the law. The classic example is the bloody shirt brought to a lawyer’s office. The Model Code is pretty much silent about these matters apart from section that appears in the BC Code:

#### SUPPRESSING EVIDENCE

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| **5.1-2** When acting as an advocate, a lawyer must not: […]1. knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
 |

The issue here is that according to STINCHCOMBE the defence **does not** have a duty to disclose as its role is purely adversarial, aside from 3 narrow exceptions where there is sort of a duty:

1. disclosing alibi with sufficient time for Crown to investigate,
2. psychiatric defence should be disclosed with sufficient time for Crown doctor to examine accused,
3. any expert evidence should be disclosed 30 days before trial – even if not disclosed this will just result in an adjournment or the TJ weighing the evidence less, so there is not even a concrete duty)

The problem arises because communication of evidence is clearly protected by the duty of confidentiality combined with no obligation to disclose means that giving evidence to the lawyer becomes the equivalent of throwing the gun into a swamp. Defence counsel cannot use privileged status to dispose of evidence (as that would be illegal as stated in the above rule). But what about when defence counsel just hold on to real evidence? **There is a risk of being convicted of obstruction of justice and/or accessory after the fact** (includes hiding evidence in the *AR*).

#### PRESERVATION OF CLIENTS’ PROPERTY

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| **3.5-1** In this section, “property” includes a client’s money, securities as defined in the Securities Act, original documents such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client’s correspondence, files, reports, invoices and other such documents, as well as personal property including precious and semi-precious metals, jewellery and the like.**3.5-2** A lawyer must:1. care for a client’s property as a careful and prudent owner would when dealing with like property; and
2. observe all relevant rules and law about the preservation of a client’s property entrusted to a lawyer.

COMMENTARY[2] These duties are closely related to those regarding confidential information. A lawyer is responsible for maintaining the safety and confidentiality of the files of the client in the possession of the lawyer and should take all reasonable steps to ensure the privacy and safekeeping of a client’s confidential information. A lawyer should keep the client’s papers and other property out of sight as well as out of reach of those not entitled to see them |

### R v MURRAY [1992] OnCJ (G31, G260)

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| --- | --- |
| ***FACTS*** | Criminal charge of attempting to obstruct justice brought against Ken Murray in relation to his representation of Paul Bernardo. This was the biggest case of Murray's career. The charges arose out of some incriminating video tapes made by Bernardo. These tapes present Homolka as a more active participant than she admitted to the police. Bernardo hid the tapes in the ceiling, and the police didn't find them in their search. The police gave Murray permission to get Bernardo's personal effects from the house. Bernardo told Murray to get the tapes, saying that they were important to his defence. Murray involves junior counsel, and develop a code to communicate with Bernardo if they are successful. Murray views the tapes, makes a copy, and then hangs on to them. Murray’s assistant seeks advice from senior criminal defence attorney, John Rosen, in general terms, who advises him that he has no obligation to assist the Crown. Murray claimed that he kept the tapes for strategic purposes, to assist in Bernardo’s defence at trial. Murray eventually goes to Law Society, who advised (and Murray followed) to turn the tapes over to a new lawyer (Rosen) for **A** (who turned them over to police) and withdraws himself from the case.The Crown strikes a deal with Homolka, which they would not have done if they had access to the tapes. Murray is eventually charged with attempting to obstruct justice for hiding the tapes.**Issue:** is Murray guilty of obstruction of justice? |
| ***RULING*** | *Actus reus* fulfilled but Murray is not convicted because *mens rea* was not proven beyond a reasonable doubt – i.e. not proven that Murray *never* intended to disclose.Once he had discovered the overwhelming significance of the critical tapes Murray was left with **three legally justifiable options**:* 1. immediately turn over the tapes to the prosecution, either directly or anonymously;
	2. deposit them with the trial judge; or
	3. disclose their existence to the prosecution and prepare to do battle to retain them.

