

INTRO TO ETHICS/LAWYER'S ROLE

Ethics = study of morals, duties, values and virtues

- Deontological reasoning = reasoning from rules (religious, legal, group norms)
- Teleological reasoning = consid of consequences, weighing competing harms
- Ontological reasoning = arguing from virtues or morals

3 Models of Advocacy:

1) Woolley = zealous advocacy

- always put client's interests first; lawyer must provide access to system and advance client's goals while client directs outcome
- can manage moral complexity in 3 ways:
 - 1) choose clients
 - 2) discuss courses of action w/ clients
 - 3) withdraw from rep

R v Neil: (alleged abuse of process, conflict of interest; law firm initially repping A ultimately repping co-A)

Three dimensions are discussed:

- 1) duty to avoid conflicting interests
- 2) duty of commitment to the client's cause ("zealous rep")
- 3) duty of candour- if conflict arises, client should be first to know

2) Luban = moral agency

- Lawyer cannot be absolved of moral obligations, institution cannot be an excuse
 - system is a social structure, lawyer has a creative hand in advocating the outcome
- Adversarial system not necessarily the best system for truth-finding
 - i.e. intimidation tactics, issues w/ transparency
- Despite criticisms, adversary system is justified (pragmatic argument):
 - It does as good a job as any at finding the truth and protecting legal rights
 - Some adjudicatory system is necessary
 - already well established
- Adversarial ruthlessness only appropriate in crim defence (little man vs. the state)
 - In other contexts, lawyer's role carries no moral privileges or immunities
- If conflict btwn professional and serious moral obligation- moral takes precedence

3) Farrow = sustainable professionalism

- Lawyer's own principles/interests must be balanced w/ others
 - Aspirational values = access to justice, equality, public interest
- Zealous advocacy is too narrow, moral agency is unrealistic in practice
- Competing interests: client, lawyer, profession, public
- Understanding and openness to diversity in our notions of professionalism
- Complex and pluralistic landscape of lawyers, clients, and public

GOVERNANCE OF THE PROFESSION

Self-Regulation = control, direction or governance of an identifiable group by rules/regulations determined by members of the group

- Imp factors: **protecting the public**/ensuring quality of service, balancing the market, contributing to society, maintaining independence and confidence in the rule of law (separate from the state)

Legal Profession Act → LSBC → governs lawyers (through Code of Conduct)

- LSBC sets credentials for membership, disciplines members, creates rules
- Consumers also regulate by making complaints

Discipline = **complaint/investigation stage, hearing stage, penalty/sanction stage**

- Benchers (elected lawyers and appointed lay people)- review complaints
- Adversarial hearing process- LS counsel reps the public, judge must be impartial
- Penalties may include fines, suspensions, disbarment; decisions are published

Devlin & Heffernan: “The Ends of Self Regulation?”

- Alt model: independent regulatory agency appointed by gov’t
- Agency handles complaints, LS establishes codes of conduct/stds of practice and governs admissions
- View that 1 org cannot fulfill a representative + regulatory function, external agency could improve legitimacy of the profession and improve legal services, would allow greater lay participation in discipline proceedings
- Problem? Another layer of bureaucracy that must be staffed and monitored

THE CONTEMPORARY LEGAL PROFESSION

- History of discrim against women, ethnic/religious minorities (Jewish, black, Ab)
- Deeply entrenched notions of white supremacy, class privilege, masculinity
- Major structural changes are required- i.e. better work-life balance, mentorship programs to retain top female talent
- High-functioning alcoholism, addictions- Lawyers Assistance Program to help

Fitness to practice = whether some med condition/diagnosis is “reasonably likely to impair ability to function” as an articulated student/ lawyer

- LS may impose restrictions on ability to practice (too broad = discriminatory)
- Assessed upon admission, no duty to report if illnesses develop later

Gichuru v LSBC: (medical fitness question, history of depression disclosed; multiple evaluations leading to human rights complaint) Question systemically discriminates against those w/ mental disabilities and individually discriminates against applicant.

