**LAW 468 – Ethics**

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# The Legal Profession & Lawyer Regulation

## Concept of Law as a Profession and Arguments for Self-Regulation

**Trait Definition:** The control, direction, governance of lawyers through rules and regs made by lawyers, acting collectively, in the form of an autonomous governing body, undertaken in the public interest to ensure that legal services are provided to the public ethically and competently only by those qualified to do so. → just attributes; tells us nothing about why the consideration of law as a profession should be continued

**Weberian Approach:** professions differ from other occupations in the strategies they pursue to gain advantage in a competitive market by:

* Constructing: a market for specialized services that are valuable and that cannot be produced by the consumer alone and then
* Limiting: that market by controlling production; meant to remedy disorder and overly competitive markets (which would also threaten wealth and prestige of those already within the market)

∴ **self-regulation is self-serving**, not in the public interest; the limitations required for protecting the public are not as stringent as those imposed by LS

Interesting question of whether this is a chicken-egg problem: if we didn’t offer or encourage societal competition/stratification, and instead promoted other values, what would the result be?

**Structural/Functional Approach:** professions create order and stability

* Offers constrained structure within which people can compete for accolades and wealth (which is better than having no constraints to the striving of rapacious elites)
* Source of community in an individualistic society
* Self-regulation defines professions because:
  + - * 1. Only lawyers possess the knowledge and expertise necessary to monitor/judge others’ behaviour

[***LS of MB v Savino*** accepted this argument; **but** if the monopoly on legal services didn’t exist, this wouldn’t be the case. Furthermore, information asymmetry can be easily overcome]

* + - * 1. Self-regulation is necessary to maintain the independence of the bar

[independent bar = check on unfettered state power ∴ enhances RofL **but** is self-regulation really necessary for an independent bar? Further, the bar has not protected equality or RofL – that’s an assumption (see: ***Canada (AG) v LSBC:*** Independence of the bar = hallmark of a free society)]

**→ the above 2 arguments are the two most prominent.**

**Historical Approach:** exclusivity pursued as a way to protect lawyers and elites’ status within society as leaders. Maintaining such a leadership position necessary to protect the essential British-ness of Western Canadian society from new social/ethnic challenges

**Rhetorical:** Social contract with the state to trade monopoly for self-regulation in the public interest. → theoretical ex post justification

**Efficiency:** administrative and enforcement costs are paid by lawyers themselves rather than taxpayers. → But monopoly costs the public far more than a tax would for creating a gov’t monitor

## Regulating Lawyer Conduct (Canons of Legal Ethics)

### Disciplinary Process

* Role of discipline is to protect the public and punishments are given for deterrence purposes
* Lawyers required to have insurance to compensate others (***LPA s. 30***)

1. **Complaint and Investigation**

* Less formal than other two stages
* Complaint from a client or former client complaining of actual or perceived misconduct (can also come from the judiciary, other lawyers, or the public (***LPA s. 26***), or audits, media commentary, legal proceedings, or law enforcement reports)
  + Complaints made by clients: taken to have waived confidentiality over anything req’d to investigate the complaint (as narrow an infringement as possible though)
* Complaints are not anonymous – procedural fairness requires that the target of the complaint be able to answer the charge
* Regulatory issues: poor communication, services issues (delay, inactivity), conflicts of interest, dishonesty, trust accounting deficiencies, breach of undertaking, breach of privilege or confidentiality, rudeness, incompetence, theft, personal life issues

1. **Complaint reviewed and assessed**

* Chief concern here is of underreporting
  + b/c there is a reluctance (despite ethical obligations) to report the misconduct of their colleagues, fearing retaliation, hostility, etc.
    - Should failure to report someone else result in disciplinary action?
  + Clients also do not know what constitutes lawyer misconduct, or they think that reporting would be futile
* Also, complaints about the quality of services being provided are not adequately addressed because many times they fall outside of the focus on ethical duties and competence
  + LSs can’t give the consumer anything for their issue – they can only intervene administratively in order to bring about a resolution or refer the complaint to another agency which could provide a remedy
    - Clients complaining about fees → court taxation processes
    - Complaint of neglect/loss → go see another lawyer for a possible malpractice claim

1. **Complaint reduced to writing, reviewed by admin staff, and shared with the lawyer in question**

* Lawyer required to answer any questions or provide docs/records as required
* Further investigation then takes place, as necessary

1. **Decision made to either dismiss the matter or refer to either practice standards committee (for competence concerns) or a conduct or discipline committee (where ethics or violation of LS rules)**

* If dismissed, complainant allowed to appeal

1. **Conduct committee reviews the complaint**

* Can include further investigation, referral to a conduct review committee or a bencher for a mandatory review, or a referral to a practice standards or review committee

1. **Conduct committee decides whether to dismiss or prepare citation**

* Citation sets out the charges and/or alleged misconduct to be considered by the hearing committee

**What Happens to Complaints?**

- Most (around 80%) are closed by staff. Around 10-15% referred to the Discipline Committee, which can order: (**r. 4-4**)

* No further action
* Conduct Letter
* Conduct Meeting
* Conduct Review
* Citation
* Section 36(h) summary proceeding
* Referral to Practice Standards
* Referral to member file
* Referral to benchers for summary proceeding where member has been convicted of an offence (**r. 4-52**)

It’s only when a matter proceeds to a citation and a hearing that that goes on the lawyer’s disciplinary log.

A lawyer can have a number of complaints, but not everything goes to the hearing stage. A member of the public wouldn’t be able to see the long list of complaints if nothing ever got to a hearing. BUT the Discipline Committee can see the history of complaints, and it can impact their decision.

1. **Hearing**

* Adversarial in nature, conducted before a panel of the discipline or conduct committee
* Conducted by LS counsel (either an employee of LS or a private practitioner appointed specifically for the proceedings)
* Burden of proof borne by the LS whose counsel must provide clear and convincing evidence of misconduct
* Bears a strong resemblance to criminal proceedings
  + Accused lawyer is entitled to full disclosure of all relevant docs, all witness statements, and experts’ reports but accused lawyer does not have to make disclosure to the same extent
    - Lawyer *is* required to cooperate in the investigation and to produce any documents as required
  + But lawyer is also compellable as a witness
* Lawyer entitled to notice, representation, and hearing before an impartial adjudicator (∴ LS folks need to keep their various roles distinct)
* B/c they are authorized by statute, the proceedings are subject to Charter scrutiny and common law judicial review
  + S. 7 rights apply (constitutionally guaranteed procedural rights) but not s. 11 (b/c it has been held to be regulatory, not penal or criminal in nature)
  + Courts likely to give the tribunals a fair amount of deference

Process of decision making by the panel:

1. **Determine whether the facts have been proven**
2. **Determine if the facts, as proven, constitute professional misconduct/conduct unbecoming**
3. **Decide what the appropriate penalty under the circumstances**

* Final decision must be in writing, with reasons provided

1. **Penalty/Sanction**

* Purpose of any sanction must be protection of the public or the profession’s reputation (not the punishment of the lawyer)
* Panels typically empowered to impose a range of remedies; in determining what is appropriate, they will look at:
  + Nature and extent of injury to others
  + The blameworthiness of the conduct
  + Penalties imposed on others of similar misconduct
  + Mitigating and aggravating circumstances (e.g. lawyer’s general reputation/character and attitude towards discipline, whether they have made restitution, whether it was an isolated event or a re-occurrence, prior discipline record, need for deterrence, mental state)
* A right of appeal exists from the decisions of hearing panels to either an appeal panel (or to the benchers, as a whole) or to the courts, or both
  + Panel’s decision re: professional misconduct/conduct un. → reviewable by court on reasonableness standard (is the decision intelligible, transparent, and justified + does it fall within range of reasonable outcomes?)
  + Procedural issues: reviewed on correctness standard

**Possible Citation Outcomes:**

* Dismissal
* Adverse determination (lawyers, former lawyers and articled students) [NOTE: “adverse determination” = “a finding against”]
  1. Professional misconduct
  2. Conduct unbecoming a lawyer
  3. Breach of Act or Rules
  4. Incompetent Performance of Duties
* Reprimand
* Fine (max: $50,000 for lawyers and $5,000 for students)
* Suspension (lawyers or former lawyers)
* Conditions and restrictions (lawyers)
  1. Ex: you need to get anger management, you need to participate in a substance abuse program, you can only practice under another lawyer’s supervision, you can only practice in a certain area, etc.
* Disbarment (lawyers or former lawyers)
* Extension of articling term or setting aside enrollment

Optional Review by the Law Society Review Panel and appeals from the review panel go to the BCSC

### Discrimination and Harassment

* **6.3-3**  A lawyer must not sexually harass any person.
* **6.3-4**  A lawyer must not engage in any other form of harassment of any person.
* **6.3-5**  A lawyer must not discriminate against any person.
  + **[1]** A lawyer has a special responsibility to comply with the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.

### Regulations of Lawyers by the Courts

* Negligence: standard of care is reasonable knowledge or skill
  + Lawyers have mandatory insurance
  + Lawyers usually sued for Negligence

***Butterfield (Re), 2017 LSBC 2***

* Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.  Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.
* When determining whether a proposed disciplinary action falls within the range of fair and reasonable discipline, the main considerations are the public interest and maintaining public confidence in the legal profession.
  + The factors encompass specific and general deterrence, rehabilitation, punishment and denunciation.

# The Lawyer-Client Relationship

## Formation of the Lawyer-Client Relationship

* Two different visions of the lawyer:
  + Lawyers are the beneficiaries of a monopoly, so they have an obligation to make legal services available and be guided by fiduciary obligations
  + Lawyers are business persons and lawyer-client relationships should be governed by usual market norms
    - Provisions of legal services should be guided by the retainer contract

## Advertising, Fees, Fee Sharing and Solicitation

### Advertising:

* Some believe that advertising and solicitation reduce the professional status of lawyers because they introduce vulgarity and commodification
* Others claim that advertising and solicitation are essential so as to ensure that the public has access to justice
* It is important to for lawyers to be able to brand and market themselves
* **4.2-3**  This section applies to any marketing activity undertaken or authorized by a lawyer in which he or she is identified as a lawyer, mediator or arbitrator.
* **4.2-4**:
  + **“marketing activity”** includes any publication or communication in the nature of an advertisement, promotional activity or material, letterhead, business card, listing in a directory, a public appearance or any other means by which professional legal services are promoted or clients are solicited;
  + **“lawyer”** includes a member of the Law Society, and a person enrolled in the Law Society Admission Program.
* **4.2-5**  Any marketing activity undertaken or authorized by a lawyer must not be:

1. false,
2. inaccurate,
3. unverifiable,
4. reasonably capable of misleading the recipient or intended recipient, or
5. contrary to the best interests of the public.

* **[1]** For example, a marketing activity violates this rule  if it:

1. is calculated or likely to take advantage of the vulnerability, either physical or emotional, of the recipient,
2. is likely to create in the mind of the recipient or intended recipient an unjustified expectation about the results that the lawyer can achieve, or
3. otherwise brings the administration of justice into disrepute.

* **4.2-7**: A lawyer marketing legal services shall specifically identify in all marketing materials that they are licensed as a lawyer
* **4.3-0.1** A lawyer may state in any marketing activity a preference for practice in any one or more fields of law if the lawyer regularly practises in each field of law in respect of which the lawyer wishes to state a preference.
* **4.3-1** Unless otherwise authorized by the *Legal Profession Act*, the Law Society Rules, or this Code or by the Benchers, a lawyer must:

1. not use the title “specialist” or any similar designation suggesting a recognized special status or accreditation in any other marketing activity, and
2. take all reasonable steps to discourage use, in relation to the lawyer by another person, of the title “specialist” or any similar designation suggesting a recognized special status or accreditation in any marketing activity.

**Fees**

* **3.6-1** A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.
  + **[2]** The **fiduciary relationship** between lawyer and client requires full disclosure in all financial dealings between them and prohibits the acceptance by the lawyer of any hidden fees. No **fee**, **extra fees**, **reward**, **costs**, **commission**, **interest**, **rebate**, **agency** or **forwarding allowance**, or related to professional employment may be **other compensation** taken by the lawyer from anyone other than the client without full disclosure to and the consent of the client….

**Fee Sharing and Referral Fees**

* **3.6-7:** Fee sharing with non-lawyers is prohibited
  + **3.6-6**: can get a referral fee for referring work to another lawyer
  + **3.6-8**: exception for sharing fees with people practicing in a multi-disciplinary practice

**Solicitation**

* Concerns: lawyers may invade people’s privacy, take advantage of vulnerable persons, engage in overreaching, succumb to opportunistic ambulance-chasing or stir up unnecessary litigation
  + Counter-Argument: people do not always know their rights and do not always have a sense of the services that lawyers can provide. Solicitation can fill this “market gap”.
* ***Law Society of Sask v Merchant***: Lawyer sending letters to survivors of residential schools, promises that they would not have to pay anything for litigation, could win a lot of money, etc.

**Solicitation and Public Appearances**

* **7.5-1** Provided that there is no infringement of the lawyer’s obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.
  + **[1]**  Lawyers in their public appearances and public statements should conduct themselves in the same manner as they do with their clients, their fellow practitioners, the courts, and tribunals. Dealings with the media are simply an extension of the lawyer’s conduct in a professional capacity. The mere fact that a lawyer’s appearance is outside of a courtroom, a tribunal or the lawyer’s office does not excuse conduct that would otherwise be considered improper.
  + **[2]**  A lawyer’s duty to the client demands that, before making a public statement concerning the client's affairs, the lawyer must first be satisfied that any communication is in the best interests of the client and within the scope of the retainer.
* ***Stewart v CBC***: In the context of public media attention directed at a former client or case, lawyers must not engage in behaviour that is motivated by self-promotion or self-aggrandizement

## Choice of Client

### Moral Non-Accountability or “Taking it Personally”?

* **4.1-1**: a lawyer must make legal services available to the public efficiently and conveniently
  + **[1]** A lawyer has a general right to decline particular representation, but it is a right to be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation
* A lawyer should **refuse to take a client** if:
  + There is a conflict of interest
  + The lawyer lacks competence in the matter
  + There is a continuing retainer with a previous lawyer
  + The lawyer has the potential to be a witness in a case
  + There is an illegal purpose
* Lawyers subject to human rights laws (**6.3-3**)

**Moral Non-Accountability**: a social good that promotes the fair administration of justice

* Modern legal regimes are extremely complex, and citizens need lawyers to guide them
* Truth emerges through the thrust and parry of resolute advocacy
* It is the task of the judge, not the lawyer, to ultimately decide the legal entitlements of parties
* Consequently, the lawyer is simply a neutral agent whose obligation is to represent the client’s interest without regard to the morality of that client’s conduct or attitude, and without necessarily having regard to that morality in deciding whether to represent the client

“**Taking it Personally**”: acknowledges the importance of the larger systems values above, but there must be limits

* Structures are important, so too are human agency and human accountability
* Lawyers must take responsibility for their choice of clients and the strategies they deploy on behalf of those clients
* E.g. Criminal defence lawyers representing those they believe to be guilty, tax lawyers with tax avoidance, contracts lawyers who draft unconscionable contracts

## Triggering the Lawyer-Client Relationship

* “**Client**” means a person who:
  + (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
  + (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf,
  + and includes a client of the law firm of which the lawyer is a partner or associate, whether or not the lawyer handles the client’s work.
* ***Descôteaux v Mierzwinski***: right to confidentiality arises as soon as the potential client has their first dealings with the lawyer’s office in order to obtain legal advice

### Mental Health and Diminished Capacity

* A major ethical challenge for a lawyer in serving a client who might have a mental health challenge is to **resist the impulse to over-ride the client’s autonomy** with the lawyer’s own understanding of what would be in the client’s best interest, while remaining alert to circumstances (i.e. incapacity) in which the lawyer’s duty shifts from respecting autonomy to protecting best interests
* **3.2-9**: When a client’s ability to make decisions is impaired because of minority or mental disability, or for some other reason, the lawyer must, as far as reasonably possible, maintain a normal lawyer and client relationship.

### Compulsory Continuing Legal Education

* All provinces and territories have introduced compulsory continuing legal education
* The basic model is that lawyers are obliged to participate in **12 hours of** **Continuing Professional Development (CPD)** per year, two of which must focus on either practice management or professionalism and legal ethics

### Advising Clients: Candour and Conflicting Duties

* A lawyer’s **duty of loyalty** to their client requires that the **lawyer disclose all material facts** relating to the matter for which they were retained
* **3.2-2**: requires lawyers to be “honest and candid”
* In ***Strother v 3464920 Canada*** and ***Canadian National Railway Co v McKercher LLP*** (*CN’s lawyer takes on a class action suit against CN*), the SCC discussed how candour helps to give effect to the lawyer’s obligation to put their client’s interests first
  + Overlaps with the standard of competence expected of lawyers and might also engage the duty to keep client information confidential
  + ***McKercher***: candour can be connected to issues of commitment to the client, but is also a free-standing duty
* Duty of candour supports the lawyer’s **long-established fiduciary duty** to their clients, and **allows the lawyer to disagree with the client in the interest of honest advice**
* **Lawyers must disclose material facts relating to their advice**, even when the lawyer believes the client already has that information.
  + 3 categories of **information subject to candour**:
    - Information on the lawyer-client relationship, such as conflicts of interest, errors, or negligence relating to the client’s matter;
    - Information directly relating to the legal work for which the lawyer was retained; an
    - Information which is relevant to the client’s interests and relevant to the matter for which the lawyer was retained but not directly to the work which the lawyer was retained to perform.

## Termination of the Lawyer-Client Relationship

### The Retainer

* In ***Neil***, ***Strother*** and ***McKercher***, the SCC has made it clear that in some circumstances, a **business conflict can be a legal conflict**, i.e., that a lawyer may be retained by two clients who do not have a legal dispute with each other, but may have competing business interests
  + Lawyers can avoid this potential problem by sending their clients an explicit termination letter once legal services have concluded – can create economic issues for the lawyer

### Withdrawal: Obligatory or Optional

* **3.7-1**: A lawyer must not withdraw from representation of a client except for good cause and on reasonable notice to the client
  + **[1]**: Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action
    - If a lawyer accepts a client, the lawyer has a duty of fidelity and loyalty
    - It is inappropriate for a lawyer to withdraw on capricious or arbitrary grounds
* **3.7-2** If there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.
  + **[1]** A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by his client, the client refuses to accept and act upon the lawyer’s advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.
* **3.7-3** If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw.
  + **[2]** In criminal matters, if withdrawal is a result of non-payment of the lawyer’s fees, the court may exercise its discretion to refuse counsel’s withdrawal. The court’s order refusing counsel’s withdrawal may be enforced by the court’s contempt power.
* **3.7-7** A lawyer must withdraw if:

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

* **3.7-9.1**  Subject to exceptions permitted by law, if the reason for withdrawal results from **confidential** communications between the lawyer and the client, the lawyer must not disclose the reason for the withdrawal unless the client consents.
* **3.7-3** If, after reasonable notice, the client fails to provide a retainer or funds on account of disbursements or fees, a lawyer may withdraw.

### Court Approval of Withdrawal

* ***R v Cunningham*** **(2010 SCC)**: a court has the authority to refuse criminal defence counsel’s request to withdraw for non-payment of legal fees
  + If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal
  + When timing is an issue, the court may enquire further:
    - **Ethical reasons**: accused is requesting that counsel act in violation of his or her professional obligations or if the accused refuses to accept counsel’s advice on an important trial issue 🡪 court must grant withdrawal
    - **Non-payment of legal fees**: the court can exercise discretion on the withdrawal request
    - In either case, the court must accept counsel’s answer at face value and not enquire further due to solicitor-client privilege

### Preservation of Clients’ Property

* **3.5-1**  In this section, **“property”** includes a client’s **money**, **securities** as defined in the *Securities Act*, **original documents** such as wills, title deeds, minute books, licences, certificates and the like, and all other papers such as client’s correspondence, files, reports, invoices and other such documents, as well as personal property including precious and semi-precious metals, jewellery and the like.
* **3.5-2** A lawyer must:

1. care for a client’s property as a careful and prudent owner would when dealing with like property; and
2. observe all relevant rules and law about the preservation of a client’s property entrusted to a lawyer.