Because Murray did not take any of these courses of actions the *actus reus* of the offence was committed. Despite numerous incriminating factors (G265-266), the *mens rea* not proven BARD as court is satisfied that Murray’s argument that he planned to use the tapes at trial was reasonably feasible AND that he held a reasonable mistaken belief that his conduct was lawful (there was no clear rule in Ontario Code) – mistake of fact. |
| RATIO | Physical evidence is not covered by privilege, only communications are.But just because privilege does not apply does not mean there is always a duty to disclose physical evidence. The basic rule (471) is:* It’s not obstruction of justice (no MR) if counsel takes and conceals real evidence during pre-trial period if counsel honestly believes it has exculpatory uses and intends to disclose it at trial.
* Obstruction of justice if defence counsel takes and conceals real evidence and realizes it is inculpatory.
 |
| *NOTES* | This case creates a huge loophole for mistake of fact defences in these situations where the code is not clear (may be fine in criminal context but legal ethics should require more).**Privilege** only covers communication for between a lawyer and client created for the purpose of obtaining legal advice. Communication is the key element. **Exceptions** do exist (i.e. “child pornography” + proceedings of crime).When we get to the contemporary version of the problem (i.e. electronic file sent to Murray with a video), is there a difference?* What Bernardo writes in the email would definitely have been **privileged.**
* Could argue that by sending a *copy* that did not exist before, for the purpose of obtaining legal advice, that file sent is covered by **privilege**.
* Taking a copy of a video relevant to a crime does not prevent the police from getting the video in the course of their normal investigation, as the original version still exists. Potentially okay to just go over to the client’s place of business, have them boot up their computer, and read the content without having it transferred.
 |

DIFFERENT VIEWS OF THE **MURRAY**CASE

* Crown view it as defence counsel *never being able to take evidence*
* Ontario Law Society was very concerned about drafting a rule for the future, but committee could not agree on a rule. Two Crown counsel on the committee took the view that the only option should be to turn over evidence to the police or Crown in every single case regardless of whether the material was thought to be material to their case.
* **Fundamental point**: most pieces of evidence are helpful for one side in some ways, and one side in the other (keeping helpful evidence would obstruct conviction).
* Other members of the committee thought lawyers should be able to take position of evidentiary material if “necessary to avoid miscarriage of justice and got the opinion of the law society that it was proper to keep the evidence, and finally that evidence had to be disclosed to the Crown during the case)

At the time there was only one rule in Canada that dealt with this issue (the Alberta Ethical Code) – always required handing over physical evidence. Alberta Rule 4.01(9): a lawyer must not conceal property having potential value in a criminal proceeding. This seems overly broad, as it seems to apply to exculpatory evidence as well, and counsel has never had such a duty.

#### FLSC MODEL CODE 2.05(6) (*G473*)

A permissive provision dealing with when a lawyer has evidence that is relevant to a crime – basically lists the potential avenues in MURRAY and also states that to preserve privilege the lawyer may get independent counsel (who does not know who client is) to disclose or deliver the property. This does not operate in BC. Also since it is permissive (“Generally a lawyer must”) it is not that helpful.

A legal ethics approach to this problem must require counsel at a minimum to:

1. review the material immediately,
2. advise the client that their request to have the lawyer not view the material is unethical,
3. advise the client the if the evidence turns out to be substantially inculpatory that it is illegal and unethical for counsel to conceal it,
4. if the content does not have clear exculpatory purposes the lawyer must consult with a Panel of seniors lawyers from the law society

ELECTRONIC EVIDENCE

How do these responsibilities dealing with physical evidence apply in the electronic context? Leighton bets that at some point in our careers our clients will want to give us something and we will suspect it is evidence of a crime. For example, in a family law file, a wife might steal husband’s iPhone because it can link up to his Dropbox files – can you take that?

ENTERING GUILTY PLEAS

Defence counsel have four ethical obligations when entering a guilty plea:

* Duty to investigate and know the file
* Duty to give competent advice about what will happen if the client does or does not plead guilty, so that they can make an informed decision
* Duty to ensure that the client's decision is voluntary
* It cannot be a plea of convenience (R v KS). This means the **A** must accept the basic underlying features of what he's pleading to.