- Prima facie discrim established by 3 elements:
 - Perceived to have a disability
 - Received adverse treatment
 - Disability or perceived disability was a factor in the adverse treatment
- Q and process that follows affirmative answer = disproportionately neg effect
- Although rationally connected/adopted in good faith- std is not reasonably necessary to achieve LS goal of assessing fitness/competency

CHARACTER

- Mental health diagnosis may prevent practice- unethical/unprofessional?
- **Good character assessment** upon admission (assessed at the time of admission)
 - Goals: **protecting public**, protecting reputation of profession
 - Criticisms: limited predictive value, character is subjective

FLSC Consultation Report:

- “character” should be replaced w/ “suitability to practice”
- 4 categories of relevant conduct: **respect for rule of law and admin of justice, honesty, governability, financial responsibility**
- past misconduct- must assess nature/seriousness, evidence of rehab/remorse
- application of std requires: collection/verification of info, further investigation, assessment of info, hearings/appeals
 - onus on applicant to rebut (on BoP) presumption of unsuitability

Mohan (Re): (student involved in serious academic dishonesty during undergrad/law) Panel decision that applicant rehabilitated and redeemed himself, has good character.

- Not enough evidence to prove that thesis was plagiarized
- Emphasis on character reference letters: has since conducted himself in an honest, professional and ethical manner; has admitted past transgressions
- Time lapse: 7 years since wrongdoing, has produced sig amt of respected work

Re: Applicant 5: (Benchers' review of Mohan) Panel decision overturned.

- Panel did not assess applicant's credibility or consider circumstantial evidence
- Applicant did not discharge onus of proof that he is now of good character
- Note: BCCA has since reversed this decision, Mohan has been admitted (deference to panel decision, appeals should be rare)

ADVERTISING

Rule 4.2-5: any marketing activity must not be false, inaccurate, unverifiable, reasonably capable of misleading, or contrary to the best interests of the public.

LSBC v Jabour: (prices of services listed, guilty of "conduct unbecoming") **Broad power is vested in Benchers to prohibit advertising;** can restrict any matter, conduct or thing deemed to be contrary to the best interest of the public or legal profession, or that tends to harm the standing of the legal profession.

- Somewhat tacky- however, would not run afoul of current rules ?

LS of Sask v Merchant: (direct solicitation of clients- Ab victims of residential schools) Guilty of misconduct, since letters **reasonably capable of misleading recipients;** marketing activity generally in bad taste.

- Misleading b/c: assumes recipient has valid cause of action, fails to disclose rigors of litigation and potential losses of money/legal fees
- In bad taste b/c: assumes situation of recipient, disregards potential impact of receiving the letter, predicts "sig compensation" w/o any info
- Direct solicitation must comply with LS rules

Stewart v Canadian Broadcasting Corp: (lawyer hosted TV show revisiting crime/trial, was accused of breaching fid duty of loyalty) Primary purpose to publicize himself = damages + disgorgement of profits. In the **context of media, lawyers must not engage in behavior motivated by self-promo- 7.5-1(3)**

CHOICE OF CLIENT/WITHDRAWAL

Should refuse client if:

- There is a conflict of interest
- Lawyer lacks competence in the matter
- There is a continuing retainer w/ a previous lawyer
- Lawyer has potential to be a witness in the case
- There is an illegal purpose

Moral non-accountability vs. taking it personally

- Idea that lawyer = neutral agent, has obligation to rep client w/o moral judgment
- Vs. idea that human agency and accountability are imp to legal work

Rule 2.1-5: should make legal services available to public in efficient/convenient manner

- However, right to decline rep in various sections of the Code

3.7-1: must not withdraw from rep except for good cause and on reasonable notice

3.7-2, 3.7-3: **optional withdrawal** if serious loss of confidence or non-payment of fees

3.7-7: mandatory withdrawal if client persists in unethical instructions or lawyer is not competent (**3.1: competence**)

Triggering lawyer-client relationship:

- In general, offer + acceptance of retainer K establishes **right of confidentiality**
- As soon as client has first dealings w/ lawyer's office in order to obtain advice- **solicitor-client privilege** arises = communications are privileged

Terminating lawyer-client relationship:

- When legal issue has concluded, relationship/duty of loyalty may continue
- Potential conflicts arise when accepting new clients
- Client has absolute right to end relationship, lawyer does not have same right

R v Cunningham: (client unable to pay legal fees, application for withdrawal) **Court may refuse a request for withdrawal due to non-payment of fees.**