# Lawyer’s Duty to Preserve Client Confidence

Reasons for preserving client confidences and **protecting privilege**:

* **Promote client honesty**:client who’s assured of complete secrecy more likely to reveal to counsel all info relevant to case
  + Lawyer is better able to advise the client and hence provide competent service
* Fosters the autonomy and dignity of the client by protecting their privacy
* Connected to the duty of loyalty owed by lawyer to the client

## Privilege and Confidentiality

**Solicitor/Client Privilege** – **WIGMORE 3 PART TEST**

1. Communications between a lawyer and client
2. For purpose of legal advice
3. Expectation of confidentiality

* Confusion around what is protected
  + Not underlying facts & **not by virtue of a lawyer’s presence**
* **S/C** **privilege** **belongs to client** – only the client can waive it!!
* Class privilege, not a case-by-case basis

**Duty of Confidentiality (3.3-1)**

* Duty of confidentiality is **broad but not absolute**
* Must hold in strict confidence any info gained in the course of the relationship and **must not divulge** unless: authorized by client; required by law; required by law society; or otherwise permitted by rule

**Similarities**:

* Foundational
* Require S/C relationship 🡪 survives the relationship (**lasts indefinitely** if there has been no waiver)
  + **Commentary 5(b) to 3.3-1**: a lawyer should not disclose having been consulted by a person about a matter, whether or not the lawyer-client relationship has been established by them
* **Waiver** (where client wants to disclose the info) can occur with either
* Purpose 🡪 full, frank and protected communications between S/C
* Any **exceptions** must be as **narrow** as possible
  + Tension between duty and privilege on one hand and public interest on the other
    - Conflict between value of systematic confidence on behalf of general public that info shared with lawyers is vigorously protected by S/C privilege & criticism that larger public interest suffers when lawyers only look out for clients

**Differences**

* **Confidentiality** is **ethical** as defined by the Codes, **privilege is legal** as defined by courts
  + Substantive legal principle w/ constitutional status as a principle of fundamental justice for purpose of ***Charter* s.7**
* **Confidentiality** is engaged with reference to **all info** gained in relationship while **privilege** is only engaged for **purpose of legal advice *(scope of solicitor-client privilege is narrower)***
* Breaches of client **confidentiality** can result in a lawyer being investigated & disciplined by the Law Society, while courts are the source of the law of solicitor-client **privilege**
* Confidentiality: ethical obligation continues even if information is known by others, whereas communication of privileged information to others brings an end to that duty
* **Privilege** is a legal duty primarily associated with **law of evidence**, whereas ethical duty of **confidentiality** is a defining feature of **all lawyer-client relationships**
* Confidentiality and privilege should not be conflated, although they both arise out of the **duty of loyalty**.
* Confidentiality applies irrespective of where information came from, but privilege only includes information provided by the client and communications from the lawyer to the client

|  |  |
| --- | --- |
| **CONFIDENTIALITY** | **PRIVILEGE** |
| A **broader** obligation imposed by the law society | A **narrower**/legal obligation imposed by the law |
| **Ethical** principle | **Legal duty** |
| All client information acquired by the lawyer during the relationship is subject to this obligation | Only private communications that take place between a lawyer and a client are subject to this obligation |
| The obligation continues even if others know that information | Once communicated to 3rd parties, the information is not privileged anymore |
| This is the defining feature of *all* lawyer-client relationships | This is a principle of evidence law and fundamental justice |
| For **any communication** during the course of professional relationship | For the purposes of providing **legal advice** |
| Confidentiality survives the relationship |  |

LSBC v McCormick

*Class action: numerous allegations & lawsuits brought by female RCMP officers against RCMP for sexual misconduct on the job. M representing RCMP in disciplinary hearing. Mid-case, officer said he wanted to settle, so they flew in a senior person to deal with it. M agrees to go on CBC & talk critically about RCMP (regardless of being retained by RCMP previously). Talked about info not in public domain; said she felt cause of women was very strong & her sympathies remained with them.* **//**

* Claims she was told by senior officer that S/C privilege was waived BUT they moved to **confidentiality & duty of loyalty** to client 🡪 **Law Society felt it was very inappropriate** (shared info that was not public 🡪 breach of confidence)

R v Murray [2000 OSCJ]

**Solicitor-client privilege protects communications between solicitor & client**. [These were not communications. There was a duty of confidentiality to B, but absent solicitor client privilege, there was no legal basis permitting concealment of tapes.]

**Confidential Information**

**3.3-1**A lawyer at all times must hold in **strict confidence** all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information **unless**:

1. expressly or impliedly authorized by the client;
2. required by law or a court to do so;
3. required to deliver the information to the Law Society, or
4. otherwise permitted by this rule.

* **[1]**  A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. The client must feel completely secure and entitled to proceed on the basis that matters disclosed to the lawyer will be held in strict confidence.
* **[2]**  This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.
* **[3]**  A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.
* **[4]**  A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer’s professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter.
* **[5]**  Generally, unless the nature of the matter requires such disclosure, a lawyer should not disclose having been:
  + (a)     retained by a person about a particular matter; or
  + (b)     consulted by a person about a particular matter, whether or not the lawyer-client relationship has been established between them.

#### Use of confidential information

**3.3-2**A lawyer must not use or disclose a client’s or former client’s confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client.

* **[1]**  The **fiduciary relationship** between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer’s use of a client’s confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client’s or former client’s consent before disclosing confidential information.

***Disclosure of confidential information***

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

* Saskatchewan, Manitoba: “must”
* New Brunswick: includes financial harm
* **[5]**  If confidential information is disclosed under this rule, the lawyer should prepare a written note as soon as possible, which should include:
  + (a)     the date and time of the communication;
  + (b)     the grounds in support of the lawyer’s decision to communicate the information, including the harm he or she intended to prevent, the identity of the person who prompted him to communicate the information as well as the identity of the person or group of persons exposed to the harm; and
  + (c)     the content of the communication, the method of communication used and the identity of the person to whom the communication was made.

**3.3-4** If it is alleged that a lawyer or the lawyer’s associates or employees:

1. have committed a criminal offence involving a client’s affairs;
2. are civilly liable with respect to a matter involving a client’s affairs;
3. have committed acts of professional negligence; or
4. have engaged in acts of professional misconduct or conduct unbecoming a lawyer,

the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required.

**3.3-5** A lawyer may disclose confidential information in order to establish or collect the lawyer’s fees, but must not disclose more information than is required.

**3.3-6** A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer’s proposed conduct.

**3.3-7** A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.

### Exclusions and Exceptions

* **The “Crime/Fraud” or “Criminal Communications” Exclusion**: confidential communications, whether they relate to financial means or to the legal problem itself, lose that character if and to the extent they were made for the purpose of obtaining legal advice to facilitate the commission of a crime (***Descôteaux et al v Mierzwinski***: *lied about finances for legal aid/elevated to substantive rule*)
* **The “Public Safety” Exception**: solicitor-client privilege can be outweighed by public safety concerns through the following factors: (similar to **3.3-3**)
  + - Is there a clear risk to an identifiable person or group of persons?
    - Is there a risk of serious bodily harm or death?
      * Includes physical and psychological harm (***R v McCraw***)
    - Is the danger imminent?
  + **Two-Step Test for Whether Privilege Waved under Public Safety Exception:**
    - **STEP 1**: Determining When Public Safety Outweighs Solicitor-Client Privilege (“CLARITY” (General Rule) 🡪 a group or person must be ascertainable)
      * But can’t be too vague (e.g. I’m going to kill everyone in this city).
      * Some factors (non-exhaustive) to consider:
        + Is there evidence of long-range planning?
        + Has a method for effecting the specific attack been suggested?
        + Is there a prior history of violence or threats of violence?
        + Are the prior assaults or threats of violence similar to that which was planned?
        + If there is a history of violence has the violence increased in severity?
        + Is the violence directed to an identifiable person or group of person?
      * **SERIOUSNESS**: For the public safety interest to be of sufficient importance to displace SCP, the threat MUST be to occasion serious bodily harm or death (serious psychological harm included).
      * **IMMINENCE**: The risk MUST be serious: a serious risk of bodily harm. The nature of the threat must be such that it creates a sense of urgency.
        + May be applicable to sometime in the future.
      * **DEPENDING** on the **SERIOUSNESS** and **CLARITY** of the threat, it will NOT always be necessary to impose a particular time limit on the risk.
        + It is sufficient if there is a clear and imminent threat of serious bodily harm due to an identifiable group, and if this threat is made in such a manner that a sense of urgency is created.

A statement made in a fleeting fit of anger will usually be insufficient to disturb the SCP.

On the other hand, IMMINENCE as a factor may be satisfied if a person makes a clear threat to kill someone that he vows to carry out three years hence where he is released from prison.

* + - **STEP 2**: The Extent of Disclosure
      * Generally limited as much as possible
      * The JUDGE setting aside the Solicitor-Client Privilege should strive to strictly limit disclosure to those aspects of the report or document which indicate that there is an imminent risk of serious bodily harm or death to an identifiable person or group.
        + Consideration to portions of report which refer to an identifiable group; that the risk is serious in that it involves a danger of death or serious bodily harm; and that the serious risk is imminent (as per definition above).

E.g. if report does not reference serious harm but describes aspects of the offence (e.g. fraud) then those reference would necessarily be deleted.

* **The “Innocence at Stake” Exception**: the accused must establish that the information sought in the solicitor-client file is not available from any other source and is unable to raise a reasonable doubt as to their guilt **in any other way** (***R v McClure***)
  + The accused seeking protection of a solicitor-client communication must provide some evidentiary basis upon which to conclude that there exists a communication that **could raise a reasonable doubt** as to their guilt
    - The evidence sought should be considered in conjunction with other available evidence in order to determine its importance. It is the totality of the evidence that governs. However, when the accused is either challenging credibility or raising collateral matters, it will be difficult to meet the standards required of stage one.
  + The judge must examine the solicitor-client file to determine whether the communication is **likely to raise a reasonable doubt**
  + In 2002 the SCC consider this test again in ***R v Brown***
    - Affirmed ***McClure*** but added FOUR features:

1. Despite the risk after the fact that an innocent person may be convicted of crime, most appropriate mechanism is traditional appeal to royal prerogative: **s.690 CCC**
2. ***McLure*** applies to BOTH oral and written communications
3. Disclosure is to be made to the accused and NOT the crown.
4. Disclosure limited to purpose of adducing info that would avoid wrongful conviction and cannot be used to incriminate the privilege holder who is “entitled to immunity regarding the subsequent use of his privileged communications, which would have been protected but for the operation of ***McClure***.

* **Absolute Necessity**: exception against privilege to the extent absolutely necessary in order to achieve the end sought by the enabling legislation
  + The law society has authority to demand privileged records in the course of discharging its duty to investigate complaints (***Law Society of Saskatchewan v EFA Merchant***)
  + ***Legal Profession Act*** **s. 88**: disclosing records to the law society does not remove or destroy privilege

### Legislative Exceptions (3.3-1(b))

* ***Goodis v. Ontario***, **SCC 2006** [judicial intervention only when absolutely necessary]
  + Solicitor/client communications should not be interfered with “except to the extent absolutely necessary in order to achieve the ends sought by the enabling legislation.”
  + Legislative provisions should be interpreted restrictively, and intervention should not readily be inferred
* ***Law Society Sask v. Merchant***, **SKCA 2008** [law society intervention?]
  + Whether the Law Society can meddle into client files as part of investigation
  + Law societies have statutory authority/obligation to investigate complaints against members – **must include authority to request privileged documents – 3.3-1(c)**
  + Requests for documents **must be framed narrowly**
  + Focus on independence of bar, tied to self-regulation

### In House Context

* S/C privilege applies
* Need to distinguish between business and legal advice
* Need to clearly identify client & who is authorized to speak on behalf of client to ensure no inadvertent waiver of privilege
* Sharing privilege on a need to know basis to prevent waiver

### Class vs Case-by-Case privilege

* **Class privilege: examples**
  + Solicitor/client privilege
  + Spousal privilege (may not exist anymore)
  + Informer privilege
* **Case-by-case privilege: examples**
  + Doctor/patient (incl. psychologist/patient)
  + Journalist/informant
  + Religious communications

### Withdrawal from Representation

* No solicitor-client privilege over counsel seeking to withdraw from representation due to non-payment of fees in cases where the non-payment is not linked to the merits of the matter (***R. v. Cunningham***)
* If no timing issue = withdraw allowed w/out question
* If timing issue = court may ask why
* If ethical reasons, no further question, withdrawal granted
  + Acting in violation of professional obligations (**Rule 3.7-7(b)**)
  + The accused refuses to accept counsel’s advice on an important trial issue (**Rule 3.7-2 Commentary**)
* If non-payment, no further question, may or may not be granted

### Custody of Evidence

R v Murray [2000 OSCJ]

*M removed videotapes from B home which showed sexual abuse: used code words when finding it, shook hands & agreed not to tell anyone about the tapes****.*** *Did not disclose existence to Crown for 17 months****.*** *In 1994, M asked LSUC for advice & appeared before TJ*

*who directed tapes be sent to new counsel for B.* / ***Whether M’s action in secreting videotapes obstructed course of justice.* /**

**H**: Found **not guilty** of obstruction of justice by concealment of tapes as he lacked necessary *mens rea* (believed he didn’t have obligation to disclose them before trial).

* Tapes not privileged as not communications.
* No obligation to assist police **but** taking positive steps to conceal evidence is **unlawful –** shouldn’t have taken possession
* M testified he had to retain the tapes for B’s defence. ***Why?*** Possibly to tie down H’s evidence to show she was involved**/**try to negotiate resolution for Crown**.** M had consulted senior counsel asking if he should reveal it to prosecution or save it for trial – Was told the first duty is to client and should be held for trial. M stated it was never his intention to bury the tapes
* **Notes:** BC does not have instant answer to this, but model code does.

**5.1-2.1:**A lawyer must not counsel or participate in the **concealment, destruction or alteration of incriminating physical evidence** so as to obstruct or attempt to obstruct the course of justice.

* New rule which provides assistance to defence lawyers with respect to physical evidence.
* Responsive to criticism in ***R v Murray***

# The Duty of Loyalty and Conflicts of Interest

* “**conflict of interest**” means the existence of a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person
* “**consent**” means fully informed and voluntary consent after disclosure
  + (a) in writing, provided that, if more than one person consents, each signs the same or a separate document recording the consent; or
  + (b) orally, provided that each person consenting receives a separate written communication recording the consent as soon as practicable
* **“disclosure”** means full and fair disclosure of all information relevant to a person’s decision (including, where applicable, those matters referred to in commentary in this *Code*), in sufficient time for the person to make a genuine and independent decision, and the taking of reasonable steps to ensure understanding of the matters disclosed

**Duty to Avoid Conflicts of Interest:**

* **3.4-1** Lawyer must not act or continue to act for a client where there’s a **conflict of interest**, *except as permitted under the Code.*

|  |
| --- |
| **[0.1]**In a real property transaction, a lawyer may act for more than one party with different interests only in the circumstances permitted by Appendix C.  **[1]** As defined in these rules, a conflict of interest exists when there’s **substantial risk** that the lawyer’s loyalty to or representation of a client would be **materially & adversely affected** by lawyer’s own interest or lawyer’s duties to another client, a former client, or a 3rd person. The risk must be *more than a mere possibility*; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer. A client’s interests may be seriously prejudiced unless the lawyer’s judgment and freedom of action on the client’s behalf are as free as possible from conflicts of interest.  **[2]** A lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflict of interest.  **[3]**The general prohibition and permitted activity prescribed by this rule apply to a lawyer’s duties to current, former, concurrent and joint clients as well as to the lawyer’s own interests.  **Representation**  **[4]** Representation means acting for a client and includes the lawyer’s advice to and judgment on behalf of the client.  **The fiduciary relationship, the duty of loyalty and conflicting interests**  **[5]**The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client’s cause, the duty of confidentiality, the duty of candour and the duty not to act in a conflict of interest. This obligation is premised on an established or ongoing lawyer client relationship in which the client must be assured of the lawyer’s undivided loyalty, free from any material impairment of the lawyer and client relationship.  **[6]**The rule reflects the principle articulated by the Supreme Court of Canada in the cases of ***R.* v. *Neil* 2002 SCC** and ***Strother v 3464920 Canada Inc.* 2007 SCC** 24, regarding conflicting interests involving current clients, that a lawyer must not represent one client whose legal interests are **directly adverse** to the immediate legal interests of another client without consent. This **duty arises even if the matters are unrelated**. The lawyer client relationship may be irreparably damaged where the lawyer’s representation of one client is directly adverse to another client’s immediate interests. One client may legitimately fear that the lawyer will not pursue the representation out of deference to the other client, and an existing client may legitimately feel betrayed by the lawyer’s representation of a client with adverse legal interests. The prohibition on acting in such circumstances except with the consent of the clients guards against such outcomes and protects the lawyer client relationship.  **[7]**Accordingly, factors for the lawyer’s consideration in determining whether a conflict of interest exists include:   * the immediacy of the legal interests; * whether the legal interests are directly adverse; * whether the issue is substantive or procedural; * the temporal relationship between the matters; * the significance of the issue to the immediate and long-term interests of the clients involved; and * the clients’ reasonable expectations in retaining the lawyer for the particular matter or representation.   **Examples of areas where conflicts of interest may occur**  **[8]**Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive.  **(a)**  A lawyer acts as an advocate in one matter against a person when the lawyer represents that person on some other matter.  **(c)**  Lawyer provides legal advice to small business on a series of commercial transactions & at same time provides legal advice to an employee of the business on employment matter, thereby acting for clients whose legal interests are directly adverse.  **(d)**  A lawyer, an associate, a law partner or a family member has a personal financial interest in a client’s affairs or in a matter in which the lawyer is requested to act for a client, such as a partnership interest in some joint business venture with a client.  **(i)**  A lawyer owning a small number of shares of a publicly traded corp. would not necessarily have a conflict of interest in acting for the corporation because the holding may have no adverse influence on the lawyer’s judgment or loyalty to the client.  **(e)**     A lawyer has a sexual or close personal relationship with a client.  **(i)**  Such a relationship may conflict with the lawyer’s duty to provide objective, disinterested professional advice to client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client’s right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit **exploitation** of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer’s firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client’s work.  **(f)**  A lawyer or their law firm acts for a public or private corporation and the lawyer serves as a **director** of the corporation.  **(i)**   These two roles may result in a conflict of interest or other problems because they may   1. affect the lawyer’s independent judgment and fiduciary obligations in either or both roles, 2. obscure legal advice from business and practical advice, 3. jeopardize the protection of lawyer and client privilege, and 4. disqualify the lawyer or the law firm from acting for the organization.   **(g)** Sole practitioners who practise with other lawyers in cost-sharing or other arrangements represent clients on opposite sides of a dispute. See rules 3.4-42 and 3.4-43 on space-sharing arrangements.  **(i)**   The fact or the appearance of such a conflict may depend on the extent to which the lawyers’ practices are integrated, physically and administratively, in the association. |

**3.4-2**A lawyer must not represent a client in a matter when there is a conflict of interest unless there is **express or implied consent** from all clients **and** the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.

**(a)**     Express consent must be **fully informed and voluntary** after disclosure.

**(b)**    Consent may be **inferred** and need not be in writing where all of the following apply:

**(i)**   the client is a government, financial institution, publicly traded or similarly substantial entity, or an entity with in-house counsel;

**(ii)**  the matters are unrelated;

**(iii)** lawyer has no relevant confidential info from one client that might reasonably affect the other; and

**(iv)**  the client has commonly consented to lawyers acting for and against it in unrelated matters.

* **Note:** **Disclosure** is key to obtaining a client’s consent

**Dispute**

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

**Concurrent Representation with Protection of Confidential Client Information: (Maintain Confidentiality)**

* **3.4-4**Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:
  1. disclosure of the risks of the lawyers so acting has been made to each client;
  2. **each client consents** after having received independent legal advice, including on the risks of concurrent representation;
  3. the clients each determine that it is in their best interests that the lawyers so act;
  4. **each client is represented by a different lawyer in the firm**;
  5. appropriate screening mechanisms are in place to protect confidential information; and
  6. all lawyers in the law firm withdraw from representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

**Joint Retainers: (Don’t Maintain Confidentiality)**

* **3.4-5**Before a lawyer is retained by more than one client in a matter or transaction, lawyer must advise each of the clients that:

1. the lawyer has been asked to act for both or all of them;
2. no info receivedd in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
3. if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

* **3.4-6**If a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts a joint retainer from that client and another client, the lawyer must advise the other client of the continuing relationship and recommend that the client obtain independent legal advice about the joint retainer.
* **3.4-7**When a lawyer has advised the clients as provided under rules 3.4-5 and 3.4-6 and the parties are content that the lawyer act, the lawyer must obtain their consent.
* **3.4-8** If a “contentious matter” arises and can’t be resolved, the lawyer must withdraw from acting for all parties.
* **3.4-9** **Unless** the clients agreed in advance that, if a “contentious matter” arises, the lawyer will continue acting for one of the parties.