HANDLING CRIMINAL LAW DISCLOSURE

**Disclosure materials** are those materials prosecution gives to the defence so that they know the information the police have accumulated as a result of their investigation. What often happens is that defence counsel may want to use that information for things other than “full answer in defence”. **Bottom line:** Can you use disclosure for whatever you want? **No.**

* In BC, the rule is of an **implied undertaking of confidentiality** (what rule?!) attached to criminal disclosure materials. Very well-established and means that if you have a situation of overlapping criminal/civil pieces of litigation, the disclosure CANNOT be passed from criminal to civil without the “implied undertaking” being removed. This requires Crown consent or a court application.
* The implied undertaking rule applies in civil proceedings as well. Information gained from discovery can only be used in those proceedings (JUMAN v DOUCETTE [2008] SCC).

THE ETHICAL OBLIGATIONS OF DEFENCE COUNSEL IN SEXUAL ASSAULT CASES

Elaine Craig, S256

Her argument: Defence counsel are ethically obligated to restrict their carriage of a sexual assault case to conduct that supports findings of facts within the bound of the law. Specific critique of counsel’s conduct in R v A(A). More specifically counsel cannot use strategies that derive their probative value from three social assumptions about sexual violence:

1. Baseless assumption that once women’s chastity is lost she is more likely to have sex with anyone and to lie
2. that women who are actually raped will tell someone immediately and if they fail to do so they are lying
3. that women who genuinely do not want to have had sex will fight back physically or try to escape.

This obligation flows from the reforms to sexual assault laws.

## ROLE OF CROWN COUNSEL

*G435-437, 451-454*

Crown counsel is a small "m" minister of justice, and has to a duty to make decisions in the public interest and not just seek a conviction at all costs. This means that:

* + - 1. A prosecutor can seek a conviction but must all the while strive ensure the defendant has a fair trial
			2. The prosecutor’s goal is not to obtain a conviction at any cost but to assist the court in eliciting truth without infringing upon the legitimate rights of the accused
			3. At each stage of the criminal justice process, the discretion vested in the prosecutor should be exercised with objectivity and impartiality, and not in a purely partisan way.

### KRIEGER v LAW SOCIETY OF ALBERTA [2002] SCC (G442)

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| ***FACTS*** | Krieger was a Crown prosecutor who was subject to a complaint to the Law Society. He argued that the Law Society could not review the matter since it would interfere with the exercise of prosecutorial discretion. |
| ***RULING*** | SCC decides that the Law Society does have jurisdiction over prosecutors. Crown are considered lawyers and also prosecutors. As ordinary lawyers, the ordinary rules apply. However, the system requires Crown discretion, and it cannot be constantly second-guessed.SCC provides a carve out for Crown discretion**: the core functions of the prosecutor are protected and therefore not subject to oversight by the Law Societ**y, as they are independent rights owing to the AG (i.e. bringing a charge, staying a charge, accepting a guilty plea). The Law Society still has some control over Crown misconduct, but it must be clear misconduct. |
| RATIO | Courts and law society should not interfere with core prosecutorial discretion, but the Law Society retains jurisdiction and can intervene if there is clear misconduct. |

#### DUTY AS PROSECUTOR

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| **5.1-3** When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably within the limits of the law while treating the tribunal with candor, fairness, courtesy and respect. |

TREVOR SHAW

Director of Prosecution Support

Unique characteristics of Crown counsel in Canada – number of institutions and people that scrutinize Crown’s conduct:

* Internal controls within the Minister
* Independent body in the form of the Law Society. Rule 5.1-3:duty as lawyer when acting as a prosecutor must act with candor and respect.
* Crown counsel should not prevent anyone from getting representation (Crown want the accused to be represented! Makes life much easier)
* Must meet disclosure obligations – only debate is whether to disclose peripheral materials + rules for confidential informants
* Fail-safe: When in doubt, put evidence in question before the Court
* Civil suits – Crown/Attorney General can be sued for malicious prosecution
* Judicial oversight: there are no personal repercussions but it can result in a stay of proceedings, which could be against the public interest.

