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# ch. 2: Legal Profession + Lawyer Regulation

## Self-regulation

### Introduction to the concept

* Regulation of lawyers by lawyers (“self-regulation”) – rules and regulations are determined by the members of the group
* Self-regulation is undertaken in the public interest: ensure legal services are provided ethically and competently
* Self-regulation allows lawyers to maintain a competitive marketplace: seen as a social contract in that the profession self-regulates and in return, they have state sanctioned market dominance
* In order to limit/control the number of producers (i.e. lawyers), entry into the market is controlled through (exclusionary) formal education requirements, licensing standards or qualifications and evaluations (*sociological analysis*)
* Controlling the production of producers/lawyers allows the profession to maintain its social status and economic benefits
  + A critique might say that self-regulation is done in the self-interest of lawyers (pursuit of wealth and status) rather than the public interest
  + In fact, regulatory restraints which bar entry might be seen as detrimental to consumers due to increased costs and unfair competition (*economic analysis*)
* (*structural functional analysis*) It is beneficial for lawyers to self-regulate so that they are free from outside interference from either the state or other bureaucracies

### How it works in practice

* In order to provide legal services to clients in a particular jurisdiction, one must be a lawyer admitted to the law societies in that jurisdiction
* 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
* *Canada (AG) v Law Society of BC* (1982 SCC): the independence of the Bar is a hallmark of a free society. It must be free from state interference, in the political sense, so that it can deliver services to individuals, particularly in the fields of public and criminal law. “The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar.”
* The independence of lawyers as a self-regulating professional that protects individual rights and liberties from the pervasive threat of the state is a key components of the rule of law (fundamental constitutional law principle)
  + Critique: evidence does not suggest that lawyers protect disfavoured, minority viewpoints but that just the opposite seems to be born out in the evidence
* *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 who are themselves subject to the rules of self-gov’t
* Law societies are statutory delegates of prov’l or territorial legislatures – they are empowered to regulate lawyers in the public interest
  + Their decisions are reviewable by provincial superior courts
  + Despite prov’l jurisdiction, national self-regulation has emerged through co-operative action with the Federation of Law Societies of Canada (FLSC)
    - This led to national mobility protocol – need to have consistent and efficient regulation of lawyer movement, + need for mobility not to be frustrated by different provincial standards
    - Has led to common educational, admission, ethical, and disciplines standards and policies.
    - Produced the *Model Code of Professional Conduct*

### Scope of self-regulation

* Entry regulation: admission into the profession (education requirements, articling period, bar admission course and examination, and satisfaction of “good character” requirement)
  + In 2009 the FLSC put out a Final Report on the Canadian Common Law Degree and by 2015, it will be fully implemented, requiring law schools to certify that their grads have successfully completed a program of study that comports with those standards in relation to competencies, professionalism, and ethics
  + These entry requirements are a barrier to low-income individuals given the increasing costs
  + The Law Society of Upper Canada dealt with articling shortage with the option of extra law school training—will likely create two classes of articling students
  + The good character requirement is intended to protect the public, ensuring that only persons worthy of trust and who have integrity and moral strength enter the profession but in reality, the ambiguous term allows attitudes, experiences, and prejudices of the decision-maker to enter into the decision and can be arbitrary and discriminatory
    - In *Martin v Law Society of BC*, the Court upheld the Society’s decision to refuse admission to an educationally-qualified applicant because he was affiliated with communism (1950 BCCA)
* Conduct regulation: enforcement of practice standards and norms
  + Discipline is undertaken on a provincial basis but the FLSC created national standards for handling complaints and discipline
  + Early codes of conduct were based on ethics and etiquette expected of a gentleman
  + There has been a resurgence of national codes w/ the 2009 CBA *Code of Professional Conduct* and the FLSC *Model Code of Professional Conduct* and the FLSC 2011 conflict rules—the two former are remarkably similar in content and language + reflect a strong national consensus
* Critiques of written codes:
  + Serve the profession’s interest of projecting an ethical image
  + Used by legal elites to suppress those elements of the profession that they do not approve of (class bias)
  + Fundamental concept of a written code—some think it should be a matter of personal decision or choice and that you cannot regulate ethical behavior through specific, detailed rules.

### Anatomy of lawyers’ codes

* Loosely categorized as: duties to clients, courts, and other lawyers; and duties to the professional and the larger society
  + Clients, courts, and other lawyers:
    - Act honourably, with integrity, and competently (knowledge of substantive law, professional judgment and experience, legal and practice management skills, and intellectual and emotional capacity)
    - Must act in good faith, honestly, and with courtesy, fulfill every undertaking given, with candour and fairness, and must avoid sharp practice
    - Duty of confidentiality and to avoid conflicts of interest
      * Confidentiality is broad but not absolute and is mandated by other interests at stake
  + To society and the profession
    - **Must report misconduct of other lawyers**
    - Responsibility to make services widely available and accessible
    - Ensure the administration of justice is conducted in an open, impartial, and fair manner
    - Also advertising, solicitation, fees, and unauthorized practice are all regulated but done largely to serve the profession’s interests of restricting competition for legal services and protection the their monopoly

### Duty to Report other lawyers

* categories where you must report
  + 4/7 new
  + **Abandonment** of **law practice**
  + Participating in **crim’l activity** related to a lawyer’s practice
  + Any other situation where a **lawyer’s clients** are likely to be **materially prejudiced**
  + **Mental instability** of a lawyer of such a nature that the lawyer’s clients are likely to be materially prejudiced
  + 3/7 were the sole content of prev rule:
    - **Shortage of trust monies** (self-reporting here)
    - **Breach of undertaking or** trust condition where it has not been consented to or waived
      * Consenting exception is new
    - Conduct that raises a **substantial Q as to another’s lawyers honesty, trustworthiness, or competency as a lawyer**
      * Competency is new
* **All are predicated on damage to lawyer’s client except the last** (honesty, etc.)
* S. 3 of the *Legal Profession Act* entrenches this paramount interest in public interest—that the overriding purpose of regulation is to ensure that we serve public interests above our own.

### Discipline

* Discipline is for primary purpose of protecting the public, not for punitive purposes
  + Also to deter other lawyers from breaching professional standards – There must be a real possibility of professional discipline in the mind of lawyers
* Cdn law societies are empowered by leg’n to discipline their members for “professional misconduct”, “conduct unbecoming a barrister and solicitor” or “conduct deserving of sanction”
  + These are imprecise on purpose—reflects discretionary nature and allows governing bodies to discipline conduct that is not a breach specifically spelled out in the code (catches what was not anticipated in the drafting of the code)
* Discipline proceedings have 3 distinct stages:
  + Complaint and investigation
    - Many clients do not know what constitutes misconduct so there is likely underreporting
    - Also unresponsive to many client complaints that fall short of misconduct
    - If a complaint is appropriate for formal discipline, they are reduced to writing, reviewed by administrative staff, and shared with the lawyer
    - If a complaint is dismissed, the complainant may appeal that dismissal
  + Hearing stage
    - This stage is adversarial in nature
  + Penalty/sanction stage

## Other regulatory functions

### Legal liability of lawyers

* Can be held liable for omissions which cause damage to clients
* Can be subject to concurrent liability in K and tort
* SoC: reasonably competent solicitor of ordinary competence/prudence
* Perfection is not req’d
* But if there is gross neglect or a pattern of neglect🡪 incompetence + discipline
* Lawyers are req’d to participate in indemnity and insurance schemes in Canada, est’d and maintained by the provincial law socs

## Canons of Legal Ethics (LSBC)

* Benchers are not limited to the specific principles in the code – they apply norms of behaviour expected of lawyers in that province; more exist beyond the Code than in it explicitly
  + The general Canons deal with everything you’d likely face
  + They sensitize you to the essential issue but may not particularize

### 2.1 Canons of Legal Ethics

* These Canons of Legal Ethics in rules 2.1-1 to 2.1-5 are a general guide and not a denial of the existence of other duties **equally imperative** and of other rights, though not specifically mentioned—**statement of general principles** that **underlie the remainder of the rules** in this Code.
* A lawyer is a **minister of justice**, an **officer of the courts**, a **client’s advocate** and a **member of an ancient, honourable and learned profession**.
* In these several capacities, it is a lawyer’s duty to **promote the interests of the state**, serve the **cause of justice**, maintain the **authority and dignity of the courts**, be **faithful** to **clients**, be **candid** and **courteous** in relations with other lawyers and **demonstrate personal integrity**.