**Acting Against Former Clients:**

**3.4-10**Unless the former client consents, a lawyer must not act against a **former** client in:

1. the same matter,
2. any related matter, or
3. any other matter, if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client.

**[1]**This rule prohibits a lawyer from attacking legal work done during the retainer, or from undermining client’s position on a matter that was central to the retainer. It is not improper, however, for a lawyer to act against a former client in a matter **wholly unrelated** to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter.

**3.4-11**When a lawyer has acted for a former client and obtained confidential info relevant to a new matter, another lawyer in the lawyer’s firm may act against the former client in the new matter, if the firm establishes, in accordance with rule **3.4-20**, that it is **reasonable** that it act in the new matter, having regard to all relevant circumstances, including:

1. the adequacy and timing of the measures taken to ensure that no disclosure of the former client’s confidential information to the partner or associate having carriage of the new matter will occur;
2. the extent of prejudice to any party; and
3. the good faith of the parties.

\*\***Note**: or **consent**

**3.4-17** to **3.4-23** ***conflicts from transfer between firms***:

* Where the transferring lawyer has relevant confidential information from a former client, and the firm represents another client in the same or related matters
* The firm can’t continue to act for the client unless it has taken steps to protect confidentiality and advised the former client of the steps (or the former client consents)
* The transferring lawyer can’t participate or communicate any confidential information
* Also applies to non-lawyer staff

## Client-Client Conflicts or Lawyer-Client

* Extend to an **appearance** of conflict, not restricted to just actual conflict

### Duties to Former Clients & Conflict Checks

MacDonald Estate v Martin (1990 SCC)

*Lawyer moves from plaintiff firm to defence firm. Lawyer was active in plaintiff litigation but not in defence litigation (they kept her out of involvement). Plaintiff & counsel made application to have firm disqualified from representing them. Defence firm provided sworn statements saying no confidential info relating to plaintiff had been shared.* ***Could defence firm continue to act?***

***What standard is to be applied in legal profession to determine what constitutes disqualifying conflict of interest?***

* **H:** Two-part test. Did not pass it.
* Three competing values:

🡪 **1.** Concern to maintain high standards of legal profession and **integrity** of the system of justice \*\*\***most important**

🡪 **2.** Litigant should not be deprived of their **choice of counsel** without good cause

🡪 **3.**  Permitting reasonable **mobility** in legal profession: tendency for large firms & high changeover of lawyers betw/ firms

* CBA Code of Professional Conduct – places high standard on lawyer who finds themselves in position where confidential information may be used against a former client
* **Disqualifying conflict of interest: the probability or possibility of real mischief**

**🡪 Probability**: requires proof that lawyer actually possessed confidential info & there is a probability of its disclosure

🡪 **Possibility**: if reasonably appears disclosure might occur, this test is satisfied

🡪 Clear trend in favour of **stricter test**: probability test not sufficiently high

**Appropriate Test:** Public represented by reasonably informed person satisfied no use of confidential information will occur

* **Step 1: *Did lawyer receive confidential info attributable to solicitor-client relationship relevant to matter at hand?***

🡪 once it is shown by client there existed a previous relationship, court should **infer** that confidential info was imparted

**unless** solicitor provided otherwise 🡪 must have base of some relevance to give rise to this **rebuttable presumption**

🡪 disqualification should be **automatic**if same lawyer involved: no assurances or undertakings not to use it will avail

🡪 a lawyer who has relevant confidential info cannot act against their client or former client

* **Step 2: *Is there a risk it will be used to the prejudice of the client? (Objectively reasonable person test)***
* However, applying this to firms is **unrealistic:** strong inference that lawyers who work together share confidences [**rebuttable presumption**]– unless there is clear & convincing evidence that court should draw inference that all reasonable measures have been taken to ensure no disclosure done by the tainted lawyer
* **Rebuttable presumption** arises if relationship with former client also related to new matter unless lawyer can demonstrate that no confidential information shared (**presumption rebutted by ethical walls:** **Rules 3.4-17 to 3.4-23** sets out what a firm needs to do in order to **rebut the presumption**

**A:** Obviously she worked on the case & was in possession of confidential info. No reason not to accept the affidavits of reputable counsel – however, this is **not sufficient** to demonstrate that all reasonable measures have been taken

* Nothing in affidavits to show any independently verifiable steps taken by the firm to indicate screening
* Nothing to show that when D was told not to speak to four members working on the case

**Dissent**: Neither firm mergers or mobility of lawyers can be allowed to adversely affect public confidence in judicial system

* If a lawyer has previously acted for a client & joins a new firm, new firm should not be allowed to act at all in order to maintain public confidence of fairness
* Large firms do not represent the **majority** of lawyers

**3.4-18** – rules apply when lawyer transfers from one firm to another & there is a **(1) reasonable belief** lawyer has confidential information on same or **(2) related matters and conflict exists or (2) actual knowledge** of relevant info respecting that matter

**1]**The purpose of the rule is to deal with **actual knowledge**. Imputed knowledge does not give rise to disqualification. As stated by the SCC in ***Macdonald Estate* v *Martin* [1990 SCC],** with respect to the partners or associates of a lawyer who has relevant confidential info, the concept of **imputed knowledge** is unrealistic in the era of the mega-firm. Notwithstanding the foregoing, the inference to be drawn is that lawyers working together in the same firm will share confidences on the matters on which they are working, such that actual knowledge may be presumed. That presumption can be rebutted by clear & convincing evidence that shows that all reasonable measures, as discussed in **3.4-20**, have been taken to ensure that no disclosure will occur by the transferring lawyer to the member or members of the firm who are engaged against a former client.

**[2]**The duties imposed by this rule concerning confidential info should be distinguished from the general ethical duty to hold in strict confidence all info concerning business & affairs of the client acquired in the course of the professional relationship, which duty applies without regard to the nature or source of the info or to the fact that others may share the knowledge.

**[3] Law firms with multiple offices**— This rule treats as one “law firm” such entities as the various legal services units of a government, a corporation with separate regional legal departments and an interjurisdictional law firm.

**3.4-20** – if actual knowledge, new firm must cease representation unless client consents or ethical wall created and if requested, client advised of steps taken

* Guidelines in Commentary: ethical walls don’t always work & may not be as adequate/ complete as guidelines require

**Commentary**

**[3]**The guidelines that follow are intended as a checklist of relevant factors to be considered. Adoption of only some of the guidelines may be adequate in some cases, while adoption of them all may not be sufficient in others.

**Guidelines: How to screen / measures to be taken**

* **1.** The screened lawyer should have no involvement in the new law firm’s representation of its client in the matter.
* **2.** The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
* **3**. No member of the new law firm should discuss the current matter or previous representation with the screened lawyer.
* **4.** The firm should take steps to preclude the screened lawyer from having access to any part of the file.
* **4.1** The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm.
* **5.** The new law firm should document the measures taken to screen the transferring lawyer, the time when these measures were put in place (the sooner the better), and should advise all affected lawyers and support staff of the measures taken.
* **6.** These guidelines apply with necessary modifications to situations in which non-lawyer staff leave one law firm to work for another and a determination is made, before hiring the individual, on whether any conflicts of interest will be created and whether the potential new hire actually possesses relevant confidential information.

**3.4-21**Unless the former client consents, a transferring lawyer referred to in rule **3.4-20** must not:

1. participate in any manner in the new law firm’s representation of its client in the matter; or
2. disclose any confidential information respecting the former client except as permitted by rule **3.3-7**.

**3.4-22**Unless the former client consents, members of the new law firm must not discuss the new law firm’s representation of its client or the former law firm’s representation of the former client in that matter with a transferring lawyer referred to in rule **3.4-20** except as permitted by rule **3.3-7**.

**3.4-23**A lawyer or a law firm must exercise due diligence in ensuring that each member and employee of the law firm, and each other person whose services the lawyer or the law firm has retained:

1. complies with rules **3.4-17 to 3.4-23**; and
2. does not disclose confidential information:
   1. of clients of the firm; or
   2. any other law firm in which the person has worked.

Ontario v Chartis Insurance (2017)

*Plaintiff lawyer moves to defence firm; ethical wall set up including undertakings. Plaintiff lawyer works closely with defendant lawyer & defendant on other matters.* ***Was the ethical wall sufficient to rebut presumption?***

* **TEST**: **Would a reasonably informed person be satisfied that no use of confidential info would occur?**
* Technical compliance with rule was not adequate and will not be adequate in every case (didn’t comply with spirit of rule)
* 2 lawyers worked closely together 🡪 reasonably informed person test not satisfied. No clear & convincing evidence to **rebut presumption** of info sharing.
* Primary policy is **integrity of the legal profession**

### Duties to Current Clients

R v Neil [2002 SCC]

**Lawyer may not represent client whose interests are directly adverse to immediate interests of another current client.**

*Neil accused of criminal offences. Initially represented by V firm. Lazin, a member of V firm, also represented Lambert in divorce & possible charges related to same incidents. Lazin attended meeting with Neil to obtain evidence to assist in Lambert’s defence. Lazin also had another client report false affidavit prepared by Neil to police. V eventually withdrew from representation of Neil. Lazin tried to pin Neil with charges to keep Lambert innocent. Neil claimed his lawyer had failed to adequately represent him & sold him out to interest of another client.* **// *What are proper limits of lawyer’s duty of loyalty to current client where lawyer did not receive any confidential info relevant to the matter in which he proposes to act against current client’s interest?***

* **H**: **Duty of loyalty breached.**  Fiduciary cannot serve 2 masters at same time. Duty of loyalty – essential to administration of justice – high public importance. **Duty of loyalty**: focus must be on client only

**Bright Line Rule**: **lawyer may not represent one client whose interests are directly adverse to immediate interests of another current client** *even if the mandates/matters are unrelated*, **unless** **both clients consent** after receiving **full disclosure** (& pref. independent legal advice), & lawyer reasonably believes they can represent each client w/o adversely affecting the other.

* **Disclosure**: full & fair disclosure of all relevant info in sufficient time for them to make a genuine/ independent decision
* Broad **duty of loyalty** defined:

🡪 Duty to avoid conflicts

🡪 Confidentiality

🡪 Duty of commitment to the client’s cause (zealous representation, not soft peddle)

🡪 Duty of candour (to provide full disclosure on any matters material to your retainer)

* **Conflict of interest** defined: substantial risk that lawyer’s representation of the client would **be materially and adversely affected** by the lawyer’s own interests or by the lawyer’s duties to another client, a former client or a third person 🡪 adopted in **R 1.1-1** (loyalty added)

**H:** Law firm did owe a duty of loyalty to N and should not have taken up cause of LB in proceedings

* **Here**: actual conflict sowhile bright line test does not apply – it does satisfy the substantial risk test
* Breach of Duty of Loyalty: duties they undertook to other clients conflicted with duty of loyalty owed to N
* Created **professional litigant exception** 🡪 Government, banks etc. where no confidential information
* Bright line rule subject to considerable debate in profession (CBA and Federation disagreed over approach)

Strother v 3496420 Canada Inc. [2007 SCC]

**Where concurrent clients are business competitors but there is no legal conflict, a lawyer is not in breach of their duty of loyalty unless there is a substantial risk that the lawyer’s representation will be materially & adversely affected.**

*Monarch was a film development & financing co.; retained Davis&Co to handle most of its legal business. Strother (senior partner) was responsible for most of tax advice. Tax loophole shut down & Monarch started winding down. Darc (formerly senior employee of Monarch) & Strother developed new approach to same loophole & Strother took a financial interest (50% personal profit) in new co. which successfully used new loophole. Davis&Co had policy that forbade such arrangements: Strother left Davis&Co & joined Darc – earned $60 million in his venture. Monarch not told of new loophole or to get another opinion. Monarch sued Strother and Davis&Co for violations of obligations allegedly owed to Monarch (breach of fiduciary duty).* **/ *Did Davis&Co and Strother******violate obligations owed to Monarch?***

**SCC:** Davis&Co didn’t, but Strotherdid. Strotherput his own financial interest in one client ahead of his duty to other client Monarch in breach of fiduciary duty.

* Foundation for **fiduciary duties** is protection of **integrity of justice system**: fiduciary duties include the **duty of loyalty** (client’s business ahead of own)
* Scope of retainer important 🡪 ambiguity resolved in favour of client

**Reasoning:**

* Retainer in 1998 – depended on Strother’sadvice of marketing tax schemes – does not matter that he was not asked for advice on new film tax shelter opportunities as Strotherwas still their tax lawyer
* Monarch was entitled to know about new advice: new marketing scheme publicly disclosed & not protected by S/C confidentiality
* Strothernever should have put himself in a position where he could not have had full material disclosure of info that may have affected their want of Monarch’s continued employment (shouldn’t have taken on this new client at all) 🡪 **ongoing obligation**
* **Breach of Retainer**: retainer not concluded; advice that business was dead had changed – should’ve been expressed
* Davis&Co could have taken on Darc but had ongoing fiduciary duty to Monarch: **Conflict of interest principles do not preclude a law firm or lawyer from acting concurrently for different clients in the same line of business:** Can act concurrently for clients with competing commercial interests but not competing legal interests 🡪 **Duty of loyalty** exists for both
* Difficulty in representing Monarch arose from a Strotherconflict, not a Davis&Co conflict – no reason to believe new retainer would interfere with proper representation of Monarch
* Strotherhad a duty to his original client: **breach** was failure to provide material disclosure to that client of his financial interest in a potential competitor deprived the client of any opportunity to consider whether it wanted to continue consulting Strother
* Court re-emphasized definition of **conflict of interest** & **bright line rule** from ***Neil***
* Remedy: $1 million to Monarch

**Dissent (McLachlin):** more limited scope of Strother’s obligations meant that Strotherhad not violated his duties to Monarch 🡪 K of retainer delineated core of lawyer’s responsibilities (never asked for advice on new tax schemes – not necessary to provide to Monarch)

Canadian National Railway Co v McKercher LLP [2013 SCC]

*M was acting for CN on several matters (CN had long history w/ M) & w/o CN’s consent or knowledge, it accepted a retainer to act for W in a $1.75 billion class action against CN (legally & factually related to current retainers). M terminated all retainers with CN except one which CN terminated. CN applied to strike M as the solicitor of record in the class action due to a conflict of interest***. / *Should M be struck due to conflict of interest? Can a law firm accept a retainer to act against a current client on a matter unrelated to the client’s existing files? Can a firm bring a lawsuit against a current client on behalf of another client?***

**H: Conflict.** Application of **bright line test** at SCC level.

* 3 salient dimensions: duty to avoid conflicting interests, a duty of commitment to the client’s cause and a duty of candor
* **Bright line rule** (*limited in scope*): Absent proper consent, a lawyer may not act directly adverse to the immediate interest of a current client … unless the lawyer is able to demonstrate that there is no substantial risk that lawyer's representation of the current client would be materially and adversely affected by the new unrelated matter

🡪 applies only to **legal interests** as opposed to commercial or strategic interests

* In determining whether the bright line rule applies, the law firm must ask whether:

🡪 the immediate legal interests of the new client are directly adverse to those of the existing client;

🡪 the existing client has sought to exploit the bright line rule in a tactical manner; and

🡪 the existing client can reasonably expect that the law firm will not act against it in unrelated matters.

* If the firm concludes that the bright line rule is inapplicable, it must ask whether there is a substantial risk of impaired representation (materially and adversely affected) 🡪 if no, then they can represent the new client.
* Determination of whether there exists a conflict becomes more **contextual** and looks to whether the situation is “liable to create conflicting pressures on judgment” as a result of “the presence of factors which may reasonably be perceived as affecting judgment.” Onus falls upon the client to establish, on a balance of probabilities, the existence of a conflict — there is only a **deemed conflict of interest** if the bright line rule applies.

**M argued**: Bright line rule not a categorical (absolute) prohibition; no conflict of interest in absence of substantial risk that representation on matters acting on would be materially & adversely affected by representation of other client

* CN a “professional litigant;” no confidential information

**CBA (intervenor)**: Unrelated matter rule is presumptive not categorical 🡪 must be **substantial risk of material impairment** of client representation, otherwise too broad. Factors to consider include:

🡪 Size of client – an individual vs. large corporation

🡪 Confidential information

🡪 Nature of the matters

🡪 Same lawyer?

**Intervener – Federation**

* Focus on **public interest**; maintain trust that exist between lawyers and clients

🡪 Not maintained if act against current client even if matters unrelated

🡪 Fiduciary duty of loyalty to client protects integrity of administration of justice 🡪 otherwise public confidence is lost

🡪 If a conflict, only act with expressed or implied consent

🡪 Rule clear, functional and easily applied and understood

* Rule can be **rebutted** by showing no real risk that client’s representation will be materially impaired
* M’s conduct fell clearly in the bright line rule – **adverse in legal interest**, and it was reasonable for CN to have expected they would not concurrently represent a party suing it for $1.75 billion
* M’s termination of retainers breached its **duty of commitment** (“dumping” client) & also breached **duty of candour** by not advising CN of retainer with W

**SCC:** discussed **Bright Line Rule:**

* **Duty of loyalty** involves the **3 C’s:** Avoid **conflicting** interests; **Commitment to client’s cause; candour**

**1. Avoid conflicts of interests**

* Bright line deemed conflict of interest (applies to both related & unrelated matters)
* Must exercise professional judgment free of conflicting pressure
* Reinforces **duty of confidentiality – 2 tests** (***Martin***):

**🡪1) *Did lawyer receive relevant confidential information in solicitor/client relationship?***

**🡪 2) *Is there risk it will be used to the prejudice of that client?***

🡪 Difference between relevant confidential information and understanding of corporate philosophy

🡪 Information must be capable of being used in tangible way (*ie. info that can damage client*)

**2. Commitment to Client’s Cause**

* Not soft pedal (**zealous**)
* Ensure representation of client not impaired because of another client or other interests
* Not summarily drop a client in order to avoid conflict – ethical rule of law societies

🡪 Limitations on lawyer terminating a relationship with a client

**3. Duty of Candour**

* Must **disclose** factors **relevant** to effective representation
* Advise client before accepting retainer even if outside Bright Line
* **Ongoing duty to be candid** with the client
* Must maintain **confidentiality** 🡪 if can’t disclose, do not act

**Remedy:** Court has inherent jurisdiction to **remove firm**

* **Disqualification** – **3 grounds** (first 2 – disqualification normally be required)

1. Avoid improper use of confidential information

2. Avoid risk of impaired representation

3.Maintain reputation of administration of justice

* Send message that disloyal conduct is not condoned by courts – protect public confidence
* However, court has **discretion** not to disqualify: Relationship ended? Delay in bringing application, prejudice to new client, law firm accepted retainer in good faith

**Held: Disqualification not required.**

**SCC: rejected argument that Rule rebuttable**: cannot be rebutted or otherwise attenuated. It applies to concurrent representation in **both related *and* unrelated matters**. Reflects trust relationship

* Difficult to compartmentalize interest of different clients when interest fundamentally adverse
* **Limited in scope**: immediate legal interests must be **directly adverse** in the matters on which the lawyer is acting

🡪 No tactical use of rule (i.e. big company retaining all major law firms to attempt to use conflict to their advantage)

🡪 Unreasonable expectation of client that firm not act – **exception** not norm

**If** **bright line rule does NOT apply:** Bright line deemed **conflict of interest** 🡪 if you fit within the bright line rule, then you can’t act **unless consent is obtained.** Otherwise issue – if you don’t fit within the bright line rule, the test is ***whether there is a substantial risk that the lawyer’s representation is materially and adversely affected?***

* **Contextual;** must exercise professional judgment free of conflicting pressures – initially lawyer decision
* Ultimately, **onus on client to prove on balance of probabilities**

## Lawyer-Client Conflicts

* Arises in various circumstances 🡪 frequent example is misuse of trust funds
* Problem for clients but also harmful to reputation to the profession 🡪 results in significant penalties

Stewart v Canadian Broadcasting Corp [1997 ON]

**Fiduciary relationship continues even after termination of retainer and is not restricted to confidentiality. /** *S ran over J with car; convicted of criminal negligence causing death. G represented him during sentencing. G was host/narrator of CBC show re-enacting plaintiff’s claim 10 yrs later.**S sued G + CBC.* ***/ Did G breach a duty of loyalty to his former client? /* H: Yes, he did.**

* When lawyer involved himself again in the subject matter of the retainer, the **fiduciary duty of loyalty** was triggered. This duty can prevent lawyer from discussing subject matter of retainer despite wide knowledge about non-confidential information.
* G claims public benefit from show (educational purpose) 🡪 any “educational content” was fully independent of G (he could have withdrawn); involving himself in the subject matter of concluded retainer triggered fiduciary obligation of loyalty
* Breach of fiduciary duty of loyalty by “putting own self-promotion or self-aggrandizement before the interest of the plaintiff’s”
* Publicized former client; undercut benefits/protections he’d provided as counsel; therefore, increased adverse public effect

Law Society of Upper Canada v Hunter [2007]

**When a lawyer acts for someone with whom they’ve had a personal relationship, this may interfere with the duty to provide objective, disinterested, professional advice to client. /** *H was treasurer of Law Society. Had consensual romantic relationship w/ client; had her sign acknowledgement they had relationship & advised her to seek independent legal advice even though he did not. H ended relationship (attended her home w/ his lawyer to seek confirmation of their romantic relationship as described), told her he’d been involved with 2 other women. Consulted Law Society.* ***/ Was there professional misconduct?* / *H:* Yes, there was.**

* Romantic relationship with client created **conflict of interest** – Lawyer may not provide objective advice - no consent with independent advice obtained
* Code R3.4-1 Commentary (e) & Consent Rule 3.4-2: do not create an absolute prohibition against initiating or continuing a sexual or romantic relationship with a client but raises need to exercise **caution**
* Obligations: discuss with the client at the outset of the romantic relationship whether they should continue to act on their behalf, refer to the potential conflict of interest and potentially advise independent legal advice
* Here, there was a **clear conflict of interest**: she was vulnerable in the middle of her family law dispute, considered this to be a serious relationship – he should have told her to seek independent legal advice at the outset of the relationship
* Mitigating factors: Cooperated with the Law Society 🡪 **Remedy:** 60-day suspension and fine of $2500
* Useful discussion on dangers associated with developing to close a personal relationship with client when obligated to provide objective disinterested advice 🡪 should have told client to obtain independent legal advice

***LSS v Balon [2016]***

*Lawyer agreed to sell to an existing client an office building that included a bar. $40,000 deposit. Client learned that bar might not be able to pay rent but did not hear this from the lawyer. Client did not receive independent legal advice.*

* Lawyer admitted: entered into business transaction w/ client when there were **conflicting interests**; drafted & signed Offer to Purchase w/ client that was beneficial to lawyer & not ensuring client received independent advice; preferred his own interests over client ($40,000).
* **Decision:** Despite resignation, still subject to discipline; reprimanded; fined & ordered to pay costs.

