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# Introduction

## Legal Ethics

* **Definition**
* **Ethics** – study of morals, duties, values and virtues
  + Attempts to order human conduct toward the right and the good
* **Professional ethics** – code of rules worked out by members of the profession to govern themselves
* **Different kinds of reasoning**
  + **1. Reasoning from rules –** non-consequentialist / deontological
    - Using set of rules that could spring from variety of sources
    - Religious
    - Legal
    - Group norms
      * Ex. sharing private info is wrong – even tho it might not be illegal
  + **2. Reasoning from consequences –**teleological reasoning
    - Consider the harm caused
    - Weighing of competing harms – pros v cons/ benefit vs harm
  + **3. Ontological reasoning**
    - Reasoning from virtue/ character/ values
      * Decision-making is motivated by desire to be a good person
        + by how we define our ideals of conduct n character
      * at times may conflict –
        + loyalty vs honesty vs respect for privacy

### Role Morality

* ethical rules / norms of the role occupied
  + ex. unethical for lawyer to disclose secret cuz of the duty of confidentiality
* **legal ethic involves:**
  + rules
  + virtues
  + consequences
* issue- requirement of role morality may conflict with personal morality
* exception – even duty of confidentiality has exceptions
  + *smith v jones -*  recog a future harm exception to lawyer-client confidentiality
    - Rule of Professional conduct – 3.3-3
  + *R v butt*
    - Accused convicted of sexual interference against 12 yr old boy
    - Defence counsel learned accused was HIV+
    - Disclosed to crown n court
      * 🡪 commended defence counsel

### Sources of Regulation

* Case law and legislation – most significant doctrinal source of guidance
* Rules of professional conduct
* Law society disciplinary decisions
  + Provides insight into meanings of provisions of the code of conduct
* Principle / norms

## Tanovich – Learning to Act like a Lawyer

* **Existing problem**
* **University code is not enough:**
  + Gap btw university code of conduct vs law society code of conduct
* Prob
  + No positive obligation – not requirement to do sth
  + Cultural competence – need to have skills rep client from diverse background
* Current Focus – only on things that are related to campus
* Should have more stringent code
  + Reason
    - When entering law school – essentially entering law school
      * Since almost everybody gets called to the bar –
    - Need to create culture of professionalism
    - More and more students are serving communities thru pro bono
    - Separate code for law students – to give effect to the professional element of the law program
* Reasons against stringent code
  + Redundant – already lots social pressure for law student
  + Still young when at school – may make mistake that wont be made later
  + Waste of resources dedicate to disciplinary actions

# Lawyer’s Role

## Different Views

### Traditional view- Zealous Advocacy

* **Classic duty of advocate –**  R v Neil
  + Advocate knows only one person in this world –
    - Need to save client at all cost – irrelevant the harm to others
  + Lawyer’s duty include:
    - duty of commitment to client’s cause / zealous representation
      * ensuring divided loyalty doesn’t cause lawyer to “soft peddle” his defence of client out of concern for another
    - Duty of loyalty
      * Important in practise of law
      * Reason
        + Essential to integrity of administration of justice
        + If no trust of lawyer 🡪 legal system fall apart
* Defence of Zealous Advocacy – Wooley
* **Idea -** Lawyer – resolute advocate for client
  + Always put client interest above your own –
  + Pursue every possible advantage for them
* **Reason –** 
  + 1. Violence - will resort to violence to solve dispute w/out law
    - Problem – ppl can resolve prob in peaceful way – can b other system in place
  + 2. Access to legal system
    - Lawyer – skilled paid friend
      * Provide access to legal system to advance client’s goal
        + Since legal system is not a system ordinary ppl can access on their own
      * Facilitate client’s accomplishment to the ends
        + But client get to determine the means n the ends
  + 3. Still limitations –
    - Although system has room for interpretation for ambiguity but still has boundaries
    - Ordinary competent lawyer – can ascertain where the boundaries are
* **Dealing with morality conflict** 
  + 1. Choosing clients
  + 2. Discussing w/ clients which course of action – pros n cons
  + 3. Withdrawing from representation
  + Reality check
    - may not be able to choose / withdraw – since may work in big firms w/ targets need to be met
    - UK – cab rank rule
      * Cannot choose clients – have to take the next cab in line
      * Exception – no time/ ability
* **Problem with morally responsible lawyer**
  + Place enormous trust in lawyer’s morality
    - But no trust in morality of laws n legal system –
    - Prob – they can’t easily be separated since lawyer’s morality reflects n influences law n legal system
  + Doesn’t acct for possibility of moral disagreement amongst ppl
  + Clients should be deciding which course of action – since its their int at stake
    - Not lawyers – as long as its permitted by the law

### New Approach

* **Morally responsible lawyer-**  Luban, The adversary system of excuse
* **Idea**- lawyer cannot be absolve of moral responsibility
  + even when making decision on behalf of clients
* **Dealing with moral conflict**
  + Morality- should be making moral decision
    - should be same for lawyer n non-lawyer
  + if professional and moral obligation
    - conflict- follow personal / moral obligation
    - no conflict – follow professional
* **Problem with traditional approach**
  + 1. May not be Truth-seeking
  + No evidence adversary system is better at finding out truth than other system
    - Reason – may use other tactics that’s not engaging in truth-seeking advocacy
      * Ex. Slapp lawsuits – large corp sue individual who are outspoken about their corp
        + In order to stop their protest – sue them –even if lack merit
        + Using what the law permits – but not truth seeking
    - If adopt zealous advocacy – if law permits you to do this - must do it if its best for clients
  + 2. Lawyer’s individual morality doesn’t change
    - Even when become lawyers – still maintain original morality
  + 3. “hired friend” – not applicable
    - Many clients – powerful corporation
      * Not at disadvantage / no access to legal system
* **sustainable professionalism** – Farrow
* **idea-** 
  + lawyer has obligation to family, public, legal system and client
  + Competing int
  + 1. Client int
    - Central role – but not the only one
  + 2. Lawyer int
    - Pecuniary and non-pecuniary int
  + 3. Ethical and professional int (of lawyers n the profession)
    - Reject the idea that lawyers are members of a homogenized and unified profession
      * 1. Ppl who practise law are of diverse background
      * 2. Deal with diver obligation cuz of client’s demands
      * 3. Exclude wide range of ppl who are / want to be practising law in diverse n meaningful ways in society
  + 4. Public int
* **dealing with moral conflict**
  + balancing of interest –
    - bring in diff kinds of value –
      * each can find their own bal n mix that takes all of them into acct to make things ethical n professional
  + has to be sustainable –
* **problem with approaches above**
  + zealous advocacy – disrespects lawyers profession
  + morally responsible –
    - prob – circular problem
      * ppl have diff ideas n views of morality – some moral dilemma may be justified according diff ppl’s pov
    - seem to suggest – there’s some shared/ required understanding of what is moral/ good

##### R v Neil Lawyer’s duty

Fact

* Appellant – application for stay of proceeding in crim trial
  + Reason – abuse of process from conflict of interest of law firm

Analysis

* **Lawyers duty include:**
  + duty to avoid conflicting int
  + duty of candour – with client on matters relevant to retainer
    - if conflict emerges – client should be among first to hear it

# Governance of the Profession

## Self-Governance

* **general power** 
  + statute delegates powers to self-regulate
    - but still subject to market n other laws
  + set std for admission
  + create discipline process
    - include – power to disbar
  + limit supply
    - monopoly on legal services
* **bc**
* Legal Profession Act –
  + Creates Law Society of BC
* Power to
  + Set credentials for membership
  + To discipline members up to and including disbarment
  + Make rules of conduct
* Done thru – elected lawyer benchers and appt lay benchers
* **Benchers**
  + 25 lawyers elected for 2 yr terms
  + Geographic distribution – based on counties
  + 4 term max – volunteers
  + Fewer women, visible minorities, first nations, young lawyers, solicitors
  + 6 lay benchers – appt by province
* **Issues**
* Fewer big firm lawyers disciplined
  + Reason –
    - better supervision esp for junior lawyer
    - specialization in big firm – diff ppl handling money vs doing work for client