2.1-1 To the state

1. A lawyer owes a duty to the state, to maintain its integrity and its law. A lawyer should not aid, counsel or assist any person to act in any way contrary to the law.
2. When engaged as a Crown prosecutor, 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.
3. A lawyer should accept without hesitation, and if need be without fee or reward, the cause of any person assigned to the lawyer by the court, and exert every effort on behalf of that person.

2.1-2 To courts and tribunals

1. A lawyer’s conduct should at all times be characterized by candour and fairness. The lawyer should maintain toward a court or tribunal a courteous and respectful attitude and insist on similar conduct on the part of clients, at the same time discharging professional duties to clients resolutely and with self-respecting independence.
2. 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 lawyer to submit the grievance to the appropriate authorities.
3. A lawyer 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 client’s cause or in the evidence tendered before the court.
4. A lawyer should never seek privately to influence a court or tribunal, directly or indirectly, in the lawyer’s or a client’s favour, nor should the lawyer attempt to curry favour with juries by fawning, flattery or pretended solicitude for their personal comfort.
5. Annotations

2.1-3 To the client

1. A lawyer should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client, and give an open and undisguised opinion of the merits and probable results of the client’s cause. The lawyer should be wary of bold and confident assurances to the client, especially where the lawyer’s employment may depend on such assurances. The lawyer should bear in mind that seldom are all the law and facts on the client’s side, and that audi alteram partem (hear the other side) is a safe rule to follow.
2. A lawyer should disclose to the client all the circumstances of the lawyer’s relations to the parties and interest in or connection with the controversy, if any, that might influence whether the client selects or continues to retain the lawyer. A lawyer must not act where there is a conflict of interests between the lawyer and a client or between clients.
3. Whenever the dispute will admit of fair settlement the client should be advised to avoid or to end the litigation.
4. A lawyer should treat adverse witnesses, litigants and counsel with fairness and courtesy, refraining from all offensive personalities. The lawyer must not allow a client’s personal feelings and prejudices to detract from the lawyer’s professional duties. At the same time, the lawyer should represent the client’s interests resolutely and without fear of judicial disfavour or public unpopularity.
5. A lawyer should endeavour by all fair and honourable means to obtain for a client the benefit of any and every remedy and defence that is authorized by law. The lawyer must, however, steadfastly bear in mind that this great trust is to be performed within and not without the bounds of the law. The office of the lawyer does not permit, much less demand, for any client, violation of law or any manner of fraud or chicanery. No client has a right to demand that the lawyer be illiberal or do anything repugnant to the lawyer’s own sense of honour and propriety.
6. It is a lawyer’s right to undertake the defence of a person accused of crime, regardless of the lawyer’s own personal opinion as to the guilt of the accused. Having undertaken such defence, the lawyer is bound to present, by all fair and honourable means and in a manner consistent with the client’s instructions, every defence that the law of the land permits, to the end that no person will be convicted except by due process of law.
7. A lawyer 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 lawyer. A lawyer should scrupulously guard, and not divulge or use for personal benefit, a client’s secrets or confidences. Having once acted for a client in a matter, a lawyer must not act against the client in the same or any related matter.
8. A lawyer must record, and should report promptly to a client the receipt of any moneys or other trust property. The lawyer must use the client’s moneys and trust property only as authorized by the client, and not commingle it with that of the lawyer.
9. A lawyer is entitled to reasonable compensation for services rendered, but should avoid charges that are unreasonably high or low. The client’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.
10. A lawyer should try to avoid controversies with clients regarding compensation so far as is compatible with self-respect and with the right to receive reasonable recompense for services. A lawyer should always bear in mind that the profession is a branch of the administration of justice and not a mere money-making business.
11. A lawyer who appears as an advocate should not submit the lawyer’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 lawyer is a necessary witness with respect to other matters, the conduct of the case should be entrusted to other counsel.

Annotations

2.1-4 To other lawyers

1. A lawyer’s conduct toward other lawyers 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 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 fulfil 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 and should take no paltry advantage when an opponent has made a slip or overlooked some technical matter. A lawyer should accede to reasonable requests that do not prejudice the rights of the client or the interests of justice.
4. Annotations

2.1-5 To oneself

1. A lawyer 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 lawyer and should accept without hesitation a retainer against any lawyer who is alleged to have wronged the client.
2. It is the duty of every lawyer to guard the Bar against the admission to the profession of any candidate whose moral character or education renders that person unfit for admission.
3. A lawyer should make legal services available to the public in an efficient and convenient manner that will command respect and confidence. A lawyer’s best advertisement is the establishment of a well-merited reputation for competence and trustworthiness.
4. No client is entitled to receive, nor should any lawyer 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.
5. A lawyer should recognize that the oaths taken upon admission to the Bar are solemn undertakings to be strictly observed.
6. All lawyers 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.

## Hearing outcomes 2013:

* 20 citations issues, 15 hearings completed, 1 hearing review completed, 2 summary proceedings for crim’l convitions, 2 disbarments, 7 suspensions, 9 fines, 1 reprimand, 1 dismissal
* Panels have 3 people on them: 1 bencher, 1 lawyer, 1 member of the public
* Summary proceedings: only in very rare situations where a lawyer has been convicted by a crim’l offence 🡪 don’t want to let the lawyer relitigate – only need certificate of conviction
  + This is used sparingly

## Complaints type:

* Poor communication
  + Remediation usually occurs w/ this complaint
* Service issues such as delay/inactivity
  + Remediation usually occurs w/ this complaint
* Billing disputes
  + Often no jurisdiction
* Conflicts of interest
* Dishonesty
* Trust accounting deficiencies
* Breaches of undertaking
  + This is very serious in the area of real estate transactions
  + Promises given by lawyers to other lawyers (no discretion at the staff level; the discipline committee wants to hear it)
* Breach of privilege or confidentiality
* Rudeness
* Withholding client file or funds
* Incompetence
  + This rarely leads to discipline unless there is a pattern 🡪 usually remedial
* Theft
* Personal life issues – 2 issues: (a) those reported (as req’d) and (b) those not reported to the LSBC

Notable cases:

* Martin Wirick – real estate
  + Had a terrible client who was charged criminally
  + The client used W to perpetuate horrible fraud ($48 million)
  + Trust assurance fund was instituted b/c of this case
  + He was disbarred – cannot practice in any jurisdiction for 20 years
* Sandy McCandless
  + Client was operating fraudulent scheme, which defrauded shareholder/investors
  + Police informed M that they were investigating; nevertheless, he continued to act as a conduit for the fraud, accepting the $$
  + He was steadfast in holding that he was not acting fraudulently until the end
* Sanjeev Rai
  + Same realtor (scam artist) referred many transactions to him
  + He did not provide much of the documentation, he didn’t receive the docs through his office
  + No discipline record; very inexperienced and was previously a crim’l lawyer
  + Suspension of 1 mo
* Garrett Power
  + Arrested in Toronto with a dif name (he gave his adopted, not legal name to po)
  + Charge was 5 counts of obtaining sexual services for someone under 18 years🡪 he was acquitted
  + Obtained his law degree and on his appl’n for enrolment, he failed to disclose this alias + his crim’l offences
  + He was admitted + in 2007 he was charged w/ sexual exploitation of a minor + convicted + LSBC became aware of his previous charges + unrevealed alias
  + Guilty of conduct unbecoming
* Brian Rea
  + Arrested for accessing crim’l pornography – convicted
  + Mental health issues
  + He made an undertaking not to practice for 3 years during the investigation + suspended for 6 mo. – he had many conditions
  + Had it not been for a DR note discussing his mental health
* Malcolm Zoraik
* William Mastop – lawyer acting for a gang, facilitated some of their illicit activity
  + He gave info to the gang, which included sensitive info such as informants
  + Nobody was injured as a result but a very serious offence
  + Convicted in participating or contributing in crim’l org for purposes of facilitating ability to carry out an indictable offence
* Brian Kirkhope – inappropriate use of communications
  + Rep’d husband – husband had taped convo b/w wife-lawyer; Mr. K used that tape to cross-examine wife at XFD
  + This is a crim’l offence
* Dumpster case – serious breach of confidentiality, privacy – lawyer wanted to dispose of a bunch of old files; dumped them in the dumpster in the parking lot of his mother’s condo 🡪 conduct review (on record but name not publically exposed)

# Ch. 3: Lawyer-Client rel’nship

## Formation of the S-C relationship

### FLSC model code

* Must make services avl to the public efficiently and conveniently
* May offer services to a prospective client by any means, so long as they are not
  + False or misleading
  + Amnt to coercion, duress, or harassment
  + Take advantage of vulnerability
  + Otherwise bring the profession into disrepute; or
  + Bring the admin of justice into disrepute

## Marketing

* Lawyer may mkt so long as it is:
  + Demonstrably true, accurate, and verifiable
  + Neither misleading, confusing or deceptive
  + In the best interests of the public and consistent with the high standards of professionalism
* NOT:
  + Stating the amount rec’d in past cases, degree of success without noting that it varies based upon individual facts, and therefore not necessarily indicative
  + Suggesting qualitative superiority over other lawyers
  + Raising expectations unjustifiably
  + Suggesting aggression
  + Disparaging others
  + Taking advantage of vulnerable persons/groups

## Advertising fees

May advertise if:

* Reasonably precise to services offered for each quoted fee
* Whether add’l charges are added to the fee, and
* Must strictly adhere to that price

## Advertising expertise

Must not do so unless certified as a specialist by LSBC.