**3.4-26.1**:A lawyer must not perform any legal services if there is a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s

1. relationship with the client, or
2. interest in the client or the subject matter of the legal services.

**[1]** Any relationship or interest that affects a lawyer’s professional judgment is to be avoided under this rule, including ones involving a relative, partner, employer, employee, business associate or friend of the lawyer.

* A client cannot consent to there being a conflict of interest in a relationship scenario

**3.4-27**: When a client is required or advised to obtain **independent legal advice** concerning a matter, that advice may only be obtained by retaining a lawyer who has no conflicting interest in the matter.

**3.4-27.1**: A lawyer giving independent legal advice under this section must:

1. advise the client that the client has the right to independent legal representation;
2. explain the legal aspects of the matter to the client, who appears to understand the advice given; and
3. inform the client of the availability of qualified advisers in other fields who would be in a position to advise the client on the matter from a business point of view.

**3.4-28**: Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is **fair & reasonable** to the client, client consents to the transaction & client has independent legal representation with respect to the transaction. (Client cannot consent to not getting legal representation).

**[1]**This provision applies to any transaction with a client, including:

1. lending or borrowing money;
2. buying or selling property;
3. accepting a gift, including a testamentary gift;
4. giving or acquiring ownership, security or other pecuniary interest in a company or other entity;
5. recommending an investment; and
6. entering into a common business venture.

**[2]**The relationship between lawyer and client is a **fiduciary one**, and no conflict between the lawyer’s own interest and the lawyer’s duty to the client can be permitted. The remuneration paid to a lawyer by a client for the legal work undertaken by the lawyer for the client does not give rise to a conflicting interest.

**3.4-31**:A lawyer must not borrow money from a client unless

1. the client is a lending institution, financial institution, insurance company, trust company or any similar corporation whose business includes lending money to members of the public, or
2. the client is a related person as defined by the *Income Tax Act* (Canada) and the lawyer is able to discharge the onus of proving that the client’s interests were fully protected by the nature of the matter and by independent legal advice or independent legal representation.

**3.4-34**:If a lawyer lends money to a client, before agreeing to make the loan, the lawyer must:

1. disclose and explain the nature of the conflicting interest to the client;
2. require that the client receive independent legal representation; and
3. obtain the client’s consent.

**3.4-37**:A lawyer must not include in a client’s will a clause directing the executor to retain the lawyer’s services in the administration of the client’s estate.

**3.4-38**:Unless the client is a family member of the lawyer or the lawyer’s partner or associate, a lawyer must not prepare or cause to be prepared an instrument giving the lawyer or an associate a gift or benefit from the client, including a testamentary gift.

**3.4-39**:A lawyer must not accept a gift that is more than nominal from a client **unless** client has received independent legal advice.

**3.4-40**: A lawyer must not act as a surety for, deposit money or other valuable security for, or act in a supervisory capacity to an accused person for whom the lawyer acts.

# Ethics in Advocacy

**5.1-1**  When acting as an advocate, a lawyer must represent the client **resolutely and honourably** within the limits of the law, while treating the tribunal with **candour, fairness, courtesy,** and **respect**.

**[1]  Role in adversarial proceedings** – In adversarial proceedings, the lawyer has a duty to the client to **raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case** and **to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.**

* The lawyer must discharge this duty by **fair and honourable means**, **without illegality** and in a manner that is consistent with the lawyer’s **duty to treat the tribunal with candour, fairness, courtesy and respect** and in a way that promotes the parties’ right to a fair hearing in which justice can be done.
* Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected

**[3]** The lawyer’s function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client’s case.

**[4]** In adversarial proceedings that will likely affect the health, welfare or security of a child, a lawyer should advise the client **to take into account the best interests of the child**, if this can be done without prejudicing the legitimate interests of the client.

**[6]** When opposing interests are not represented, for example, in without notice or uncontested matters or in other situations in which the full proof and argument inherent in the adversarial system cannot be achieved, the lawyer must take particular care to be accurate, candid and comprehensive in presenting the client’s case so as to ensure that the tribunal is not misled.

**[8]** In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.

**5.1-2**  When acting as an advocate, a lawyer **must not**:

1. abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;
2. **knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable**;
3. appear before a judicial officer when the lawyer, the lawyer’s associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;
4. endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;
5. knowingly attempt to **deceive** a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
6. knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;
7. knowingly assert as fact that which can’t reasonably be supported by the evidence or taken on judicial notice by tribunal;
8. make suggestions to a witness recklessly or knowing them to be false;
9. deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;
10. improperly dissuade a witness from giving evidence or advise a witness to be absent;
11. knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;
12. knowingly misrepresent the client’s position in the litigation or the issues to be determined in the litigation
13. abuse, hector or harass a witness;
14. when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal charge or by offering to seek or to procure the withdrawal of a criminal charge;
15. needlessly inconvenience a witness; or
16. appear before a tribunal while under the influence of alcohol or a drug.

###### **Duty as Prosecutor**

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

###### **Disclosure of Error or Omission**

**5.1-4**  A lawyer who has unknowingly done or failed to do something that, if done or omitted knowingly, would have been in breach of this rule and who discovers it, must, subject to **section 3.3** (Confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it.

###### **Courtesy**

**5.1-5**  A lawyer must be courteous & civil & act in good faith to the tribunal and all persons with whom the lawyer has dealings.

###### **Undertakings**

**5.1-6**A lawyer must strictly and scrupulously fulfill any undertakings given and honour any trust conditions accepted in the course of litigation.

* Visions of the Advocate
  + Centrality of their interests depends on which vision of the advocate one subscribes to
    - Loyal advocacy
    - Pursuit of public interest (moral agent in pursuit of justice)
    - Seeing the lawyer as required to pursue and balance a variety of competing interests
  + Modern codes of conduct primarily define the litigation lawyers role in terms of the zealous advocate
* Must also be faithful to administration of justice – the **duty to the Court is paramount** – higher cause of truth and justice – therefore, the **lawyer must produce all relevant authorities**, even those contrary to their client’s position

**5.2-1**  A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless

1. permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal;
2. the matter is purely formal or uncontroverted; or
3. it is necessary in the interests of justice for the lawyer to give evidence.

**5.2-2**  A lawyer who is a witness in proceedings must not appear as advocate in any appeal from the decision in those proceedings, unless the matter about which he or she testified is purely formal or uncontroverted.

**5.6-1**  A lawyer must encourage public respect for and try to improve the administration of justice. 

**5.6-2**  A lawyer who seeks legislative or administrative changes must disclose the interest being advanced, whether the lawyer’s interest, the client’s interest or the public interest. 

**5.6-3**  A lawyer who has reasonable grounds for believing that a dangerous situation is likely to develop at a court facility must inform the persons having responsibility for security at the facility and give particulars.

**5.7** A lawyer who acts as a mediator must, at the outset of the mediation, ensure that the parties to it understand fully that:

1. the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and
2. although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, they will not be covered by solicitor-client privilege.

**7.2-11**A lawyer must:

1. not give an undertaking that cannot be fulfilled;
2. fulfill every undertaking given; and
3. honour every trust condition once accepted.
   * **[1]** Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms….

## Ethics in Advocacy: Civil Context

* **Advocacy at trial:** where a lawyer is supposed to act most zealously in favour of a client and also where the lawyer has the greatest responsibility to protect and ensure proper functioning of the justice system
* One of the biggest differences is that you are facing a party who is *also* zealously representing their client
  + Both lawyers have the same duties within certain ethical constraints
* *Code of Conduct* is the **same** for criminal and civil lawyers
  + Obligation on client to disclose ***all* relevant documents** (even ones that hurt them)
  + Duty as counsel to ensure client lives up to disclosure obligations
  + Client also needs to be told what’s relevant
* Reputation is so important 🡪 don’t want to be known as a lawyer that doesn’t provide full disclosure
* **The challenges, then, when thinking about ethics in advocacy** are (1) first to identify the various and often competing interests to which a litigator must be faithful; (2) to try to sort out how to balance and resolve those competing interests.

### Ethics in Pre-Trial Procedures

* **Pleadings**: pursuit of an action without legal merit can place a client at risk of liability in an action for abuse of process

DCB v Zellers Inc [1996 MBQB]

**A competent & responsible lawyer should know when there is no legal principle to support their client’s position & shouldn’t pursue action in such case.**

*Plaintiff sues defendants for money she paid to them as comp for damages the defendant sustained resulting from thefts committed by her young son. They sent letter claiming $225 otherwise they would pursue the matter in court.* **/ *Can plaintiff recover on the ground that Zellers never had a valid claim against her personally?* / H: Yes.**

* Zellers could not have seriously thought this claim would succeed because they did not have a viable claim against the parents/plantiffs.
* Plaintiff was **misled** by the tone and content of the lawyer’s letter
* The plaintiff is entitled to a refund on the ground of monies paid under a mistake

### Ethics at Discovery

* Obligation on client to disclose **all relevant documents** (even ones that hurt them)
  + Duty as counsel to ensure client lives up to disclosure obligations
  + Client also needs to be told what’s relevant
  + Have to disclose confidential documents in discovery
  + Don’t disclose privileged documents, but have to disclose existence of them
* Convincing your client to do something they don’t want to do may be difficult, but is part of your job as counsel
  + Clients should trust you; show them that you are skilled and their advocate
* Highly regulated by provincial regulation, but the process of discovery is usually conducted in private areas (large room for unethical behavior)

Grossman v Toronto General Hospital [1983 ON]

**A party must candidly describe in affidavit of production not only docs for which no privilege is claimed but also those for which privilege is claimed**. **Lawyers have a duty to make full, fair & prompt disclosure**, **& when asserting privilege, lawyer should at least describe the docs so that may be contested & mediated by the court**.

*Death of G who is claimed to have been lost while a patient in Toronto Hospital. Body discovered after 12 days in air duct shaft. Hospital affidavit on production revealed only hospital record.* ***/ Can plaintiffs make an order requiring a better affidavit on production?* / H: Yes, they can**.

* Defendant claims plaintiffs failed to establish any docs **exist** that should be produced other than deceased medical record

🡪 Claim any other paper relevant to issues in lawsuit are **privileged** as the Hospital retained solicitors at a very early point

🡪 However, the answer made is a mere boiler plate calculated to conceal all and any documents from inspection

* Rules of Practice are designed to **facilitate production**, not frustrate it
* Whole course of the defendants’ conduct has been to refuse to disclose anything on the ground that unless plaintiffs can prove something exists they have no right to know if its existence 🡪 unfair attitude that can work injustice

**H:** Plaintiffs are awarded costs to plaintiffs but did not order them to the solicitor specifically.

### Ethics at Negotiation

**Settlement negotiations**

* Can be accomplished in court, mediations, etc.
* Act as advocate in the negotiations and carry the same obligations as if in court (cannot lie, mislead the other side, etc.)
* Don’t misrepresent the client’s instructions
* Know how to present risks and strengths of client’s position to them (and to opposing counsel)
* No Model Code rules on the conduct of negotiation

**Encouraging Compromise or Settlement**

**3.2-4**A lawyer must **advise** and **encourage** a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must **discourage** the client from commencing or continuing **useless** legal proceedings.

* **[1]** A lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options.

## Ethics at Trial

* There is a need to balance the duty to the client with the duty to the court

### Witness Preparation

* Occurs in private; can be a difficult process
* Can tell witness what they will be asked about, what the judge may say, etc.
  + Client is entitled to be told what the **legal theory** of their case is and how it fits together; important facts that support their case; issues, etc.
* When preparing client for examination, review all documents with them (both sides) so they understand **evidentiary framework** that their evidence fits in
* **Difference between *witness preparation* and *witness coaching* (illegal) 🡪 cannot suggest or help them shape their evidence to achieve what they want**
* Obligation not to assist their own client or witness in the giving of false or misleading evidence
  + ***R v Sweezey –*** counseled witness to be forgetful and evasive when testifying
    - Held not only to breach criminal code but also his duty as an officer of the court
* Witness preparation guidelines on pages 410-411 of the textbook

**Lawyer as witness:**

**5.2-1**  A lawyer who appears as advocate must not testify or submit his or her own affidavit evidence before the tribunal unless

1. permitted to do so by law, the tribunal, the rules of court or the rules of procedure of the tribunal;
2. the matter is purely formal or uncontroverted; or
3. it is necessary in the interests of justice for the lawyer to give evidence.

**5.3** Subject to the rules on communication with a represented party set out in rules **7.2-4 to 7.2-8**, a lawyer may seek information from any potential witness, whether under subpoena or not, but the lawyer must disclose the lawyer’s interest and take care not to subvert or suppress any evidence or procure the witness to stay out of the way. 

### Cross Examination

* Right to full answer + defence; does not include right to info that would only distort truth-seeking function of trial process
* Defence counsel do not have the same latitude in cross-examining sexual assault complainants given the equality & privacy interests at stake
  + Not permitted to “whack the complainant” through use of stereotypes re: victims of sexual assault (***R v Mills***)

R v Lyttle [2004 SCC]

**Counsel may put Qs to witnesses for which they have good-faith basis for putting forward** (*any* hypothesis honestly advanced on reasonable inference, experience, or intuition of counsel) **& need not show evidence to bring forward same. However, counsel may not cross in a manner that is calculated to mislead.**

*B was beaten by 5 men with baseball bats, 4 of them masked. Defense claimed that B ID’d the accused (the unmasked man) as man who attacked them to protect others from prosecution. TJ ruled that counsel could only cross-examine Crown witnesses if she furnished substantive evidence of her drug debt theory of the case. Defendant did & lost right to address jury last.* ***/******Did TJ err in allowing counsel for the accused to cross-examine only on matters for which she had a substantive evidentiary basis?*** /Yes, they did.

* Sometimes cross-examination is the only way to prove things
* Information falling short of admissible evidence may be put to the witness, and may incomplete or uncertain so long as the cross-examiner does not put suggestions to the witness that they know to be false
* “**Good faith basis:**” as long as counsel has a good faith basis for asking an otherwise permissible question in cross examination, the **questions should be allowed**

R v R (AJ) [1994 ONCA]

**Cross exam by Crown involving argumentation w/ accused, personal opinion or abusive tone may prejudice accused’s defence & undermine appearance of a fair trial**

*Accused charged with multiple counts of incest & sexual assault against his daughter & granddaughter. Counsel for appellant (convicted) claims Crown’s cross exam of appellant resulted in miscarriage of justice – contends overall conduct was improper & prejudicial.* **/** ***Did cross exam lead to miscarriage of justice?*/ H: Yes it did.**

* Crown counsel is entitled and expected to conduct a vigorous cross examination BUT **there are limits**: when it moves from aggressive to **abusive**
* Cross examination was **abusive and unfair**:

🡪 Crown counsel adopted sarcastic tone and entered editorial commentary

🡪 Was calculated to demean and humiliate the appellant

🡪 Repeatedly gave evidence and stated her opinion during cross examination

🡪 Cross exam prejudiced appellant in his defense and significantly undermined the **appearance of fairness** at trial

### Representations about the Law

Lawyers have a duty not to deliberately refrain from informing a tribunal of binding authority that the lawyer considers to be **directly on point** and which has not been mentioned by the authority party.

* Cannot withhold authorities, even those that are against the client
* Case where lawyer fails to tell Master that he failed on the same argument with same client in Court of Appeal (***GM v Isaac***)
* Disclosure obligation weighs most heavily when you have an unrepresented litigant on the other side or where you are moving on an *ex parte* application 🡪 must be much more forthcoming
* ***Cases in another jurisdiction that are merely persuasive?*** 
  + Only cases that are on point and dispositive MUST be disclosed
  + Most judges expect more & would appreciate being told that there is a similar case or a persuasive case from another court

General Motors Acceptance Corp of Canada v Isaac Estate [1992 ABQB]

**Lawyers have a duty to bring forward relevant law in that jurisdiction to the attention of the court.**

*Car returned by owners to plaintiff and dealer because parents very sick. Counsel of both sides cited a bunch of cases. Judge said they failed to cite an important case. When the judge mentioned the case, the lawyer came clean and said that he was counsel on that case and he lost in that case.*

What happened here was also met in another 🡪 counsel for defendant was actually in that other case

* It was lawyer’s responsibility as an officer of the Court to bring the case to judge’s attention.
* It is **improper** to not bring forward a relevant case on the ground that it is distinguishable 🡪 this is up to the judge!
* It’s not okay to argue that because the case is distinguishable it should not be included. It’s the judge’s role to make that determination. Not counsel.
* Lougheed Enterprises v Armbruster: (1) Judges do not expect counsel to search out unreported cases, although if there is an unreported case on that point, he should bring it to the court’s attention; (2) “on point” does not man cases whose resemblance to the case at bar is in the facts. It means cases which decide a point of law; (3) counsel cannot discharge his duty by not bothering to determine whether there is relevant authority. In this context, ignorance is no excuse.

# Professionalism and Civility

* Lawyers cannot lie or miss any of their obligations (i.e. trial) (Re Ahuja)

**2.1-4** **Conduct to Other Lawyers**

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

**Courtesy and Good Faith**

**7.2-1** A lawyer must be **courteous and civil** and act in **good faith** with all persons with whom the lawyer has dealings in the course of his or her practice.

* Summary of useful commentary:
  + **[1]** fair and courteous dealings
  + **[2]** no personal animosity as otherwise judgment clouded
  + **[3]** no ill considered criticism
  + **[4]** agree to reasonable requests
  + **[5]** not proceed in default

**Communications**

**7.2-4** A lawyer **must not**, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is **abusive, offensive**, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

**Inadvertent Communications**

**7.2-10**A lawyer who has access to or comes into possession of a document that the lawyer has reasonable grounds to believe belongs to or is intended for an opposing party and was not intended for the lawyer to see, must:

1. in the case of a paper document, return it unread and uncopied to the party to whom it belongs,
2. in the case of an electronic document, delete it unread and uncopied and advise the party to whom it belongs that that was done, or
3. if the lawyer reads part or all of the document before realizing that it was not intended for him or her, cease reading the document and promptly return it or delete it, uncopied, to the party to whom it belongs, advising that party:
   1. of the extent to which the lawyer is aware of the contents, and
   2. what use the lawyer intends to make of the contents of the document.

