**INTRODUCTORY**

Sources:

* Case law and legislation – negligence, fiduciary duty, rules of ethics (ex. privilege), etc.
* Rules of Professional Conduct – provincial law society codes, BCA’s *Model Code.*
* Law Society Disciplinary decisions – interpretation of Codes and clear violations. Bad for grey areas.
* Principles & Norms – help fill the gap between conduct rules and personal morals.

**Legal Profession Act:**

* S.3: It is **the object and duty of the society** to uphold and protect the public interest in the administration of justice by:
	+ (a) Preserving and protecting the rights and freedoms of all persons,
	+ (b) Ensuring the independence, integrity, honour and competence of lawyers,
	+ (c) Establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
	+ (d) Regulating the practice of law, and
	+ (e) Supporting and assisting lawyers, articled students…in B.C. in fulfilling their duties in the practice of law.
* S.1: “**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.
* Professional misconduct not defined in the Act. Generally something done in the course of work.

Theoretical Frameworks for Ethical Reasoning:

* Deontological Reasoning:
	+ Reasoning from rules (religious, legal, group norms, etc.).
	+ Non-consequentialist in determining whether something is right or wrong.
* Teleological Reasoning:
	+ Reasoning from consequences – weigh the competing harms and make a decision.
* Ontological Reasoning:
	+ Reasoning from virtue or character – decisions made based on the desire to be a good person.
	+ These duties may conflict at times (ex. loyalty, honesty, respect for privacy, etc.).

**TANOVICH – LEARNING TO ACT LIKE A LAWYER**

- Law schools should have codes of professional responsibility, as a distinct and separate code of conduct for law students, to prepare students for the ethic standard required of lawyers. Why?

* Law students are an integral part of the legal profession, and there should be a code governing their conduct to reflect this and to teach them how to respond to ethical dilemmas.
* A code of conduct must be relevant to law students to inspire ethical practice.
* Many incidents in the last few years indicate a lack of professionalism among law students.

- It should include disciplinary offences for both academic misconduct and violations of the relevant Code.

**CANONS OF PROFESSIONAL ETHICS**

- Rules 2.1-1 🡪 2.1-5 of the *BC* *Code*: General statements of principles that underlie all the rules in the Code.

- The Law Society monitors and enforces these duties. Gets its’ authority from the *Legal Profession Act (LPA).*

TO THE STATE

**2.1-1(a)**: A L owes a duty to the state, to maintain its integrity and its law. A L should not aid, counsel or assist any person to act in any way contrary to the law.

**(b)**: When engaged as a Crown prosecutor, a L’s primary duty is NOT to seek a conviction but to see that justice is done; to that end the L 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.

**(c)**: A L should accept without hesitation, and if need be without fee or reward, the cause of any person assigned to the L by the court, and exert every effort on behalf of that person.

TO THE COURTS AND TRIBUNALS

**2.1-2(a)**: A L’s conduct should at all times be characterized by candour and fairness. The L should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of Cs, at the same time discharging professional duties to clients resolutely and with self-respecting independence.

**(b)** Judges, not being free to defend themselves, are entitled to receive the support of the legal profession against unjust criticism and complaint. Whenever there is proper ground for serious complaint against a judicial officer, it is proper for a L to submit the grievance to the appropriate authorities.

**(c)** A L should NOT attempt to deceive a court or tribunal by offering false evidence or by misstating facts or law and should NOT, either in argument to the judge or in address to the jury, assert a personal belief in an accused’s guilt or innocence, in the justice or merits of the C’s cause or in the evidence tendered before the court.

**(d)** A L should never seek privately to influence a court or tribunal, directly or indirectly, in the L’s or a client’s favour, nor should the L attempt to curry favour with juries by fawning, flattery or pretended solicitude for their personal comfort.

TO THE CLIENT

**2.1-3(a)**: A L should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a C, and give an open and undisguised opinion of the merits and probable results of the C’s cause. The L should be wary of bold and confident assurances to the C…

**(b)** A L should disclose to the C all the circumstances of the L’s relations to the parties and interest in or connection with the controversy, if any…A L must not act where there is a conflict of interests between the L and a C or between Cs.

**(c)** Whenever the dispute will admit of fair settlement the C should be advised to avoid or to end the litigation.

**(d)** A L should treat adverse witnesses, litigants and counsel with fairness and courtesy, refraining from all offensive personalities. The L must not allow a C’s personal feelings and prejudices to detract from the L’s professional duties. At the same time, the L should represent the C’s interests resolutely and without fear of judicial disfavour or public unpopularity.

**(e)** A L should endeavour by all fair and honourable means to obtain for a C the benefit of any and every remedy and defence that is authorized by law. The L must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law…No C has a right to demand that the L be illiberal or do anything repugnant to the L’s own sense of honour and propriety.

**(f)** It is a L’s right to undertake the defence of a person accused of crime, regardless of the L’s own personal opinion as to the guilt of the accused.

**(g)** A L should not, except as by law expressly sanctioned, acquire by purchase or otherwise any interest in the subject-matter of the litigation being conducted by the L. A L should scrupulously guard, and not divulge or use for personal benefit, a C’s secrets or confidences. Having once acted for a C in a matter, a L must not act against the C in the same or any related matter.

**(h)** A L must record, and should report promptly to a C the receipt of any moneys or other trust property.

**(i)** A L is entitled to reasonable compensation for services rendered, but should avoid charges that are unreasonably high or low. The C’s ability to pay cannot justify a charge in excess of the value of the service, though it may require a reduction or waiver of the fee.

**(j)** A L should try to avoid controversies with Cs regarding compensation so far as is compatible with self-respect and with the right to receive reasonable recompense for services. A L should always bear in mind that the profession is a branch of the administration of justice and not a mere money-making business.

**(k)** A L who appears as an advocate should not submit the L’s own affidavit to or testify before a court or tribunal except as to purely formal or uncontroverted matters, such as the attestation or custody of a document, unless it is necessary in the interests of justice. If the L is a necessary witness with respect to other matters, the conduct of the case should be entrusted to other counsel.

TO OTHER LAWYERS

**2.1-4(a)**: A L’s conduct toward other L should be characterized by courtesy and good faith. Any ill feeling that may exist between clients or lawyers, particularly during litigation, should never be allowed to influence Ls in their conduct and demeanour toward each other or the parties. Personal remarks or references between Ls should be scrupulously avoided, as should quarrels between Ls that cause delay and promote unseemly wrangling.

**(b)** A Lr should neither give nor request an undertaking that cannot be fulfilled and should fulfil every undertaking given. A L should never communicate upon or attempt to negotiate or compromise a matter directly with any party who the L knows is represented therein by another L, except through or with the consent of that other L.

**(c)** A lL should avoid all sharp practice and should take no paltry advantage when an opponent has made a slip or overlooked some technical matter. A L should accede to reasonable requests that do not prejudice the rights of the C or the interests of justice.

TO ONESELF

**2.1-5(a)**: A L should assist in maintaining the honour and integrity of the legal profession, should expose before the proper tribunals without fear or favour, unprofessional or dishonest conduct by any other L and should accept without hesitation a retainer against any L who is alleged to have wronged the C.

**(b)** It is the duty of every L to guard the Bar against the admission to the profession of any candidate whose moral character or education renders that person unfit for admission.

**(c)** A L should make legal services available to the public in an efficient and convenient manner that will command respect and confidence. A L’s best advertisement is the establishment of a well-merited reputation for competence and trustworthiness.