How we define what prosecutors do:

* Do we do it by describing what they do right **or** by describing what they do wrong?
* Leading text in Canada: Prosecutorial Misconduct by Robert J. Frater (negative descriptor)
* If prosecutors were firefighters their story would be: “Firefighting: All the Houses that Burned Down”

What do prosecutors do right:

* Help the police prepare the case for court
* Help the defence prepare their case (disclosure)
* Help judges prepare their decisions
* Part of a **chain of justice:**
	+ From the crime scene to the court to the jail
	+ Prosecution is an essential link of that chain
	+ All links are required to reach the end

OVERZEALOUS ADVOCACY

### R v BOUCHER [1955] SCC (G451)

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| ***FACTS*** | Victim was an elderly shop keeper in Quebec, found murdered by blunt force trauma and axe to the head. There was a rumor of treasure/money in the shop. The **A** was not at church that day like he usually was on Sundays. Crown called psychiatric evidence, also relied on letter that **A** wrote to his wife from prison. **A** argued that the letter was obtained illegally, he succeeded and the evidence was thrown out. 2 trials occurred, 2 execution dates were set- then stayed by courts. 3rd and 4th trial at SCC, retrial over the issue of the jury address. SCC ultimately ordered a new trial, even though the prosecutor was never identified in the judgment.  |
| ***RULING*** | SCC dismissed the motion for leave to appeal, would not delay the sentence. Boucher sentenced to death, executed by hanging.Most cited quote from Rand: “Crown not being there to win or lose but to do justice.” Crown is in the odd position of being an adversary but an adversary playing by certain rules of ethics, restraint, and neutrality.In the jury address in question, the prosecutor called crime “revolting”, asked that the jury have no sympathy for the **A**, and finished by saying that he would be happy to see the **A** get the death penalty. This was unacceptable because:* 1. It made the Crown into a witness (whose testimony would not be admissible)
	2. It employed an appeal to emotion
 |
| RATIO | The Crown cannot use inflammatory or vindictive language based on personal opinion that the A is guilty. |

# ETHICS FOR CORPORATE IN-HOUSE COUNSEL

The key questions here surround divided loyalties: should in-house counsel be a gatekeeper/sheriff who has ethical obligation to do something in relation to client’s conduct? Should they report to various people inside, or even outside the organization, or simply withdraw?

Issues also arise regarding contamination between legal advice and business advice. The international setting of much corporate in-house work creates a multiplicity of ethical obligations. Who is response for that oversight? Clearly a tension between the idea that it should be up to the law societies in Canada to regulate this type of conduct – but what about the role of securities agencies penalizing lawyers for their misconduct?

LYNN CHARBONNEAU

Deputy General Counsel, HSBC

**Privilege:** Who is the client and who is the lawyer? Being careful in an in-house environment – the client is not your boss, not the executive, not the board, but the organization as a whole. The client owns privilege, and only they can waive it. Have to be very careful, as someone improperly forwarding an email with your opinion can constitute waiving of privilege and have far-reaching consequences. She switched in-house because she wanted to see the outcomes of her decisions, see the post-deal problems and solutions. She advises the bank on their transactions, supervises and manages a team of lawyers, and focuses on broad strategy for her line of business. This means asking three questions:

1. Is it lawful?
2. Is it practical?
3. Is it the right thing to do?

Professional obligations supersede organizational obligations. When is in-house is giving legal advice and when are they giving business advice? The issue, as always, is one of **privilege.** Often legal advice bleeds into business advice: for example, she has negotiated dozens of subscription agreements and can broadly speaking say where things are going to land on any given issue. Never give advice or write an email you can’t live with being published on the front page of the paper.

#### WHEN THE CLIENT IS AN ORGANIZATION

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| **3.2-3** Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer must act for the organization in exercising his or her duties and in providing professional services.COMMENTARY[1] A lawyer acting for an organization should keep in mind that the organization, as such, is the client and that a corporate client has a legal personality distinct from its shareholders, officers, directors and employees. While the organization or corporation acts and **gives instructions** through its officers, directors, employees, members, agents or representatives, the lawyer should **ensure that it is the interests of the organization that are served and protected**. Further, given that an organization depends on persons to give instructions, the lawyer should be satisfied that the person giving instructions for the organization is acting within that person’s authority. |

LEGAL OR FRAUDULENT BEHAVIOUR ASKED OF IN-HOUSE COUNSEL

For example, the Ford Pinto case in the U.S. The company was doing risk assessment: recall of vehicles vs. costs payable to purchasers from exploding gas tanks. This is difficult, as there is no bright line rule. It is not acceptable to lie by omission (Rule 3.2-8[3]). Don’t get to point fingers/blame other; if you encourage, aid or assist in some way, you’re liable for the offence. Sometimes the line is simple (e.g. Enron): if you’re going to orchestrate fraud, you’re liable.