**Courtesy**

**5.1-5** A lawyer must be **courteous + civil** & act in **good faith** to the tribunal & all persons with whom the lawyer has dealings.

* **[1]** Legal contempt of court & professional obligation are not identical & consistent patternof **rude, provocative or disruptive** conduct by a lawyer, even though unpunished as contempt, may constitute **professional misconduct.**

## Civility

**Civility** has two central meanings:

1. Requirement that lawyers treat each other and those participating in the justice system with a degree of **politeness**
2. Has been defined to include obligations on lawyers to act **fairly, honestly** and with the utmost **integrity** in their dealing with other lawyers and with members of the court

**Civility is an element of professionalism:**

* Treating people with courtesy & respect
* Said to ensure lawyers uphold their duties as officers of the court and to maintain and improve the standing of the administration of justice in the eyes of the public

1. Court’s inherent jurisdiction includes obligations for lawyer civility
2. Codes of conduct contemplate a high level of lawyer civility
3. Best practice civility codes provide guidance for courts
4. Lawyer’s own personal ethics play an important and positive self-regulating role in the area of civility

* Is there a conflict between civility and zealous representation?
  + We argue no, as you can still zealously represent your client in a polite manner. Civility requires that we treat opposing counsel and the judges with respect. This does not prevent a lawyer from acting zealously in their client’s interest, but in the words of Dore, that this should be done “with dignified restraint”.

**Woolley: *Does Civility Matter?***

* Civility is used to refer both to **good manners** and to other, substantive obligations such as assisting the court by accurately drafting orders and not submitting perjured evidence.
  + To the extent that civility refers to good manners, that shouldn’t be regulated because it may harm ability of lawyers to be critical (in a good way) of one another or to **advocat**e for their client.
* Determining whether a statement or course of conduct is “**civil**” is too subjective, and the standard provides no guidance for lawyers. When civility is being used to refer to other ethical rules, then those rules should be stated explicitly instead since otherwise the emphasis on civility obscures what has actually occurred.
* Incivility deserves sanction not because it is rude, but because it impacts the functioning of the justice system, is contrary to the interests of the client or whatever the specific circumstance gives rise to.

Law Society of Upper Canada v Joseph Groia [2016]

**Law Society is able to address in-court incivility & should do so to secure nobility of profession. PRACTICE OF LAW IS A PRIVILEGE, NOT A RIGHT.**

*G acted for client in quasi-criminal matter; made repeated unjustified personal attacks on opposing client & allegations of serious prosecutorial misconduct. Was sufficiently pervasive as to overtake orderly & normal progress of trial. G’s conduct during trial: improper, inappropriate & misconceived in law in many instances 🡪 failed to bring formal motion and purported to put the prosecution on notice which prolonged the proceedings.* / **H: Guilty of professional misconduct** for acting incivilly in court.

* Balances 2 **ethical obligations**: **(1)** Act with courtesy, civility & good faith& **(2)** duty of zealous advocacy for client’s cause
* 🡪 One obligation does not prevail over the other: neither is absolute & must not be abused 🡪 duty to client doesn’t permit counsel to act **unprofessionally** (duty of commitment does not permit or require breach of duty of civility)
* One of the issues was the judge didn’t reprimand or anything: interfering with independence of judiciary
* **Context** always important: Single incident may not trigger discipline, but here: ongoing nature of disparaging comments
* Comments made in bad faith or without reasonable basis not appropriate

Law Society claims:

* He failed to treat the court with courtesy & respect due to his consistent pattern of rude, improper or disruptive conduct
* Failed to act in good faith and failed to conduct himself in affair courteous, respectful and civil manner to the court
* Undermined the integrity of the profession by communicating with OSC prosecutors in a manner abusive/offensive
* Failed to act with courtesy & good faith through engaging in ill-considered, uninformed criticism of conduct of OSC prosecutors at specific time
* **Deferential standard of reasonableness** applies to judicial review of the Conduct Decision
* Requirement of professionalism for lawyers, both inside & outside courtroom, incl. zealous advocacy accompanied by courtesy, civility & good faith dealings, secures nobility of profession in which lawyers are privileged to practice.

Schreiber v Mulroney [2007 ONSC] \*hotly contested litigation: See 7.2-2 below

**This sort of sharp practice is impermissible.**

*M had been served with statement of claim & disputed jurisdiction of Ontario to decide litigation. S counsel agreed that while jurisdictional issue was being resolved, M would not file statement of defence. No indication that counsel told S they had agreement in place with counsel for M that M would not be noted in default. Statement they were not offered opportunity to be present before Master H not true. Breached agreement when he sought default judgment w/o advance notice.* **/ *Can default proceedings be set aside based on his lack of civility?* / H:Yes, it can.** Judgment set aside.

* Lack of notice breached principles of **civility** & was **unjust**
* Wrote extremely misleading letter to O/C
* Instructions from client to obtain judgment not a defence
* Failure to advise court of agreement or opposite counsel of application criticized considerably (**egregious breach**)

**Other Civility Rules**:

* ***7.2-3*** *a very specific rule about not recording conversations.*
* ***7.2-4*** *civility in communications (e.g. emails, letters)*
* ***7.2-5*** *prompt replies to other lawyers*
* **7.2-6**  Subject to rules 7.2-6.1 and 7.2-7, if a person is represented by a lawyer in respect of a matter, another lawyer must not, except through or with the consent of the person’s lawyer:

(a)     approach, communicate or deal with the person on the matter; or

(b)     attempt to negotiate or compromise the matter directly with the person.

* **7.2-7** on second opinions
* **7.2-8** communication with a corporation or other organization
* **7.2-9**When a lawyer deals on a client’s behalf with an unrepresented person, the lawyer must:

1. urge the unrepresented person to obtain independent legal representation;
2. take care to see that the unrepresented person is not proceeding under the impression that his or her interests will be protected by the lawyer; and
3. make it clear to the unrepresented person that the lawyer is acting exclusively in the interests of the client.

## Professional Misconduct Cases

**Courtesy and Good Faith**

**7.2-2** A lawyer must **avoid sharp practice** and not take advantage of mistakes not going to merits or sacrifice client’s rights.

Law Society of BC v Laaraker [2011 LSBC]

**Professional misconduct is a marked departure from the conduct the Law Society expects of its members.**

*L responded to demand letter to parents of daughter caught shoplifting & posted a comment on blog about lawyer who made demand (first line: “I am a lawyer”) – sarcastic, demeaning response that contained discourteous & personal remarks about other lawyer.* / ***Does this constitute professional misconduct and/or conduct unbecoming?* / H: Yes;** conduct was clearly a marked departure - prof. misconduct.

**Professional Conduct test:**

* ***Martin***: revised in Re: Lawyer 10 – **marked departure** from lawyer, and must also be culpable or blameworthy

**Conduct Unbecoming test: contrary to best interests** of public or legal profession, or to harm standing of legal profession

* Letter to O/C **not** considered **conduct unbecoming** as was undertaken within his practice (but IS **professional misconduct**), but **blog posting** is **both** b/c performed partly privately & partly in course of practice (ID’d himself as a lawyer & rec’d referrals from it)

**Incivility**

* ***Lanning* [2008]** – lawyer’s communication must be **courteous, fair, respectful**
* ***Green* [2003]** – Not in best interests to express ourselves in fashion that promotes acrimony/intensifies the difficulty of stressful circumstances 🡪 public writings or comments have a negative effect on system as a whole
* Both cases **incivility found to be professional misconduct**

# Issues in Regulation

**Law Society Powers:**

* Comprehensive power to regulate lawyers – self-regulatory organization
* Determine criteria for admission to the legal profession
* Requirements for Canadian law schools
* Decide whether an individual applicant has “good character” sufficient to permit admission to the profession
* Determine the organizations within which lawyers may work and provide legal services to the public
* Establish the codes of conduct – with the power to discipline lawyers for misconduct

**Integrity**

**2.2-1** A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession **honourably and with integrity**.

**[1] Integrity** is the fundamental quality of any person who seeks to practice as a member of the legal profession. If a client has any doubt about his or her lawyer’s ***trustworthiness***, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer’s ***usefulness*** to the client and ***reputation*** within the profession will be destroyed, regardless of how competent the lawyer may be.

**[2]** **Public confidence**in the administration of justice and in the legal profession may be eroded by a lawyer’s irresponsible conduct. Accordingly, a lawyer’s conduct should reflect favourably on the legal profession, inspire the *confidence, respect and trust* of clients and of the community, and avoid even the appearance of impropriety.

**[3]** Dishonourable or questionable conduct on lawyer’s part in either private life or professional practice will reflect adversely upon integrity of the profession & administration of justice. Whether within or outside professional sphere, if conduct is such that knowledge of it would likely **impair client’s trust** in the lawyer, Society may be justified in taking disciplinary action.

**[4]** Generally, however, the Society will **not** be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer’s professional integrity.

**Regulatory Compliance**

**7.1-1**A lawyer must

1. reply **promptly** and completely to any communication from the Society;
2. provide documents as required to the Law Society;
3. not improperly obstruct or delay Law Society investigations, audits and inquiries;
4. **cooperate** with Law Society investigations, audits and inquiries involving the lawyer or a member of the lawyer’s firm;
   * + - * **NOTE:** *Firms are audited at least once every 6 years or more often if there is a complaint about a lawyer*
5. **comply with orders** made under the Legal Profession Act or Law Society Rules; and
6. otherwise comply with the Law Society’s regulation of the lawyer’s practice.

**Meeting Financial Obligations**

**7.1-2**A lawyer must promptly meet financial obligations in relation to his or her practice, including payment of the deductible under a professional liability insurance policy, when called upon to do so.

**Duty to Report**

**7.1-3**Unless to do so would involve a breach of solicitor-client confidentiality or privilege, a lawyer **must report** to the Society:

1. shortage of trust monies;
   * **(a.1)** a breach of undertaking or trust condition that has not been consented to or waived;
2. the abandonment of a law practice;
3. participation in criminal activity related to a lawyer’s practice;
4. the mental instability of a lawyer of such a nature that the lawyer’s clients are likely to be materially prejudiced;
5. conduct that raises a substantial question as to another lawyer’s **honesty, trustworthiness, or competency** as a lawyer; &
6. any other situation in which a lawyer’s clients are likely to be materially prejudiced.

**Encouraging Client to Report Dishonest Conduct**

**7.1-4**A lawyer must encourage a client who has a claim or complaint against an apparently dishonest lawyer to report the facts to the Society as soon as reasonably practicable.

## Professional Self-Regulation

**Self-Regulation:** regulation of lawyers by lawyers

* Refers to the control, direction or governance of an identifiable group by rules and regulations determined by the members of the group 🡪 most direct means of regulating lawyers in Canada
* **Pros:** 
  + Professions have argued they alone must exercise regulatory control:
    - Only members of a profession possess the knowledge & expertise necessary to assess each other’s conduct 🡪 regulated by experts in your own field who understand the profession best
    - Only the profession possesses the necessary independence or autonomy from the state to regulate its members in a disinterested fashion in the public interest
  + More cost effective
* **Cons**:
  + Public perception of self-regulation; not a good sample size to determine public interest

**Justification for Self-Regulation**:

1. Importance to Rule of Law & Independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society: ***Canada v Law Society of BC***
2. No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers who are themselves subject to the rules established by their governing body**: *Law Society of Manitoba v Savino***
3. Lawyers are best equipped to understand technical complexity involved in lawyer regulation; more efficient by extension; higher standards
4. Balancing the market for lawyers 🡪 in essence, self-regulation creates a **monopoly** over services

**Critique of Lawyer Self-Regulation:**

1. Underlying information asymmetry about lawyer conduct is product of **lawyer monopoly** over legal knowledge
   1. Dominance/monopoly over the market: only lawyers admitted to the law society can provide legal services
2. Effective government or third-party regulation doesn’t depend on regulator possessing same knowledge as the regulated
3. Issue of major law firms potentially being influenced by their large clients
4. Benchers representing lawyers and not the public interest and society

Supported by its members on number of bases:

* Appeal to history – law guilds of medieval England 🡪 however, they were often unjust
* **Specialized knowledge and expertise** of lawyer 🡪 however, this could be due to this separation
* **More efficient and cost effective** as costs are paid by profession 🡪 however, costs are imposed on society at large – limit consumer choice and makes cost of services greater

## The Structure of Self-Regulation

**The Role of Law Societies:**

* Management of the law society’s affairs and the exercise of its vested powers occurs through benchers who are largely elected
* Admission and discipline decisions which affect individual members of the profession are subject to the supervisory jurisdiction of the superior courts in each province
* Sometimes, LS rules are made contingent on government approval
  + Intermittent government inquiries also give some transparency
  + Self-regulation increasingly supplemented/replaced by legislation
  + Legislature provides power to the law society through legislation
* There is the **Federation of Law Societies**, which brings together the provincial law societies
  + It does not have any power through legislation
  + National self-regulation is sort of emerging through cooperative action by FLSC
* **Law Society of BC vs BC branch of the Canadian Bar Association**:
  + LSBC: regulate and act in the public interest 🡪 Need to be – and be seen to be - **protecting the public interest**
  + BC Branch of the CBA: advocating for its lawyer members
* While we still regulate in a largely **reactive** way, we are increasingly moving to proactive means, to prevent the wrong, and therefore the harm, from happening in the first place
  + Working on regulating entities (i.e. firms) as well as individual lawyers
  + LSBC to partner with law firms to ensure they have the appropriate systems, supervision, and training in place so everyone in the firm acts ethically
* Holding yourself out as a lawyer and practicing the law without a license are punishable by the Law Society

**Law Society’s Mandate:**

* ***LPA* s.3:** It is the object & duty of the society to uphold and protect the public interest in the administration of justice by…

1. preserving and protecting the rights and freedoms of all persons,
2. ensuring the independence, integrity, honour and competence of lawyers,
3. establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
4. regulating the practice of law, and
5. supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practice law in British Columbia in fulfilling their duties in the practice of law.

**Public Participation at LSBC**

* The management and conduct of a law society’s affairs and the exercise of its vested powers occurs through the **Benchers**, who are a largely elected body
  + Benchers (i.e. board) - 6 non-lawyers appointed by gov’t out of 31
  + Involved in committees i.e. Complainants Review Committee (CRC) - 3 appointed benchers out of 8 members
  + Hearing panels now made up of one bencher, one non-bencher lawyer, one public member in order to provide for **public oversight**
* Law societies are statutory delegates of provincial and territorial legislatures – they are empowered to regulate lawyers in the public interest – their decisions are **reviewable** by provincial superior courts and legislature can amend or take away powers
  + Legislation has increased in recent years that monitors the profession
  + LSBC is a creature of statute - the ***Legal Professions Act*** which lays out the basic structure of the LSBC. The LSBC has the power to set credentials for membership, discipline and disbar members and make rules of conduct.

**Transparency**

* Citations and Notices of Hearings on website
* Open hearings
* Published decisions
* Lawyer Directory on website with discipline histories

**Accountability**

* Accountability in discipline and decision-making process – most statues provide for appointment of few non-lawyers to **public oversight**
* Ombudsperson & courts can review their processes (judicial reviews & appeals); CRC
* Key performance measures for timeliness, fairness, courtesy, thoroughness and whether someone would recommend the
* complaint process, as judged by complainants

**Federation of Law Societies of Canada (FLSC)**

* National coordinating body of Canada’s 14 provincial and territorial law societies 🡪 need for a more consistent and efficient regulation of lawyer movement between various provincial jurisdictions
* Many national initiatives including:
  + Lawyer Mobility
  + National Admissions Standards
  + Model Code of Professional Conduct
  + Model rules to fight money laundering and terrorism
  + Law school programs & Law Practice Program as **alternative to articles** for licensing & admission to bar for students unable to secure articles
* FLSC National Discipline Standards:
  + To ensure consistent, high standards in our complaints and discipline processes
  + 21 standards dealing with **timeliness, openness, public participation, transparency, accessibility & training**
  + All law societies have significantly improved because of the standards

**Complaints – *Where do they come from?***

* Lawyers reporting lawyers
  + Opposing parties and other lawyers (often reluctant to report misconduct of colleagues)
  + In 2015, 11.3% of complaints came from other lawyers
  + Of the lawyer-lawyer complaints, 35% were in family law
  + Overall, 21.7% of all new complaints were in family law 🡪 usually by the opposing party (higher tensions)
* Courts; AG BC; LSBC
* 3rd parties such as creditors; media
* Clients (not the majority 🡪 less than 50% of the time)

**Regulatory Issues**

* Poor communication; service issues such as delay/ inactivity
* Conflicts of interest
* Dishonesty; theft
* Trust accounting deficiencies
* Breach of undertaking or breach of privilege or confidentiality
* Rudeness or incompetence
* Personal life issues

## Entry Regulation

Applications for enrolment, call and admission or reinstatement done through ***LPA s. 19***; 2 requirements must be met:

1. **Attaining Educational Requirements:**

* Meant to facilitate entry but often a barrier in itself
* Law school: limited number of spots in law schools
* Articling: scarcity and uneven experiences
  + Ontario had an articling crisis, so it created a Law Practice Program
* Bar admission course: supposed to make up for uneven articling but mostly just replicative of law school
* Bar exam: a bar to outright incompetence but not much else
* NCA process: those who have foreign education who then take Canadian exams to practice law here

**Competency**

* The Federation of Law Societies requires law schools to teach competencies in substantive areas of law and in practical schools to be able to give out “approved” law degrees
  + Includes research, writing, problem-solving and a course in ethics and professionalism
    - Very broad mandate required by the FLS on what is required in an ethics course and Woolley argues that professors are not able to teach it all in their courses and it’s also hard to do so in a purely academic setting
      * Woolley states that the FLS is restricting academic freedom
* Harder to mandate what principals have to provide and teach articling students vs influencing law courses in law school

**Discrimination**

* Can a law society refuse to approve a law degree because the law school engages in what the society views as discriminatory practices? 🡪 TWU case
  + FLS approved the law school based on the content that was being covered, resources, etc.
  + Covenant has now become optional for students, but not staff

1. **Good Character:**

* Ensuring only those persons worthy of trust, with moral strength, and integrity are admitted to the profession and practice
* Meant to protect the public but it’s a malleable standard ∴ a dangerous instrument leading to arbitrary and discriminatory denial to practice
* Similar misconduct ≠ similar results (unpredictable even within the same jurisdiction)

**Practice of Law** includes (***LPA s. 1***):

1. appearing as counsel or advocate,
2. drawing, revising or settling
   1. a petition, memorandum, notice of articles or articles under the *BCBCA*, or an application, statement, affidavit, minute, resolution, bylaw or other document relating to the incorporation, registration, organization, reorganization, dissolution or winding up of a corporate body,
   2. a document for use in a proceeding, judicial or extrajudicial,
   3. a will, deed of settlement, trust deed, power of attorney, etc.,
   4. a document relating in any way to a proceeding under a statute of Canada or British Columbia, or
   5. an instrument relating to real or personal estate for filing in a registry or other public office,
3. doing an act or negotiating in any way for the settlement of, or settling, a claim or demand for damages,
4. agreeing to place at the disposal of another person the services of a lawyer,
5. giving legal advice,
6. making an offer to do anything referred to in paragraphs (a) to (e), and
7. making a representation by a person that he or she is qualified or entitled to do anything referred to in paragraphs (a) to (e),

but does not include

1. any of those acts if performed by a person who is not a lawyer and not for or in the expectation of a fee, gain or reward, direct or indirect, from the person for whom the acts are performed,
2. the drawing, revising or settling of an instrument by a public officer in the course of the officer's duty,
3. the lawful practice of a notary public,
4. the usual business carried on by an insurance adjuster who is licensed under Division 2 of Part 6 of the [*Financial Institutions Act*](http://www.bclaws.ca/civix/document/id/complete/statreg/96141_00), or
5. agreeing to do something referred to in paragraph (d), if the agreement is made under a prepaid legal services plan or other liability insurance program;

Authority to practice law w/ exceptions in ***LPA s. 15***; interprovincial practice and cooperation in ***LPA s. 16***

* **7.3-1**  A lawyer who engages in another profession, business or occupation concurrently with the practice of law must not allow such outside interest to jeopardize the lawyer’s professional integrity, independence or competence.
* **7.3-2**  A lawyer must not allow involvement in an outside interest to impair the exercise of the lawyer’s independent judgment on behalf of a client.
* **7.4-1**  A lawyer who holds public office must, in the discharge of official duties, adhere to standards of conduct as high as those required of a lawyer engaged in the practice of law.
* **7.6-1**  A lawyer must assist in preventing the unauthorized practice of law.