**(d)** No C is entitled to receive, nor should any L render any service or advice involving disloyalty to the state or disrespect for judicial office, or the corruption of any persons exercising a public or private trust, or deception or betrayal of the public.

**(e)** A L should recognize that the oaths taken upon admission to the Bar are solemn undertakings to be strictly observed.

**(f)** All Ls should bear in mind that they can maintain the high traditions of the profession by steadfastly adhering to the time-honoured virtues of probity, integrity, honesty and dignity.

**THE LAWYER’S ROLE**

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| **2.1-1 To the State** | Maintain integrity & law//Don’t help people break the law |
| **2.1-2 To court & tribunals** | Conduct characterized by candor & fairness//Don’t try to deceive or improperly influence the court |
| **2.1-3 To the client** | Obtain any remedy/defence via fair & honorable means w/in the law |
| **2.1-4 To other lawyers** | Conduct characterized by courtesy & good faith//avoid sharp practice |
| **2.1-5 To oneself** |  |
| **2.2 Integrity** | (1) Trustworthiness of L is key to the C-L relationship(2) Irresponsible conduct can erode public confidence in admin of justice(3) Dishonorable/questionable conduct by L in private or professional life reflects adversely on the profession |

**WOOLLEY – IN DEFENCE OF ZEALOUS ADVOCACY**

- Woolley is a proponent of resolute advocacy, the idea that law is a civil compromise for dispute resolution, worthy of respect in and of itself. Law isn’t necessarily moral, but it shows the middle ground.

- Resolute advocacy has 2 central features:

* 1) Places decision-making in the hands of the client.
* 2) Ls must interpret and work through the law to achieve client goals.

- Lawyers engage in good faith interpretation of the law and work w/in the letter of the law to provide clients w access to a system of justice, so any action required by L’s role is morally justified.

- If law permits a course of action and legal merit is contentious, the final say should be left to the client. The law facilitates self-determination.

**LUBAN – THE ADVERSARY SYSTEM EXCUSE**

- Goes against Woolley, says that morality is greater than client choice – personal morality objection.

* Ls retain responsibility for their moral choices - not absolved b/c the choice was made “for the C”.

- The adversarial system, by forcing lawyers into one-sided, zealous advocacy roles, institutionally excuses lawyers from ordinary moral obligations conflicting w their professional obligations.

- Morality and legality are not the same: professional obg is not an absolute, but a rebuttable presumption.

* Where professionalism and morality conflict, morality should win out.

- Woolley’s model of state vs. individual pressure is only appropriate in the criminal sphere.

**FARROW – SUSTANABLE PROFESSIONALISM**

- Diff people and groups have diff views of morality.

* The modern discourse of an ethically sustainable profession challenges the time-honoured centrality of client autonomy and a lawyer’s unqualified loyalty to the client’s interests.

- Fundamental interests include: C interests; L interests; ethical and professional interests (advanced by diversity), and; public interests.

**REGULATION OF THE PROFESSION**

**LPA:**

* **S.15(1)** No person, other than a practicing lawyer, is permitted to engage in the practice of law.
* **S.19(1)** No person may be enrolled as an articled student, called and admitted or reinstated as a member unless the benchers are satisfied that the person is of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court.

Goals of self-regulation

* Public interest – ensure legal services are provided ethically and competently.
* Allows layers to maintain a competitive marketplace – social contract.
	+ Limit/control the # of producers - formal education requirements, licensing standards, etc.
* Maintain social status and economic benefits of the profession.

Arguments for self-reg

* Historical – links an independent and self-reg profession w the protection of individual rights and liberties from the state.
	+ *Canada (AG) v Law Society of BC*: “Independence of the bar from state…is one of the hallmarks of a free society…regulation of these members of the profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense…”
	+ *Law Society of Manitoba v Savino* (1983 MB CA): No one is better qualified to say what constitutes professional misconduct than a group of practicing barristers.
* Part of social K – market dominance in exchange for self-reg (not a burden to society to regulate).
	+ Justification for the monopoly?
* More efficient and cost effective than external reg.
	+ Internal reg is not paid by taxes, but it drives up ultimate consumer cost due to monopoly.
* Protection of the public – ensure quality of service.
	+ This isn’t just met by self-reg.
* Promote confidence in the legal system. Knowing it’s independent/self-reg promotes confidence, as Ls are best equipped to understand the complexity involved in reg.

Arguments against self-reg

* Asymmetry about appropriateness of L conduct is a product of L’s monopoly over legal knowledge.
* Access to justice problem.
* Evidence from other fields shows effective gov or 3rd party reg doesn’t depend on the regulator possessing the same knowledge as the regulated.
* Conflict of interest.

- Disciplinary Process:

* **Complaint & investigation** – initial screening by admin staff, most filtered out 🡪
* **Hearing** – quasi-judicial & highly formal, burden of proof on LS. Subject to *Charter* and judicial review.
* **Penalty/sanction** – purpose is protection of the public & profession’s reputation, not punishment.

**FITNESS TO PRACTICE**

**GOOD CHARACTER**

- s.19 above – good character and repute. 4 categories:

* Respect for the rule of law and the admin of justice (ex. criminal charges, violation of court orders).
* Honesty (ex. academic, professional, or employment misconduct or sanction).
* Governability (ex. discipline by professional organizations, regulatory advisory, refused license on basis of character).
* Financial responsibility (ex. personal bankruptcy, corporate insolvency, default of loans, misused positions for financial gain).

- The good character assessment is to gauge applicant’s suitability to practice at that point in time.

- The burden of proof is on the applicant to establish, on BoP, that they are of good character.

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| Re Mohan, 2012 LSBCRemorse, admitting, passage of time | - Applicant withdrew application. Had a history of academic dishonesty (cheated on math test in undergrad, plagiarized essay in law school), then failed to answer questions on the LS application, and possible plagiarism of honors thesis. Reapplied in 2012 after getting LLM. He presented character reference letters and fully admitted past transgressions.* He was admitted. Decided he was not of good character. Implicit finding of credibility, good to go.
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**MENTAL HEALTH**

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| Gichuru v LS BC 2009 BCHRTDiscrimination on basis of mental illness | - Old question on articling admissions form asked if applicants had ever been treated for schizophrenia, paranoia, etc. G had a history of depression, answered accordingly. Sent additional info as required, showed he was being treated, and eventually cured, went to psychiatrist when bar required him to, got non-practicing membership, etc. Filed complaint on human rights grounds for discrimination.* Successful. Asking the question led to adverse impacts on his career.
* Question not found to be reasonably necessary to accomplish the goal of establishing medical fitness to practice. Systemically discriminatory.
 |

- New Question: Medical Fitness: Based on your personal history, your current circumstances or any professional opinion or advice you have received, do you have any existing condition that is reasonably likely to impair your ability to function as an articled student? (new question currently posed).

* Improvements wrt *Gichuru*: Specific timeframe, deals w connection btwn condition and ability to practice, relies on self-assessment.
* Downsides: Too watered down, self-assessment can be abused.

**NY TIMES – LAWYERS OF SOUND MIND?**

- Mental health inquiries are irrelevant, unethical and humiliating. They are also illegal under the *Americans With Disabilities Act*, which forbids public entities from administering licensing programs from discriminating against applicants on the basis of disability.

- There is no evidence to suggest people w mental illness are any less ethical or less capable than other Ls.