DISTINCTION BETWEEN REPORTING WITHIN AND OUTSIDE OF THE ORGANIZATION

#### DISHONESTY, FRAUD WHEN CLIENT AN ORGANIZATION

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| **3.2-7** A lawyer must not engage in any activity that the lawyer knows or ought to know assists in or encourages any dishonesty, crime or fraud. |
| **3.2-8** A lawyer who is employed or retained by an organization to act in a matter in which the lawyer knows or ought to know that the organization has acted, is acting or intends to act dishonestly, criminally or fraudulently, must do the following, in addition to his or her obligations under rule 3.2-7:**[3]** Such conduct includes acts of omission. Indeed, often it is the omissions of an organization, such as failing to make required disclosure or to correct inaccurate disclosures that constitute the wrongful conduct to which these rules relate. Conduct likely to result in substantial harm to the organization, as opposed to genuinely trivial misconduct by an organization, invokes these rules.**[5]** A lawyer acting for an organization who learns that the organization has acted, is acting, or intends to act in a wrongful manner, may advise the chief executive officer and must advise the chief legal officer of the misconduct. If the wrongful conduct is not abandoned or stopped, the lawyer must report the matter “up the ladder” of responsibility within the organization until the matter is dealt with appropriately. If the organization, despite the lawyer’s advice, continues with the wrongful conduct, **the lawyer must withdraw** from acting in the particular matter in accordance with rule **3.7-1**. In some but not all cases, withdrawal means resigning from his or her position or relationship with the organization and not simply withdrawing from acting in the particular matter. |

In-house counsel DON’T have an obligation as lawyers to report OUTSIDE of their organization (e.g. to Securities Regulator); it ends with them walking away.

**Q: C**an withdrawal mean something less than walking away?

**A:** LYNN says no. If you actually have gone to extent of escalating something up to Board of Directors of your company and they don’t respond, how can you stay? Ultimately, you have a duty to yourself as a lawyer which would force you to walk away.

# ACCESS TO JUSTICE

FOUNDATION FOR CHANGE: REPORT OF THE PUBLIC COMMISSION ON LEGAL AID IN BC

Leonard Doust

Until the 1960s, legal aid in British Columbia was provided through *pro bono* efforts and volunteer services. In 1979 the Legal Services Society (LSS) was established by provincial statute. The demand for legal aid services has grown steadily while government contributions have been inconsistent. **In the mid-1990s British Columbia had one of the most comprehensive programs in Canada**, but the continued increasing demand consistently outpaced budget allocations, giving rise to shortfalls in service.

Reductions in government commitment to legal aid became evident through the 1980s and 1990s when the federal government capped transfer payments and moved to a general transfer of funds to the provincial government rather than a transfer specifically designated for legal aid. The commitment of the provincial government also gradually eroded and **in 2002, the budget of LSS was reduced by close to 40 percent over a three year period.** Budget reductions have necessitated changes in service delivery by LSS including the closure of approximately 45 branch offices, which were replaced by seven regional centers. In 2010 the number of regional centers was reduced to two. Most notably, poverty law services and many family law services were eliminated.

Based on the evidence, Doust concludes that the services provided in British Columbia today are too little, and their longevity or consistency is too uncertain. He made 7 overarching findings:

* The legal aid system is falling needy individuals and families, the justice system, and our communities.
* Legal information is not an adequate substitute for legal assistance and representation.
* Timing of accessing legal aid is key.
* There is a broad consensus concerning the need for innovative, client-focused legal aid services.
* Steps must be taken to meet legal aid needs in rural communities.
* More people should be eligible for legal aid.
* Legal aid should be fully funded as an essential public service.