## Fee Sharing

A lawyer must not (in)directly split fees w/ any non-lawyer; or give any reward for the referral of clients to any non-lawyer.

* BUT may engage in promotional activities involving reasonable expenditures on promotional items or activities that might result in the referral of clients from non-lawyers, including:
  + Making an arrangement for the sale of the practice that includes % of revenues generated
  + Leaseholds 🡪 % of revenues generated
  + Paying employees for services (*not referrals*) based on the law firm’s revenue
  + Occasionally entertaining potential referral sources by purchasing meals, providing tickets for sporting or other activities or client functions
* This does not apply to multi-disciplinary practices of lawyers + non-lawyers in a partnership agreement to share fees + sharing fees w/ lawyers if (i) interprov’l firm or (ii) Canadian + non-Canadian lawyers
* If a lawyer refers a client to a specialist lawyer (not b/c of a conflict of interest), a referral fee may be given if:
  + Reasonable and doesn’t increase the price to the client; and
  + Client is informed and consents

## Solicitation

* The concern: lawyers trying to stir up business by preying on vulnerable individuals, “ambulance chasing” + stirring up unnecessary lit’n🡪 but, people do not always know their rights or when they’ve been violated so don’t lawyers fill in that market gap by soliciting clients?

### *LawSoc of Sask v Merchant* – 2000 Hearing Committee

**F:** At the end of the 90s, Tony Merchant sent ltrs to FN people who had attended residential schools, informing them of their victimization and seeking to retain them as clients. The ltr sought the names of other potential clients and advised that they’d keep referrals private. Advised the clients that solicited-individuals that, as TM’s client there would be “no down side”. However, in sm. print TM req’d payment of fees if the claim was discontinued or transferred. The ltr also provided quantum estimations for sexual abuse w/o knowing the particulars of the recipients’ experiences and sent those to people he had never met.

**I1**: Was TM guilty of conduct unbecoming a lawyer by sending a ltr which would likely create, in the mind of the recipient, an unjustified expectation about the results that the lawyer might achieve, in contravention with the Code?

**A1**: No, b/c it was within the range of subsequent judgments + recipients claimed that it did not create such an expectation in their minds.

**I2**: Were the ltrs reasonably capable of misleading the intended recipient in such a way as to be conduct unbecoming a sol/barrister?

**A2**: Yes—the info on fees was misleading; calling the “assigned and retainer agreement” an “authorization” was also misleading. The language suggested speedy recovery and did not explain the length of the process. It was also misleading b/c it assumed that the recipient had a valid COA without ever speaking to them (or meeting in some instances…)

**I3**: Was TM guilty of “conduct unbecoming” because the marketing activity was in bad taste or otherwise offensive, so as to be inimical to the best interests of the public or members, or hurt the standing of the legal profession?

**A3:** Yes because TM (i) assumed the recipient was FN, (ii) assumed the recipient attended a residential school, (iii) assumed many or most were likely to be victims of abuse, and (iv) based on above, stated believe of “sig comp”. This did not consider the effect of receiving such a ltr, with prediction of “sig comp” and assumptions about likely situation of recipient (but could not discipline on this basis b/c of the wording of the *Code*).

**D**: $5,000 fine, reprimand, and costs ($10K)

**P/H** Appeal to SKCA denied; decision affirmed.

**R:** It is not contrary to marketing rules to attempt to solicit clients by telling them what likely compensation will be if it is reflective of the future reality of compensation.

**R2**: Lawyers should not engage in offensive advertising through solicitation, assuming the likely positions and causes of action of potential clients with whom they’ve never met.

## Public communications

* Public communications about a client’s affairs should not be for the purpose of publicizing the lawyer and should be free from any suggestion that the lawyer’s true purpose is self-aggrandizement or self-promotion

### *Stewart v CBC*

**F:** Horrific case with woman being dragged to her death under the car of the inebriated accused. A leading loathsome defence and being universally hated in Canada. The lawyer coming in after-the-fact to do damage control. Lawyer later appearing on CBC program about the case, using public info, but rep’ing himself as client’s lawyer.

**D**: Pay $2,500 for transitory distress to client + disgorge profits from program

**A**: Found to be primarily for the purpose of self-promotion—not kosher.

## Choice of client

* Hutchinson: most important choice b/c once it’s made🡪 moral and ethical obligations follow
* “Ethical consensus” – lawyer should refuse if:
  + Conflict of interest
  + Lack of competence
  + Continuing retain with prev lawyer
  + Lawyer is potential witness
  + Illegal client purpose
* Beyond that, there are 2 poles: moral accountability and “taking it personally”
  + Moral Non-A:
    - The legal system is very complex
    - Citizens need guidance
    - Truth emerges through the adversarial process
    - Lawyers are neutral agents and should *not* be tasked with deciding entitlements
  + Taking-it-personally:
    - The law is an instrument of power in which real people both benefit and suffer
      * Therefore, lawyers are responsible for their choice of clients + the strategies deployed on their behalf
* Prux + Layton:
  + Lawyers should have some discretion, re: unpopular clients
  + If personal distaste is so severe as to cause the lawyer to reasonably conclude that legal rep would suffer🡪 ethical imperative to reject
  + If quality of work would not suffer, the lawyer should only decide not to represent after considering the following:
    - Lawyer should hold severe belief in the immorality
    - Repugnance must relate to the legal representation, not to the client’s personality (i.e. sexual assault, not homosexuality)
    - Should not allow public opinion to shape decision
    - Should consider importance of representation to the client
    - Likelihood of client finding other competent rep’n
    - *Cannot* consider private opinion of guilt, particularly not if you’re a crim’l lawyer
    - Some lawyers may have profound moral objections to taking on certain types of rep’n and that’s alright
  + If the lawyer does reject to rep the client, they should give reasonable assistance (FREE) to the client to find another competent lawyer

### Model Code

* Must make services avl to the public efficiently and conveniently
* Commentary:
  + There’s a general right to decline (to rep a client) *but* that right should be exercised prudently, particularly if the result is that the person is going to have a hard time getting legal advice
    - You can’t reject them merely b/c their cause is unpopular or they are notorious
    - You cannot reject them merely because of powerful interest of malfeasance that is involved
    - You cannot reject them out of your personal opinion about their guilt
  + If you decline a client, you should help them retain counsel, without charge (except possible referral fee) qualified, competent counsel
    - *This is different than the English “cab-rank” rule for barristers—first come, first serve* (but the lawyers find a way around)
* Discrimination: lawyers may not discriminate against any person
  + Human rights laws apply to the interpretation of this rule

## Accessibility of legal services

* If lawyers have the right to choose, the result is that some can’t access (esp poor)
  + The law soc *encourages* (only) pro bono
  + McLachlin: can have the most advanced justice system in the world, but it will be a failure if it does not provide justice to those whom it was meant to serve

Administration of Justice

* Lawyers must encourage respect for, and try to improve, the administration of justice
  + This requires a basic commitment to the concept of equal justice for all w/in an open, advanced, impartial system and need to make constant effort to improve the admin of justice and maintain public respect for it

## Triggering the lawyer-client rel’nship

* Model Code: voluntaristic conception
  + Client: consults lawyer and lawyer agrees to render legal services (or having consulted lawyer, *client reasonably concludes that the lawyer has agreed*)

### *Descôteaux v Mierzowski* – 1982 SCC

**F**: Accused filled out legal aid forms at the lawyer’s office—that’s it.

**I**: When does the lawyer-client rel’nship begin?

**R**: Items required by a lawyer to decide whether to rep a client are just as much communications in order to obtain legal advice, even if they are administrative in nature. Here, privilege is triggered prior to the retaining of legal aid through the provision of info on legal aid forms.