**FEDERATION OF LAW SOCIETIES OF CANADA – PROPOSED AMENDMENTS; DUTY TO REPORT**

- Report sets out recommendations to amend Model Code wrt the duty to report.

- Under “duty to report misconduct”:

* Takes out “misconduct”.
* Takes out provision for reporting mental instability of a L of such a nature that L’s Cs are likely to be materially prejudiced.
* Takes out provisions of any other situation in which a L’s Cs are likely to be materially prejudiced.

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| LS BC v Lessing 2013 LSBCMental health plays a role in disciplinary hearings | - L got divorced for a fifth time, led to financial troubles. Didn’t report judgments of indebtedness against him, breached court orders, was found in contempt of court, etc.* L has mental health issues – does that play a role in a disciplinary action?

- Yes. Mental health issues mitigate the discipline here. But still have to balance this w public confidence in the profession, still have to punish for bad behaviour.- Balancing public confidence w rehabilitation. Consider:* Aggravating factors – here, L was a “frequent flyer” for discipline.
* Impact on the victim and advantage gained by the respondent.
* Acknowledgment of wrong and attempts at redress.
* Possibility of remediating/rehabilitating respondent.
* Need to ensure public’s confidence in integrity of the profession.

- L got 1 month suspension and couldn’t self-represent w/out consent from LS. |

**ADDICTION**

**BENTON – HIGH-FUNCTIONING ALCOHOLICS: LAWYERS ARE NOT ABOVE THE “BAR”**

- High functioning alcoholics are able to maintain their work, social life, etc. Don’t fit the stereotypical idea of what an alcoholic looks like.

- Very high numbers of lawyers are high-functioning alcoholics.

* 18% who practiced for 2-20 years.
* 25% who practiced for 20 years or more.

**LAWYERS ASSISTANCE PROGRAM BC – SOME TIPS ON WARNING SIGNS OF ADDICTION**

- Lawyers, judges and law students usually do their best to cover up any addictions they may have.

- Keep an eye out for the following:

* Attendance (come in late, misses court, frequently fails to return from lunch, unexplained absences…)
* Performance (procrastinates, misses deadlines, fails to return correspondence, erratic behaviour…)
* Behaviour (hard to get along w, deterioration of appearance and hygiene, dishonesty, bad finances…)
* High risk situations (marriage breakdown, loss of job, complaining of overwork, stress, bad finances…)

**COMPETENCE**

- 3.1-1 Skills: substantive law + investigating facts + identifying issues + legal research and analysis + communication + timely + advocacy/negotiation + writing + problem solving + CLE.

- 3.7-1 L must perform all legal services undertaken on a C’s behalf to the standard of a competent L

* [2] competence is founded on both legal & ethical principles including knowledge of current practice and procedure.
* [5] lawyer should feel honestly competent OR able to become so without delay.
* [6] if NOT competent -->decline to act/obtain consent to collaborate/obtain C’s consent to become competent.
* [7] may require advice or collaboration with experts in non-legal fields.
* [8] L should clearly specify facts, circumstances, and assumptions upon which their opinion is based.
* [10] can give advice on non-legal matters, but should clearly distinguish legal from non-legal advice.
* [12] timely service - if delay is anticipated, client should be informed.
* [15] standard of perfection not required - negligence not tied to lack of professional standard - even without negligence, disciplinary action may arise.

- Negligence is not the same as incompetency – need not have one to have the other.

- For judges, competency also involves appreciating the social context of legal issues, the “lived reality” of those affected by their decisions (McLachlin).

**LAWYER-CLIENT RELATIONSHIP**

**ADVERTISING**

- “Marketing activity” is defined very broadly in the ***BC Code***:

* **4.2-4:** …or any other means by which professional legal services are promoted/clients are solicited.
* **4.2-5**: Any marketing activity undertaken or authorized by a L must not be:
	+ **(a)–(e)**: False, inaccurate, unverifiable, reasonably capable of misleading the recipient or intended recipient, or contrary to the best interests of the public.
* **4**.**3-0.1**: L can advertise preferred area of practice if they regularly practice in that field.
* **4**.**3-1(a)**: Unless otherwise authorized, L must NOT use title “specialist” or something similarAND **(b)** take rsbl steps to discourage others from doing so.

- Pros: Lawyers should be allowed to brand themselves in a highly competitive free market, gives consumers info on who to choose, promotes access to justice.

- Cons: Could lessen professional status of Ls, invasive, a commodification, contributes to litigious culture.

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| LSBC v Jabour 1980 SCCLS can regulate advertising | - Jabour advertised, offering flat fees, big illuminated sign. Found guilty of “conduct unbecoming” by LS. Challenged LS’s jurisdiction to regulate advertising.- LS can regulate any conduct unbecoming, which is anything found to be contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the profession.* If an ad fits this description, it can be regulated.
* Jabour got 6 month suspension – harsh!

- NOTE: Ad regulations relaxed after s.2(b) of the Charter came in. |
| LS Sask v Merchant 2000 LSDDConduct unbecoming wrt advertising | - Merchant firm wrote to survivors of residential schools to start claims. Listed $$ awards, “nothing to lose”, sign “authorization”, asking for referrals.- Conduct unbecoming?* Asserted they had nothing to lose, no risk – simply untrue, big risk.
* Gave impression process would be simple.
* Assumed everyone had a valid course of action w/out doing any research.
* Retainer contrary to letter, probably not read or understood.

- Overall: Offensive and in bad taste. |

**FORMATION**

- Start of relationship may be clear, w formal offer & acceptance of retainer contact.

* BUT relationship can form w/out formal retainer.

- First dealings doctrine: L-C relationship forms when the C first deals w L’s office to obtain legal advice. This includes initial discussions of preliminary info L reqs in order to decide whether to rep C (*Descoteaux*).

* Be careful when receiving confidential info during informal dealings – can later lead to a conflict of interests (**3.3-1[4]**).

- Phantom client: People who think you’re their L when you’re not. Can be the result of casual conversations. Good to make people think they need to sign a formal retainer agreement.

**TERMINATION**

- Ls reluctant to send explicit termination letters b/c it can make C feel “dumped” and L usually wants to keep the relationship w the C open for later services. Often leave it implicit, based on resolution of the action.

* BUT explicit termination prevents future conflicts of interest.

- The relationship can be terminated at any point by C – absolute discretion.

- L’s ability to terminate is limited.

**WITHDRAWAL**

- **BC Code**:

* **3.7-1**: L must not withdraw except for good cause and on rsbl notice to the C. Min prejudice to C.
* **3**.**7-2**: If there has been a serious loss of confidence btwn L and C, L may withdraw.
* **3**.**7-3**: If, after rsbl notice, C fails to provide retainer or funds for disbursements/fees, L may withdraw.
* **3**.**7-4**: L can withdraw in criminal case for non-payment if enough time for new L to prepare, notice given to C, accountable for previous fees, etc.
	+ Court can refuse to grant this (*Cunningham*).
* **3.7-7**: Must withdraw if discharged by C//not competent to act//C persists in instructing L to act in unethical manner.
* **3.7-8**: Must withdraw in way minimizing expense & prejudice to C, facilitates transfer to successor L.
* **3.7-9.1**: L can’t disclose reason for withdrawal if it’s the result of confidential communication.