### Justification

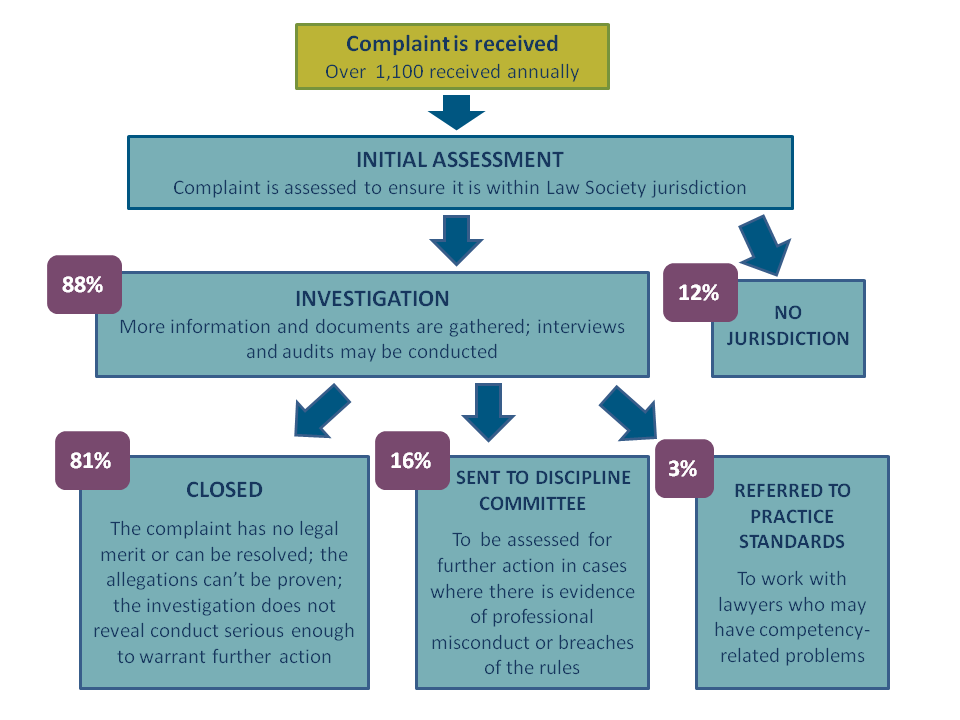
* **Protection of the public**
  + Ensure quality of service
    - Reason - Irreparable harm from poor service
  + Prob – these are justification for regulation – NOT self-regulation
* **Independence of legal profession**
  + Defend rule of law
    - Reason – if states are in control can undermine the independent legal system
      * Route for corruption – will destroy the rule of law
  + Promote confidence in legal system
* **Balance the mkt**
  + Prevent over/ undersupply of public good
* **Special knowledge n expertise** 
  + Only the profession n members – possess knowledge n expertise to access each other

### Counterarguments

* **Conflict of interest** 
  + Not possible to fulfill both representative n regulatory fcn
* **Unnecessary restrain the free market**
  + Restraints on entry—detrimental to consumers
  + Anticompetitive – artificially inflating prices
* **underlying info asymmetry**
  + abt appropriateness of lawyer’s conduct
    - reason – from lawyer’s monopoly over legal knowledge
      * don’t know what constitutes lawyer misconduct
* **reactive and inefficient**
  + primarily focus on basis of complaints rather than actively seeking out problematic behaviours
* **protection for lawyers only** 
  + rare for lawyers to report others’ misconduct
  + lenient penalties – cuz sensitive to colleagues situation
  + process – not consumer only
* **alternatives**
  + other jurisdiction – success in 3rd party / govt regulating
    - expertise/ knowledge – can be acquired or brought

## Discipline Proceedings

* **1. Complaint/ investigation stage**
  + Process – begins with some complaint
    - Can be from – client, judiciary, other lawyers, members of the public
    - Reviewed n assess by member of law society admin’s staff
  + Criticism
    - Under-reporting of lawyer’s ethical violation/ misconduct
    - Information asymmetry
    - Process too complex / believe its futile
    - Unresponsive to quality complaints
    - Mismatch btw client needs n regulatory responses
  + Once complaint initiated – lawyer is require to ans question
  + Decide to dismiss or refer to practise std committee / conduct or discipline committee
    - If dismiss – can appeal
* **2. Hearing stage**
  + Adversarial – conducted before a panel of discipline / conduct committee
  + Law society counsel must act independently – in public int
  + Judicial/quasi-judicial – cuz potential significant effect
    - Subject to charter scrutiny n common law judicial review
  + Multi-stage process
    - 1. Whether facts are est
    - 2. Determine whether facts constitute professional misconduct
    - 3. Appropriate penalty
    - 4. Explain final decision in writing
* 3**. Penalty / sanction stage**
  + Purpose – protect public / profession reputation
    - Not to punish the lawyer
  + Sanction – reprimand, fine, suspension to disbarment
    - Could include- remedial training, education, restriction on practise
  + Determine factor – nature n extent of injury to others, blameworthiness, penalties imposed on others, mitigating, aggravating factors
  + Most severe –disbarment is imposed lease frequently
    - Can be reinstated – but high std cuz law society must be convinced that rehabilitation of lawyer is total and genuine
  + Right of appeal exists



# Contemporary Legal Professions

## Challenges

* **Shortage in** 
  + Articling
  + Rural lawyers
* **Women in legal profession** 
  + Nova Scotia Project – its our little secret
    - Illustrate many women are prone to discriminating and inappropriate jokes
  + Many women are leaving legal profession
    - sexual harassment
      * Sends out the msg that u r not going to become successful if remain in that culture
    - Profession doesn’t respond well to caregivers
    - Dissatisfaction with practise of law itself
      * Adversarial work culture
      * Hierarchical
      * Not a lot of mentorship / support – women gets mommy-tracked
    - Work hours
  + Suggestion for retaining female talent
    - Approach it systematically –
      * Preferably with 3rd party – do exit interviews, research on #
      * Benchmark firm’s performance against other industries
    - Reason – high cost, time, n effort to train associates
      * Cheaper –to keep them n develop them even if have to accommodate
* **Addiction**
  + High-function alcoholics – alcoholics who is able to maintain professional n persona life
    - Ch – perfectionist, overachiever
* **Work-life balance**
* **Fitness to practise**
* Law Society – credential committee to approve ppl to practise
  + Most – just checking whether requirements are met
  + Small # - need to go thru more in-dept process
    - Reason – fitness, character
* **Fitness –** 
  + Medical condition – may put your client at risk if unrestricted
    - Wording of question 🡪 could potentially be discrimination Gichru

##### Gichuru v Law Society of BC fitness to practise

Fact

* P – was diagnosed with major depression during law school n need to take time off
  + Treatment – was successful
  + But when applying for articles – answered yes to medical condition
* Law society –
  + Want documents to show depression resolved
* As a result- articling was delayed
  + N when had to apply – need to provide new medical documents
* Filed human rights complaints against law society

Analysis

* **View on the original question**
* Controversial – Single out ppl who sought help
  + Reason –
    - only ask whether had sought any treatment for psychiatric/ medical
    - assume correlation of condition with fitness to practise law
* law society sought expert for help to improve the question
  + professor response:
    - identified problematic issue in current situation
    - suggest:
      * 1. No such q should be ask
      * 2. Least intrusive – focus on ppl who are involuntarily hospitalized
        + Able to capture ppl who didn’t sought treatment but needed it
      * 3. Narrow down the question
  + Law society – took 3rd option n focus on the list of condition believe are real risk to client
* **Systematic discrimination and individual discrimination on grounds of disability – yes** 
  + Question has no time limit –
  + Focus only on mental illness – exclude other illness
    - Cannot be justified – cuz 77% who checked yes
      * Have conditions placed on their ability to practise
* **Law society –** decide to change the question
  + New question – “based on your personal history… any existing condition that is reasonably likely to impair..”
  + Pros:
    - Time limit – ask sth that’s currently taking place
    - Connection with ability to practise n the condition
    - Asking u to report your own assessment
    - Includes all condition – not limited to mental illness
  + Cons
    - Ppl may tend to say no