- 1) if enough time, adjournment not necessary- withdrawal allowed, no reasons
- 2) if timing is an issue- court entitled to inquire further
 - **ethical reasons:** counsel must withdraw, court must grant withdrawal
 - **non-payment:** court may exercise discretion to refuse request
 - Factors to consider = feasibility of self-rep, other means of rep, impact on A from delay, conduct of counsel, impact on Crown/co-A, impact on complainants/witnesses/jurors, fairness to defence counsel (length/complexity of proceedings), history of proceedings
 - **Ultimately, would withdrawal cause serious harm to admin of justice?*

Variety of interests must be considered:

- 1) client interests- fid duty (duty of competence, loyalty, communication)
- 2) legal profession- obligation not to breach law, mislead court, or undermine admin of justice
- 3) society at large- interest in ensuring efficient and prompt proceedings

Unpopular clients: balance btwn access to justice and right to choose clients

- everyone entitled to legal rep, not role of lawyer to pre-judge- **2.1-3(d)**

NEGOTIATION AND ADVISING

- have come to expect a certain amt of lying/deception (esp in negotiation- bluffing)
- However, cannot use role morality to excuse lying
- Distinction btwn statements of fact and position- not always clear to public/media
- Balance btwn non-disclosure and promotion of truth

Rule 2.2: integrity- duty to discharge all responsibilities honourably

Rule 3.2-7: Must not engage in any activity that lawyer know assists or encourages dishonesty, crime or fraud (**test case exception-** commentary 4)

Law Society of Upper Canada v Sussman: (counseled client to breach court order regarding access to children) Guilty of misconduct; **circumstances in which solicitor may counsel client to ignore terms of a mandatory order are extremely confined.**

- Did not bring variable application until much later, no imminent risk of danger

Torture memo example:

- Enabled torture, distorted law to reach outcome that client wanted, did not indicate that these interpretations were outside the mainstream
- Role of counselor and advocate = fundamentally diff
 - **Counselor must provide independent and candid advice**

- Responsibility to tell client what law requires, fact that this understanding is not one the legal interpretive community would accept

Law Society of Newf & Lab v Regular: (lawyer denied rumor of co sale) Response was deliberately intended to mislead/deceive and conceal the sale of assets; **failure to act w/ integrity, guilty of misconduct.**

- Would have been better to say that info was protected by confidentiality

DUTY OF LOYALTY

Rule 3.2-2: general duties of honesty and candour

3.4: conflicts of interest (commentary 5 = fid relationship, duty of loyalty including confidentiality/candour; commentary 8e = close personal or sexual relationship)

3.4-2: must not rep in a conflict unless clients give informed **consent**

3.4-4: concurrent rep is possible in limited circumstances

Law Society of Upper Canada v Hunter: (sexual relationship w/ client) Guilty of misconduct, should have recommended indep legal advice; mitigating factors = out of character, self-reported, was remorseful, no evidence that legal work was actually affected. **Personal relationship may interfere w/ lawyer's duty to provide obj professional advice- s.3.4-1(8)(e)**

- **Factors to consider:** vulnerability of client, power imbalance, whether lawyer may be a witness, whether relationship will interfere w/ confidentiality, fid duty, ability to exercise independent professional judgment, or ability to fulfill obligations as an officer of the court and in the admin of justice
- In general- **clients are entitled to indep and obj advice**
 - Difficult for lawyer to remain dispassionate, difficult to evaluate whether consent is informed/valid in these circumstances; should recommend indep legal advice

R v Neil: (see above- conflict of interest case) Statement of **bright line rule = must not rep one client whose legal interests are directly adverse to the immediate legal interest of another client w/o consent- s.3.4-1(6)**

CNR v McKercher: (possible conflict repping 2 corp clients) **Breach of bright line rule and duty of loyalty to clients** = duty to avoid conflicting interests, duty of commitment, duty of candour.