**Lawyer Delegation**

* **6.1-1**  A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.
  + **[1]** A lawyer may permit a non-lawyer to act only under the supervision of a lawyer
* **6.1-3** There are things a lawyer cannot delegate
* **6.1-3.3** There are things a lawyer can delegate to a paralegal
* **6.1-4**: a lawyer cannot work with someone who **in any jurisdiction** has been suspended or disbarred or permitted to resign or undertaken not to practice
* **6.1-6**: cannot let anyone use his or her account for submission or registration of documents.
* **6.1-7**: there are some things a real estate marketing assistant may do.

### Students

* **6.2-1**: Follow LSBC rules on recruitment and engagement
* **6.2-2:** A lawyer acting as a principal to a student must provide the student with meaningful training and exposure to and involvement in work that will provide the student with knowledge and experience of the practical aspects of the law, together with an appreciation of the traditions and ethics of the profession.
  + **[1]**A principal or supervising lawyer is responsible for the actions of students acting under his or her direction.
* **6.2-3:**An articled student must act in good faith in fulfilling and discharging all the commitments and obligations arising from the articling experience.

### Good Character Requirement

* **Purposes**: to protect public, maintain high ethical standards & maintain public confidence in legal profession (Wooley)
* ***Does character determine conduct?*** 🡪try to use past behavior as a predictor for future behavior
  + In Ontario, they ask only for convictions, whereas BC requires charges and convictions (***Mangat***)
* **Time** seems to be an important consideration
* Character and repute overlap (***McQuat***)

**Starting point for definition of good character and repute:**

1. An appreciation of the difference between right and wrong; moral fiber to do that which is right no matter how uncomfortable the doing may be; belief that the law supports these principles
2. ***McQuat***:commitment to speak the truth; resolve to place clients’ interests first; trustworthiness in handling client’s $$
   1. Be ethically equipped to never break the client’s trust

**Issue of Good Character & Fitness**

* Not common to get a one-issue case
* Criminal offences & charges, academic dishonesty, general messiness, fitness cases
* **Offences** vs **charges**: issue is not whether you were convicted, but rather quality of character (BoP is also different: balance of probabilities)
* Criminal: applicant has been subject of criminal charge or conviction
* Fraud, theft (not as common)
* Passage of time, demonstration of good support/ insight, & honesty of applicant in giving testimony all help with admission
  + If applicant is misleading, then **not presently of good character**

Preyra v Law Society of Upper Canada [2000]

*Falsified transcript in order to obtain articles: stated he was candidate for Rhodes scholarship, falsely indicated he intended to pursue Master of Laws. Cont’d to misrepresent himself even after these were discovered. Now has attended therapy & tendered evidence from articling principals that he had changed his ways.* **/ *Does he pass good character test?* / No.**

* One year ago, he was still misrepresenting himself
* He has not satisfied the onus of proof on the balance of probabilities that he is now of good character
* Cannot impose conditions on a law society membership

Law Society of Upper Canada v Burgess [2006]

*Committed plagiarism on essay in undergrad. Continuously lied to LSUC & people who provided her with character references (said she used a paper from a diff course instead of the Internet). Only admitted the truth after being confronted w/ discrepancies.* / ***Does she pass the good character test?* / H: No.**

* References must have full disclosure on the situation
* No sufficient passage of time or psych evidence to conclude she’s a person of good character & suitable for admission to LS

De Jong (Re) [2017]

*Long history of dealing drugs, 2 criminal charges (2002), 26 criminal charges (2006), Pled guilty to possession of cocaine for the purpose of trafficking (2010), Completed JD in 2017.*

/ ***Does she pass the good character test?* / H: Yes.**

* The existence of a prior criminal record, even involving serious offences, is not in and of itself an impediment to the Applicant satisfying the character and fitness standards now.
* The key issue for this Panel is whether we accept that the Applicant has rehabilitated herself to the point where she currently satisfies the good character and fitness requirements of the Act.

### Mental Health

Law Society of Upper Canada v Vanessa Andrea Vader [2013]

*Failed to respond to communications from the law society and failed to cooperate with investigations. Charged with professional misconduct. Serious mental illness.*

/ ***What should be the consequences of professional misconduct by someone who has a mental illness?***

* The public interest in regulatory cases arising out of mental illness can be satisfied by means other than formal disciplinary proceedings, particularly in cases such as the one before me, where the licensee is already administratively suspended. Having regard for her condition, demonstrated during her testimony and her lack of financial resources, she is no risk to the public as she is likely to remain suspended for a significant period time.
* In the context of our understanding of mental illness in 2012, a discipline process leading to the penalty phase consideration of specific and general deterrence is wholly inapplicable when the inappropriate conduct is caused by mental illness.
* Application of the principles of specific and general deterrence have no place in the lexicon of Law Society cases dealing with licensees suffering from mental illness and other related problems.

### Conduct Unbecoming

**s.1(1) *LPA*** 🡪 "conduct unbecoming a lawyer" includes a matter, conduct or thing that is considered, in the judgment of the benchers, a panel or a review board, (a) to be contrary to the best interest of the public or of the legal profession, or (b) to harm the standing of the legal profession

* Gives the LSBC the jurisdiction to create **rule 2.2-1(6)**to regulate extra-professional behaviour of lawyers
* Lawyers can’t argue that unethical conduct outside of work not subject to discipline
* LSBC will mostly not interfere with purely personal conduct. **Where they do interfere is illegal conduct, animal cruelty, tax evasion, other things that include a public element.**

Law Society of Alberta v Sychuk [rehabilitation not the only factor for reinstatement (different from admission)]

*Lawyer with good record was super drunk. Killed his wife. Disbarred and convicted of 2nd degree murder. Now wants to reapply for admission. Says he is rehabilitated.*

***Should they readmit him?* / No.**

* There is no bar *per se* to readmission because of the seriousness of the crime.
* The controlling factor to readmission at law is **rehabilitation 🡪** The more serious the crime, the more clearly it has to be demonstrated that rehabilitation is complete; time is also very important
* Disbarment is not a life sentence
* **BUT rehabilitation cannot be the paramount factor at the expense of the standing of the legal profession.**
* **Good character without good reputation insufficient**.
* The life sentence imposed upon the Applicant reflected society’s denunciation of the crime he committed.
* The denunciation by the law society and the people would be compromised or undermined if the LS were to be reinstated.
* Applications for reinstatement are different from applications for admission b/c it implies that the oath of office has been broken. It is an exacerbating factor that someone committed a serious offence at a time when they were sworn to uphold the law. Good character without good reputation is insufficient

**Criminal Code s. 718** The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

1. to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
2. to deter the offender and other persons from committing offences;
3. to separate offenders from society, where necessary;
4. to assist in rehabilitating offenders;
5. to provide reparations for harm done to victims or to the community; and
6. to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

## Why Sanctions are Necessary

* Deterrence, both specific and general
* Public protection, not punishment
  + Protect clients/public from harm or future harm
  + Ensure public confidence in the profession
* For legal profession, guard against loss of self-regulation and ensure:
  + Independence of bar
  + Respect for rule of law

Law Society of Upper Canada v Terence John Robinson [2013]

*The appellant was being chased by an individual challenging him to fight -- rather than engage the police, the appellant succumbed to illegality and caused a friend and client to physically intervene -- the harassing individual was seriously injured as a result.*

***What should be the consequences for the lawyer and do the Gladue principles apply?* / H: Yes, the Gladue principles apply.**

* Gladue principles (which articulate the approach to be taken to the sentencing of Aboriginal offenders in criminal cases) apply to discipline proceedings
* Prior to the events of June 2007, the Sarnia police regularly singled him and other Aboriginal people out for differential treatment. The evidence also disclosed that he was warned about continuing to practice in Sarnia. The appellant was unlikely or felt unable to seek out the police to end his harassment at the hands of Mr. Verville.
* Considered systemic racism and discrimination, access to justice for the aboriginal community and that the appellant did not feel like he was able to bring his problem with the victim to the police.

Law Society of Upper Canada v Carey [2017]

*The Lawyer’s client was subject to a court order that prohibited any dealing with monies or assets. On instructions from his client, in 2006, the Lawyer returned trust funds to his client, believing that the order did not apply to his trust account because of his solicitor-client duties. The evidence was that the Lawyer’s view was consistent with the standard of conduct at the time. Not until 2015 did the Supreme Court of Canada definitively determine that the Lawyer’s solicitor-client duties were no defence to the allegation that he had breached the order and that his return of trust funds to the client constituted civil contempt, even though he lacked the intent to disrespect the administration of justice.*

***Was this professional misconduct by the lawyer?* / H: No.**

* The circumstances of this case warranted a departure from the general rule that a lawyer’s breach of a court order and/or a finding of contempt will lead to a finding of professional misconduct
* The Lawyer acted in good faith – He did what he honestly believed was right and, in making his decision to return the trust funds, he considered his ethical obligations – He had a reasonable but mistaken basis for concluding as he did, but made an error in judgment – The Lawyer’s conduct did not bring discredit upon the profession and, therefore, it was not professional misconduct.

## Sanctioning Lawyers for Misconduct

Adams v Law Society of Alberta [2000]

*Adams got four complaints against him – two were for sexual exploitation of his 16-year-old client. He pled guilty to sexual exploitation for the criminal charges and got a 15-month conditional sentence.*

***Does he deserve to be disbarred for his conduct?* / H: Yes.**

* The court did not agree that the most serious disciplinary sanction, disbarment, be reserved for the most serious misconduct by the most serious offender
* The disposition/disbarment was not *manifestly unreasonable*

Law Society of Upper Canada v Hunter [2007]

*Hunter had a sexual relationship with a client and had a resulting conflict of interest.*

***What kind of penalty should be given?* / H: Suspended for 60 days and costs of $2500.**

* Hunter was a bencher and a treasurer of the law society and the hearing panel received a lot of letters from lawyers talking about Hunter’s high integrity, professionalism and ethics
* Acknowledged his wrongdoing and self-reported to the society
* Misconduct has already taken a significant toll on him – resignation as treasurer, unable to practice law for other reasons

## Regulating the Unauthorized Practice of Law

* Law societies given the responsibility to police the unauthorized practice of law
  + Martin: Should the law society be given this responsibility?
    - Might increase their monopoly over the practice of law and self-regulation

Law Society of Upper Canada v Boldt [2006]

*Boldt was a paralegal and mediator. She unlawfully offered legal services, represented clients in court and provided legal advice. She was given an injunction against practicing law and then later these contempt proceedings commenced because she allegedly violated the injunction by practicing law.*

***Did she practice law and if so, what is the remedy?* / H: Yes, with four months of house arrest and costs of $35,000 (sentencing in a separate proceeding).**

* Her practice did not change at all after getting the injunction
* The disposition/disbarment was not *manifestly unreasonable*

### Duty to Report

**7.1-3** Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society:

1. the misappropriation or misapplication of trust monies;
2. the abandonment of a law practice;
3. participation in criminal activity related to a lawyer’s practice;
4. conduct that raises a substantial question as to another lawyer’s honesty, trustworthiness, or competency as a lawyer;
5. conduct that raises a substantial question about the lawyer’s capacity to provide professional services; and
6. any situation in which a lawyer’s clients are likely to be materially prejudiced.

**British Columbia**:

* “(a) a shortage of trust monies” not just “misappropriation or misapplication”
* “(a.1) a breach of undertaking or trust condition that has not been consented to or waived”
* BC, PEI: missing conduct about capacity.
* BC: (d) “the mental instability of a lawyer of such a nature that the lawyer’s clients are likely to be materially prejudiced”
* Problematic **[Devlin, Downie & Wildeman]**:
  + Discriminatory
  + Stigmatizing
  + Vague
  + Do lawyers have ability to evaluate “mental instability”?

**Reasons for the Rule**:

* Law society cannot protect the public interest unless it knows about potential risks **[Devlin, Downie & Wildeman]**
* Corollary of self-regulation
  + But if we didn’t have self-regulation, you could still have the duty to report

**Triggering Threshold**:

* Problem: **7.1-3** does not indicate what threshold triggers the reporting obligation **[Chapman]**
* Parameters:
  + Suspicion, belief, knowledge?
  + Reasonable (objective vs subjective)?
  + May or is?
* Examples of combinations:
  + Who believes on reasonable grounds that a licensee may…
  + Who suspects that a licensee is…
* **Security of Court Facilities**
  + **5.6-3** A lawyer who has **reasonable grounds** for **believing** that a dangerous situation **is likely to** develop at a court facility must inform the persons having responsibility for security at the facility and give particulars.

## Diversity in the Legal Profession

**Recommendations by the Law Society of Upper Canada’s Working Group:**

1. Reinforcing Professional Obligations
2. Diversity and Inclusion Project
3. Adoption of Equality, Diversity and Inclusion Principles and Practices
4. Measuring Progress through Quantitative Analysis
5. Measuring Progress through Qualitative Analysis
6. Inclusion Index
7. Repeat Challenges Faced by Racialized Licensees Project Inclusion Survey
8. Progressive Compliance Measures
9. Continuing Professional Development Programs on Topics on Equality and Inclusion in the Professions
10. Licensing Process
11. Building Communities of Support
12. Addressing Complaints of Systemic Discrimination
13. Leading by Example

# Counselling and Negotiation

## Counselling

**Counselling** – giving client information, opinion and advice

* What the **law** is
* What “market” is re: how something is generally handled
* What you **suggest** given your experience
* In the business context, if a lawyer is concerned about issue X, often the client does not want a lot of research done and to be told there is a 60% chance a court would decide in the client’s favour re: issue X. The client wants the lawyer to figure out a different way of approaching the matter, so issue X is avoided.
* Tension between client autonomy & lawyer providing advice/guidance (lawyer expressly or implicitly making the actual decision)
* Raises **ethical issues**:
  + ***Can a lawyer ever advise his or her client to break the law?* 🡪 No**
  + ***What is the extent to which a lawyer can provide advice that could be used by the client as a basis for a subsequent decision to break the law?***
* Lawyers are obliged to be honest and candid
* Ensure words are given in an understandable manner

To counsel you need: **Competency** – you must be competent to advise in a particular area

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

* **[10]** In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved. In many instances the lawyer’s experience will be such that the lawyer’s views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, if necessary and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.
* **“competent lawyer”** means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer’s engagement, including:

1. knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practices;
2. investigating facts, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action;
3. implementing as each matter requires, the chosen course of action through the application of appropriate skills
4. communicating at all relevant stages of a matter in a timely and effective manner;
5. performing all functions conscientiously, diligently and in a timely and cost-effective manner;
6. applying intellectual capacity, judgment and deliberation to all functions;
7. complying in letter and spirit with all rules pertaining to the appropriate professional conduct of lawyers;
8. recognizing limitations in one’s ability to handle a matter or some aspect of it and taking steps accordingly to ensure the client is appropriately served;
9. managing one’s practice effectively;
10. pursuing appropriate professional development to maintain and enhance legal knowledge and skills; and
11. otherwise adapting to changing professional requirements, standards, techniques and practices.

* ***Central Trust Co. v Rafuse***: the appropriate standard of care is that “of the reasonably competent solicitor”

**3.2-1** A lawyer has a duty to provide **courteous, thorough and prompt service** to clients. The quality of service required of a lawyer is service that is **competent**, timely, conscientious, diligent, efficient and civil.

* Line between legal & business advice not always clear, esp. in solicitor’s area. Need to **distinguish legal from other advice**.
  + If advice turns out to be incorrect, client may be able to sue & it might not be covered (only legal services covered)

**3.2-2** When advising a client, a lawyer must be **honest and candid** and must **inform** the client of all information known to the lawyer that may affect the interests of the client in the matter.

* Must disclose all relevant facts 🡪 can’t just tell client what they want to hear
* Advice must be **clear,** in terms client can understand
* Lawyer must notify a client of their language rights (**3.2-2.1**)
* **[2]** A lawyer’s duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer’s own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.
* **[3]** Occasionally, a lawyer must be firm with a client. Firmness, without rudeness, is not a violation of the rule. In communicating with the client, the lawyer may disagree with the client’s perspective, or may have concerns about the client’s position on a matter, and may give advice that will not please the client. This may legitimately require firm and animated discussion with the client.

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

* **[1]** A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.
* **[2]** A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate.
* **[4]** A *bona fide* test case is not necessarily precluded by this rule and, so long as no injury to a person or violence is involved, a lawyer may properly advise and represent a client who, in good faith and on reasonable grounds, desires to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case. In all situations, the lawyer should ensure that the client appreciates the consequences of bringing a test case.

**3.2-8**A lawyer who is **employed or retained by an organization** to act in a matter in which lawyer knows or ought to know that the organization has acted, is acting or intends to act **dishonestly, criminally or fraudulently**, **must do the following**, in addition to his or her obligations under rule **3.2-7:**

1. advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, criminal or fraudulent and should be stopped;
2. if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, **advise progressively the next highest persons or groups,** including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, criminal or fraudulent and should be stopped; and
3. if the organization, despite the lawyer’s advice, continues with or intends to pursue the proposed wrongful conduct, **withdraw from acting** in the matter in accordance with section **3.7**.

* Trust your instincts – gut reaction – if it **feels** **wrong**, it likely is

**Encouraging Compromise or Settlement**

**3.2-4**A lawyer must **advise** and **encourage** a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must **discourage** the client from commencing or continuing **useless** legal proceedings.

* **[1]** A lawyer should consider the use of alternative dispute resolution (ADR) when appropriate, inform the client of ADR options and, if so instructed, take steps to pursue those options.

### Counselling and Illegal Conduct

Law Society of Upper Canada v Sussman [1995]

**A lawyer is not to counsel a client to break or disobey the law. Very limited situations in which a lawyer can tell their client to disobey a court order.**

*S is charged that while acting for a wife in matrimonial proceeding, he* ***counseled*** *his client to breach terms of Court Order respecting access. Order was that wife would have custody of 2 kids & husband would have weekend access to both children. Solicitor wrote to husband’s solicitor stating he would be preparing an interim restraining order, & that he had instructed his client not to permit access to the child that weekend.*

***Did S counsel his client to breach the terms of the Court Order? Should he receive reprimand, and if so what?*** **/ H: Yes. One-month suspension.**

* S argued he had intended to bring a variation application & had never done so – had 7 months’ delay in doing so
* Only circumstances in which a lawyer can tell their client to disobey the court order:

🡪 Reasonable and honest belief of there being **imminent risk of danger to a child**

🡪 Requirement that there is an **immediate application to a court** to have the issues determined forthwith

* No application by the solicitor at all
* Otherwise clean record and was in ill health – was suspended from the practice for one month

### Issues in Counseling

* Ensure to differentiate from business/financial/strategic advice
* David Luban – Lessons for Lawyers
  + Post-9/11 – government wanted to interrogate detainees in as forceful and effective a way as possible without violating international law related to torture
  + Criticisms of Bybee memo: enabled torture, stretched and distorted the law to reach the outcome the client wanted, and nowhere indicated its interpretations were outside the mainstream
  + Lawyer’s description of the law should be more or less the same as it would be if the client wanted the opposite result from the one they want 🡪 litmus test of independent advice

**Errors: BC Code 7.8-1 – Avoiding and Admitting Mistakes**

If you made an error – **don’t try to hide it**! Tell client right away. Suggest independent legal advice before making a decision.

**7.8-1** When, in connection with a matter for which a lawyer is responsible, a lawyer **discovers an error or omission** that is or may be damaging to the client and that cannot be rectified readily, the lawyer must:

1. promptly **inform the client** of the error or omission without admitting **legal** liability;
2. recommend that the client obtain **independent legal advice** concerning the matter, including any rights the client may have arising from the error or omission; and
3. advise the client of the possibility that, in the circumstances, the lawyer may no longer be able to act for the client.

## Negotiation

* Acting as a negotiator for your client – to **negotiate a solution.**
* Lack of regulation for lawyer negotiations in order to respect lawyer’s obligation to **promote the interests of their client**
  + ***Westcom TV Group Ltd. v CanWest Global Broadcasting***: there is no recognized pre-contractual duty to bargain in good faith
* **What is the standard required for a lawyer?**
  + **Competent lawyer:** lawyer who has & applies **relevant knowledge, skills** & attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature/terms of the lawyer’s engagement, including:
    - **3.1-1(c)** implementing as each matter requires, chosen course of action through application of appropriate skills, including: **(v)** **negotiation;**
* **Good faith:**
  + **2.1-4(a):** A lawyer’s conduct toward other lawyers should be characterized by **courtesy and good faith**
  + **5.1-5** (*this refers to tribunal but is also general*): A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings
  + **7.2-1** A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice
    - **Commentary [3]** A lawyer should **avoid** ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.
* **Maintain civility**, hopefully a sense of humour, openness.
* **Self-Represented client on the other side: 7.2-9**
  + Lawyer must urge self-rep to obtain legal advice; reiterate that you’re not their lawyer
  + Some argue there should be more regulation for negotiations
* Negotiating parties are able to withhold material facts from each other and make untruthful statements
  + However, lawyers **cannot deliberately mislead on the facts**!
  + Goal should be to negotiate a settlement

**6.1-3**  A lawyer must not permit a non-lawyer to:

(i)      conduct negotiations with third parties, other than routine negotiations if the client consents and the results of the negotiation are approved by the supervising lawyer before action is taken;

**3.2-4**A lawyer must advise and encourage a client to compromise or settle a dispute whenever it is possible to do so on a reasonable basis and must discourage the client from commencing or continuing useless legal proceedings.