# Character

## Hearing Process

* If answer yes on application – refer to credential committee
* Need to decide – whether the applicant can be admitted to practise
  + Committee – made up of 3 members
    - Benchers, non-bencher lawyer, non-lawyer bencher
* Appeal:
  + 1. To full body of benchers – will vote as a whole to c whether person should be admitted
  + 2. To BCCA

### Character Assessment

* **Reasons** Consultation Report
* Law society has duty to protect the public
  + Need to take reasonable measure to protect public
  + Ensure members are suitable to practise
* Public confidence – important for administration of justice
  + Take all reasonable effort to ensure members will conduct in high ethical std
* Use character assessment to assess suitability at the time of application
  + Important 1st opportunity to review applicants
* **Approach** Applicant 5
  + Need to make finding of credibility of applicant
  + Burden of proof – on applicant to satisfy on BOP that applicant has meet requirement
  + Important to analyze circumstantial evidence
    - Can be sufficient to find witness not credible
    - Lots of circumstantial evidence at odds w/ direct evidence
      * 🡪 need to take additional steps

### Factors to Consider

* **1. Respect for rule of law** 
  + Reason – members are key participants in justice system that advance the rule of law
    - Expect to uphold n demonstrate respect for rule of law
  + Ex. criminal conviction, failure to comply w/ court order
* **2. Honesty**
  + Reason – in position of trust n need to conduct selves honestly in dealings w/ clients
    - lawyer need to be trusted in all situation
    - in fiduciary relationship – breach of trust n exploitation 🡪 very relevant
      * can undermine public, client confidence n effective admin of justice
  + Other kinds of dishonesty
    - Includes professional and academic misconduct
    - Academic misconduct most frequent Applicant 5
* **3. Governability** 
  + Willingness to accept authority
  + Whether you can be subjected to rules n regulations
    - Look at whether you’ve been subjected to disciplines in other jurisdiction/ profession
* **4. Financial responsibility** 
  + Act as fiduciaries – may be entrusted w/ client’s money
  + Broad includes
    - Bankruptcy, financial problem, mismanagement
  + Will consider – whether finally irresponsible / unfortunate debtor
* **Timing**
  + Consider at the time of admission - r u a person of good character
  + Also consider
    - Lapse of time
    - What you have done since misconduct
    - Repeated offence?
      * Cumulative effect like in Applicant 5
* **Image of the profession**
* **Use of character reference**
* Often use – applicant provide letter of reference attesting to their gd character
  + Issue – weight to put on this
    - Since the letters wrote are biased – wont have “bad” ref letter

##### Mohan Good Character

Fact

* Cheated on math exam but denied even after finding was made against him
* Plagiarized again in law school n suspended
* During hearing
  + Found out sociology thesis was also plagiarized
  + But claim its mistake by school

Analysis

* **Initial hearing -** Admitted his application
  + Put lots of weight on character reference
  + Reason
    - Allegation regarding sociology paper – no convincing evidence
    - Time lapse –
    - Now produced a lot of significant work
* **Benchers –** reversed – not good character
  + Reason – error of law
    - Did not make finding of credibility
      * Need to state whether believed evidence / found it credible
      * Have to go further – need to determine applicant’s credibility
    - Convinced the sociology thesis was cheating
      * Did not discharge onus of proof that he was not cheating

# Lawyer and Clients

## Power of Law Society

* Jabour
* Guardians of proper standard of professional and ethical conduct
* Intention of legislature – give bencher very broad power
  + May prohibit **any** conduct – that’s contrary to public/ profession’s best int
* General power to determine what conduct is acceptance in:
  + Practise of law
  + Members conduct

## Advertising

* **Pre-charter**
* Law society – Jabour
  + Conduct unbecoming – can include prohibition of commercial advertising
    - Can prohibit any conduct that’s contrary to public/ profession’s best interest
* **Now -**  Code 4.2
  + **Marketing activity must not be**
    - False/inaccurate / unverifiable
    - Reasonably capable of misleading the recipient/ intended recipient
    - Contrary to best int of public
  + Only certain things can be put on ads
* **Prob – direct solicitation**  **Merchant**
  + Actually targeting individual by name –
    - Approach them saying they might have a legal claim and u can help
  + Concern
    - Misleading, pressuring client
    - Failure to disclose important information
    - Impact on recipient
    - Esp true in contingency fee arrangement
      * May appear free – but could be substantial cost associated

## ****Choice of Client****

* **Acceptable criteria to reject**
* Competence - time, subject matter **3.1**
  + Involves – adequate knowledge of practise n procedures by which such principles can be effectively applied
  + If proceeds – but don’t believe cant be competent 🡪 not being honest with client
* Conflict of interest
  + May become witness of the case – less common
* Concern client wants to do illegal / unethical activity
* **Rule** 
  + UK- cab rank rule
  + CA – balance btw
    - Ensuring access to justice versus
    - Personal values / circumstance – so don’t want to act for client
* **Diff views on choice of clients**
* 1. Moral non-accountability
  + Task of judge to decide legal entitlement of parties
    - Lawyer – neutral agent w/ obligation to rep client int
    - Social gd that promotes fair administration of justice
* 2. Take it personally
  + Take responsibility for choice of clients n strategies they deploy
* 3. Middle path – for criminal lawyer
  + Enjoy some discretion
    - Reject where personal distaste is so severe -🡪 quality of legal rep would suffer
      * Should be related to the concerns intimately connected to representation
        + NOT merely to client’s personality
  + Other times –
    - Sincere belief in immorality of rep
    - Slow to allow public opinion to shape decision
    - Lawyer’s private opinion – should not constitute basis to decline
    - Cannot turn client away on ethically prohibited ground of discrimination
* **If reject** – must provide reasonable assistance to find another competent advocate free of charge
* **Acting for unpopular client**
* Arguments for
  + Guardian as rule of law – have right to be represented
  + Be about legal right and wrong – not own moral right n wrong
* Arguments against
  + Lawyer should be able to enjoy what they are doing

## Triggering of Solicitor-Client Relationship

* **Source** 
  + Primary – contractual
  + Fiduciary relationship
    - Special duty owe from lawyer to client
* **When does it crystallize**
* **First dealing doctrine**
  + The moment you have first dealing 🡪 relationship is formed
    - Even if don’t go further / not yet retained
* **Lawyer’s obligation**
  + Clarify the extent of obligation assumed
    - Don’t want client to leave with any uncertainty how things will go from here
  + Have to make it obvious
    - I m not your lawyer unless certain condition are met
* Reason –
  + avoid phantom client
    - Only speaks w/ staff or initial consultation n assume they have retained u
    - But lawyer is not under such impression
  + Unrepresented parties –
    - believe they can seek advice from when you rep the other side
  + casual conversation
  + presumption – is in favour of client

## Termination of Relationship

* **when does it end?**
* **When taken formal steps to end it**
* Even if practical obligation ends – client obligation does not end
  + Conflict of interest still in play
* Prob-
  + wants repeat business so reluctant to official end relationship
  + Imbalance of power Rule 3.7-1 Commentary 1
    - Client – can fire you for no reason
    - Lawyer – owes fiduciary right, cannot terminate easily

### Withdrawal

* **Approach Rule 3.7**
  + Civil? 3.7-3
  + Criminal ? 3.7-4, Cunningham
* **Requirement**
* **good cause –** include
  + Serious loss of confidence
  + Non-payment of fees
    - Should ensure sufficient time for client to obtain other’s services
    - **Civil proceeding**
      * Not require to obtain court’s approval b4 w/draw
        + Court has no jurisdiction to prevent lawyer from doing so
        + Decision to withdraw –not reviewable by court