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| R v Cunningham 2010 SCCCourt can refuse withdrawal on non-paymentMust grant for ethical reasons | - L worked at Legal Aid, retained as defence for C charged w 3 sexual offences against a young child. To continue getting Legal Aid funding C had to update his financial info, which he didn’t do. 2 weeks later, L applied to withdraw on basis of inability to pay.* Issue – in a criminal matter, can court refuse request to withdraw b/c C hasn’t complied w financial terms of the retainer?

- Yes. Can refuse request based on non-payment alone. Can harm C and administration of justice. Withdrawal is a remedy of last resort.* BUT if withdrawal sought for ethical reasons, court must accept it on face value.

- Take into consideration timing of withdrawal – very early or last minute? |

**CHOICE OF CLIENT**

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| **2.1-1** To the State | Accept w/out hesitation and w/out reward (if necessary) every C assigned by court |
| **2.1-3** To the client | Rep w/out fear of judicial disfavor or public unpopularity//The right to defend C accused of a crime regardless of L’s own belief//Make services available to public |

- The unpopular C is entitled to rep when liberty interests are at stake, but these C can raise ethical issues.

- Choice of client is a very important decision. L-C relationship triggers moral and professional obgs.

- *Proulx & Layton:* L should decline taking on a client where they believe the quality of legal rep will suffer as a result of personal distaste for the potential client or cause.

* If it’s not that extreme, follow these guidelines:
* Hold a sincere belief in the immorality of the rep
* Repugnance should relate to concerns to the rep at hand, not C’s personality.
* Don’t let public opinion shape your decision.
* Consider the importance of rep for that C and whether they could get rep elsewhere.
* Don’t choose based on your private opinion of guilt or innocence.

**DUTY OF LOYALTY**

- **3.4-4 🡪 3.4-11**

- “Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system…is a reliable and trustworthy means of resolving their disputes and controversies” (*Neil*).

**CONCURRENT REPRESENTATION**

**3.4-4**: Where there is no dispute among Cs about subject matter of proposed rep, 2 or more Ls in a firm can act for current Cs w competing interests and may treat info received from each C as confidential and not disclose it to other Cs, provided that:

* (a) disclosure of risks has been made, (b) each C consents after getting independent advice, (c) Cs each determine it’s in their best interests, (d) each C is represented by a diff L in the firm, (e) Appropriate screening mechanisms are in place to protect confidential info, and (f) all Ls in the firm withdraw from the rep of all Cs in respect of the matter if a dispute that cannot be resolved develops among the Cs.

**JOINT RETAINERS**

**3.4-5**: Before L is retained by more than 1 C, must inform Cs that (a) L has been asked to act for both/all of them, (b) no info can be treated as confidential wrt each other, and (c) if a conflict develops that can’t be resolved, L can’t continue to act for both/all of them and may have to withdraw completely.

**3**.**4-6:** If L has continuing relationship w C for whom L acts regularly, before accepting a joint retainer w that C and a new C, L must advise new C of continuing relationship and recommend they get independent advice about the joint retainer.

**3.4-7**: When L has advised Cs under -5 and -6 and Cs want L to act, L must obtain their consent.

**ACTING AGAINST FORMER CLIENTS**

**3.4-10**: Unless former C consents, L must not act against a former C in (a) the same matter, (b) any related matter, or (c) any other matter if L has relevant confidential info arising from the rep of former C that may reasonably affect the former C.

**3**.4**-11**: When L has acted for a former C and obtained confidential info relevant to a new matter, another L in the L’s firm may act against former C in the new matter if the firm establishes that it is reasonable that it act in the new matter, having regard to all relevant circumstances, including:

* (a) the adequacy and timing of measures taken to ensure no disclosure of former C’s confidential info to the new L, (b) the extent of prejudice to any party, and (c) the good faith of the parties.

**CONFLICTS OF INTEREST**

**3.4-1**: L must not continue to act where there is a conflict, except as permitted.

**3.4-2**: If there is a conflict, must not act unless there is express/implied consent AND rsbl belief in ability to rep C w/out adverse effect on loyalty to C:

* (a) Express consent must be fully informed & voluntary after disclosure
* (b) Consent may be inferred, need not be in writing if C has in-house counsel, it’s an unrelated matter, L has no confidential info that might affect things and C commonly consents to conflicts like this (ex. *McKercher*).

- **Bright-Line Rule**: L (or firm) can’t concurrently rep Cs adverse in interest w/out first obtaining their informed consent (3.4-2), and w the belief they can do so w/out adverse effect.

* Scope:
	+ Applies to related and unrelated matters.
* Only applies where the immediate interests of clients are directly adverse.
* Only applies where the adverse interests are legal interests – not strategic or commercial.
* Doesn’t apply where it would be unreasonable for party to expect firms not to act for others.
* Applies where concurrent rep creates a substantial risk of impaired representation.
* **3.4-1[1]:** Substantial risk = more than mere possibility. Genuine & serious risk of prejudice to C’s interests.
* **TEST**: See *Neil*.

- **Substantial Risk Principle:** If Bright-line rule doesn’t apply, question is whether concurrent rep creates a substantial risk of impaired representation (*Neil, McKercher*).

* Substantial risk = more than mere possibility, must be genuine & serious risk of prejudice to C’s interests (3.4-1[1]).
* Onus of establishing that a substantial risk exists and that L should be removed is on the party alleging the conflict.

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| R v Neil 2002 SCCDuty of loyaltyBright line rule | - Criminal trial, brought stay of proceedings on abuse of process. Firm that initially rep’d the C ultimately ended up rep’ing co-accused – conflict of interest.- Duty of loyalty intertwined w fiduciary nature of L-C relationship. 3 dimensions:* Duty to avoid conflicting interests.
* Duty of commitment to the client’s cause.
* Duty of candour.

- Bright line rule TEST:* Did L receive confidential info attributable to S-C relationship relevant to matter at hand?
* Is there a risk that the info will be used to the prejudice of C?
* If L’s new retainer is sufficiently related to the past matters, rebuttable presumptions that possession of the info raises a risk of prejudice.

- Here not directly adverse nor in legal matters. But still a conflict. |
| CNR v McKercher2013 SCCSubstantial risk principle | - L counsel for CNR for many years, then took retainer to act in class-action against CRN. Ls hastily terminated relationship w CNR throughout firm, but CNR applied to have L removed as counsel from class-action as well. Worried about misuse of confidential info. Also worried that L knew their litigation strategy.* First ask if bright line rule applies. If not, use substantial risk principle.

- Here, bright line applies. Immediate legal interests were directly adverse, even though the matters were unrelated.* But no risk of misuse of confidential info, so L not removed. Knowledge of general litigation strategy is not enough, can’t be used in a tangible manner.
 |

**SEXUAL RELATIONSHIPS WITH CLIENTS**

- No absolute bar to sexual relationships w clients, but serious questions are raised wrt potential dangers. The L should always discuss potential conflict w C and advise them to seek outside legal advise (*Hunter*):

* L’s ability to provide objective, disinterested, dispassionate advice to C may be threatened.
* C’s ability to objectively evaluate or challenge the advice received may be threatened.
* Consent may be more apparent than real (vulnerability).

- Factors:

* Emotional/financial vulnerability of C.
* Creation of power imbalance (either way, most likely in favour of L).
* Can put privilege in jeopardy – confusion about what info was obtained under S-C privilege.
* May lead to L having to act as a witness at a future date.
* Interference w professional duties.