- **2 types of prejudice** = misuse of confidential info, jeopardization of effective rep
 - If rule inapplicable- must ask: whether concurrent rep creates a **substantial risk** of impaired rep
 - **1) does bright line rule apply?**
 - Yes → then cannot act, unless both parties consent
 - No → then see question 2
 - **2) will concurrent rep create a substantial risk of impaired rep?**
 - Yes → then cannot act, unless both parties provide informed consent
 - No → can act

DUTY OF CONFIDENTIALITY- broader than privilege, extends to all aspects of lawyer-client relationship (while privilege only protects communications)

Rule 3.3: confidentiality

*Limited exceptions = court order to disclose info, client gives permission, public safety, defending against "ineffective assistance of counsel"

Smith v Jones: (psych assessment revealed continuing danger to public, lawyer did not disclose) **Public safety exception to solicitor-client privilege (3.3-3):** when public safety is involved and death or serious bodily harm is imminent, privilege may be set aside.

- 1) clear risk to an identifiable person or group of persons
- 2) risk of serious bodily harm or death
- 3) danger is imminent

R v Cunningham: (non-payment of fees disclosed, possible breach of privilege) In other legal contexts, payment or non-payment may be relevant to merits of a case and disclosure may cause prejudice.

Fed of LS of Canada v Canada (AG): (money laundering legislation, mandatory reporting scheme) **Regime unconstit- violates s.7 of Charter**, cannot be saved by s.1.

- liberty interests of both lawyers and clients are engaged by the impugned provisions in a manner that does not accord w/ principles of fundamental justice
 - info gathered could be given to law enforcers and used against clients
 - lawyers could be imprisoned for not complying w/ requirements
- **privilege and independence of the bar = principles of fundamental justice**
 - In particular, regime interferes w/ independence of the bar to an unacceptable degree
- S.1 analysis: objective is pressing/substantial, there is a rational connection; however, not minimally impairing and not proportional
- Objectives of statute are already being met by LS regulation
- In BC: no cash rule = lawyers cannot accept \$7500 or more in 1 transaction
 - Can accept retainer in cash, but any refund > \$1000 must be in cash

ADVOCACY and CIVILITY

- Balance btwn **duty to client** (zealous advocacy) and **duty to court** (civility)
- Illegal to coach a witness (i.e. to be forgetful/evasive when testifying- *Sweezy*)
- **Civility** = good manners among lawyers (politeness in communication, conduct essential to ensure proper functioning of judicial processes)
- Rambo vs. Atticus Finch article- concept of professionalism linked to masculinity

2.1-3(e): should endeavor to obtain benefit of every remedy and defence authorized by law

2.1-4: conduct toward other lawyers should be courteous and in good faith

3.2-1: lawyers are expected to be civil

R v Lyttle: (cross-exam based on a theory) As long as counsel has a **good faith basis** for asking an otherwise permissible question in cross-exam, the question should be allowed.

- Limitations: cannot resort to harassment, misrep, repititiousness, or questions whose prejudicial effect outweighs probative value, cannot mislead court

R v R(AJ): (incest/sexual assault case) Cross-exam, considered in its totality and in the context of the entire trial, prejudiced A in his defence and undermined the appearance of fairness; **inappropriate to state personal opinions or argue w/ witness.**

GM Acceptance Corp of Canada v Isaac Estate: (car loan, buyers got sick and dealer agreed to refund, then reneged; facts v similar to another case) Counsel has **duty to bring all relevant law to the attention of the court**, whether positive or negative.

R v Felderhof: (uncivil attacks on prosecutors by defence counsel, unfounded allegations of prosecutorial misconduct) Must treat witnesses, opposing counsel, and the court w/ fairness, courtesy and respect; allegations must have foundation in the record.

- Judge does not lose jurisdiction unless counsel's conduct prevents a fair trial
- Duty to court, to clients, and to admin of justice: requires civility in court

Art Verlieb- lack of respect hurts in 4 ways:

- 1) counsel under personal attack becomes preoccupied, client's case suffers
- 2) judge becomes preoccupied w/ managing conflicts btwn counsel
- 3) serious personal disputes delay court proceedings

- 4) legitimacy of the system itself is undermined (public interest)

CRIM LAW PRACTICE

- purpose of court proceedings = to seek justice and truth
- both Crown and defence counsel “must not mislead the court”; focus on honesty, integrity, duty not to make frivolous arguments, duty of civility (*Felderhof*)

Rule 2.1-2: should maintain a courteous and respectful attitude toward court, at the same time discharging professional duties to clients resolutely