Unless evidence for improper purpose🡪 contempt

* + - **Crim** – court can exercise discretion to refuse withdrawal Cunningham
      * Decision to withdraw – professional responsibility
      * If adequate time – n conditions met – OK 3.7-4
      * If not adequate time – cannot withdraw 3.7-5, Cunningham
* **Reasonable notice to client**
  + Unless client cannot be located after reasonable efforts
  + Governing Principle –
    - Protect client’s int to best of lawyer’s ability
    - Not desert client at critical stage of matter or
      * put them in position of disadv/ peril
  + General rule
    - Enough time to retain n instruct replacement counsel
    - Every effort should be made to ensure withdrawal occurs at appropriate time
* **Not permitted**
  + To waste court time
  + Prevent other counsel from reallocating time / resources for matter in question
* **Power of court** Cunningham
  + Can even use contempt power – but should only be use sparingly
  + Purpose – to protect admin of justice and ensure fairness
    - Not disciplinary
    - Law society – reactive to discipline
* **Approach**
* Timing
  + Far in advance – no adjournment needed
    - Allow withdraw – no need to enquire into reasons
  + If timing is issue – enquire further
    - Ethical reason – have to allow
      * Inappropriate to require counsel to continue to act that would put them in violation of professional responsibilities
      * Cannot say non-pmt is an ethical reason
    - Financial reason – court has discretion - Consider
      * whether its feasible for accused to rep themselves
      * other means of obtaining rep
      * impact on accused from delay – esp if in custody
      * conduct of counsel - Reasonable notice?
      * Impact on crown n any co-accused
      * Impact on complainant, witness, jurors
      * Fairness to defence counsel
        + Expected length n complexity of proceeding
      * History of proceedings
* Court’s approach
  + Determine whether withdraw would cause serious harm to administration of justice
  + Accept counsel’s answer at face value
    - Don’t enquire further to avoid trenching potential issues of privilege
  + Refusal to withdraw – remedy of last resort
    - Relied upon only when its necessary to prevent serious harm to administration of justice

##### Law Society v Jabour Advertising

Fact

* Senior lawyer advertise serviced provided by his law firm
* Law society – found him guilty of conduct unbecoming
* Challenged law society’s ability to regulate member’s advertising

Issue

* Does law society’s power to regulate conduct unbecoming extend to discipline of marketing?

Analysis

* **Conduct unbecoming –** 
  + Any matter, conduct – to be contrary to best interest of the public/legal profession
    - That tend to harm the standing of legal profession
* Power of law society

##### Law Society of Sask v Merchant Direct Solicitation

Fact

* Recog substantial gain from indian residential school students
* Approach n directly solicited to former students
* Former students
  + Complain to law society

Analysis

* **Conduct unbecoming?**
  + No – cuz amt speculated are not outside realm of possibility
    - Did not create unjustified expectation about result
* **Problem with letter**
* Misleading intended client
  + Fail to disclose
    - Potential length, uncertainties of litigation, rigor of trial
  + Overstatement
    - Retainer agreement had some significant obligation
      * But stated “ there’s nth to lose”
  + Minimize significance of attached document
    - Sound like – only need to fill it out – only authorization when its retainer agreement
* Marketing act – offensive
  + Implicitly assume likely situation of all recipients
  + Disregard potential impact the letter may have on recipient
* **Conclude –** professional misconduct

##### R v Cunningham Withdrawal

Fact

* Lawyer wants to withdraw
  + Argue- client is not granted legal aid – so not able to serve him

Analysis

* **Court has power to grant / refuse withdraw? Yes**
  + Can even use contempt power – but should only be use sparingly
* Not exclusive law society oversight
  + Purpose – to protect admin of justice and ensure fairness
    - Not disciplinary
    - Law society – reactive to discipline
* Law society rules
  + Not bound to apply the codes – but should consider it as important statement of public policy
  + Support
    - Exceptional constraint on counsel doesn’t threaten their independence
      * Necessary to protect integrity of admin of justice
* **Approach**
* **Case at bar -** Cannot withdraw
  + Too late – huge prejudice

# Negotiation/ Advising

## Duty of Lawyers when Advising

* **Duty to be competent –** Rule 3.1
  + Most basic duty of lawyer –
  + Include:
    - Having the ability, time, no conflict of int
* **Duty to give advice that’s within the limits of the law**
  + Obligation – to tell clients if proposed action is illegal
    - Reason – have duty to promote n uphold the law even w/ own clients
  + If advising corporate client
    - If possibility of illegal activity – need to advise up the chain all the way to the end
    - If persist – duty to withdraw
* **Always the lawyer**
  + Cannot take off the lawyer hat n say I am acting as ordinary citizen
    - Unless – not part of law society anymore
  + Issue – when providing business suggestion
    - have to ensure that clients know u r not giving legal advice
      * reason – lawyer’s liability insurance will not protect your client for business advice
* **role morality** War on Terrorism by Luban
  + have to bring diff kind of role morality when advising
  + **litigants** –zealous advocate
    - may exaggerate when presenting the law cuz can be countered by other side
      * there’s an impartial decision-maker who will choose btw arguments
        + 🡪 justifies one-sided partisanship
    - still has some responsibility –
      * if aware of authority against your position – have obligation to bring to attn. of court
  + **advising** – neutral role
    - there’s no adversary / impartial adjudicator
      * need to tell the client what the law requires- even if its not what client wants
    - **test -** advice should be more or less the same regardless of which side you are advising
      * should NOT be result driven
    - objective
      * ex. Torture memo – justice dept told US govt saying that unless there’s threat to organ failure, it is not torture
        + prob – in-house lawyers – added dimension of ethical issue
    - must not mislead other lawyer Regular

### Advising Illegal Conduct

* **Only allow** to advise client to refuse to follow court order when- Sussman
  + Imminent risk / danger
  + Immediate application to court to have it determined
    - \*\*very limited situation\*\*
* **Test case** Rule 3.2-7
  + General rule – lawyer should not assist in any dishonest crime
* If bona fide test case – not precluded Commentary 4
  + If there’s no injury to other person/ violence
  + Client acts in good faith and reasonable grounds
  + Has to ensure client appreciates consequences of bringing a test case
* **Information provided**
  + If ask about chance been caught
    - If the information is out there – ok to provide
    - If not – not competent to answer the question

## ****Negotiation****

* **General view**
* Negotiation is all about lying
  + Reason – if 2 parties are non-lawyers, expected they will be lying / bluffing
    - if lawyers are subject to diff rules – discourage ppl from using them
* lawyers lie
  + source
    - actual lies
    - statement of position – blur distinction btw statement of fact vs position
      * fact – intends to convey truth
      * position – made in course of advancing an argument
      * lawyer – often quoted in media, could be statement of either but tend to be interpreted as statement of fact
* **improving perception**
  + strength rules of professionalism – to deal w/ lying
  + public statements – aim to reflect that its statement of position and not fact
    - put focus of statement back on client
  + negotiation – regulate like Alberta Code
    - balance the duty of obligation to other lawyers, public interest n need for fair process
* **issue – Regulation**
* **Support**
* Alberta Code of Conduct –
  + 6.02(2)- lawyer must not lie to / mislead another lawyer
    - If prevented by rules of confidentiality –
      * Can refuse to answer
      * If that is misleading – seek consent to disclosure
    - Misleading – creating misconception thru oral, written, other comm, actions/ conduct, failure to act / silence
  + 6.02(5) – lawyer must immediately correct resulting misapprehension subject to confidentiality
    - If correction requires disclosure of confidential info – seek consent
      * If refused- obliged to withdraw
    - Inaccurate rep – not limited to misrep that would be actionable in law
* Better for public impression of lawyer

##### Law Society of Upper Ca v Sussman Refusal to follow court order

Fact

* Court order
  + Mother gets custody on weekdays n father on weekends
* Sussman – counselled client to breach the terms of court order respecting access
  + Advise client to deny access to children
* Husband reports to law society

Analysis

* **Professional misconduct?** Yes
* Sussman argue – was intend to do sth to get the order varied
* **Court** – never done anything – explanation not convincing
  + Limited circumstances where counsel can offer advice to refuse to follow court order
  + Obligation of lawyer n client
    - Trust the efficacy of court system and follow court order

##### Regular mislead other lawyer

Fact

* Majority shareholders – rep by Regular
* Minority shareholders – rep by Hughes
* H wrote to R – asking whether company may be sold
* R replied – its rumour even though it is true

Analysis

* R – deliberately mislead H to conceal the sale
  + 🡪 professional misconduct
    - Reason – failed to act with integrity, failed in responsibility to other lawyer, failed to avoid questionable conduct

