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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