The need for legal aid is greatest in family law, child protection, and poverty law. Based on his 7 findings, Doust makes 9 recommendations:

* + - 1. Recognize legal aid as an essential public service
			2. Develop a new approach to define core services and priorities
			3. Modernize and expand financial eligibility
			4. Establish regional legal aid centers and innovative service delivery
			5. Expand public engagement and political dialogue
			6. Increase long-term, stable funding
			7. The legal aid system must be proactive, dynamic and strategic
			8. Greater collaboration between public and private legal aid service providers
			9. Provide more support for legal aid providers

“Legal aid is an important part of our social safety net. It is the means by which we as a society ensure that low-income persons can protect their legal rights, and access entitlements and protections that are guaranteed to them by law.”

DONNA MARTINSON, Q.C.

Retired BCSC Judge, Adjunct Prof at SFU

“A Lawyer? Yes Please – But Not Just Any Lawyer, Please”

Professionalism and Meaningful Access to Justice

* GG David Johnston: "Lawyers have a social contract - lawyers have a monopoly over legal services, in return must act as an officer of the court and must advance access to and the administration of justice. If lawyers fail to meet their obligations under this contract, society will change the contract."
* Three reports outline the scope of the problem:
	+ - 1. **SCC National Action Committee - A Roadmap for Change**
	+ McLachlin CJC: "increasingly failing in our responsibility to provide a justice system that [is] accessible, fair and citizen-focused. We are too often incapable of producing just outcomes, proportional and addressing the needs of those the system is meant to serve."
	+ Must consider "everyday legal problems from the everyday perspective" in order to develop a user-centered system
	+ Study of unrepresented people in court system where court workers thought that civil justice system is very much open to abuse by those with more money at their disposal, inaccessible due to procedural requirements.
	+ People don't have much faith in lawyers and the legal system, and the language of justice is foreign and inscrutable to everyday people.
		- 1. **Canadian Bar Association Report**
	+ Many people said the justice system is not to be trusted, only for people with money, arbitrary, difficult to navigate and inaccessible to ordinary people.
		- 1. **BC Public Commission on Legal Aid**
	+ Our legal aid system is failing the people of BC, reaping "devastation wreaked by the absence of adequate legal assistance and representation."
	+ Needs are greatest and have most consequence in family law, child protection and poverty law.
	+ Women are disproportionately affected by legal aid in family law as they are frequently in a situation of relative economic disadvantage and they often bear the lion's share of both the short-term and long-term consequences. Impact is even greater when a woman is trying to leave an abusive relationship.

#### LAWYER AS MINISTER OF JUSTICE

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| **2.1 CANONS OF LEGAL ETHICS**A lawyer is a minister of justice, an officer of the courts, a client’s advocate and a member of an ancient, honorable and learned profession. In these several capacities, it is a lawyer’s duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity. |
| **2.2-2** A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions. |
| COMMENTARY [1] Collectively, lawyers are encouraged to enhance the profession through activities such as:1. participating in legal aid and community legal services programs or providing legal services on a pro bono basis;
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#### RESPECT FOR THE ADMINISTRATION OF JUSTICE

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| **5.6-1** A lawyer must encourage public respect for and try to improve the administration of justice. |
| COMMENTARY**[2]** Admission to and continuance in the practice of law implies, on the part of a lawyer, a basic commitment to the concept of equal justice for all within an open, ordered and impartial system.However, judicial institutions will not function effectively unless they command the respect of the public, and, because of changes in human affairs and imperfections in human institutions, constant efforts must be made to improve the administration of justice and thereby, to maintain public respect for it. |

Competency is also required for access to justice to meaningful – people need effective legal advice. The Code of Conduct talks about what it means to be a **competent lawyer** (Rule 3.1-1)**:**

* Means having and applying “relevant knowledge, skills and attributes…”
* Includes: Investigating facts, identifying issues, ascertaining client objectives
* Requires a broad understanding of relevancy

Those engaged in legal analysis must not only understand the facts and the law, but also the social context from which they arise. McLachlin CJC: “They must appreciate the human beings and situations before them, and appreciate the lived reality of the men, women and children who will be affected by their decisions.”