# Duty of Loyalty

## Conflict of Interest

* **Most contentious topic n hard fought**
* Reason:
  + Money – rep one party/company disqualifies you to rep for another🡪 significant financial impact
  + Personal conflict – financial stake in outcome, personal connection
* **Regulation** 
  + Law Society Rules
  + Court - common law
    - Need to bring motion to court to remove counsel from cases

### General Principles

* Conflict of interest is importance because: McKercher
  + **1. Effective representation** – when conflict🡪 divided loyalty
  + **2. Misuse of confidential information** 
    - Esp with past clients
      * But possession access to litigation philosophy – NOT enough
    - Must be useable in some tangible manner against the client
    - Test
      * 1. Did lawyer receive confidential info attributable to s-c relationship relevant to matter at hand
      * 2. Risk that it will be used to prejudice of that client

### Code

* Rule 3.4-1 – general statement **should not be engaged in conflict of int**
  + Except as permitted as under this code
  + Commentary
    - Raise all kinds of diff possibility
    - Issue - the fact that solicitor/client relationship - is a fiduciary relationship
      * So need to go beyond discharging the contractual duties
* Comm 1- **Requirement** 
  + Substantial risk that – lawyer’s loyalty to / rep would be materially and adversely McKercher
    - Affected by – lawyer’s own int, duties to others
  + More than mere possibility –
    - Must be genuine, serous risk
    - Reason - Client int – may be seriously prejudiced unless lawyer’s free from conflict of int
* 3.4.2 – **subject to client’s consent**
  + Client can consent to proceed notwithstanding there’s a potential of conflict
  + Requirement –
  + **fully informed and voluntary** consent on part of client
    - disclosure – essential requirement to obtain consent
      * if not possible – lawyer must decline to act
    - inform
      * relevant circumstances
      * reasonably foreseeable ways that it could adversely affect client’s int
      * Often involve encouraging client to seek independent legal advice
  + **may be inferred** – need not be in writing if all following applies
    - client – govt, financial institution, public trade/ similarly substantial entity/ entity with in-house counsel
    - matters are unrelated
    - lawyers have no relevant info from one client that might reasonably affect the other
    - client has commonly consented to lawyers acting for and against it in unrelated matters
* 3.4-10 **-Acting against former client** 
  + Cannot act if:
    - Same matter
    - Related matter
    - Any other matter
      * If possess relevant confidential information that may reasonably affect former client

### Court Approach – **McKercher**

* **bright line rule- directly adverse legal int** Rule 3.4-1 Commentary 6
* **Rule -** cannot concurrently rep client adverse in int w/out their consent
* **Requirement**
  + 1. Immediate interest of client are directly adverse
  + 2. Adverse in legal int
  + 3. Cannot be raised by party who seeks to abuse it
    - Not using it for tactical advantage
      * Ie goes out n request rep from all law firm – using it strategically
  + 4. Not Unreasonable – exceptional case
    - If unreasonable for client to expect that its law firm will not act against it in unrelated matter
      * Not reasonable for client to expect exclusive loyalty
    - Ex. professional litigants – in large firm when there’s sufficient distance and compartmentalization
      * Part of accepted business practise
    - Consider
      * Nature of relationship btw firm n client
      * Terms of retainer
      * Types of matter involved
* **Principle**
  + Difficult for lawyer/firm to neatly compartmentalize the int of diff clients whose int are adverse
  + Relationship – based on trust n loyalty
* **substantial risk test – indirectly adverse legal int** 
  + **Burden** – only client to prove there’s substantial risk’
  + **Test**
    - whether concurrent rep of clients create a substantial risk
      * lawyer’s rep-would be materially and adversely affected by the lawyer’s own int
        + or by the lawyer’s duties to another current client /former client / 3rd person
  + **Approach** –
    - decide whether lawyer should be disqualified NOT disciplined
    - contextual – look to whether situation is liable to create conflicting pressure on judgment
* **Remedy**
  + **Disqualify when**
    - misuse of confidential information
    - can’t rep client effectively
  + **discretion**
    - reputation of administration of justice –
      * “looks bad” – courts have discretion, need to look at all factors
      * May be required to send msg that disloyal conduct is not condoned by courts
    - Consider:
      * Behavior disentitling the complaining party from seeking the removal of counsel
      * Significant prejudice to new client’s int in retaining counsel of choice
        + Party’s ability to retain new counsel
      * Fact that law firm accepted the conflicting retainer in gd faith
        + Reasonably believing concurrent rep fell beyond scope of bright line

### Personal Relationship

* **Issue – whether you can provide effective presentation** 
  + can you give dispassionate advice?
    - Emotion – could cloud judgment 🡪 lack objectivity
  + A judgment to decide – whether you have ability to meet the duty owed to clients
* **Sexual relationship**
  + Duty to provide objective, disinterested advice to client
* **Impact of relationship** Hunter
  + Lawyer
    - Interfere with lawyer’s fiduciary obligation to client
      * Ability to exercise independent professional judgment
      * Ability to fulfill obligation as officer of court n admin of justice
    - Impact on ability to provide the advice objectively n independently
    - Difficult to remain dispassionate
  + Client
    - Inhibit client from challenging / questioning the advice
    - Exploitation of clients’ vulnerability – power imbalance
    - Similar to therapist – patient relationship
* Approach –
  + discuss with client @ outset of relationship – whether to continue to act on their behalf
  + @minimum – reflect to danger associated w/ the conflict of int
  + Suggest independent legal advice – not required
    - if client is unsophisticated/ vulnerable - should recommend
      * to ensure client’s consent is informed, genuine and uncoerced
    - Any uncertainty – resolved in favour of such recommendation
    - In some circumstance – conflict may be so profound so simply cannot continue to act
* **Problems with** Hunter **‘s penalty** 
  + Light penalty
    - Lots of disagreement abt appropriateness of penalty
  + Relevant to consider hunter’s emotional toll?
  + Since such a prominent lawyer – shouldn’t there be more severe punishment?
    - Image of law society?

##### CNR v McKercher – SCC Conflict of Int

Fact

* CNR retained McK to act for them in 3 diff issues
* McK – obtained by Wallace for class action against CNR
  + Decide to take on the case
  + So terminated 2 of the 3 retainer agreement with CNR w/out their consent
* CNR - went to court to request termination of McK’s rep
* **@trial –** McK ought to be disqualified
* **@CA –** overturned

Analysis

* **Case at bar**
* **Bright line rule -** Immediate int – directly adverse n legal disputes
  + Nature of lawsuit – alleging misconduct of CNR that went beyond the money
* Breach of duty of candour – did not inform client
* Problem – its big firm and big client
  + But court still say – this is your client n ppl are attacking your client
  + Cannot turn around n repudiate them w/out informed consent
* Remit to trial to consider if disqualification is required to maintain public confidence

##### Law Society v Hunter

Fact

* Had affair w/ client – when broke up
  + Asked her to sign a waiver that she ack the conflict of int
    - Refused – yet hunter persisted

Analysis

* @time of case – Ontario had detail rule about lawyer having sexual relationship w/ client
* **Case at bar**
  + Client – emotionally vulnerable – should recommend independent legal advice
  + Already take significant toll – don’t need specific deterrence
    - Only general deterrence – dissuade like-minded lawyers from similar conduct

# Duty of Confidentiality

## General Principles

* **Broadest and robust duty**
* **Reason**
  + Relationships is built on trust – 3.3-1, Comm 1
    - client should feel free to tell the lawyer everything w/out concern it’ll b told
* **Extent** 
  + Diff from solicitor/client privilege Comm 2
    - Its ethical duty – which exceeds the privilege –
      * Much broader extends to anything the client tells u, gives you
      * Duty is not just a legal one – it extends to the broader world
  + Survives even after the relationship is over Comm 3
  + Owes to anyone seeking advice/ assistance invoking lawyer’s professional knowledge Comm 4
    - Even if not retained / rep them
  + **Withdrawal**  Cunningham
    - Court should be respectful if defence counsel wish to withdraw
      * Should not inquire too much – since may need to reveal confidential info
    - Financial info
      * Altho prima facie privileged
      * But in w/draw situation – no
        + Since only need to disclosed that accused had paid or not
        + Reason – hard to see how it could be used against accused
* **Impact of disclosure**
* Costly
  + Harry Potter – author wrote book under fake name
    - But lawyer spilled the secret – had to pay lots $$ in damages