Note: you get the sense that this was something the SCC was itching to talk about but probably chose the wrong case and went overboard.

## Competence and quality of legal service

* Very few are disciplines for incompetence despite this being a *huge* client complaint
  + *Does the law society really properly respond to what truly bothers consumers of legal services?*
* *Central Trust v Rafuse* (86 SCC): standard is of a reasonable/ordinarily competent/prudent solicitor.

### Model Code

Competency

* Competent lawyer applies and has relevant knowledge, skills, and attributes
  + General legal principles and procedures; sub’ve law + procedures in area that she practices
  + Investigate facts, identify issues, ascertain client obj.
  + Skills: legal research, analysis, appl’n of law to relevant facts, writing and drafting negotiations, ADR, advocacy, problem-solving
* Communicate timely and efficient manner
* Cost effective, diligent, conscientious in carrying out functions
* Recognizes own limitations
* Pursues appropriate prof development
* Adapts to changing professional requirements, standards, techniques
* Complies with letter and spirit of the rules

Quality of service

* Duty to provide courteous, thorough, and prompt service
* Quality atleast equal to that which lawyers generally expect from a competent lawyer in a like situation
* Maintains certain standards in practice
  + Keeping clients reasonably informed + answering reasonable requests
  + Responding to phone calls from clients
  + Keeping client appointments
  + Being civil
  + Responding in a timely manner
  + Maintaining adequate office staff

### *Nova Scotia Barristers’ Society v Richey* – 2002

Complaint: professional misconduct and incompetence

**F**: Sr. litigator who was highly intelligent and performed well on some files, failed miserably on others—not following instructions, responding to communications, file management, providing full and timely disclosure. This was so despite rules and court order.

**D**: professional incompetence and misconduct est’d—fined $1K w costs ($30K) + practice monitoring + reprimand

**A**: Did not decide whether a single instance was incompetence, but rather looked at a long and predictable pattern

**R**: Regardless of evidence of some good lawyering, patterns of individuals acts of neglect that became predictable go above and beyond errors in judgment, becoming professional incomp

### Law Soc of AB v Syed – 1994

C: incompetence

**D**: Incompetence est’d but only given reprimand

**F**: S advised client to make a guilty plea w/o ever doing a cursory preliminary investigation; lawyer didn’t advise the client of the importance of elections + failed to recognize + advise on an importance defence

**R**: The conduct of a single file which demonstrates gross negligence is sufficient to establish incompetence, without a larger pattner.

**A**: In this case, Member admitted to conduct deserving of sanction (but claimed to be *just short* of incompetent).

## Cultural Competence

* Voyvodic suggests 5 essential habits:
  + Note dif b/w lawyer and client
  + Map out the case, considering dif cultural understanding of the lawyer/client
  + Consider add’l reasons for puzzling client behavior
  + Identify and solve communication pitfalls to see client’s story through their eyes, and
  + Examine prev communication failures and develop a proactive way to ensure that it doesn’t happen again

### *R v Fraser* – 2011 NSCA

**P/H**: Appeal based on incompetence legal rep of trial counsel, leading to a miscarriage of justice

**F**: Accused, F, was convicted. His lawyer was S. S did not consider the *Parks* issue—that the accused could challenge cause for each juror (despite F’s serious concerns, re: black man, white sexual assault complainant, all-white jury). S was dismissive + claimed that it had never been an issue before for his clients. This denied F his statutory right to challenge potential jurors for cause.

**A**: It would be sufficient to look at failings (re jury selection) to order a new trial but looked at broader issues w/ trial pref and performance, including

* Didn’t call witnesses w/ material evidence (did not even cursorily interview witnesses)
* Did not seek adjournment when new evidence came up
* Did not prep F for the cross-examination
* Opened the accused to invasive cross-examination when it was unnecessary
* Conducted ineffective cross
* Only sent client 1 1-sentence ltr during the entire retainer
* Made decisions (e.g. court) without consulting client
* Even got the client’s charge wrong on the court materials

**D**: Legal rep falls far short🡪 miscarriage of justice 🡪 deprivation of constitutional right to full answer and defence. Verdict set aside; new trial ordered.

**R**: The performance of lawyers should not be reviewed on a stnd of perfection, nor subject to a forensic audit when an unfavourable result is achieved; rather it should be reviewed on an objective stnd: the level of competence on a standard of reasonableness.

### Continuing Legal Education

* Many provinces have requirements—BC requires 12h/y, with 2 focusing on professionalism, ethics, or practice management

## Termination of Lawyer-Client rel’nship

* **Retainer** agreement may explicitly or implicitly contemplate the demise of the relationship
* **Obligatory w/drawal**:
  + Discharged by client
  + Client persist in instructing the lawyer to act contrary to professional ethics; and
  + The lawyer is not competent to continue
* **General rule**: the client may fire the lawyer at will but the lawyer may only fire the client if there is good cause for termination
* **Optional w/drawal**: if there has been a serious loss of confidence b/w lawyer and client, examples:
  + Client deceives Lawyer
  + Client refuses to accept lawyer’s advice on a sig point
  + Client is persistently unreasonable or uncooperative in a material respect
  + Lawyer is having difficulty obtaining adequate instructions
    - But these may not be used as a threat to force a hasty decision for a difficult Q upon a client
* **Non-payment of fees**: if, after reasonable notice, the client fails to provide $$, lawyer may withdraw unless serious prejudice to the client would result
  + Lawyer should ensure adequate time for client to obtain services of another lawyer + for the latter to be prepared for trial
  + Test: serious prejudice to client
  + US (Amer Bar Assn): permits w/drawal where cont’d rep “will result in unreasonable financial burden on the lawyer”🡪 not grounds in Canada

## Court approval of withdrawal

* Cts have inherent jurisdiction over orderly administration of justice🡪 in BC, this is rarely invoked (but it is in AB and ON)

### *R v Cunningham* – 2010 SCC

**F**: Ms. C worked for Yukon Legal Aid. She retained DC to rep the accused, Mr. M. Mr. M did not provide necessary updated financial info. After 2 weeks, Ms. C app’d to have Legal Aid withdraw as counsel.

**I**: In a crim’l matter, does the Ct have authority to refuse to grant DC’s rqst to withdraw because the accused did not comply with the financial terms of the retainer?

**A (timing of w/drawal – can Ct ask why)**: If counsel seeks w/drawal early so adjournment is not nec, Ct should not inquire into reasons and should allow w/drawal. If timing is an issue, should inquire into counsel’s reasons—but once they are given, the Ct should accept them @ face value, so as not to tramp upon S-C priv.

**R**: Courts review w/drawal in a preventative way: to protect the admin of justice and ensure trial fairness. This does not create a conflict of interest or breach of S-C privilege. This is the inherent jurisdiction of superior courts.

**R2**: If counsel seeks to withdrawal (a) early so no adjournment is nec or (b) for ethical obligations, the Court must allow withdrawal. If counsel seeks to withdraw for non-payment of fees, the Ct should exercise its discretion and consider the following (non-exhaustive) factors:

* Feasible to rep self?
* Other means of obtaining rep?
* Impact on A from delay of proceeding (worse if in custody)
* Conduct of counsel (reasonable notice? Did they apply ASAP?)
* Impact on Crown, co-accused, complainant, witness, jurors
* Fairness to DC, considering length and complexity of the case
* History (has the accused repeatedly switched lawyers?)