CROWN COUNSEL

- duty to seek justice in the **public interest** (balance btwn advocacy/achieving a conviction when warranted, and being fair/objective to A)
- must ensure a **fair trial**, must be obj, goal is not to obtain a conviction at all costs- **5.1-3(1)**
- when addressing the jury- cannot express personal opinion through inflammatory or vindictive language, cannot leave impression that A should be found guilty

Trevor Shaw- many levels of control over Crown:

- 1) **Internal/employer control** within MOJ (policy manual)
- 2) **LS control** (**Rule 5.1-3**)
- 3) **Civil lawsuits** (tort of malicious prosecution)
- 4) **Judicial stays** (judge can intervene if there is misconduct)
- However- presumption of proper conduct, large amt of trust in Crown
- Crown are an essential link in the chain of justice from crime scene to court to jail

R v Boucher: (inflammatory jury address) Crown acted as a witness, gave inadmissible evidence and appealed to emotion; crim prosecution is an investigation that should be conducted w/o feeling, w/ the **single view of determining the truth**.

Krieger v Law Society of AB: (Crown learned of blood test results that favored A, did not disclose to defence)

Finding of professional misconduct requires an intentional departure from fundamental duty to act in fairness.

Failure to disclose all relevant info- if dishonest or in bad faith = ethical breach within jurisdiction of LS.

- Prosecutorial discretion = decisions as to whether prosecution should be brought, continued or ceased, and what the prosecution ought to be for

DEFENCE COUNSEL

- Duty of loyalty to client, duty not to mislead the court
- Potential problem of defending guilty client- avoid forming opinions, pre-judging
 - Can continue to defend a client, even if convinced of their guilt
 - Can only use certain methods of defence- which do not involve knowingly misleading the court
- Subject to LS control, client control (negligence action), possible judicial intervention- however, regulation of defence much narrower than Crown

Rule 5.1-1: must rep client resolutely and honourably within limits of the law

5.1-2: must not attempt to deceive by suppressing “what ought to be disclosed”

Crown must disclose all relevant info to defence, but there is **no reciprocal disclosure obligation** on defence counsel. 3 exceptions related to timing:

- Alibi should be disclosed in suff time to allow proper investigation
- Psych defence should be disclosed to allow Crown psychiatrist time to examine A
- Expert opinion evidence should be disclosed 30 days before trial

Physical evidence: protected by confidentiality, not by privilege

- Note that Crim Code prohibits disposal of incriminating evidence (obstruction of justice, accessory after the fact- both require necessary MR)
- **Must turn over inculpatory evidence to authorities**
- Acting anonymously through a 3rd party- protects confidentiality attaching to the circumstances in which the material was acquired
 - i.e. should anonymously send evidence to another lawyer to give to the police, or tell client to leave it where it is

R v Murray: (Bernardo/Homolka case, counsel took possession of videotapes and delayed in disclosing them) Tapes were overwhelmingly inculpatory and should not have been concealed; however, defence of **mistake of fact** applied, Murray honestly believed he was entitled to conceal them until trial = **lack of MR (intention) to obstruct justice.**

- 1) defence counsel can take possession of real evidence and conceal it during pre-trial, if they honestly believe it has **exculpatory** uses at trial
- 2) cannot take possession of real evidence and conceal it if counsel realizes that evidence is **inculpatory** (= obstruction of justice)
- At min- must review material immediately, advise client that it is illegal for counsel to conceal incriminating evidence, consult w/ panel of senior lawyers convened by LS if exculpatory uses are not obvious
- Note: inculpatory = proving guilt of D; exculpatory = tending to exonerate D

Plea bargaining = Rules 5.1-7, 5.1-8

- 1) **duty to investigate** all facts and law applicable to case
- 2) **duty to give competent advice** about prospects of acquittal/conviction if case proceeds, and implications/possible consequences of a guilty plea
- 3) **client's decision about plea must be voluntary**
- 4) **client must admit necessary factual/mental elements** of offence
- Note: public interest must not be sacrificed in the interest of expediency (plea of convenience)

R v K(S): (10 counts of sexual assault, client pled guilty to 4 but declared innocence throughout proceedings) Guilty plea should not have been accepted, given that client denied guilt; **essential to plea bargaining process that A is prepared to admit to the facts supporting the conviction.** Pleas set aside, new trial directed.