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| LS of Upper Canada v Hunter 2007 LSDDSexual relationshipDuty to advise of conflict | - Prominent and senior L w active roles in LSs had consensual sexual relationship w C for several years. L ended it, tried to get C to sign form saying he complied w rules.* Issue – professional misconduct?

- Yes. There is an obg to discuss conflict w client:* Created a conflict of interest in rep’ing her.
* Failed to recognize & address issues arising from the conflict.
* On breaking up, pressured her to sign form saying she’d been informed of the conflict and advised to get outside legal advice (she never was).

- L got 60 day suspension + $2,500 fine geared at general deterrence. |

**DUTY OF CONFIDENTIALITY**

- L can’t render effective professional service to a C unless there is full an unreserved communication.

**3.3-1**: L must keep in strict confidence ALL info concerning C’s biz & affairs. Do not divulge unless:

* (a) Expressly or impliedly authorized by client.
* (b) Required by law or a court.
* (c) Required to deliver the info the LS.
* (d) Otherwise permitted by the rule.

**3.3-2**: L must not use/disclose to C’s disadvantage or L or 3rd party’s benefit w/out consent of C (*Greenspan*).

**3.3-2.1**: L must claim privilege if asked to produce docs. If required to disclose, keep it limited.

-Privilege is narrower than confidentiality:

* Privilege: Rules of evidence. Privilege belongs to the client. Covers communications only.
* Confidentiality: Ethical rules apply regardless of nature or source of the info (3.3-1[2]).

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| R v Cunningham 2010 SCCWithdrawal & info wrt non-payment of fees | - L worked at Legal Aid, retained as defence for C charged w 3 sexual offences against a young child. To continue getting Legal Aid funding C had to update his financial info, which he didn’t do. 2 weeks later, L applied to withdraw on basis of inability to pay.* To what extent must L disclose reasons for application to withdraw?

- Revealing non-payment doesn’t usually go to S-C privilege, but may attach where:* Non-payment is relevant to the merits of the case.
* Or disclosure would cause prejudice to the client.

- If withdrawal is sought for ethical reasons, even late in the game, court must accept L’s answer at face value and not enquire further, to avoid trenching on S-C privilege. |

**PUBLIC SAFETY EXCEPTION**

**3.3-3:** L may disclose confidential info, but not more than is required, when L believes on reasonably grounds that there is an imminent risk of death or serious bodily harm and disclosure is necessary to prevent it (i.e. there is no other way).

* **3.3-3[4]**: If you think this kind of disclosure is warranted, contact LSBC for advice.

- Test for when this exception applies: See *Smith v Jones*).

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| Smith v Jones 1999 SCCPublic safety at risk | - C charged w aggravated sexual assault, sent for psych exam, was told it was confidential. Described in detail his plan for further plans to attack women.- Privilege of confidentiality should be set aside where public safety is involved and death or serious bodily harm is imminent. Consider:* **Clarity of risk to identifiable group or person** – long-range planning, specific details of method, prior history of violence/threats, prior similar acts, etc.
* **Seriousness of the threat** – death or serious bodily or psychological harm.
* **Imminence** – sense of urgency.
 |

**OTHER EXCEPTIONS**

**3.3-4**: L can disclose required info in order to defend against allegations that they (a) committed a criminal offence involving a C’s affairs, (b) are civilly liable wrt a matter involving a C’s affairs, (c) have committed acts of professional negligence, or (d) have engaged in acts of professional misconduct or conduct unbecoming.

**3**.**3-5**: L can disclose in order to establish or collect fees.

**3**.**3-6**: Can disclose to another L to secure legal or ethical advice about proposed conduct.

**MONEY LAUNDERING**

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| Federation of LS of Canada v Canada (AG) 2013 BCCADuty of confidentiality is important | - Challenge under s.7 and s.8 of the *Charter* wrt leg wrt money laundering. Scheme req reporting of suspicious transfers & large cross-border movements of $. Ls to perform C identification & verification, keep records of financial transactions, etc.* This info could be accessed by feds & law enforcement.

- Regime imposes conflicting interests and corresponding obg on Ls wrt C’s interests, state interests, and L’s liberty interests (at risk if they violate).* Violates independence of the bar, regime invalid (to Ls).
 |

**ADVOCACY & CIVILITY**

**ETHICAL DUTIES – “OFFICERS OF THE COURT”**

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| **2.1-2** To courts and tribunals | Conduct should be characterized by candour & fairness//maintain courtesous & respectful attitude//don’t mislead court or misstate facts |

- 5.1-2(g) When acting as an advocate, L must now knowingly assert as fact that which cannot reasonably be supported by the evidence.

* Avoid frivolous or vexatious claims

- Primary goal of court system is the search for truth. In the adversarial system, both sides are officers of court.

**WITNESS PREPARATION**

- Ls are expected to prepare their Ws, but coaching is unethical, unprofessional, and illegal.

* The aim should be to make W comfortable w the process and w their own knowledge of the facts.

- Ls who counsel evasion/forgetfulness commit a crim offence & breach their duty to the court (*R v Sweezey*).

- Sanctions include: costs against client; costs against L personally; LS discipline; criminal sanctions.

- Tell them they have to tell the truth.

* Can’t go beyond helping them say what they want to say in the best way they can.

**CROSS-EXAMINATION OF WITNESSES**

- Cross-X is the “ultimate means of testing truth and veracity” of evidence, it is integral to the adversarial system. It is part of the *Charter* right to make full answer and defence.

- CAN’T: 5.1-2(m) Abuse, hector, harass a W (h) Make suggestions to W recklessly or knowing them to be false.

- CAN: 5.1-2[4] Pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition (*Lyttle*).

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| R v Lyttle 2004 SCCCan ask Qs on a reasonable hypothesis | - Accused was identified by the victim of a robbery. Defence’s theory was that he was purposefully misidentified so the victim could shield the members of their drug ring. At trial, defence was prevented from pursuing this line of questioning b/c judge said they didn’t have “substantive evidence” of the theory. Appealed.* Court said cross-x is indispensable in the search for truth, sometimes there is no other way to expose falsehood, error, to elicit vital info, etc.

- Questions can be put wrt matters that aren’t independently proved – just need a good faith basis for putting the question. Honestly advanced on the strength of reasonable inference, experience of intuition. |
| R v R (AJ) 1994 Ont CAAggressive vs. abusive tactic | - Accused charged w multiple counts of incest and sexual assault in relation to his daughter and granddaughter. Convicted. Appeal on basis that prosecuting counsel’s cross-x resulted in a miscarriage of justice based on overall conduct and tenor.* Court agreed, characterized cross-x as abusive and unfair.

- Counsel’s approach was to demean and humiliate the accused. Bad tone, stated her opinion as to his guilt, argued w him, etc. Improper and prejudicial. |
| General Motors v Isaac Estate 1992 AB QBOfficer of the court | - In a case before the court, counsel neglected to mention a very obviously relevant case that went the opposite way. Right on point, similar facts, etc.* It is L’s responsibility as officer of the court to bring it to judge’s attention. Silence about a relevant decision, especially a binding one, is not acceptable.
 |

**CIVILITY IN ADVOCACY**

- 5.1-1 L must represent client resolutely and honorably w/in the limits of the law, while treating the tribunal w candor, fairness, courtesy and respect.

- 5.1-5 L must be courteous and civil and act in good faith to the tribunal and all persons w whom L deals.