## Whistle-blowing: up the ladder withdrawal

Post-*Enron*, the US SEC adopted up-the-ladder reporting, also adopted in US Model Code

* Ultimately withdraw if concerns not addressed, but first going as high as the Board of Directors

## Supplementary obligations upon withdrawal

* Must give **reasonable notice**
  + Minimize expense and prejudice to client
  + Do all possible to facilitate orderly transfer of matter to the successor-lawyer
  + Not desert client at critical stage🡪 cannot create disadvantage or peril
  + Give sufficient time to retain counsel
  + Should not waste court or other counsel time or resources
* Also
  + Notify client in writing w reasons and explain that the trial will proceed and that they should retain other counsel ASAP
  + Subject to the lawyer’s rights of a lien, deliver property and papers to which the client is entitled
  + Give the client all relevant info in connection with the case (subject to trust conditions)
  + Account for funds and refund any remuneration not earned
  + Promptly render account of outstanding fees
  + Cooperate with successor-lawyer, minimizing expense and avoiding prejudice to client
  + Comply with Court rules…
* If a Q of a **lien for unpaid fees** arises upon withdrawal, the lawyer should consider the effect of enforcement on the client’s position and should not enforce if it would **materially prejudice** a client’s position in any uncompleted manner (obligation to deliver papers and properly is subject to the lawyer lien)
* If a lawyer **leaves a firm**, the client’s interests are paramount and should not be abused or harassed🡪 they should be free whether they want to stay or leave and should be given notice of their options in writing

# Ch. 4: duty to preserve client confidences

* conflict b/w value of systematic confidence on behalf of the gen’l public that info shared w/ lawyers is vigorously protected by SC priv *and* the criticism that the larger public interest suffers when lawyers only look out for clients
* “Confidentiality” and “privilege” should not be conflated—both arise out of the duty of loyalty but:

Proulx + Layton:

* Confidentiality is the linchipin of the professional rel’nship
  + The more info you have about your client, the btr the re
  + Related to duty of loyalty
  + Fosters dignity of the client

|  |  |
| --- | --- |
| **Confidentiality** | **Privilege** |
| Broader—law soc obligation | Narrower/legal—legal obligation |
| Ethical principle | Legal duty |
| All client info acquired by lawyer during rel’nship | Only private communications that take place between a lawyer and a client |
| Continues even if others know the info | Once communicated to 3rd parties, the info is not privileged |
| Defining feature of *all* lawyer-client rel’nships | Principle of evidence law and fundamental justice |
| For any communication during course of professional rel’nship | For the purposes of providing legal advice |
| If communicated, still confidential | If communicated, not privileged |
| Survives rel’nship |  |

### Model Code

* Lawyer must keep in strict confidence all info, re: client’s business or affairs acquired in the course of the professional rel’nship and must not divulge unless
  + Express or implied client auth
  + Req’d by law or court
  + Req’d to deliver info to law soc
  + Otherwise permitted by this rule
* *Cf* with privilege which has developed thru the courts in case law
* mere fact of communication from client 🡪 lawyer: still confidential but not privileged
* Confidentiality: even if you withhold the name of a client, you should never discuss them—not even to your family.

## Exceptions: crime and fraud

### *Descôteaux v Mierzwinski* – SCC 1982

**F**: Police obtained a warrant to get the accused’s appl’n for legal aid. He was charged w/ fraudulently reporting a lower income in order to be eligible for gov’t services, like legal aid.

**P/H**: accused app’d to quash the seizure on grounds of SC priv. The QBSC denied. CA denied.

**R**: The SC rel’nship begins when the potential client first deals with the lawyer’s office to obtain legal advice.

**I**: Can an exception to SC priv be est’d? (yes)

**R2**: Confidential communications lose that confidential nature if and to the extent that they are made for crim’l purposes (i.e. obtaining legal advice to engage in crime) and the same is true *a fortiori* when the communication *itself is a material element* (i.e. the *actus reus*) of the crime.

## Exceptions: public safety

### *Smith v Jones* – 1994 SCC

**F**: J was charged w/ aggravated sexual assault of a prostitute. DC retained a psych, Dr. S, to assist w/ trial prep. Dr. S’s assessment revealed that J had a clear murderous plan (involving kidnapping, sexually assaulting, torturing, and murdering prostitutes of a certain stature from a specific area) and Dr. S thought he was a dangerous individual who was likely to commit future offences if not treated. Dr. S advised DC. Upon learning that DC wasn’t going to tell the judge of same, Dr. S appl’d to be permitted to release this info under the public safety exception to SC priv.

**P/H**: Yes, exception, duty to disclose. CA upheld but *not mandatory only permissive*.

**R**: SC priv is the highest priv recognized by the Cts.

**I**: What is nec for the public safety exception to SC priv?

**\*\*R2**: Reqs of public safety exception:

1. **Clear** risk to identifiable group or person
   1. Must be ascertainable (e.g. kids under 5 in x; single women in appts)
   2. Cannot be too vague (everyone in this city) unless it is a particularly compelling, extreme, and imminent threat
2. **Seriousness**: death or serious bodily harm must be threatened
   1. Includes serious psychological harm
   2. Needs some element of violence
3. Danger is **imminent**
   1. Imminent threat so that some sense of urgency is created
   2. These can’t merely be made in fleeting bouts of rage
   3. Around 3y time was sufficient imminent if the threat was very clear and very serious (e.g. I’m going to murder x in y way on z day, when I am released from prison)

**R3**: When disclosure occurs under this exception, it **must** be lmtd *as much as possible*, providing only that which pertains to the public safety risk.

***Obiter***: privilege belongs to the client—not the lawyer.

**Major (dissent, in part**):

* Too great a chilling effect; good for individuals to speak freely to their psychs🡪 promotes mental health (which is a public good, in the public interest)
* Would lmt disclosure only to Dr. S’s opinions and diagnosis but maintain privilege for all of J’s communications to Dr. S (*would prevent J’s words from being used against him*)

## Exception: Innocence at stake

### *R v McClure* – 2001 SCC

**F**: M was charged w sexual offenses against former students. JC came fwd w further allegations and began a civil suit. M sought product of JC’s lawyer and lit’n file to determine the nature of the claim and assess motive for fabrication.

**I**: When, and under what circs, does the s. 7 right to make full answer and defence override SC priv?

**A**: Both SC priv and right to full answer/defence are principles of fundamental justice, therefore neither will always prevail.

**\*R (innocence-at-stake-test)**:

1. Accused must establish some evidentiary basis that a comm exists that could raise a reasonable doubt (RD) of guilt and A is not provided with access, A will not otherwise be able to establish a RD.
2. Trial J. must examine the comm to determine whether info exists *in fact* that is likely to raise a RD (not definitively). Any info of same that is found, even if not alluded to in step 1, should be produced to DC.

**D**: No production; no evidence that accused couldn’t *otherwise* raise a RD.

## Legislative exception to confidentiality and privilege

* From time-to-time the leg’r will try to introduce leg’n that sets aside the client’s right to confidentiality and the leg’n comes under judicial scrutiny

### *Goodis v ON (Ministry of Correctional Services*) – 2006 SCC

**F**: A journalist appl’d for access to all records (re: allegations of sexual abuse committed by offenders of which probation officers knew) pursuant to *FOIPA*. The Minister claimed SC priv to nearly *all* relevant docs.

**I**: Can the records be disclosed notwithstanding the claim of SC priv?

**\*R**: SC priv will not yield unless it is absolutely necessary to disclose the privileged info in order to achieve the end sought by the enabling leg’n. This is so even in the access-to-info context.

### *Law Soc of Sask v Merchant* – 2008 SKCA (leave to appeal to SCC refused)

**F**: The wife of 1 of M’s clients had made the complaint to the LSS that M had disobeyed a court order (order to pay funds into court to secure child-support obligations). The wife learnt that her husband had rec’d 2 payments from M. M would not tell her whether funds were paid into court b/c he claimed Priv. LSS was investigating the complaint; they sought an order authorizing it to enter into his offices and take possession of M’s records related to this file.

**D**: Appeal allowed; M ordered to disclose.

**\*R**: Absolute necessity test is 2-fold:

1. Does the body seeking disclosure of records (which are subject to SC priv) have the authority to rqst those records?
2. If such powers exist, have they been exercised in such a way as to NOT interfere with prv except as to the extent absolutely necessary?

**A**: LSS has auth to demand production of any member’s records and property that a bencher reasonably believes are req’d for investigation. LSS also req’d only materials directly relevant to the complainant so it passed the test.

### *FLSC v Canada (AG)* – 2011 BCSC

**F**: Parliament introduced Regime (s. 448.1 Crim’l Code), requiring lawyers (among other professionals) to collect and retain info on their clients that could be used by law enforcement. This was targeted at money laundering and the financing of terrorism. As a response, the Law Socs had adopted a “no-cash” rule and “client ID” rule.

**P/H:** The FLSC sought an injunction (which was rec’d) and then brought this petition that the law violated ss. 7 + 8 of *Charter*.

**A**: The leg’n, insofar as it purports to apply to lawyers and law firms is unconstitutional, as infringing upon s. 7—jeopardizing lawyer’s liberty interests and those of clients *contrary* to the principles of fundamental justice (i.e. SC priv). It was not saved by s. 1 b/c not proportional (self-regulation strategy of no cash and ID rules obtained the statutory objectives through the power of disbarment, find, reprimand, and suspension without violating the *Charter*).

**R**: SC priv is a prin of fundamental justice.

## Lawyer w/drawal: SC priv and confidentiality

* When a lawyer needs to withdraw in crim’l context, how do you protect confidentiality?