CORPORATE COUNSEL

- Diff ethical challenges may arise where employer = only client
- **Cognitive dissonance-** where professional norms of client loyalty conflict w/ personal norms of honesty and integrity
- Lawyer may lose capacity for indep judgment/disinterested advice

Rule 3.2-3: must act for the organization (duty is to the co, not to any particular person)

3.2-8: where org has acted, is acting, or proposes to act in a way that is dishonest, fraudulent, criminal or illegal:

- Should consider whether feasible/approp to give advice in writing
- May advise chief exec officer of misconduct
- Must advise chief legal officer of misconduct
- If org continues w/ misconduct, must withdraw from particular matter

Wilder v Ontario (Securities Commission): (jurisdiction of OSC vs. LS to regulate misconduct of in-house counsel who wrote letter to OSC containing untrue statements) Assertion of jurisdiction by OSC may infringe constit principle of rule of law, must ensure on case-by-case basis that solicitor-client privilege is protected.

- 1) Lawyer is entitled to be dealt w/ fairly and permitted to answer allegations
- 2) client has interest in confidentiality; lawyer must not disclose privileged info
- In-house counsel may be subject to additional regulation besides LS (i.e. corp regulation)

ACCESS to JUSTICE

2.1: duty to serve the cause of justice; 2.1-5: make legal services available in an efficient/convenient manner

2.2-2: duty to advance legal profession

5.6-1: must try to improve admin of justice

3.2-4: encouraging compromise or settlement, when reasonable/fair

Reports on Access to Justice: (McLachlin et al), guest speaker Donna Martinson

- increasingly failing in our responsibility to provide a justice system that is accessible, responsive and citizen-focused; too complex, slow, expensive
- poor/vulnerable are particularly prone to legal issues, increasing self-rep
- most serious consequences in **family law, child protection, poverty law**
- **greater diversity needed**- public best served by a more representative and inclusive legal profession/judiciary (i.e. more women and ethnic minorities)
- must look at everyday legal problems as experienced by the public
 - **social context is important**
- **must recognize access to justice as a central aspect of professionalism**

Basic duties of a lawyer- competence, duty of loyalty, integrity

Main policy argument: zealous advocacy vs. duties to public/court/admin of justice

Conflicts of interest:

- 1.1-1 definition
- 2.1-3(b) duty to the client
- 3.2-2(1) honesty and candour
- 3.4-1 rule
 - 3.4-1(6) Bright Line Rule
 - 3.4-1(8e) sexual relationships w/ clients
- 3.4-2 exception for consent
- 3.4-5 joint retainers
- 3.4-26.1 relatives, partners, friends, etc. as clients

Duty of loyalty:

- 3.2-2 honesty and candour
- 3.4-1(5) duty to avoid conflicts

Competence:

- 3.1-1 definition
- 3.1-2 duty to be competent
- 3.2-1 quality of service
- 3.2-2(2) honesty and candour

Good Character:

- 2.1-5(b) duty to oneself
- 2.2-1(3) integrity

Civility:

- 2.1-2 duty to courts/tribunals
- 2.1-4 duty to other lawyers
- 3.2-1 quality of service
- 5.1-1 advocacy
- 5.2-5 courtesy
- 7.2-1 courtesy and good faith

Confidentiality:

- 3.3-1 rule and exceptions
- 3.3-3 future harm/public safety exception
- 3.7-9.1 withdrawal

Crown:

- 2.1-1 duty to the state
- 5.1-3 duty as a prosecutor

Defence/zealous advocacy:

- 2.1-3(e) duty to the client
- 5.1-1 advocacy
- 5.1-2 restrictions

Plea Bargaining:

- 5.1-7, 5.1-8 rules

Advising:

- 3.2-7 cannot encourage crime/fraud- (4) test case exception

Choice of client:

- 2.1-3(j) duty to the client
- 3.7-1 withdrawal from rep
 - 3.7-2, 3.7-3 = optional withdrawal
 - 3.7-7 = obligatory withdrawal

Corp Counsel:

- 3.2-3 when client = org
- 3.2-8 rules
- 3.4-6 joint retainer (potentially)

Access to Justice:

- 2.1-5(c) duty to oneself
- 2.2-2 integrity
- 3.2-4 encouraging compromise/settlement
- 5.6-1 encouraging respect for the admin of justice