**3.2-5**  A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:

1. to initiate or proceed with a criminal or quasi-criminal charge; or
2. to make a complaint to a regulatory authority.

**Regulation of Negotiation**

* Most provincial codes of ethics require that lawyers must in their dealings with other lawyers and self-represented opposing parties act with **integrity and in good faith,** maintain civility
* Reasons supporting a lack of regulation of lawyer negotiation:
  + Need to respect lawyer’s obligation to promote interests of their client
  + If lawyers are more restricted in their negotiation tactics, clients will be tempted to forego the use of lawyers
  + Concerns about misrep and deceit are already covered by tort law
  + Drafting a rule about this would be difficult

Law Society of Newfoundland and Labrador v Regular [2005]

**A lawyer cannot deliberately mislead another lawyer to get a favourable outcome.**

*R represented Petroleum Services Ltd & Barrie James who held 75% of the shares of PSL. H represented S who held 25% of the shares. Letter was sent by H w/ rumour that PLS was being sold. R stated it was untrue & that his client is committed to resolving issues. By way of a Directors’ notice filed by R, S was removed as a Director – done w/o actual notice. R filed notice with registry of companies changing registered office address of PSL & changed the name to BJHL.*

***Was R’s response to intentionally mislead S & is this a failure of responsibility?* /**

**H: Yes**, failure of responsibility to opposing counsel & R failed to act with integrity/ avoid questionable conduct.

* Inescapable inference is that Regular’s response to Hughes letter was **deliberately intended to mislead** H.

# Ethics & Criminal Law Practice

* Threatening criminal proceedings to obtain a civil advantage 🡪 comes up often in different ways
  + I.e. can’t interfere with Crown’s decision to press charges or not by threatening them with a civil penalty
  + Or if other side is accusing your client of fraudulent or criminal activity and suing civilly for damages and then threatens to go to police to press charges if they don’t get a certain amount
* Be careful to keep civil and criminal claims **separate**

**Threatening Criminal or Regulatory Proceedings**

**3.2-5**A lawyer **must not**, in an attempt to gain a benefit for a client, **threaten,** or advise a client to threaten:

1. to initiate or proceed with a criminal or quasi-criminal charge; or
2. to make a complaint to a regulatory authority.

**Inducement for Withdrawal of Criminal or Regulatory Proceedings**

**3.2-6**  A lawyer must not:

1. give or offer to give, or advise an accused or any other person to give or offer to give, any valuable consideration to another person in exchange for influencing the Crown or a regulatory authority’s conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or the regulatory authority to enter into such discussions;
2. **accept** or offer to accept, or advise a person to accept or offer to accept, **any valuable consideration in exchange for influencing the Crown** or a regulatory authority’s conduct of a criminal or quasi-criminal charge or a complaint, unless the lawyer obtains the consent of the Crown or regulatory authority to enter such discussions; or
3. **wrongfully influence** any person to prevent Crown or regulatory authority from proceeding with charges or a complaint or to cause Crown or regulatory authority to withdraw the complaint or stay charges in a criminal or quasi-criminal proceeding.

**Dishonesty, Fraud by Client**

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

## Criminal Advocacy

* **Defence counsel**: defend client zealously
* **Crown counsel**: not the same role; advocate of the court

Both Crown and defence counsel have **dual roles** (although different ethical obligations)

* **Crown** is expected to be fair, objective and dispassionate in presenting the case for the Crown but is also expected to argue forcefully for a legitimate result 🡪 **cannot take a purely adversarial position**
* **Defence** is expected to vigorously represent the interests of the accused but is also expected to remain independent of the client and to be mindful of various overriding duties to the court
  + **Client’s interest** is the one thing that matters when defending an accused
    - Pursuit of client’s interest must be **honourable**: part of bargain you strike with your client
  + Without defence counsel, rule of law would collapse 🡪 important to ensure societal balancing of values is preserved
  + Dedication to accused preserves everyone’s rights 🡪 should not be eroded under any circumstances
  + Role of defence lawyers can be lonely
    - chilling effect may prevent them from taking on egregious cases where they are needed the most
  + Accomplished in a framework of lawful and honourable behaviour
* **Both have an overriding duty to the court, the profession and the public**

### Guilty Pleas

* ***R v Hanemaayer***: guilty plea must be voluntary, unequivocal and informed
* Can’t be a party to perjury, i.e. can’t plead guilty if you know your client is innocent despite their instructions (***R v Johnson***)
  + Can’t abandon this duty even in the face of public criticism

**5.1-7**  Before a charge is laid or at any time after a charge is laid, a lawyer for an accused or potential accused may discuss with the prosecutor the possible disposition of the case, unless the client instructs otherwise.

**5.1-8**  A lawyer for an accused or potential accused may enter into an agreement with the prosecutor about a guilty plea if, following investigation,

1. the lawyer advises his or her client about the prospects for an acquittal or finding of guilt;
2. the lawyer advises the client of the implications and possible consequences of a guilty plea and particularly of the sentencing authority and discretion of the court, including the fact that the court is not bound by any agreement about a guilty plea;
3. the client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and
4. the client voluntarily instructs the lawyer to enter into an agreement as to a guilty plea.

**[1]**  The public interest in the proper administration of justice should not be sacrificed in the interest of expediency.

R v Johnson [2014]

*J felt pressure from his lawyer to plead guilty.*

**H:** Applicant did **not** enter his plea voluntarily; guilty plea struck.

* What lawyer did was akin to assisting the client in **perpetrating a fraud** on the court
* Lawyer breached duty to court and client

### Misleading the Court

* In pursuing client’s interests, can’t mislead other lawyers or the court
* ***R v Lytlle***: Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession
* ***R v Legebokoff***: While lawyers cannot knowingly present false or misleading evidence, they are entitled to fairly and forcefully attempt to place their client’s case in the best light possible
* **5.1-2(e)** – A lawyer must not knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct

R v Jenkins [2001]

*Accused charged with first degree murder. Defence counsel sought to withdraw to avoid being involved in misleading the court.*

**H:** Silence would be going against the duty to the court; allowed application to withdraw

* Silence is insufficient (sometimes silence = misconduct by counsel.
* Crown argued that defence counsel should remain on the case so long as they do not advance the lie. Court says no.

### Defending Sexual Assault Cases

R v Mills [2001]

*Accused challenged the constitutionality of provisions of the Criminal Code governing the production of a sexual assault complainant’s private records.*

* Court warned against cross examination based on myths and stereotypes
* Accused is not permitted to “**whack[ing] the complainant**” (exploit the stereotypes and vulnerabilities inherent in sex assault cases to secure favourable outcome.)
* Whacking -- means that you are exploiting stereotypes and vulnerabilities in sexual assault cases in order to achieve a favourable result for your client. **Prohibited**.

## Role of Defence Counsel & Presumption of Innocence

**Issue:** Public has **contempt** for the criminal justice system & specifically the role of defense counsel – rational and principled.

* ***Why?*** 🡪 Lack of understanding of the system by the public
  + How can you defend someone who has done something terrible?
* **5.1-1**  When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect.
  + **[9]  Duty as defence counsel** – When defending an accused person, a lawyer’s duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including so-called technicalities, not known to be false or fraudulent.
  + **[10]**Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.
* **Even with knowledge of a client’s guilt, the lawyer is ethically obligated, if the client so instructs, to vigorously challenge the admissibility of the evidence and the sufficiency of the Crown’s case (*R v Tuckiar***; ***R v Li*)**
* **5.1-2.1**A lawyer must not counsel or participate in the concealment, destruction or alteration of incriminating physical evidence so as to obstruct or attempt to obstruct the course of justice. (Commentary includes further instructions)
* We have created many rules & principles to provide hurdles when convicting someone – these exist to **prevent holding innocent people guilty**
  + **Presumption of innocence**
  + Crown must eliminate every **reasonable doubt**
  + The conviction of an innocent person is not only a travesty to that individual person, but it also affects the security that we feel as a country – innocent until guilty
* Not only is the defense lawyer a representative of the accused, but most importantly, defense counsel is put in that position by society, for an **equally important public purpose**: to ensure that society’s principles and rules are followed and abided by the police, prosecution and the bench
  + Society places its trust in the defense counsel – placed in a position of **trust** by society
  + Also ensure protect society’s values: solicitor-client privilege
* The ***Charter***
  + Exclusion of evidence over “technicalities”
  + These are basic rules for the benefit of society as a whole
  + Defense lawyer also upholds the ***Charter*** which affects our relationship with the state
  + **Note**: we are different from US – TJs must look at **all** available evidence in deciding whether to admit evidence
  + Overall, a lawyer is not only defending a client, but the principles and rules against the strong arm of the state
    - i.e. against unreasonable search and seizure
    - In the most egregious of cases, this is where **abuse of process** can occur
    - Other consideration – lawyers would no longer take on egregious cases

R v Delisle [1999]

*Beginner defence Lawyer relied on his impression of his client’s innocence and did not take the steps required for effective representation. Accused identified the assailant and told his lawyer he had a witness. Did not even attempt to meet the witness; determined the client should not testify in his own defence; the assailant communicate with the lawyer and confessing. Lawyer reopened the case.*

**H:** Accused was let go

* Universal rule of ethics in criminal law = counsel must not set himself up as the judge of his or her own client before the trial begins and then leave it to the trier of fcat to decided guilt or innocence.
* Assuming client is guilty can lead to ethical issues – failing to pursue leads, listen attentively, zealously defend.
* Counter is that where lawyer knows of client’s guilt, this can limit ability to defend.

### Ethical Duties of Defence Counsel

**To the Client:**

* Fearlessly raise every issue, advance every argument, and ask every question, no matter how distasteful – must represent the client resolutely. **Duty of confidentiality**.

**Defending the Guilty Client & Related Problem of Not Misleading the Court:**

* Avoid forming any opinions on the subject of guilt or innocence in the first place – **counsel’s opinion is generally irrelevant** and might actually cause counsel to fail in carrying out their partisan duty of resolutely defending the client
  + Lawyers cannot set themselves up as the **judge** of their own client (***R v Delisle,* 1999**)
* **When counsel knows client is guilty,** there are ethical constraints to not mislead the court – ***accused must be made aware of this***
  + If the accused confessed to the lawyer, the lawyer may not suggest some other person committed the crime or call any evidence that is believed to be false based upon that confession
  + They may still test evidence (admissibility, sufficiency), jurisdiction, form of indictment, etc
  + See ***R v Li* [1993]:** *lawyer knew client was guilty of robbery but continued to act by cross-examining witnesses and seeking to raise a doubt about identification* 🡪court held this is proper since he did not put up any defence **inconsistent** with facts he believed to be true
* ***What is a lawyer’s obligation when you see a client lying on the witness stand/ committing perjury before you?***
  + Tension between duty to client and duty to administration of justice
  + Must ask the court to ignore that portion of the testimony

## Ethical Duties of Crown Counsel

**2.1-1(b)**  When engaged as a **Crown prosecuto**r, a lawyer’s ***primary duty*** is **not to seek a conviction** but to see that justice is done; to that end, the lawyer should make timely disclosure to the defence of all facts and known witnesses whether tending to show guilt or innocence, or that would affect the punishment of the accused.

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

* **[1]** The prosecutor should not do anything that might prevent the accused from being represented by counsel or communicating with counsel and, to the extent required by law and accepted practice, should timely disclosure to defence counsel or directly to an unrepresented accused of all relevant and known facts and witnesses, whether tending to show guilt or innocence.
* Duty to be **fair and objective** towards the accused
* Needs institutional independence to safeguard the public interest
* Seek justice in the **public interest**:
  + Seek a conviction, all the while striving for a fair trial
  + May not try to obtain a conviction at any cost, but must assist the Court in eliciting truth without infringing upon legitimate rights of the accused
  + Exercise prosecutorial discretion with **objectivity, impartiality**, and not in a purely partisan way
* Entirely different role than defence counsel 🡪 represent the state (gatekeeper) as Ministers of justice 🡪 objectivity, independence from other interests, lack or animus (either positive or negative)
  + Goal is **not to obtain a conviction** but rather to ensure functions are carried out with **fairness and efficiency** and “an ingrained sense of dignity” (***Boucher***)
* Profound **discretion:** whether to lay a charge putting a citizen’s liberty in jeopardy
  + Must be satisfied that there’s substantial likelihood of conviction & that it is in the **interests of justice** to pursue it
  + Constant ethical obligation to perceive whether it’s worth it to pursue criminal charge (throughout entire process)
  + Also uses discretion to determine **sentence** to ask for on behalf of the public
* ***Jodoin***: courts can hold lawyers in contempt for misbehaviour, or impose costs; courts can report lawyers to Law Society to be assessed and disciplined

### Regulation of Crown Prosecutors

**The Law Societies**

Krieger v LSAB [2002] SCC

**LS jurisdiction to review failure to disclose is limited to examining whether it was an ethical violation**

* “Prosecutorial discretion” is a term of art – refers to the use of those powers that constitute the core of the AG’s office and which are protected from the influence of improper political and other vitiating factors by the principle of independence – core elements of prosecutorial discretion encompass the following:

discretion whether to bring the prosecution of a charge laid by the police

discretion to enter a stay of proceedings in either a private or public prosecution as codified in the *CC*

discretion to accept a guilty plea to a lesser charge

discretion to withdraw from criminal proceedings altogether

discretion to take control of a private prosecution

* Decisions that do not go to the nature and extent of the prosecution (i.e. Crown’s tactics or conduct before the court) do not fall within the scope of prosecutorial discretion – they are rather governed by inherent jurisdiction of the court to control its own processes once AG has elected to enter that forum

**Attorney General**

* ***BC (AG) v Davies***: Prosecutorial discretion rests with the Attorney General

**Courts**

R v Anderson (2014 SCC)

**All Crown decision making is reviewable for abuse of process:** Crown conduct that is **egregious** & seriously compromises trial fairness and/or integrity of the justice system.

* Adding to ***Krieger***’s elements of prosecutorial discretion:

the decision to repudiate a plea agreement (***R v Nixon***);

the decision to pursue a dangerous offender application;

the decision to prefer a direct indictment

the decision to charge multiple offences

the decision to negotiate a plea

the decision to proceed summarily or by indictment

the decision to initiate an appeal

* Two distinct avenues for **judicial review of Crown decision making:**

**(1)** Exercises of **prosecutorial discretion**: (discretion exercises by AG in matters within their authority in relation to the prosecution of criminal offences)

🡪 Prosecutorial discretion entitled to considerable deference

🡪 No discretion to breach an accused’s *Charter* rights

🡪 Reviewable solely for **abuse of process** – burden of proof on the claimant to prove on BoP; Crown may be required to provide reasons justifying its decision where the claimant establishes a proper evidentiary foundation

**(2 ) Tactics & conducts before the court**

🡪 High degree of deference to the tactical decisions of counsel

🡪 Governed by the inherent jurisdiction of the court to control its own processes

🡪 Abuse of process not a precondition for judicial intervention to ensure that trial process remains fair

**Held:** Abuse of process argument **failed** in this case; decision whether to seek a mandatory minimum sentence is a matter of prosecutorial discretion

### Exercising Prosecutorial Discretion

**Charging/Screening Decisions**

* Once a charge is laid by the police, Crown is responsible for screening the charge and deciding whether there should be a trial
  + Only prosecute if there is a reasonable prospect of conviction (***Henry v BC (AG)***) and it is in the public interest to do so
  + Not sound policy to mandate that every violation of the law requires the laying of charges – this has the undesirable effect of nullifying prosecutorial discretion (***R v K(M)***)

**Plea Bargaining**

R v Nixon [2011 SCC]

*Appellant charged with dangerous driving causing death & bodily harm; impaired driving. Plea discussions held between counsel so appellant re-elected her mode of trial in anticipation of pleading guilty to a lesser charge. After further legal advice, Crown revoked plea agreement.* **/ H**: **No evidence of abuse of process.**

* Nothing improper in ADM’s decision-making process (Assistant Deputy Minister of Criminal Justice Division)
* ADM’s decision to resile from plea agreement falls within scope of prosecutorial discretion
* She was returned to the position she was in pre-plea agreement: no evidence of prejudice

**Calling Witnesses**

* No obligation on the Crown to call a witness (***R v Cook***)

R v Hillis [2016 ONSC]

*Accused charged with murder and aggravated assault; entitled to use force to defend himself. TJ said that defence could elicit exculpatory evidence from two Crown witnesses, but then Crown announced that they weren’t going to call those witnesses.*

**Was Crown obligated to call those witnesses?** **/ H**: **Exceptional case where the Crown had to call them.**

* Generally, Crown is at liberty to decide who they will and will not call
* Crown cannot withhold reliable exculpatory evidence (by not calling the witnesses) because it is inconsistent with their role as a quasi-minister of justice and custodian of the public interest
* ***Cook***: Crown must not hold back evidence because it would assist the accused
* Crown does not have to call evidence merely because it assists the defence, but the Crown cannot categorically exclude all evidence that might have that effect

**Witness Guidelines for Crown prosecutors** (***R v Spence***) **🡪 also see 5.1-2**

* Counsel should generally not discuss evidence with witnesses collectively
* Witness memory should be exhausted before any reference is made to conflicting evidence
* Witness recollection should be recorded by counsel in writing
* Witness questioning should be **non-suggestive**
* Counsel may then choose to alert the witness to conflicting evidence and invite comment
* Never tell a witness that they are wrong
* Where the witness changes their evidence, new evidence should be recorded in writing

**Full Disclosure:** The Crown has the duty to disclose **all relevant information** in the Crown’s possession to defence and has discretion to disclose any irrelevant information. 🡪 ss. **2.1-1(b) & *Stinchcombe* (1991 SCC)**

**Presenting Its Case – Cross-Examination and Closing Submissions**

R v Levert [2001 ONCA]

*Appellant appealing conviction and sentence for sexual interference***.** *Appellant counsel said it was improper for Crown to suggest that the complainant was the “perfect victim”. Crown also made comments that were argued as being disingenuous about defence’s skill and were designed to denigrate defence.*

**H**: Crown’s comments did not affect the fairness of the trial. No danger of a miscarriage of justice.

## Ethical Duties of “Officer of the Court”

This duty applies to both parties – they are constrained from highly adversarial behaviour as “**officers of the court**”.

* The purpose of **Crown counsel** is to **seek justice and truth**
* Role of **defence counsel** is not to search for truth, but rather to be a **gatekeeper of the process**
* All lawyers are regarded as ministers of justice and officers of the court 🡪 client’s duty is not absolute; **overriding duty to the court 🡪** high standard of ethical conduct
* Defence is a representative, not a delegate, and must give the client the benefit of his learning, skills, and experience, but keep in mind the duty owed to the Court and to the lawyer herself
* ***What does it mean to be an officer of the Court?***
  + Not mislead
  + Not cast aspersions on the other party/witnesses where there is no sufficient basis
  + Not withhold authorities, even those that are against the client
  + Not make frivolous argument
  + Act civilly – otherwise, that lowers public respect for the administration of criminal justice and undermines the legitimacy of the results: ***Felderhof***

# Lawyers in Organizational Settings: Corporate Counsel

* Relationships with clients don’t fit within the traditional paradigm
  + Must navigate through structural conflict of interest from serving an organization by which they are employed
  + Must maintain independence and integrity while fulfilling duties of loyalty
* May suffer from ‘cognitive dissonance’ – where professional norms of client loyalty conflict with personal norms – so lawyers unconsciously dismiss or discount evidence of misconduct and its impact on third parties
* *Sarbanes-Oxley Act*, 2002 – response to lawyer responsibility for failing to prevent corporate scandal

**4 cardinal rules:**

1. Always ask “What is in the best interests of my client?”
2. You are bound by the same ethical rules as other lawyers
3. You **and everyone involved** needs to know who you are acting for
4. You **and everyone involved** needs to understand what hat you are wearing – legal or business or ….?