### *R v Cunningham* – 2010 SCC

**I**: To what degree may or must the lawyer disclose their reasons for applying to w/draw? To what degree does that compromise confidentiality and priv?

**R**: (Non-)payment of fees is not an exception to SC priv., but a matter to which priv may or may not attach depending upon the context.

**R2**: When payment or non-payment of fees is relevant to the merits of the case, or disclosure of same may cause prejudice to the client, SC priv attaches. Where it is unrelated to the s**ubstantive merits** of the case (i.e. most crim’l charges), no SC priv attaches to the info.

## Taking Custody and Control of Real Evidence

### *R v Murray* – 2000 ONSCJ

**F**: Lawyer (M) was DC to Paul Bernardo. Upon B’s instructions, M entered his home after a po search and retrieved tapes which depicted the sadistic sexual assault of his murder victims. He retained the tapes for 17mo; he didn’t know their content for the whole time but he eventually watched them and figured it out. There was evidence that he had talked it over w/ another lawyer (before knowing their contents). The Crown theory was that Holmolka was an innocent victim of B’s abuse and she got off on 2 counts of manslaughter (because the tapes which shoes her as an aggressor were not discovered). When a new laywer, Rosen, took over, he rec’d the tapes and provided to the Crown.

**C**: obstruction of justice

**I**: Did M’s action, in securing the tapes, have a tendency to obstruct the course of justice (*actus reus*)? Was it wilful (*mens rea*)?

**D**: Not guilty—RD about the *mens rea*.

**A**: M has no obligation to assist po but could not be a party to concealing the evidence by removing them and hiding them again.

**A**: The only reason he was not guilty was because there was some evidence that M sincerely though he had some defence strategy through temporarily withholding the tapes and springing them at trial. He wanted to discredit Holmolka with their use.

**R**: Privilege protects SC comm, not physical evidence. There is always a legal obligation not to conceal incriminating physical evidence.

**R2**: Overzealous crim’l DC can lead to unethical behaviour…

# Ch 5: Duty of Loyalty (Conflicts of interest)

* 2 types of conflicts: client-client; SC
* 3.4.1.: you should **not continue to act** when there is a conflict
* 3.4.2: **consent – either express or implied**
  + From all **clients**
  + Not only consent but lawyer must **reasonably believe** that he/she is able to **represent each client without** having a material adverse effect upon the representation of or loyalty to the client
  + Here, **distinction is made b/w duty of loyalty** and **effect upon representation** (so this would probably include candour)
  + **Material adverse effect:** wiggle room
  + This doesn’t say adverse effect on interest but on the representation but representation incl interests
* 3.4.5: **joint retainers** –tells you what you need to say when you have joint retainer
  + Consent should be in writing or you should write a letter noting that consent to both clients
* 3.4.10 – what to do when you are acting against former client
* Unless the former client consents, a lawyer must not act against a former client in:
  + (a) the same matter,
  + (b) any related matter, or
  + (c) 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

## Client-client conflicts, former clients

### *MacDonald Estate v Martin* – 1990 SCC

**F**: Ms. D was a junior lawyer at TW law firm + worked on Mr. M’s file. TW dissolved and Ms. D joined another firm which merged w TDS law firm. TDS rep’d the Defendant in Mr. M’s action. When Mr. M found out, he appl’d to have TDS removed. Ms. D had done no work on the defendant’s file and she (+ the law firm) gave undertakings that Ms. D would not be involved in the future.

**P/H**: dismissed at lower courts

**D**: appeal allowed – disqualified

**Sopinka** (majority):

**A**: Cts have inherent supervisory jurisdiction to remove a lawyer due to a conflict b/c they are officers of the court and affect the administration of justice, over which the courts have jurisdiction.

**\*A**: 2 approaches to disqualifying conflicts:

1. Probability of real mischief
   1. Proof that lawyer actually possesses the confidential info
   2. Proof of probability of its disclosure to the client’s detriment
2. Possibility of real mischief\*\*
   1. Justice must manifestly be seen to be done
   2. If it reasonably appears that disclosure might occur, the test is satisfied

**A**: Questioned imputing knowledge w/in the firm, particularly in the age of the megafirm. It’s plausible that firms could devise strategies to protect confidences. But strong presumption that lawyers who work together share confidences 🡪 but courts unlikely to accept these stratagem until the law societies determine whether there may be institutional guarantees.

**R**: An undertaking to avoid a conflict is, on its own, absolutely insufficient to prevent a conflict.

**R2**: Knowledge is not necessarily imputed throughout a huge firm, but the test is the “possibility of real mischief” in determining whether there is a conflict. The Q is: would a reasonably-informed member of the public be satisfied that use of confidential info would not occur? Possibility Q: (i) did lawyer receive confidential info, (ii) possibility used to prejudice?

**\*A**: To find knowledge:

1. Client shows rel’nship sufficiently related to retain
2. Court infers confidential info imparted (rebuttable presumption)
3. Solicitor must satisfy otherwise

**Cory (dissent in part, concur in result**)

* Would have an irrebuttable presumption that knowledge of 1 member = knowledge of the rest of the lawyers at that law firm
  + Needed to ensure public confidence in administration of justice
    - Other balancing factors: the mobility of lawyers and the choice of counsel should *not way even nearly as closely* as the firm goal (admin justice)
* Agreed w/ disposition of the appeal but would place a stricter duty upon lawyers than what the majority proposed
* Integrity of justice system is of such fundamental importance that it must be super important in any balancing
* Regardless of protections within a firm, lawyers in firms meet and socialize regularly, how is the reasonable public supposed to see that? Are they really going to accept “trust us”?

## Duties to current clients

### *R v Neil* – 2002 SCC

**F**: N was an independent paralegal who worked w/ LM, his assistant. LZ was a lawyer either assoc’d w/ or employed by (sharing office space) the law firm, V. A complaint was made against N w/ LawSoc for practicing w/o licence. PO investigated + 2 charges were made: (i) implicated both LM and L for which LM would be rep’d by LZ and N would be rep’d by V law firm + (ii) only N was implicated and was brought due to LZ’s attempt to get a 3rd party (Doblanko) to report N and fling more mud in N’s direction, for the benefit of LM. LZ intended to mount a “cut-throat” defence by tarnishing N. V dropped N due to the conflict. LM had his charges dropped in exchange for testifying against N. N sought a stay for his charges. V and LZ had earlier met with N, after arrest, and before LM retained LZ.

**D**: Dismissed—a stay of proceeding is not appropriate; there was no abuse of process

**A**: The law firm, V, owed N a duty of loyalty and should not have taken on the case of one of N’s alleged victims, Doblanko, though unrelated to charge (i). Despite this lack of relation, Doblanko was adverse to N’s interests.

**A**: The duty of loyalty should not be used to undermine trial fairness as a tactical advantage and disqualify an opponent’s counsel.

**A**: The duty of loyalty is intertwined w/ the fiduciary nature of the SC rel’nship + has 3 dimensions:

1. The duty to avoid conflicting interests
2. The duty of zealous rep
3. The duty of candour on all matters relevant to the retainer

**A**: In exceptional cases w/ professional litigants, consent may be inferred b/c such litigants generally accept that counsel may work for or against them, usually for tactical, not principled, reasons.

**R1**: Although a 2nd client might present with an issue factually and legally unrelated to the interests of the 1st client, the 2nd might still be adverse in interest to the 1st and should not be taken on, so as to avoid a conflict of interest.

**R2 (bright-line rule)**: The bright line rule against conflict interests: generally a lawyer may not rep one current client whose interests are **directly adverse to the immediate interests** of another current client—even if the **2 mandates are unrelated**—unless both clients **consent** after receiving **full disclosure** (and preferably independent legal advice) and the lawyer reasonably believes that she is **able to rep both** without adversely affecting the other.