ASSESSING FOR FAMILY VIOLENCE – A CONTEXTUAL ANALYSIS

#### ENCOURAGING COMPROMISE OR SETTLEMENT

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| **2.02(4)** A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing on continuing useless legal proceedings. |

Family Law Act requires a lawyer, in order to reach a fair resolution, even in a property case, to:

1. Assess whether family violence may be present and
2. If it appears to be present, they must assess the extent to which it may adversely affect:
	1. The safety of a party or a child, and
	2. The ability to negotiate a fair agreement

A COMPETENT LAWYER IN A DIVERSE SOCIETY – IMPORTANCE OF EQUALITY PRINCIPLES

Lawyers, when fact-finding and analyzing, are also guided by the ethical principles for judges which discuss the importance of equality law: “Judges [and lawyers] should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.” Ethics principles underlie the need to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society. **Conclusion:** It is not just **any** lawyer that people need, but a particular type of lawyer armed with proper skills!

**Diversity within the Legal Profession**

Meaningful access to justice requires diversity within the profession. Society will be best served when institutions which have a role in the administration of justice reflect the people they serve. There are serious problems in representation among lawyers with respect to both aboriginal and visible minority lawyers, and more broadly, with respect to women. The Law Society is taking steps to address these issues, but they will inevitably be insufficient.

**Diversity of Areas of Practice**

Some lawyers consider some areas of the law to be undesirable – unsurprisingly, they tend to be those areas “of most significance to and [that] will most benefit vulnerable people in need of legal services”. This includes family law, but applies to other areas of the law, including poverty law. Family law is often called the “poor cousin” in the justice system and is subsumed in the larger “civil justice” category.

“Over the last 20 years family law has lost its place in most Canadian law schools, with fewer full time professors teaching it. Family law has been de-emphasized by law schools, in favour of subjects more attractive to large law firms and global practice.”

CHILDREN AND ACCESS TO JUSTICE

Under the UN Convention on the Rights of the Child, all children have the right to participate in administrative and judicial proceedings that affect them – but that almost never happens.

 “The majority of family cases involve children, who are vulnerable, usually unrepresented non-parties who seldom participate directly in the process. Yet their interests are central to the conflict”

- Meaningful Change for Family Justice Report

The stakes for children are extremely high. They can be seriously harmed, and the longer the problem continues, the more harmful the situation can become and the more difficult it will be to resolve. Not only is harm caused by the alienating behaviour and the conflict associated with it, but the court process itself may exacerbate the conflict, placing the children in the middle and affecting their lives on a daily basis in highly destructive ways.

# ROADMAP FOR THE EXAM

1. What ethical issues are raised? There may be multiple but will be kept relatively compact
	1. Lawyer Bob may be in a conflict of interest
	2. Lawyer Lily’s advertising may be soliciting vulnerable clients in a manner that is coercive or misleading
	3. Lawyer Darren has displayed incivility to another lawyer
	4. Question will lead you – “what should Lawyer Bob do know?”, etc.
2. What rules or cases apply?
	1. Consider if the BC Code of Conduct applies to this situation?
		1. **Note:** We are NOT responsibility for the Code in its entirety 🡪 only things we have covered
		2. **Note:** Key is to get the substance of the rule
	2. Consider whether there is case law that deals with this question
		1. In certain areas (i.e. conflict of interest, ability of council to withdraw) we have looked at some key SCC cases
	3. Consider any other reports, articles, etc. that may assist
		1. **Note:** Do not worry about saying “Woolley’s views are the following…”! Rather, just wants us to be able to identify issue and provide perspective
3. Does the problem have a clear answer?
	1. Sometimes the rules are clear and what is being done is not ethical/legal/permissible
		1. Cannot take money from your trust account to cover personal expenses, even if you pay it back
		2. Cannot lie to the court
	2. Sometimes the rules provide guidance, but not an answer
		1. Need to exercise judgment about whether a line has been crossed
		2. Balance of competing principles may be required
			1. I.e. have duty to be zealous advocate and follow client’s instructions, but also has duty to the court 🡪 safest course may be A but B is not prohibited, or may just be up to the lawyer
	3. Sometimes there is no guidance at all (*unlikely to appear on the exam*)
		1. Need to fall back on general, personal norms
			1. Am I going to focus on consequences, and I going to focus on harms?