- A breach of civility does not only lead to rudeness, but it prevents the proper admin of justice (*Woolley*).

- 4 ways incivility undermines the administration of justice (*Groia*):

* 1) Ls may focus on defending themselves from personal attack.
* 2) Trier of fact preoccupied w managing personal conflicts in the courtroom.
* 3) Serious personal disputes lengthen and delay court proceedings.
* 4) Unfounded/irrelevant personal attacks undermine public respect and the legitimacy of the system.

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| Groia v LS Upper Canada 2013 OnLSAPAllegations of misconduct | - Bad manners and mere rudeness should not be punished, doesn’t rise to the level of unprofessional conduct. But here, counsel repeatedly impugned the motives and integrity of opposing counsel. Should never do that if it’s not in good faith and done on a reasonable basis. Very bad here, personal attacks on integrity and *bona fides*.* Mandating “civility” protects and enhances the admin of justice. Shouldn’t be used to discourage passionate, brave and bold language.
* It is always fact-specific.
 |
| LS Sask v Cherkewich 2014 SKLSSConduct unbecoming | - L rude to adjudicator. Told her he “doesn’t do” retainers and she could tell her supervisor to “shove it up his ass”. Then had client sign retainer agreement on a piece of toilet paper and gave it to her.* His conduct brought the admin of justice into disrepute but doesn’t rise to the level of conduct unbecoming. Got a reprimand and had to pay a fine.
 |

**WOOLLEY – DOES CIVILITY MATTER?**

- Civility has recently become a hot topic w legal regulator and professional association. But imposing a broadly defined obg of “civility” doesn’t meet the goal or principles of legal ethics and professional regulation, which are to guide counsel as to what is required of an ethical lawyer.

* An undue emphasis on civility actually has the potential to undermine the ability of law societies to fulfill their obg to regulate lawyers’ ethics.
* It also fosters protectionism and suppresses legitimate criticism.
* And, lawyers shouldn’t have to be civil where it undermines their ability to advocate for their client.

- Virtually all of the requirements of the civility initiatives are really just restatements or specifications of existing rules of professional conduct (ex. respect and loyalty to clients; proper functioning of the judicial system). So they are already an important part of lawyers’ ethical obgs.

* So disciplining for rudeness rather than the underlying problem obscures the real ethical issues.

**SALYZYN – JOHN RAMBO V ATTICUS FINCH**

- How we talk about civility, lawyering and ideal lawyers affects the power distribution w/in the profession.

- There are 2 traditional views of professionalism in law:

* Mythical Rmabo approach – zealous advocacy, knows no bounds – “win at all costs”.
* Atticus Finch model – more based in politeness and being refined – “gentleman’s ethics”.

- This dichotomy is not helpful but rather discriminatory against certain groups.

* Both sides are very masculine – renders women the “outsider”.
* Fosters and elitist mentality – both are white men.
* Reflects anxieties about the changing modes of authority w/in the profession.

- We need a more progressive narrative for the civility movement that incorporates female archetypes.

**ETHICS IN NEGOTIATING & ADVISING**

**COUNSELING CLIENTS**

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| **2.1-3** To the client | Knowledge of facts & applicable law//Provide open & undisguised opinion of case’s merit and probable result. |

- Tensions can arise btwn client autonomy and what decisions the lawyer thinks best.

- Duties:

* L must be honest and candid.
* Must be competent to provide the advice.
* Must have sufficient knowledge of relevant facts.
* Should indicate any assumptions being made.
* Avoid bold or over-confident assurances.
* If giving non-legal advice, be sure to differentiate.

- **Test**: Your advice should be the same as if your client wanted the opposite result.

- **Rule of Thumb**: If your best understanding of the law is outside of mainstream legal views, you should let your client know.

**LUBAN – TALES OF TERROR: LESSONS FOR LAWYERS FROM THE “WAR ON TERRORISM”**

- US gov wanted to interrogate detainees in as forceful a way possible w/out violation intnl laws of torture. Sought legal advice, and opinion said it’s not torture unless there is a risk of organ failure.

* Simply gave them the answer/justification they wanted, made the facts fit.

- Ls failed in their ethical duties as counselors and advisors:

* Distorted the law to reach the desired outcome.
* Came up with an interpretation that is far outside the mainstream one, and didn’t inform C of this.

- The role of counselor and advocate are fundamentally different.

- Litmus test: L’s advice to C should be the same as it would be if their client wanted the opposite result.

**ILLEGAL CONDUCT**

**- 2.1-1(a)**: Ls should not give clients advice on how to break the law.

- **3.2-7**: Ls MUST NOT engage in activity they know or ought to know assists in or encourages any dishonesty, crime, or fraud.

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| LS of Upper Canada v Sussman 1995 LSDDCounseling to breach order | - L essentially counseled C to breach the terms of a court order in family law case, telling her not to allow her husband access to the kids even though, by court order, he was supposed to see them on weekend. Sent note to spouse saying he’d done so. Didn’t file req paper work for variation of order until 7 months later. Complaint filed.* No imminent risk to child to justify L’s behaviour.

- Profession misconduct – undermined effectiveness of court & its’ reputation. |

**NEGOTIATIONS**

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| **2.1-3** To the client | Where dispute can end in fair settlement, advise client to end litigation. |

- **3.2-4:** Must advise and encourage settlement where reasonably possible AND discourage client from commencing/continuing useless proceedings.

- Negotiations occur outside traditional courtroom, no disclosure requirements.

- Ethical debate: Is it ok for Ls to misrepresent or conceal info during negotiations?

* Want to promote C’s best interest, but it’s bad to mislead other Ls.
* LS of Alberta takes a strict view:
	+ **6.02(5)**: L must not lie to or mislead another lawyer (“mislead” includes acts of omission such as failure to act or silence). If L becomes aware that they have mislead the other party or made a material rep that has subsequently becomes inaccurate, then (subject to confidentiality), they must immediately correct the misapprehension.

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| LS of Newfoundland and Labrador v Regular 2005 NJConfidentiality does not justify lying | - L was counsel for corp, instructed not to tell minority SH of sale of the co. Misled counsel for minority SH by sending a letter outright denying sale.* Even in this situation, lying is NOT justified. There were alternatives (ex. respond while claiming confidentiality).
* If declining to answer would be misleading in itself, L must seek C’s consent to such disclosure as necessary to prevent opposing L from being misled.

- L disciplined for:* Failure to act w integrity,
* Failure to uphold responsibilities to other counsel, and
* Questionable conduct.
 |

**PITEL – LAWYER OR LIAR? BREAKING DOWN PUBLIC PERCEPTION**

- There is a broad public perception that lawyers are liars. Why?

* Some lawyers do lie. Can be big or small (ex. saying you’re too busy to make a certain date in order to delay a proceeding).
* It’s easy to blur the line between statements of fact and statements of opinion (ex. “my client is innocent”, “my client’s health has been damaged by the defendant’s unlawful conduct”).
* Negotiation is common and there is a view that some level of deception is permissible.

**ETHICS IN CRIMINAL LAW PRACTICE**

- Crown is expected to be fair, objective and dispassionate in presenting the case, but is also expected to argue forcefully for a legitimate result (often a conviction).

- Defence is expected to vigorously represent the interests of the accused but is also expected to remain independent of the C and to be mindful of various overriding duties to the court.

- Both sides must carefully balance their competing duties to the side of the dispute that they represent as well as their competing duties to the ideals of the overall justice system.