**R3**: the duty of loyalty requires that client interests be put before lawyer interests.

### Current client conflicts – debate

* Neil (duty of loyalty) seems of greater importance than MacDonald (duty of confidentiality) because the former cannot be easily addressed within a firm with separating (*“Chinese*”) walls
  + Neil changed the standard 🡪 now bright-line rule (*not just legal interests*)
* FLSC wants to adopt the bright-line in the Model Code. The CBA hates it.
* Model Code
  + Did not adopt the bright line
  + Adopted article 2.04(1): A lawyer must not act or continue to act for a client where there is a “conflict of interest” *(i.e. substantial risk that a lawyer’s loyalty or representation of a client would be materially and adversely affected by the lawyer’s own interests or duties to another client, a former client, or a 3rd person*), except as permitted by the Code
    - More than a mere possibility of conflict of interest 🡪 this is a genuine, serious risk.
* Underlying values: public confidence in the integrity of the legal profession and the administration of justice
* Factors to consider when determining if a conflict exists
  + Immediacy of the legal interest
  + Whether the legal interest is directly adverse
  + Substantive or procedural issue
  + Temporal rel’nship b/w the matters?
  + Significance of the issue to the immediate and long-term interests of the client involved; and
  + Client’s reasonable expectations

## Former client conflicts

* Neil: duty of loyalty owed to past clients is less onerous than current clients (implicit)
* Even if the duty of loyalty allows the lawyer to act against a former client (i.e. not same or related matter), the duty of confidentiality may prevent same
* Model Code (s. 2.04(10))
  + Unless former client consents, lawyers must not act against a former client in:
    - Same matter
    - Related matter; or
    - Any other matter if the lawyer has relevant confidential info arising from the rep. of the former client that may be prejudicial to that client
  + Conflict extends to the whole firm:
    - When a lawyer has acted for a former client and obtained confidential info, another lawyer at that firm may act in the new matter against the former client if:
      * Consent of former client; or
      * Law firm establishes that it’s in the interests of justice, considering all relevant circumstances, such as:
        + The adequacy of the assurances of non-disclosure
        + Adequacy + timing of measures taken to ensure non-disclosure,
        + Extent of prejudice to any party
        + Good faith of the parties
        + Avl. of suitable alternative counsel; and
        + Issues affecting public interest
* Duty not to act against a former client in a related matter whether or not confidential info is at risk (*Brookville* – SCC)

### *Strother v ME* – 2007 SCC

**F**: S worked for ME, a film developing and financing companies in the 90s. S (+ firm, Davis) rep’d ME exclusively on matters of movie financing. When the tax advantages that had led to ME’s success were closed, S advised that there were no remaining options, and ME wound itself up in ’97. In ’98, ME was still a client of Davis + S but not exclusively retainer. In Late ‘97/early ’98, a former employee of ME, Darc, approached S w/ a loophole scheme. S did not tell Davis or ME. S agreed to take it for an advanced tax ruling for no fee and if it was successful, he would be a partner in the tax scheme with Sentinel Hill (SH). S succeeded, left Davis, and earned $60mil over 2 years (personally). ME didn’t discover the loophole well after the tax ruling was made public. ME sued both Darc + S (+ firm, Davis). Action against Davis was dismissed at the lower courts.

**D**: S was disgorged of his profits from the period up to when ME discovered the loophole on its own.

**I**: What is the duty of loyalty that a lawyer owes to past clients?

**A**: Although the ’97 “exclusive retainer” had shifted to a non-exclusive ’98 retainer, there was still a continuing duty of loyalty from Davis &Co and S; therefore, S had a duty to let ME know that his past advice should at least be revisited (subject to respecting Darc’s confidentiality). This arose out of the duty of candour (re: ’98 retainer). There’s generally no duty to revisit past advice. S should have at least told ME to consult another firm and should at least have told them when the ruling was made public.

**A**: Bright line rule: SH was trying to create a business opportunity to exploit that would also have been useful to ME and therefore, it wasn’t directly adverse to ME’s immediate interests. This is not a legal dispute, but adversity in business matters. Concurrent clients w/ conflicting commercial interests do not impair a lawyer’s ability to rep the legal interests of both, therefore no “real risk of impairment”. This is key for specialized areas and small communities.

**A**: Conflicts b/w concurrent clients where there is no risk of confidential info can be handled more flexibly than otherwise. The court should ask: is there a substantial risk that the lawyer’s representation of the complaining client could be materially and adversely affected? This is a possibility beyond mere speculation (but short of probability).

**A**: Because S’s financial interests were aligned w/ 1 of his competing clients in a lmtd market 🡪 failed to meet duty of zealous representation and candour.

**A**: D vicariously liable despite being “an innocent victim of S”

**\*R**: Where concurrent clients are business competitors, but there is no legal conflict, a lawyer is not in breach of his or her duty of loyalty unless there is a substantial risk that the lawyer’s representation will be materially and adversely affected. This test is most flexible when there is no confidential information at risk.

### *Wallace v CN Railway* – 2011 SKCA

**F**: M law firm was class counsel for W in his class action against CP, seeking $1.75bil. M was one of the firms CN relied upon for pre-class action matters in Sask. They got about 1/3 of CN’s Sask business. Just prior to the commencement of the class action, all files with CN were stopped (w/drawal or CN fired). All were matters unrelated to the class action. M knew about CN’s lit’n strategies and risk tolerance, but nothing of the substance of the proposed class action. CN only learned that M was counsel *after* the statement of claim was served.

**P/H**: The chambers J disqualified M.

**A**: Prime values are integrity of legal profession + administration of justice 🡪 these take precedence over choice of lawyer and lawyer mobility (*Neil*)

**\*R** (bright-line + substantial risk principle): Absent proper consent, a lawyer must not act directly adverse to the immediate interests of a current client unless the lawyer is able to demonstrate no substantial risk that the lawyer’s representation of the current client would be materially or adversely affected by the new, unrelated matter.

**\*A (professional litigant exception)**: Consent will be implied and cannot be retroactively withdrawn if not previously expressed in a retainer K, when:

1. Large corporate client (e.g. bank, gov’t);
2. Matters are sufficiently unrelated;
3. No danger of confidential info being abused; and
4. In the circs, its appl’n will be consistent with the high standards of the legal profession and integrity of the justice system

This is justified because such clients tend to have many resources, are not vulnerable, and are able to materially limit the choice of counsel of opposing parties.

**A**: M “dumped” CN for W file—should not have done so (duty of zealous representation). Should have cont’d to work for CN unless the latter didn’t want that. Also should have advised CN of W file in a timely manner—didn’t do that—failed duty of candour.

**R**: When there is no serious risk to the rep’n of the client and there’s no confidential info at risk, something short of disqualification is required. That being said, CN can sue M for civil damages or report to LSSK.

### *CNR v McKercher LLP* – 2013 SCC (not in txtbk)

**COA** CN had appl’d to have M removed as lawyer.

**D**: Appeal allowed—unanimous – sent back to lower court

**A**: the right-line rule applies to immediate legal interests that are directly adverse. It does not apply to condone tactical abuses. It also doesn’t apply where, in the circumstances, it would be unreasonable to expect that a lawyer not concurrently represent adverse parties in unrelated legal matters.

**A**: violated duty of candour when failed to advise of representation for W right away.

**A:** Bright line rule is applicable. The immediate interests of CN and Wallace were directly adverse, and those interests were legal in nature. Indeed, McKercher helped Wallace bring a class action directly against CN. In addition, there is no evidence on the record that CN is seeking to use the bright line rule tactically. Nothing suggests that CN has been purposefully spreading out its legal work across Saskatchewan law firms in an attempt to prevent Wallace or other litigants from retaining effective legal counsel.

**R**: A lawyer cannot unilaterally drop a client in order to circumvent the duty of loyalty.

**R:**

1. the bright line rule applies only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting,
2. it applies only when clients are adverse in legal interest,
3. it cannot be successfully raised by a party who seeks to abuse it, and
4. it does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters. (e.g. professional litigants)

**R (substantial risk):** When a situation falls outside the scope of the bright line rule for any of the reasons discussed above, the Q becomes whether the concurrent representation creates a **substantial risk** that the lawyer's representation of the client would be materially and adversely affected. The 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”. In addition, the 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.

## Lawyer-client conflicts

* affects duty of loyalty and ability to provide uncompromised representation of client’s interests (e.g. trust accounts, sexual relationships)

### *Stewart v CBC* – 1997 Ont Gen Div

**F:** S ran over a woman and was charged w/ crim’l negligence, causing death. His trial counsel advanced outrageous theories which made S very unpopular. Greenspan was his sentencing counsel and he undertook to make S’s personal reputation better and decrease the sentence. Thirteen years later, G appeared on a CBC program to discuss the case despite S advising him of non-consent. Did not use confidential info, but public info for “educational purposes”.

**D**: Breached duty in 3 ways:

1. financial interests of lawyers > interests of the client
2. self-promotion of lawyer > interests of client
3. undercut the benefits and protections provided through the retainer

ordered to disgorge profits and pay $2,500 in compensation.

**I**: Does the duty of loyalty prevent counsel from publically communicating non-confidential info about a former client’s case?