**Exceptions**

* **1. Waived by client**
* **2. Public safety** – extremely rare 3.3-3
  + Approach Smith v Jones
    - Balancing exercise –
      * Assess the imminency of the risk
      * Determine whether there’s risk to public safety
      * Reason – only want to disclose necessary information
    - Disclose –as limited as possible
  + Requirement
    - Imminent risk
    - Death or bodily harm
      * Includes serious psychological harm – if substantially interferes w/ health / well-being Comm 2
    - Disclosure – necessary to prevent the harm
  + Consider Comm 3
    - Seriousness of potential injury
    - Likelihood it’ll occur
      * Consider - Smith v Jones
        + Evidence of long-range planning
        + Method for effecting the specific attack suggested
        + Prior history of violence/ threat – similar to that of planned?
        + Violence increased in severity
        + Directed to an identifiable person / group of person

Even if large – considerable significance can be given to threaten if id is clear n forceful

* + - Imminence
      * Must create sense of urgency
        + Not necessary to impose particular time limit
    - Other feasible ways
    - Circumstances under which lawyer acquired the info
  + Issue­- rule is drafted in permissive terms 🡪 “may”
    - No obligation to do it – only moral duty

#### Money laundering

* Engage in using lawyer for money laundering
* **Possible ways to set up rules**
* 1. If concern about money laundering – clear rules
  + Rule that says – certain transaction cannot be engaged in
    - Ie paying for real estate all by cash
    - But lawyer may not like it – counterproductive
  + **Law society** – does have some rules
    - No cash rule – cannot accept more than 7500 in cash
      * If accepted cash – refunds have to be made in cash
* 2. Requirement on disclosure
  + If certain kind of suspicious transaction take place –must report
    - Part of the money laundering legislation – need to report To FINTRAC
    - Legislation put obligation on certain entities to report
* 3. Record keeping
  + Could tell lawyers need to keep track of certain kinds of info about client n sort of transaction they engage in
  + Have to hold that info –
    - Info for client identification
      * Obligation for all lawyers/client relationship to id client
        + Ie name, address, occupation
      * For certain kinds of transaction – need to take steps to verify it
* Parliament’s new amendment – struck down by court FLSC v Ca
  + Reason:
    - Violate principles of fundamental justice
      * Independence of the bar – makes lawyer agent of the state
  + Requiring lawyer to keep financial information and allow warrantless search
    - Violation of confidentiality

##### Smith v Jones public risk – disclosure

Fact

* Lawyer retains psychiatrist to examine client
  + Psychiatrist report – not helpful to defence cuz – serious n immediate threat to public
    - Never made it to court
* Psychiatrist – seek court permission to disclose information when realized report wont be disclosed

##### FLSC v Canada Money Laundering

Fact

* Parliament introduced amendments to Proceeds of Crime and Terrorist Financing Act
  + Requirement of lawyer-Take steps to deter criminals
    - Have to keep relevant info
    - allow FINTRAC to do warrantless search
* FLSC filed petition challenging the application to lawyers

Analysis

* **S 7 – liberty**  - infringed
  + **Client’s liberty** – can be used to convict them n put them in jail
    - Esp when its warrantless search
  + **Lawyer’s liberty –** lawyer can be punished for failure to do this
    - Hybrid offense
* **Principle of fundamental justice**- includes
  + **Solicitor/client privilege** –
    - @Trial - Client – should be able to rely on the lawyer in a whole way that’s confidential
      * This whole scheme undermines this whole thing
    - BCCA – no, there are lots of other provision that protects the duty of confidentiality
      * Act does contain some provision that are design to ensure the client/solicitor are still there
      * That’s not the right principle of fundamental justice
  + **Independence of the bar-** new principle articulated by BCCA
    - Scheme – makes lawyer agent of state
      * Cannot act for client n for state
    - Reason its principle
      * Fundamental to the way in which legal system out to fairly operate
      * Have to be able to rep client w/out fear from any source
      * Element of rule of law
* **S 1 analysis-** 
  + Violation o s 7 – only justified under exception situation
  + Failed at minimal impairment stage
  + Reason – law society already had rules that are less intrusive

# Advocacy and Civility

## Civility

* **includes**
  + About respect
  + Courtesy, manners, politeness
  + Conduct essential to ensure proper function of judicial process
* **judge’s role – Felderhof**
  + does not loose jurisdiction unless the conducts are preventing a fair trial
  + discretion to decide – whether to intervene
    - wide discretion – can decide whichever style to take
      * whether to intervene constantly / let it run its course
  + as long as did take steps to discourage the behaviour –
    - and did not prevent fair trial – ok

### Duty in Pre-Trial and Trial

* **witness preparation** 
  + can be conducted – if in
    - good faith and properly
    - witness coaching – unethical
      * taking it beyond the purpose of getting witness comfortable with the process
* **cross-examination**  Lyttle
  + Determine whether witness is credible
  + Opportunity to providing a fair trial to accused
* **TJ’s role**
  + Ensure fairness
  + See that justice is done
  + Balance the right of accused to receive fair trial vs need to prevent unethical cross-examination
    - May take appropriate steps to obtain assurance that there’s gd faith basis
* **Types of question allowed**
  + Based on good faith
    - Fcn of : available information, belief in likely accuracy n purpose for which its used
    - Purpose
      * Consistent w/ role as officer of the court
      * Genuine thinks is possible – based on known facts/ reasonable assumption
  + Can be hypothesis
    - Doesn’t need to be proved independently
    - Evidentiary foundation is not required – not absolute rule
  + Limitations
    - Not reckless / known to be false
    - Conduct – if too improper – can cross over the line from aggressive to abusive R(AJ)

### Problem with incivility Felderhof

* client’s case will suffer –
  + focus on defending own conduct – instead of planning n preparing arguments for the case
* trier of fact – preoccupied with managing personal conflict btw counsel
  + distraction to the court
  + compromises trial fairness
    - esp in crim trial- may affect accused’s rights
* lengthen and delay proceedings
* undermines legitimacy of system
  + undermines public confidence
  + lawyer’s legitimacy – comes from the fact that ppl come to us to solve dispute n for help
    - what we do – allows for civilized society
      * cannot maintain this position if quarrel w/ the advocates
* **Expectation of counsel** GM
  + Assume – counsel will do their duty
  + bring to court’s attn. of any relevant authority
    - need to bring cases that are similar it pt of law
      * not resemblance to case in facts
    - ignorance is not excuse
    - unreported case – not included unless counsel knows about it
  + reason­ – obligation to court to assist in administration of the law and duty to the client

##### R v Felderhof incivility

Fact

* Lawyer defending the collapse of the corporation
* During trial – became hostile
  + Belittle prosecutor’s effort, accused them of being lazy, guilty of misconduct
* Disciplined by Law society
* Crown argue – failure to stop accused’s conduct🡪 trial judge lost jurisdiction

##### GM v Isaac Estate failure to bring authority to court attn.

Fact

* Dispute over car loan
  + Children want to give car back to dealer cuz children weren’t able to drive it anymore
* Dealer accepted by loan company refused
  + 🡪 court
* Judge realize – there’s an authority that’s recent n directly on the point but was not brought to their attention
  + One that’s favoured – not aware of it
  + Other side – was aware but didn’t bring it up

Analysis

* Cost order to the client
  + GM got big cost award against them

##### R v Lyttle cross examination

Fact

* @appeal
  + Tj erried in allowing counsel or accused to cross-examine only on matters which she had substantive evidentiary basis
  + Upheld conviction

##### R v R(AJ) cross examination

* Crown counsel’s cross-examination resulted in miscarriage of justice
  + Overall conduct – so improper n prejudicial to accused🡪 rendered trial unfair
* Judge – agreed, skewed the delicate balance
  + Reason – sarcastic n repeatedly inserted editorial commentary, humiliating