## Ethical Obligations of Corporate Counsel

**Paul Paton, How it went off the rails at GM**

* Flaw in ignition switch – linked to 13 deaths; internal probe found “a pattern of incompetence and neglect”
* Special criticism for the internal legal team – lots were fired thereafter, but not general counsel
  + Kept secrets from crash victim families & valued secrecy so kept things from being found out earlier

**Rhode & Paton: Lawyers, Ethics and Enron**

* **Enron scandal** - *US public co. with largest market cap in world. Seen to have model corporate policies & stellar board. Appeared to be unimpeachable.* However, it engaged in “off balance sheet” high risk ventures considered too controversial for ordinary commercial entities that were not disclosed to investors & regulators**.** Not consolidated with other financial statements – **losses concealed from public disclosure**.Transactions not designed for legitimate economic objectives.
  + Enron restatement of financials resulted in criminal convictions, regulatory changes, worthless shares, bankruptcy
  + **Lawyers**
    - ***In house counsel*** 
      * Contributed to creation and operation of Special Purpose Entities (SPEs)
      * One lawyer invested her money in one of the entities (personal profit)
      * At least 2 lawyers had concerns but were stymied by other lawyers or management
    - ***Outside Counsel*** 
      * Assisted in SEC filings & advised on risky business
      * When “investigated” allegations – provided an insufficient report
    - ***Andersen (Accounting firm) In House Counsel*** 
      * One of the 5 big accounting (& consulting) firms at the time
      * Advised Enron on the risky strategy AND certified the financial statements.
      * Created and audited questionable investment vehicles
      * Shredded significant amount of documents related to Enron 🡪 counseled destruction of documents when knew that SEC was investigating and litigation was likely

**American Response to Enron**

* ***Sarbanes-Oxley Act:*** provision that obligated lawyers to **report criminal fraud**
  + Rules that required the US Securities and Exchange Commission to establish minimum standards of professional conduct for lawyers who practice before the commission
  + Obligated lawyers to report evidence of a material violation of securities law or breach of fiduciary duty first to a company’s general counsel, then to its CEO and ultimately to the board of directors
    - Attacked self-regulation and independence of the bar. Proposed SEC regulating lawyers
    - Ultimately a **reporting up the ladder** - to the board if necessary – but not out, preserving S/C privilege

**Canadian Response**

* Federation of Law Societies of Canada’s *Model Code of Professional Conduct* adopted the same language of the ABA *Model Code,* but omitting the “crime-fraud” exception to the professional conduct rules on confidentiality.

**When the Client is an Organization**

**3.2-3** Although a lawyer may receive instructions from an officer, employee, agent or representative, when a lawyer is employed or retained by an organization, including a corporation, the lawyer **must act for the organization** in exercising his or her duties and in providing professional services.

* **[1]** A lawyer acting for an organization should keep in mind that the **organization is the client** & that a corporate client has a legal personality **distinct** from its shareholders, officers, directors and employees. While the organization or corporation acts & gives instructions through its officers, directors, employees, members, agents or reps, lawyer should ensure that it’s interests of the organization that are served & protected. Further, given that an organization depends on persons to give instructions, the lawyer should be satisfied that the person giving instructions for the organization is **acting within that person’s authority**.

**Dishonesty, Fraud when Client is an Organization**

**3.2-8**A lawyer who is employed or retained by an organization to act in a matter in which lawyer knows or ought to know that the organization has acted, is acting or intends to act dishonestly, criminally or fraudulently, **must do the following**, in addition to his or her obligations under rule **3.2-7:**

1. **advise** the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the proposed conduct is, was or would be dishonest, criminal or fraudulent and should be stopped;
2. if necessary because the person from whom the lawyer takes instructions, the chief legal officer or the chief executive officer refuses to cause the proposed conduct to be stopped, **advise progressively the next highest persons or groups,** including ultimately, the board of directors, the board of trustees, or the appropriate committee of the board, that the proposed conduct was, is or would be dishonest, criminal or fraudulent and should be stopped; and
3. if the organization, despite the lawyer’s advice, continues with or intends to pursue the proposed wrongful conduct, **withdraw from acting** in the matter in accordance with section **3.7**.

* Trust your instincts – gut reaction – if it **feels** **wrong**, it likely is
* (withdrawal) – but note this does not violate solicitor-client privilege
* If you are employed **in-house,** this often means **resigning**

**The Role of Securities Regulators**

Wilder v Ontario (Securities Commission) [2001 ONCA]

*W is a solicitor at C, YBM was his client. Allegedly letter to OSC written by W on behalf of YBM contained misleading or untrue statements of facts. YBM charged for lack of disclosure. W & C & LSUC submit that OSC lacks satisfactory mandate to reprimand W for his conduct. Should be dealt with by quasi-judicial proceedings before Ontario Court of Justice or Law Society.***/ *Does the OSC have a statutory mandate to reprimand W for his conduct?* / H: Yes, they do.**

* *Securities Act* has 3 methods of enforcement available to OSC: quasi-criminal proceedings, power to apply for declaration from superior court, power to hold its own administrative proceedings and make an order in the public interest
* Wording of Act s. 127 – nothing in its language or legislative history to suggest it should not apply to lawyers working in their professional capacity– legislative intention to broaden their powers
* This does not limit the important role of the Law Society: LS governs legal profession in the public interest; **OSC is tasked with protecting investors & proper functioning of markets**
* However, OSC must pay adequate heed to the **importance of solicitor-client privilege**
* Lawyer is entitled to be dealt with fairly and permitted to answer the allegations that have been made
* When the lawyers answer involves revealing the confidence of the client, the client’s interest in confidentiality is invoked

🡪 But Law Society Rules of professional conduct – can reveal client confidence to defend against allegations of misconduct

* However, OSC should avoiding creating dynamic where lawyer is placed in dilemma of forgoing right to defend own interests or harming interest of the client

**Need to ensure that privilege and confidentiality are protected**

* CONTEXT MATTERS! ***Pritchard v. Ontario***: Whether or not privilege attaches depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered
* MAY NOT ATTACH! ***Potash Corp of Sask. v. Barton***: When corp counsel works in some other capacity, information is not acquired in the course of the S-C relationship and no privilege attaches

**CBA, A Checklist for In-house Counsel (Best Practices)**

* Be clear when working in your lawyer role; put in appropriate policies; establish good communications practices; avoid waivers of privilege; have everyone follow procedure; act re: concerns about loss of privilege; use strategies to avoid denial of privilege if not confidential or not for litigation

**Paul Paton, Working on the High Wire**

* Corp secretary brings knowledge and specialized expertise that serves as an important resource to the board and to the org as a whole – a repository of org history and culture, bridge between management and independent directors, etc.
* Lawyers are being recruited for the role – even if not functioning in a legal capacity
  + Unclear whether duties are captured by definition of “practice of law”
  + Blurry lines with regards to insurance and liability; also, reporting relationships
  + Consequences re: privilege

# Government Lawyers

* Public sector lawyers usually work for 1 of 3 levels of government or for a public entity
  + E.g. hospitals, school boards, public utilities, securities commissions, Crown corporations, human rights commissions, legal aid clinics, and like bodies
* Government lawyers called “the orphans of legal ethics” because so “little energy has been directed towards defining and defending the role and duties of government lawyers”
* General rule: all lawyers report to the Attorney General. They might work for a certain Ministry, which would be their client, but their boss is the AG.
  + **Client Capture**: similar to lawyers in an organizational setting, government lawyers may be subject to client capture in having their client be their employer. This is adverted by having their boss be the AG, not the specific ministry.

**Special Obligations**

* KEY ISSUE: to what extent does the fact that a lawyer’s client is the Crown affect the nature of her ethical obligations?
  + Is there a higher ethical duty?

Everingham v. Ontario [1991 ONSC]

*Crown lawyer conversed with mental health patient suing the Crown, without patient’s lawyer present.*

**H**: Government lawyers have higher obligations than other lawyers bc assumes public trust in government. Crown lawyer DQ’d.

* What occurred was a breach of ethical rule and commentary. The interaction was coincidental, no oblique motive, obtained no information, no typical ‘conflicting interests’ (Charter litigation, not private), brief and innocent, and no prejudice to the patient.

Everingham v. Ontario [1992 ONCA]

*Crown appealed the previous decision.*

**H**: The objective appearance of unfairness, oppression, and deprivation of counsel is too blatant to be tolerated.

* There was no breach of the rule. No basis for govt lawyers having higher ethical obligations. But... DQ is upheld bc **TEST is whether a fair-minded reasonably informed member of the public would conclude that the proper admin of justice required the removal of counsel**.

## Government Lawyers and Reconciliation

**Justice**

26. We call upon the federal, provincial, and territorial governments to review and amend their respective statutes of limitations to ensure that they conform to the principle that governments and other entities cannot rely on limitation defences to defend legal actions of historical abuse brought by Aboriginal people.

42. We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the Constitution Act, 1982, and the United Nations Declaration on the Rights of Indigenous Peoples, endorsed by Canada in November 2012.

**Equity for Aboriginal People in the Legal System**

51. We call upon the Government of Canada, as an obligation of its fiduciary responsibility, to develop a policy of transparency by publishing legal opinions it develops and upon which it acts or intends to act, in regard to the scope and extent of Aboriginal and Treaty rights.

52. We call upon the Government of Canada, provincial and territorial governments, and the courts to adopt the following legal principles:

* Aboriginal title claims are accepted once the Aboriginal claimant has established occupation over a particular territory at a particular point in time.
* Once Aboriginal title has been established, the burden of proving any limitation on any rights arising from the existence of that title shifts to the party asserting such a limitation.

**Professional Development and Training for Public Servants**

57. We call upon federal, provincial, territorial, and municipal governments to provide education to public servants on the history of Aboriginal peoples, including the history and legacy of residential schools, the United Nations Declaration on the Rights of Indigenous Peoples, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills-based training in intercultural competency, conflict resolution, human rights, and anti-racism.

# Judges’ Ethics, Lawyers’ Dilemmas

* Judges are lawyers, but not members of law societies; therefore, they inhabit a discrete and distinctive ethical domain
* **Five core principles: impartiality, independence, integrity, diligence, and equality**

**5.6-1**  A lawyer must encourage public respect for and try to improve the administration of justice.

**[1]** The obligation outlined in the rule is not restricted to the lawyer’s professional activities but is a general responsibility resulting from the lawyer’s position in the community. A lawyer’s responsibilities are greater than those of a private citizen. **A lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations.** The lawyer in public life should be particularly careful in this regard because the mere fact of being a lawyer will lend weight and credibility to public statements. **Yet, for the same reason, a lawyer should not hesitate to speak out against an injustice.**

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

**[3] Criticizing Tribunals** - Proceedings and decisions of courts and tribunals are **properly subject to scrutiny and criticism** by all members of the public, including lawyers, but **judges and members of tribunals are often prohibited by law or custom from defending themselves**. Their inability to do so imposes special responsibilities upon lawyers. First, a lawyer should **avoid criticism that is petty, intemperate or unsupported by a bona fide belief in its real merit**, since, in the eyes of the public, professional knowledge lends weight to the lawyer’s judgments or criticism. Second, if a lawyer has been involved in the proceedings, there is the risk that any criticism may be, or may appear to be, partisan rather than objective. Third, **when a tribunal is the object of unjust criticism, a lawyer, as a participant in the administration of justice, is uniquely able to, and should, support the tribunal, both because its members cannot defend themselves and because, in doing so, the lawyer contributes to greater public understanding of, and therefore respect for, the legal system.**

**[4]**  A lawyer, by training, opportunity and experience, is in a position to observe the workings and discover the strengths and weaknesses of laws, legal institutions and public authorities. A lawyer should, therefore, lead in seeking improvements in the legal system, but any criticisms and proposals should be bona fide and reasoned.

## Governing Regime

* Governed by 3 key mechanisms:
  + Constitutional norms: judicial independence and impartiality part of constitutional order, written and unwritten
  + Case law
  + Ethical guidelines
* Either appointed by the federal govt or by the provincial govt (or territorial govt)
  + Federally appointed judges have *Ethical Principles for Judges* (52 pg handbook)
  + Only 4 provinces have a code of conduct for judges (BC is one of them)

***BC Code of Judicial Ethics*** (*Commentary Omitted*)

* **Rule 1.00**- Judges must be truly independent and must avoid all conflict of interests.
* **Rule 2.00**- Judges must devote themselves entirely to the exercise of their judicial function.
* **Rule 3.00**-Judges should maintain their competence, both through their own work, and by participation in all programs of general education or upgrading.
* **Rule 4.00-** Everywhere and at all times, judges should behave irreproachably.
* **Rule 5.00-** Judges should be impartial, diligent and courageous.
* **Rule 6.00-** Judges must be objective.
* **Rule 7.00-** The role of judges is to render justice within the framework of the law.
* **Rule 8.00**-Judges should refrain from criticizing openly or publicly the quality of the administration of justice or the conduct of judges, other than through the appropriate channels.
* **Rule 9.00-** Reasons for judgment should be given and if reserved should be rendered within a reasonable time.
* **Rule 10.00-** Judges should:
  + a) sit at those times and in those places to which they are assigned by their Chief Judge pursuant to the statutory powers assigned to the latter, and,
  + b) conduct hearings and make their decisions with all due diligence, and,
  + c) make themselves available to assist their colleagues on those occasions when their own work ends prematurely.
* **Rule 11.00-** In the exercise of their judicial functions, judges should maintain their serenity at all times.
* **Rule 12.00-** When presiding at a hearing, the conduct of judges should reflect the seriousness and gravity of judicial proceedings.
* **Rule 13.00-** In the light of their duty to maintain order and decorum during hearings, judges should display firmness with courtesy, and at all times be patient, deliberate and dignified.
* **Rule 14.00-** Judges should treat all those appearing before them with deference and respect.
* **Rule 15.00-** Judges should attend in Court at the time designated.
* **Rule 16.00-** Judges who infringe these judicial guidelines offend the honour and dignity of the Provincial Court of BC.

## Impartiality

* **Judges must be and should appear to be impartial with respect to their decisions and decision-making.**
  + But there are 25 pages of commentary elaborating on this statement and divided in 5 categories: general, demeanor, civic & charitable activities, political activity, and conflicts of interest

Canadian Judicial Council, Re: Justice Cosgrove

*Judge engaged in serious misconduct during murder trial*

**H**: Yes. Apology was insufficient to restore the public confidence.

* Determine if the conduct alleged is so manifestly and profoundly destructive of the concept of the impartiality, integrity, and independence of the judicial role, that public confidence would be sufficiently undermined to render the judge incapable of executing the judicial office

### Recusal

* If a lawyer has concerns regarding impartiality, can request for judge to recuse himself, but up to judge to decide
* Should recusal requests be heard by another judge?

Arsenault-Camerson v. PEI [1999 SCC]

*Parents wanted French school in PEI, govt refused, sitting judge Bastarache was longtime supporter of French language rights. PEI sought to recuse Bastarache.*

**I: Reasonable Apprehension of Bias? H**: No, motion dismissed.

* Test for apprehension of bias takes into account the presumption of impartiality.
* **Bastarache**: Test for RAB not met. No evidence of a real likelihood or probability of bias that would cause a reasonable person to believe the case wouldn’t be approached with an open mind.

Weywaykum Indian Band v. Canada [2003 SCC]

*Binnie was previously involved with* Weywaykum *case as ADM in 1980s. Once motion for recusal was received, Binnie recused himself from the motion and let the other 8 judges decide.*

**I: Reasonable Apprehension of Bias? H**: No, motion dismissed.

* Essences of impartiality is that a judge has an open mind. Presumption carries weight and should only be displaced by circumstances that justify a finding a judge must be DQ’d (burden of party arguing there is a bias).
* Judges don’t need to be completely free of opinions – they just need to have an open mind.
* **TEST FOR RAB**: whether an informed person, viewing the matter realistically and practically would conclude that there is bias. Passage of time was key to finding there was no unconscious bias, and Binnie’s role was supervisory and limited.

### Judge-Lawyer Tensions

* “Judges should strive to ensure that their conduct, both in and out of court, maintains and enhances confidence in their impartiality and that of the judiciary.”
* “While acting decisively, maintaining firm control and ensuring expedition, judges should treat everyone before the court with appropriate courtesy.”

Doré v. Barreau du Quebec [2012 SCC]

*Lawyer disciplined for writing intemperate letter to judge (who was also reprimanded). Challenged constitutionality of Barreau’s decision to suspend Dore, who claimed his freedom of expression was unduly infringed.*

* Based on the seriousness of D’s conduct, the Council reprimanded D and suspended his ability to practice law for 21 days.
* On appeal, D abandoned his constitutional challenge to the specific provision, arguing instead that the sanction itself violated his freedom of expression.
* Tribunal found that D exceeded the objectivity, moderation and dignity expected of him and that the decision to sanction D was a minimal restriction on his freedom of expression.
* On judicial review, the Superior Court of Quebec upheld the decision of the Tribunal.

## Independence

* **An independent judiciary is indispensable to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.**

**Principles**:

1. Judges must exercise their judicial functions independently and free of extraneous influence.
2. Judges must firmly reject any attempt to influence their decisions in any matter before the Court outside the proper process of the Court.
3. Judges should encourage and uphold arrangements and safeguards to maintain and enhance the institutional and operational independence of the judiciary.
4. Judges should exhibit and promote high standards of judicial conduct so as to reinforce public confidence which is the cornerstone of judicial independence.

**7.7-1**  A judge who returns to practice after retiring, resigning or being removed from the bench must not, for a period of three years, unless the governing body approves on the basis of exceptional circumstances, appear as a lawyer before the court of which the former judge was a member or before any courts of inferior jurisdiction to that court or before any administrative board or tribunal over which that court exercised an appellate or judicial review jurisdiction in any province in which the judge exercised judicial functions.

* If a former judge working for a law firm is asked to provide guidance in presenting a case to their former court and colleagues, the judge likely should not answer

## Integrity

* **Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary**

**Principles**:

1. Judges should make every effort to ensure that their conduct is above reproach in the view of reasonable, fair minded and informed persons.
2. Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.

### Judicial Fundraising

* Judicial fundraising for a charitable organization may be considered a manifestation of integrity, but may be at odds with impartiality
* Judges should not be involved with political fundraising

## Diligence \*\*\*

* **Judges should be diligent in the performance of their judicial duties.**
  + Usually comes up in the case of a judge that is slow in releasing a judgment

**Principles**:

1. Judges should devote their professional activity to judicial duties broadly defined, which include not only presiding in court and making decisions, but other judicial tasks essential to the court’s operation
2. Judges should take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office.
3. Judges should endeavor to perform all judicial duties, including the delivery of reserved judgments, with reasonable promptness.
4. Judges should not engage in conduct incompatible with the diligent discharge of judicial duties or condone such conduct in colleagues.

Leader Media Productions Ltd. v. Sentinel Hill Alliance [2008 OntCA]

*Contractual dispute, P claimed TJ fell asleep throughout the trial and therefore unable to follow the evidence.*

**I: Should fresh evidence be admitted because the TJ was sleeping during trial? /** H: Appeal dismissed.

* Appellants didn’t raise the concern at trial; they were instead making a deliberate tactical decision.
* If the judge falls asleep, the concern should be raised immediately.
* Dosing off once (vs multiple times) may not show a danger of prejudice
* Judge copying from one side’s factum in their reasoning
  + Winning side does not have to make a complaint, but the other side might

**Independent Research**

* Judges may turn to the internet to fill in information gaps, but this may raise ethical concerns

## Equality

* **Judges should conduct themselves and proceedings before them so as to assure equality according to the law.**
  + May be in tension with impartiality
* ***Yukon Francophone School Board v Yukon (AG)***: Judges don’t have to completely stop activities in the community
* The issue is whether the judge is involved with an advocacy or political group, rather than just being a member of a particular group of society (e.g. blind)
* What to do when a judge’s action is wrong (Scenario 19 – telling a mother to stop breastfeeding):
  + May be in the client’s best interest not to raise the concern, as it would not impact the case
  + Possibility of raising the concern without being too confrontational

**Principles**:

1. Judges should carry out their duties with appropriate consideration for all persons (for example: parties, witnesses, court personnel and judicial colleagues) without discrimination.
2. Judges should strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.
3. Judges should avoid membership in any organization that they know currently practices any form of discrimination that contravenes law.
4. Judges, in the course of proceedings before them, should disassociate themselves from and disapprove of clearly irrelevant comments or conduct by court staff, counsel or any other person subject to the judge’s discretion which are sexist, racist or otherwise demonstrate discrimination on grounds prohibited by law.