* Must be both a “neutral partisan” and a “moral activist”.

**ETHICAL DUTIES OF DEFENCE COUNSEL**

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| **2.1-3** To the client | Right to defend C regardless of personal opinion of guilt, using any defence law allows |

**- 5.1-1**: When acting as an advocate, L must represent the C resolutely and honorably w/in the limits of the law while treating the tribunal w candour, fairness courtesy, and respect.

- Avoid forming opinions as to guilt or innocence of C – not ethical & can impact your performance.

* If you become convinced your C’s guilt, you can continue to rep them but you must NOT use any defence which involves knowingly misleading the court.
* There are ethical constraints not to mislead the court, which can compete w the duty to C.
* *Model Code* 4.01(1): Best to test all evidence and argue that it is insufficient to amount to proof that the accused Is guilty of the offence charged. Can’t go much farther than that.

- **3.7-4:** Defence L may withdraw if sufficient time for C to obtain alternate L and for new L to prepare.

* Must notify C of withdrawal; account to C for any monies received; notify Crown of withdrawal; notify clerk or registrar; comply w applicable rules of court.
* **3.7-6**: If time is insufficient but L has good cause, should attempt to have trial date adjourned. L may then apply for leave to withdraw from the record.
* Still, court may use its discretion to prevent withdrawal due to non-payment alone (*Cunningham*).

**TAKING CUSTODY AND CONTROL OF REAL EVIDENCE**

* Defence counsel not under any general duty to disclose, w 3 exceptions:
	+ Alibis, psychiatric defences, and expert opinion evidence.
* S-C privilege only protects communications, not physical evidence (*Murray*).
* Hiding or disposing of evidence exposes you to criminal prosecution.
	+ Obstruction of justice and accessory after the fact.
	+ The only defence to these charges is lack of *mens rea* (*Murray*).

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| R v Murray 2000 SCCSuppression of physical evidence ok if honest belief in exculpatory use | - L for Paul Bernardo – after police searched C’s house, L instructed to retrieve hidden video tapes. L didn’t watch them, but didn’t turn them over to police.* L charged w obstruction of justice.
* Tapes not protected by S-C privilege - only applies to communications.

- L claimed he planned to use them in defence and that disclosure would have given C’s co-accused time to prep for x-exam. Court said obstruction of justice, but he had a justification - his belief in their exculpatory value, while shaky, was reasonably feasible and led to a reasonable doubt – acquitted b/c no *mens rea*.* Since he planned to sue them, he also believed no obg to disclose them.
* If purely inculpatory, it would have been an obstruction (he saw another use).
 |

**NEGOTIATING A GUILTY PLEA**

- May want to enter a guilty plea where C faces inevitable conviction at trial, or where C simply wishes to acknowledge guilt, regardless of their prospects at trial.

- 5.1-8 L may enter into an agreement w the prosecution about a guilty plea if, following investigation:

* (a) L advises the C about the prospect for an acquittal or finding of guilt.
* (b) L adivses C 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 an agreement about a guilty plea.
* (c) C voluntarily is prepared to admit the necessary factual and mental elements of the offence charged
* (d) C voluntarily instruct L to enter into an agreement as to a guilty plea.
* [1] The public interest in proper admin of justice shouldn’t be sacrificed in the interest of expediency.

- Entering a guilty plea while the C refuses to admit guilt can lead to problems (*R v K(S)*).

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| R v K(S) 1995 Ont CAGuilty plea while maintaining innocence | - A charged w 10 counts of sexual offences, pled guilty to 4. Maintains his innocence and has never waivered from that. Made it impossible to perform a term of his probation.* Is his maintained innocence enough to set aside a guilty plea?

- When he entered the plea he didn’t know he would actually have to admit guilt. Neither L nor the TJ told him. Only found out from his probation officer.* When it became clear at trial that A was maintaining his innocence, TJ should have at least considered exercising his discretion to reject the guilty plea and proceed w the trial. The plea should be set aside.
 |

**ETHICAL DUTIES OF THE CROWN**

- 5.1-3 When acting as prosecutor, L must act for the public and the admin of justice resolutely and honorably w/in the limits of the law while treating the tribunal w candor, fairness, courtesy and respect.

* [1] Primary duty is to see that justice is done; discretion must be exercised fairly and dispassionately

- Overriding duty to seek justice in public interest. Elicit truth while respecting legitimate rights of the accused

- When giving a jury address, there are limits on zealous advocacy by the Crown (*R v Boucher*):

* Can’t use inflammatory or vindictive language to express personal opinion of guilt.
* Can’t imply that the Crown’s investigation has found the accused guilty (this is a statement of fact rather than a statement of argument).

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| Krieger v LS AB 2002 SCCProsecutorial discretionRegulation of prosecutors | - K was Crown on murder case, didn’t disclose preliminary results from blood test that implicated diff person than the accused. K and AG argued he was only delaying, and that exercise of prosecutorial discretion is immune from external disciplinary review.* Prosecutorial discretion must be independent, but it is not immune.

- P discretion is limited to the core elements of: discretion to prosecute a charge// to enter stay of proceedings//to accept guilty plea or lesser charge//to withdraw from proceedings altogether//to take control of a private prosecution.* Conduct amounting to bad faith or dishonesty doesn’t fit in here.

- Disclosure of evidence is not P discretion, but rather a P duty. If he acted in bad faith, falls to the LS to determine. |

**FEES**

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| **2.1-3** To the client | Entitled to rsbl compensation for services, avoid unreasonably high or low charges. C’s ability to pay doesn’t justify charging more, but can justify charging less |

- **3.6-1** L 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.

- Factors to consider in fees:

* Means of the client.
* Complexity of the case.
* Result.
* Amount involved.
* Time.

- Should bill regularly, with clarity, and consistently.

- Either L or C may apply for a review of fees under s.7 of the *LPA*.

* For C, must apply w/in 1 year of receiving the bill or 3 months of paying it.
* For L, can apply after 30 days of delivery, no time limit beyond that.
* Onus is always on L to show the fee is justified.

**WOOLEY – ETHICAL VS. UNETHICAL: THE TROUBLING TALES OF TONY MERCHANT**

- Merchant cleverly manipulated legal forms to avoid the effect of a court order. He didn’t outright defy it and he did not breach it. He used technical schemes to work around it for his client’s benefit.

* Court classified it as breach of a court order and assisting his C to breach the order, based on a strict liability approach, said he didn’t need *mens rea* to breach it.

- Merchant suspended for 3 months by LS of Saskatchewan, upheld by Sask CA for conduct unbecoming having to do w finagling around fees.

* Behaviour was unethical extension of behaviour that would otherwise be considered ethical & proper.
* We went too far w resolute advocacy. It’s a very fine line.

**RETAINER**

- The retainer sets out the scope of you engagement:

* **Specify the work** – set out who the client is, their wants & needs, what you can/can’t do w how much they are prepared to pay, confirm and state all assumptions.
* **Specify the fee** – be frank and upfront, confirm w scope of work.
* **Specify your responsibilities** – set out what you are and are *not* providing advice one.

- Can be a monetary retainer or simply the agreement.

**TRUST ACCOUNTS**

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| **2.1-3** To the client | Record & promptly report receipt of trust $, only use it as authorized, don’t co-mingle. |

- It’s important to have good administrative support and appropriate divisions of labour in place so that no one person could perpetrate a fraud and hide it.