# Ethics in Criminal Law

## Crown Counsel

* **Controls** 
  + 1. Internal control – policy manual n practises
    - Have lengthy quote from Boucher
  + 2. Law society control - independent self-governing body
    - Special rule just about crown counsel
    - Duty of lawyer acting as prosecutor
      * Must act for the public
      * Admin of justice
      * Resolutely n honourably
      * While treating tribunal w/ candour, n respect
    - should not prevent anyone from getting representation
  + 3. Civil suit- from the accused
    - Malicious prosecution n seek damages
    - Difficult - need to show there’s some evil / malicious intent
    - Court presumes – crown counsel will behave properly
  + 4. Judicial exercise over cases- from the judge

### Duty

* **Fair, objective and dispassionate in the case** 
  + Investigation should be conducted w/out feeling / animus on the part of the prosecution
    - w/ single view of determining the truth
  + regard self as ministers of justice assisting in its admin than as advocates
* **Chain of justice**
  + Essential link from crime scene🡪 court 🡪 jail
* **To do justice**  Boucher
  + Can seek conviction – but must strive to ensure fair trial
  + Not to obtain conviction at all cost
    - Assist court in eliciting truth w/out infringing accused’s rights
  + obligation to disclose all relevant information to defence Krieger
    - discretion over non-relevant information
  + disclosure of relevant evidence – duty not discretion Krieger
    - need to explain didn’t act in bad faith / dishonesty
  + to assist the jury Boucher
* **Ethical duties**
  + Bal btw – duty to advocate vs fair n objective toward accused
  + Principle of independence in exercise of prosecution fcn
    - Exercised with objectivity, and impartiality
  + Consider public needs n community concerns
* **difficulty**
  + Neutral partisanship in adversarial system
    - Ethically restrained adversary
  + Loyal Opposition

### Independence of prosecution- **Krieger**

* **principle**
* **Constitutional principle** – AG must act independently of partisan concerns when supervising prosecutorial decision
  + Courts will not interfere w/ exercise of exec authority
    - Respect for separation of power n rule of law
    - If court review prosecutor’s exercise of discretion
      * Becomes supervising prosecutor🡪 cease to be independent tribunal
    - Could erode integrity of system of prosecution
* **How it works**
  + Only report to Head prosecutor – not govt
  + Crown counsel Act
    - Minister – limited discretion on direction prosecutor to do certain things on specific file
      * Need to publish in gazette🡪 transparency
        + Disincentive for minister to intervene
* **Subject to who’s control**
* **Requirements to become prosecutor**
  + 1. Employment by govt
    - Perform to std of AG
  + 2. Member of Law Society
    - Remain in good standing by complying with standards of Law Society
      * 🡪 under Law Society control
* **Exceptions – Prosecutorial discretion**
* Def’n- exercised when making independent decision on prosecution
  + Discretion for – nature n extend of prosecution and AG’s participation
    - 1. Whether to bring prosecution of a charge laid by police
    - 2. Enter a stay of proceeding in private/ public prosecution
    - 3. Accept guilty plea to lesser charge
    - 4. Discretion to w/draw
    - 5. Discretion to take control of private prosecution
  + Does not include
    - Decision regarding conduct, tactics
      * Governed by court, law society
* Under AG’s control - not part of Law Society’s jurisdiction
  + - If problem🡪 abuse of process
  + Reason-
    - system needs crown discretion
      * Cannot be constantly second guessed
    - Protected from influence of improper political / other factors
* **role of law society**
  + review of prosecutor’s bad faith / improper purpose – not review of prosecutorial discretion
  + reason
    - no special immunities / privileged when act beyond the power accorded to them by law
  + approach – examine whether its ethical violation
    - even if breach legal and constitutional duty – may not be violation of ethical duty

## Defense Counsel

* **Controls**
  + Client – lawsuit
    - Breach of fiduciary duty, negligence
  + Law Society
  + Other charges against the lawyer
  + Appeal
* **Duty**
* **Officer of the court** 
  + Can’t knowingly lead false evidence
  + Duty not to make frivolous argument
    - Frivolous – not substantive, no legal merit at all
      * Prob－may be difficult cuz want to try everything to help clinet
    - Reason – wont waste court’s time
  + Duty to bring all relevant case law to the court
  + Must raise when notice irregularity in conduct –
    - Instead of use it for appeal
* **to client**
  + duty of loyalty - Not undivided – cuz also duty to the court
  + duty to rep client resolutely
    - fearlessly to raise every issue, advance every argument n ask every question
      * however distasteful which he thinks will help his client’s case

### Defending Guilty Client

* Entirely ethical to defend someone –
  + u either believe is guilty / who tells u they did commit the offence
* **ethical issue**
  + may limit the kind of evidence u may call
    - Ie – cannot call witness to prove the accused is not at the scene when they already know they are at the crime scene
    - But can attack the crown case
  + Forming personal opinion/ expression as to accused’s guilt
    - Irrelevant – its role of judge
* **Correct approach –** 
  + Not supposed to have/voice an opinion on the guilt of the accused
* **If convinced client’s guilty**
  + 1. Can continue to defend client
  + 2. Only use certain means of defence
    - Reason – duty not to mislead the court

### Preservation of Client’s Property

* **Difficulty**
* may be charged with obstructing justice Murray
  + not defence
    - s-c privilege - physical evidence not covered
  + only defence – no *mens rea*
  + but no obligation to disclose to crown
    - exception:
      * alibi, psychiatric defence, expert opinion
* **Correct approach** 
  + Avoid be in possession
    - Physical evidence – not covered by s-c privilege
      * S-c only covers – communication
  + Get another lawyer to deliver the evidence
    - Problem with Murray’s case – video so obvious where it came from
* Possible situation to take possession
  + 1. Honestly believe it had exculpatory use at trial AND
  + 2. Intend to use it at trial
  + Reason – no MR for obstruction of justice

### Plea Bargaining

* Part of duty of competence
  + Give competence advice to client whether to plead guilty or not
* **Requirement** 
  + **Rights of client**
    - Advice from counsel – for prospect of acquittal/ conviction
      * Implication and possible consequences of guilty plea
    - Entitle to weigh relative merits of trial vs guilty plea
  + **Client’s decision – not lawyer’s** 
    - Must be voluntary
    - No threat
  + **Not plea of convenience** 
    - Based on admission of necessary factual n mental elements of offence charged
    - Judge’s role- set aside the plea if evidence indicate k(s)
      * accused never intended to admit to essential fact of offence
      * may have misapprehended effect of guilty plea
      * never intended to plead guilty
* **Ethical rules**
  + Must complete a thorough analysis of facts n laws applicable – b4 plea n sentence decision

##### R v Boucher Crown Counsel Duty

Fact

* Victim – elderly shopkeeper
  + Blunt force trauma – axe to the head
* Crown counsel – inflammatory jury address
  + Very attached to the case
  + Using emotional words – little respect, no sympathy for coward…

##### Krieger v Law Society Independence of Prosecution

Fact

* Battle btw AG – saying our prosecutor are not subject to law society control
* K – learned the preliminary blood test implicated a diff person
  + Did not disclose
* Later defence counsel found out – complained to law society and AG office
* K explained – simply delaying disclosure , had discretion to do so
* AG – move to stop Law Society to discipline K’s exercise
  + Reason – exercise of prosecutorial discretion – immune from external disciplinary review

Analysis

* case at bar
  + failed to disclose all relevant info

##### R v Murray Possession of Client’s Property

Fact

* lawyer – retained to defend for accused on sexual assault n murder
  + accused – gave him direction to retrieve some hidden video
  + retrieved the video – but did not disclose the video to crown / police
  + charged with obstructing justice
    - for not turning in the videotape

Analysis

* **obstruction of justice**
* **AR** – doing an act with tendency to obstruct course of justice
* potential justification
  + s-c privilege – but only covers communication not physical evidence
  + duty of confidentiality – no legal basis permitting concealment of tapes
    - no higher right than other citizens
  + no obligation to disclose/ cooperate/ assist crown
    - have 3 choice left
      * 1. Turn over tape to prosecution
      * 2. Deposit w/ tj
      * 3. Disclose existence to prosecution – battle to retain them
* **MR –** intention
  + prob w/ Murray’s evidence of intention
* but judge conclude –
  + defence strategy of use of tape – reasonably feasible
  + Law society rules – not clear about ethical obligation in these situation
    - No charges
* Law society response – no rule was ever passed