**UNDERTAKINGS**

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| **2.1-4** To other lawyers | Shouldn’t give or request undertaking that can’t be fulfilled |

- These are essential to the operation of the legal system – honour system.

* If you give an undertaking, no matter how onerous, you are stuck w it, even if it’s fulfillment is out of your hands.

- Be sure to undertake to perform acts, not to achieve results.

**CONTINGENCY FEES**

**- 3.6-2** L may enter into a written agreement to have the L’s fee contingent, in whole or in part, on the outcome of the matter.

* LS Rules cap amounts you can get:
	+ Wrongful death from motor vehicle: 33%
	+ Any other claim for wrongful death: 40%

- Client is entitled to independent advice about reasonableness of the contingent fee arrangement.

- Typically regulated as to % and other terms you are allowed to put in.

- Not permitted for all areas of practice.

- The prevalence of these types of arrangements likely explains the difference in litigation culture between Canada and the rest of the Commonwealth (we don’t really use them here).

**CLASS ACTION/THIRD PARTY FUNDING**

- This is controversial, given the law’s entrenched disapproval of “champerty”. But it may be necessary in 2-way cost jurisdictions like Alberta and Ontario.

- BC’s Class Proceedings Act doesn’t allow for cost awards against the class plaintiff of class counsel.

* So class counsel in BC does not need the indemnity of a 3rd party lender.

- There are also concerns over improper interference by 3rd party funders.

* These concerns appear to be largely unfounded.

**KALAJDZIC ET AL. – JUSTICE FOR PROFIT**

- Third party litigation funding is not very popular in Canada, but is becoming more common.

- To get 3rd party funding, it has to be judicially approved, and it is publically known.

- Concerned that funders may take over the process and interfere in the L-C relationship.

* This can be mitigated by express limitations in the funding agreement.

- 3rd party funding could be good for access to justice, but there are worries about its’ potential for abuse both of the litigants themselves and of the system.

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| LS PEI v Aylward 2001 LSDDDuty to report others | - L’s partner was misappropriating trust fund money. L caught on – Partner put money back, was remorseful, resigned, etc. L wanted to give him time, but never reported.* Court said no good. You have a duty to report your colleagues for unethical behaviour. Can’t turn a blind eye, suspicions count too.

Found he committed unprofessional conduct for:* Not reporting when he found out//not telling the affected clients//letting the partner continue practicing and have signing authority on the accounts, etc.
 |
| LS AB v Blott 2014 LSDDDehumanizing for profit | - L had set up a system for getting Aboriginal people’s unsettled class action claims in to the gov in accordance w an agreement w the gov. But he did it in a way that was like a factory, was making money off of it.* Court said unprofessional conduct. Even in class actions Cs must be treated as people, can’t be dehumanized and just given a number.

- Bad for:* Bad process for certifying applications.
* No internal controls for handling client documents.
* Delays in actual submissions of certified applications.
* Inadequate preparation of claimants for their hearings.
 |

**WOMEN IN THE LEGAL PROFESSION**

**BLACKHOUSE – GENDER AND RACE IN THE CONSTRUCTION OF LEGAL PROFESSIONALISM**

- Ls have resorted to “professionalism” to exercise power & exclusion based on gender, race, class & religion.

- Historically, “professionalism” is linked inextricably to masculinity, whiteness and class privilege.

* Admission criteria began w winnowing out candidates who didn’t possess the “gentlemanly” accouterments of fluency in the classics. Tests based on things only the wealthy and powerful would have the chance to know, reinforcing societal prejudice and imbalance.
* So it has always had more to do w power and exclusion than it has had to do w civility and inclusion.

- This has big implications for the services that Ls offer to the public, the arguments they make in courtrooms, and the decisions made by judges. It affects their understanding of the world.

* A good example is how cases of sexual assault are still framed in a sexist way.

- Words like “collegiality” are used to justify keeping the same “standards” based on a need to “fit in”.

**NOVA SCOTIA BARRISTERS’ SOCIETY – IT WILL BE OUR LITTLE SECRET**

- Project to get anonymous stories of sexual harassment from women in the profession.

* “Laugh it off” – laughing about things can be healthy but only if it’s actually funny. If it crosses the line, women need to speak up about it and make it clear that it is not, in fact, funny.
* “Killer instinct vs. compassion” – women are supposed to be sensitive and gentle, can’t be killers. But the court room could use more empathy and understanding, from men *and* women.
* “Be nice…but not too nice” – how to be a “woman” and a “lawyer”? The 2 stereotypes don’t fit together.
* “What just happened here?” – we need to stand up for ourselves and others. The power differential makes this very hard.

**CANADIAN BAR ASSOCIATION – HOW TO RETAIN TOP FEMALE TALENT**

- Women are leaving the profession at much higher rates than men.

- It’s a big economic loss for firms to train women and then lose them, and a big loss of talent too.

- Women leave many reasons:

* Firm culture – old boy’s club.
* Lack of mentors.
* Economic structure is somewhat discriminatory to women who want to work at home as well.
* Sexual harassment.

- Many women feel it’s easier to leave than to try to change the culture, particularly as young associates.

* Need to address these to make them stay.

**ACCESS TO JUSTICE**

|  |  |
| --- | --- |
| **2.1-1** To the State | Accept w/out hesitation, and w/out fee if necessary, any C assigned by court |
| **2.1-5** To oneself | Should make legal services available to the public in an efficient and convenient manner that will command respect and confidence |

- 2.2-2 L has a duty to uphold the standard of the legal profession and assist in the advancement of its’ goals, organizations and institutions.

* [1](b) L should participate in legal aid and community legal services or provide services pro bono.

- 5.6-2 L must encourage public respect for and try to improve the admin of justice.

* [2] Basic commitment to the concept of equal justice for all w/in an open, ordered, and impartial system.
* [4] Lead in seeking improvement to the legal system – criticisms & proposals should be *bona fide* and reasoned.

- Canada has an access to justice crisis.

* The biggest impacts are in family law, child protection, and poverty law.
* Our main problems are cost, delay, long trials and complex proceedings.
* The legal profession has a contract w society. If we fail to meet the K, society will respond and redefine professionalism for us.
* We need to focus on the broad range of legal problems experienced by the public from the point of view of the people who experience them.
	+ So we need more diversity in the profession.

- *Trial Lawyers Association of BC v BC (AG)* 2014 SCC:

* Struck down BC’s court hearing fees.
	+ The fees were intended to discourage frivolous claims and fund the system. But they impede access to justice and therefore jeopardize the rule of law itself.
* Hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts and impinge on s.96 of the *Constitution Act, 1867*.
	+ Hearing fees are unconstitutional when they deprive litigants of access to the courts. This point is reached when they cause undue hardship to the litigant.
	+ Must exempt impoverished people from having to pay the fees.
* There is also a common law right of reasonable access to civil justice.

- *BC/Yukon Association of Drug War Survivors v Abbotsford (City)* 2014 BCSC:

* Homeless population in Abbotsford brought a claim via the Association of Drug War Survivors challenging Abbotsford bylaws and the city’s action in displacing homeless people.
	+ Tactics included spreading chicken manure on camps, slashing tents, and spraying bear spray on tents, belongings, and food.
	+ Basically making it illegal to be homeless.
* The City claimed the Association didn’t have standing to bring a claim. The court disagreed, saying they have standing based on public interest.
* The Association requested an expedited trial, but delays by the City made it impossible.