##### R v K(S) Plea of Convenience

Fact

* Accused charged with sexual offence
* Client agreed to plead – even tho constantly stated he was innocent
* Plea bargaining – unsuccessful
  + Cuz accused show no remorse
* Went back to court to get guilty plea overturned

Analysis

* **No plea of convenience** 
  + if client maintains his innocence

# Corporate Counsel

## Ethical Issues

* **interest at stake**
  + **public interest** – can be severely impact society
    - fraud/ misconduct by huge corporation – affects lot of people
  + **own interest –** client is also employer
  + **client’s interest –** organization
    - duty of loyalty – owe to the organization even though may receive directions from ppl
* **public int engaged**
* **gatekeeper** – ethical obligation to prevent illegal conducts of client
  + whistleblower?
    - at tension with sole obligation to client
* **duty of confidence vs protection for public**
  + corp – at intersection of private and public domains
* **who’s responsible for oversight**
* **practical issue**
* **transnational issue**
  + diff rules across diff countries at play
* **business vs legal advice**
* **cognitive dissonance** 
  + professional norms of client loyalty vs personal norms of honesty n integrity
  + lawyer- may unconsciously dismiss / discount evidence of misconduct n its impact on 3rd party
    - esp when bond socially n professionally w/ other employee
    - pressure to conform to org’s cultural norms
  + long-run problem
    - client – no access to disinterested advice
    - lawyer – lost capacity for independent judgement n moral autonomy
    - public – lose protection from org misconduct
* **client =organization**
  + ethical provision – premised on relationship btw attorney n individual
  + may need to become familiar with dynamics of the bureaucracy to discern who to speak to
  + whether official is acting in best int of corp
    - knowledge – fragmented in large modern org
    - may b difficult to know if its in best int
* **rules for privilege** 
  + privilege – belongs to organization
    - only they can waive it
  + disclosure obligation – may be relatively relaxed in transactional setting
    - may accidentally do it
* **employer=client**
  + difficult to maintain independence and integrity as professional
    - while fcn as employees of the org
  + withdrawal
    - require personal sacrifice, loss of status, income and income n employment

### Code

* Model Code – 2.02 (textbook)
* 2.02(8) – Dishonesty, Fraud when client is org
  + Requirement
    - A – advise person from whom lawyer takes instruction AND chief legal officer
      * May advise other officer but MUST advise chief legal officer
    - B- if refused to stop🡪 advise progressively up the chain
      * Up the ladder
    - C – if org continues – withdraw from acting
  + Includes
    - Omission – often is omission that constitute wrongful conduct

##### Wilder v Ontario Other Org – right to discipline

Fact

* Wilder – wrote a misleading/ untrue statement of facts letter to OSC
* Authority of OSC to discipline a solicitor for alleged misconduct

Analysis

* Nothing in OSC legislation suggest it should not apply to lawyers
  + Legislative intention – broaden power of OSC to make orders in public int
* **OSC has jurisdiction in disciplining lawyers** 
  + Both – exercise public int fcn
  + Law society – govern legal profession in public int
    - Ensure members of profession don’t engage in professional misconduct
  + OSC – protecting investors n proper fcn of Ont’s capital market
* s-c privilege
  + does not require blanket preclusion preventing OSC from reprimanding lawyers
    - there are general provision – allowing for disclosure of confidential info where necessary to defend lawyer’s legal int
  + must ensure – substantive legal right to s-c privileged respected
    - must exercise particular caution
  + avoid placing lawyer in dilemma of either
    - foregoing right to defend vs harming client’s int by disclosing privileged info
    - may have to forego the proceedings
      * @min –
        + ensure adequate steps taken to ensure proceedings conducted to fully respect the rights of lawyers n clients

# Lawyer’s Duty

Rule 3.4-1 Commentary 5

* Duty of loyalty
* **Officer of the court** 
  + Maintain public confidence in integrity of legal profession
  + Admin of justice
  + Must bring attn. to court /tribunal of any relevant authority GM
    - Up to court to decide – whether its distinguishable
      * Not lawyer – cannot decide its distinguishable and not bring it up
  + Cross- examination lyttle
    - Not mislead the court
    - Questions – must be based on good faith
  + Can’t knowingly lead false evidence
  + Duty not to make frivolous argument
* Duty to commit to client’s cause
* Duty of confidentiality
* Duty of candour
* Duty not to act in conflict of interest
* Duty to be civil

## Exam Approach

* **1. What issues are raised**
  + Identify what ethical issue is raised by the problem
* **2. What rules/ case apply** 
  + BC Code of Conduct
  + Case Law
  + Articles
* **3. Does the problem have clear answer**
  + Sometimes the rules are clear n what is being done is not ethical/legal/permissible
  + Sometimes the rule provide guidance but not an answer
    - If this is the case-
      * can say it’s a question of balancing
        + Id what the competing principles are
        + May be as far as u can go
      * State the basic guidelines/ principles that should guide the outcome
    - Need to exercise judgment abt whether a line has been crossed
    - Balance of competing principle may be required
  + Sometimes there is no guidance at all
    - Need to fall back on general, personal norms
    - Such as focus on
      * Own values, balancing harm

# Access to Justice

* **Social K with society** 
  + Member of legal profession – monopoly over legal service
  + In return –
    - Representation of clients and public citizens
    - Responsibility for quality and access to justice
  + Argue – if fail to meet obligation under social K
    - Society will change the K
* **Lawyer’s duty include**
  + Minister of justice
  + Duty to serve cause of justice n uphold std n reputation of legal profession
    - Participate in legal aid n community legal services prog Or
    - Provide legal services on pro bo no basis
  + Commitment to concept of equal justice of all
    - Encourage public respect for n try to improve admin of justice
  + Find proper balance btw criticizing courts tribunals vs finding truth/ rights
    - Avoid criticism that’s petty, unsupported by bona fide belief in its real merit
    - Know that if involved in proceeding - can appear partisan rather than objective
  + Need competent lawyer – broad understanding of relevancy
    - But understand the social context from which they arise
* **Judge –** contextual analysis

## Issues

* National Action Committee – report on access to justice
  + Barriers to justice system:
    - Cost, delays, long trials, complex proceeding
    - Incapable of producing – just outcomes, ones that are proportional to prob
  + Suggest – focus on broad range of legal problem experience by public
    - Look at everyday legal prob – from pov of ppl
    - Expansive n user centered system
  + View on current justice system
    - Abuse by ppl with money
    - General public - No idea about how to get help
    - Not much faith in lawyers n the system
* **Diverse profession** 
  + Under representation – of aboriginal n visible minority
  + Women – still way lower than man
    - Difficult to persuade women to stay in careers n return after maternity leave
  + Judge appointment
    - Still mostly while males
    - Need diversity of background to reflect diversity of ppl that the system serves
* **Diverse area of practise**
  + Some areas are considered undesirable for lawyers to practise in
    - But are most significance to n benefit vulnerable ppl
  + family law, child protection n poverty law – greatest need n most serious consequence
  + women – disproportionately affected by legal aid esp in family law
    - impact greater – if trying to leave an abusive relationship
  + in law school – family law seems to lost its place
    - lack of academics
* **Need for effective court process**
  + Judge – contextual analysis
  + Now – complex, unaffordable n inaccessible
  + Suggest-
    - Adversarial method – doesn’t work well for family law cases 🡪 modification?
  + One family – may be involved in multiple proceeding
    - Crim, family, child protection, immigration – disconnect
      * Suggest – coordination of concurrent proceedings
      * Reason – disconnect increase risk for women n children
        + Diff judges
        + No sharing of info – unaware of other proceedings
  + Litigation harassment n abuse
  + Lack of access to legal advice -
    - Suggest – can be like crim
  + May exacerbate harm done on vulnerable individuals
    - Ie children – affect their lives on daily basis – in highly destructive ways
* **Access to justice for children** 
  + Stakes for children are extremely high
  + Cases – may be heard by diff judges
    - Delay n long trials
  + Children’s charter rights, human rights – invisible