**A**: G was *not permitted* to participate in the broadcast—but another lawyer could have done so (note: G did not prepare program materials). But careful, competent, and responsible crim’l DC should have considered the risk of harm to the former client and should have not wished to injure the client.

**I**: Did G breach his fiduciary duty to S by creating the impression that G’s real purpose (before P’s interests) was self-promotion and aggrandizement?

**A**: Self-promotion occurred—G showed himself as a trusted advisor to 1 mil Canadian viewers but apparently not aggrandizement.

**R**: The fiduciary rel’nship exists *even after* the termination of the retainer, such that when G involved himself again in the subject matter of the retainer, the fiduciary duty of loyalty was trigger—he should not have taken advantage of S or undo the benefits of representation of S.

**R2**: The duty of loyalty can prevent a lawyer from discussing the subject matter of her retainer despite wide-knowledge about the non-confidential info.

### *LSUC v Hunter* – 2007

**C**: professional misconduct—sex with client = conflict

**F**: H was a bencher and the treasurer for LUSC. He had sex w/ a client over 2.5 years of representation as her family lawyer. He ended things and tried to get her to sign a statement saying that he abided by his professional obligations and told her to get independent legal advice at the start of his advice. He later attended her house to get her to sign the statement—he was unannounced and uninvited—he caused her significant emotional distress. He also called her xx times. She would not sign. He admitted to his firm and referred the matter to LSUC and resigned from his position w LSUC. He was charged with and admitted to professional misconduct in having placed himself in a conflict with his client. He brought evidence of his good repute and negative impact on his family and his law practice.

**L**: When a lawyer acts for someone with whom (s)he has a personal rel’nship, that may interfere w/ the duty to provide objective, disinterested, professional advice to the client.

**L**: Lawyers shall not (continue to) act for a client where there is (or is likely to be) a conflicting interest, unless the client has rec’d adequate disclosure to make an informed decision and consents to cont’d rep w conflict.

**D**: 60-day suspension + $2,500 fine

**\*A**: sexual and intimate personal relationships b/w S-C may conflict w/ ability to provide objective, disinterested advise to the client—before accepting/continuing the retainer, the lawyer should consider:

* The emotional and economic vulnerability of the client
* Power imbalance created
* Jeopardize client’s right to strict confidentiality
* Will the lawyer be req’d to act as a witness?
* Will it interfere w/ fid obligations and ability to exercise independent, professional judgment and fulfill obligations owed as an officer of the court

**A**: In some circs, the conflict will be so profound as to be irreconcilable w/ the lawyer’s ability to provide objective, disinterested professional advice + the lawyer *cannot* act.

**A**: Mitigating factors: legal history incompatible with this act; self-reported; agreed to shared statement of fact to save complainant from testifying; remorseful; significant toll upon the member’s personal life.

**\*A**: 3 dangers of sexual relationships b/w SC:

1. Threatens lawyer’s ability to give independent, objective judgment
2. Difficult to remain dispassionate if the rel’nship is serious; if it’s not serious, it can be exploitative
3. Difficult to evaluate if consent is more apparent than real b/c of dependence upon the lawyer

**R**: In some situations, like this one, where the client is vulnerable and unsophisticated, lawyers should recommend independent legal advice to make sure the client consents and that their consent is informed, genuine and uncoerced.

**R2**: Sexual rel’nships are not absolutely prohibited but they raise serious Qs about whether the lawyer has a conflict of interest that will jeopardize the SC rel’nship.

# Ch 6: Ethics in Advocacy

* Model Code: Represent client resolutely + honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy, and respect
  + Raise every issue, ask every Q, advance every argument—however distasteful—seek every remedy, and advance all defences
  + Should de-emphasize own views/opinions
* Must also be faithful to admin of justice—duty to Court is paramount—higher cause of truth and justice—therefore, lawyer (incl DC) must produce all relevant authorities, even those contrary to their client’s position (Denning)

## Ethics at pre-trial stage

* Pleadings:
  + How to raise fearlessly every issue and argument without participating in an abuse of process
  + Pleadings cannot contain scandalous, etc. allegations—those will be struck
  + Model Code:
    - lawyer should not abuse the process by a tribunal by… instigating proceedings clearly motivated by malice for sole purpose of injuring
    - Shall not pursue improper steps
      * Taking advantage of slips or oversights
      * Using tactics to delay or harass
      * Knowingly participating or assisting in the dishonest or dishonorable acts of clients
    - Should:
      * Fair and honourable means
      * Candour, fairness, courtesy + respect
      * Seek to promote a party’s right to a fair hearing in which justice can be done

### *DCB v Zellers* – 1996 MBCA

**F**: Z’s cost-recovery program for shop-lifting kids involved threatening to sue the parents of shoplifts for $$ above what was stolen in order to compensate for Z’s theft-surveillance. Z’s lawyer wrote to DCB asking her to pay or they would sue her. She believed she was possibly subject to a civil suit so she agreed. Later, upon discovering that there was no legal principle to establish her liability, she was pissed and took Z to small claims to recover. This was a test case for Z.

**A**: A competent and responsible lawyer should know when there is no legal principle to support his or her client’s position and should *not* pursue an action in such a case.

## Discovery

* Provincial court rules speak to these
* During the day-to-day course of things, this is very much in the hands of lawyers, not judges, so there is large room for unethical behaviour

### *Grossman v TO Gen’l Hospital* – ’83 Ont High Court

**F**: G died at TGH. His body was missing for 12 days ads was discovered in an air-duct shaft. DC took a position of not admitting anything—not even the fact of death—and would not produce *anything* P could not establish existed (ostensibly because of privilege). DC even went as far as refusing to describe that for which priv was ostensibly claimed. This was the *same* conduct, from the *same* lawyer, defending the *same* client-hospital not long before this claim.

**D**: Costs awarded at punitive level: DC (not defendant-hospital) had to pay🡪 purpose was gen’l deterrence

**A**: The integrity of the justice system depends upon the willingness of lawyers to require full and fair discovery of their clients. When lawyers stonewall one another, disclosing only that which can be forced of them, that can work real injustice, delay, and expense to the advantage of the party with the deepest pockets.

**R:** Lawyers have a duty to make full, fair, and prompt disclosure, including making diligent inquiries about material documents in the possession of others for the client, and when asserting privilege, the lawyer should at least describe the documents so that it may be contested and mediated by the court, if necessary.

**R2**: Excessive zeal may increase unfairness, obstruct the search for truth, and waste time and money.

## Negotiation

* Model Code: lawyers have a duty to encourage client compromise, when possible, on a reasonable basis, and must discourage commencing/continuing useless legal proceedings (consider ADR, inform client, if instructed, pursue ADR)
* There are no Model Code rules on the conduct of negotiation
* AB prohibits lawyers from misleading other lawyers + if aware of another lawyer’s resulting misapprehension from a lawyer rep., client (or related p.) rep., or an ally of client’s material rep that was once accurate and now inaccurate.

## Ethics at trial

* Need to balance duty to client with duty to court
* The line is usually at conscience and good faith beliefs

### Witness preparation:

* In good faith and properly-so conducting, a lawyer may prepare a witness on case theories, line of Qs, area of particular interest of opposing counsel, basic issues, etc.
* Counsel may not coach a witness 🡪 illegal, unethical, and unprofessional = obstruction of justice and witness tampering
  + This can also result in costs awarded against the lawyer personally (or the client), Law Soc sanctions + crim’l sanctions

##### R v Sweezey – Nfld CA

* Lawyer counselled forgetfulness and evasiveness
* D: lawyer given 12 mo. Sentence (obstruction)

### Cross-examination

##### R v Lyttle – 2004 SCC 🡪 Cross-examination of an opposing witness

**F**: SB, complainant, was beaten by 5 men over a gold chain—4 of whom were masked, the 5th was the accused, L. PO thought the beating was not over a gold chain but was about a drug debt. DC theory was that SB was protecting the identities of his drug associates and wrongfully ID’d accused. The Crown was not going to call the police.

**P/H:** The Trial J. ruled that DC could call the police. But J. held that DC could only cross-examine Crown witnesses if she had “substantive evidence” of the drug-debt theory. DC called the po and as a result, could not address jury last. L was convicted. ONCA held that Trial J. was wrong but did not need to overturn conviction.

**A (purpose of cross)**: (i) assess witness credibility, (ii) explore frailties of testimony, (iii) permit full answer and defence of accused (s. 7), and (iv) test veracity.

**A**: If counsel advances tenuous questions, trial J may conduct a *voir dire* to obtain counsel’s assurance that a good-faith basis exists.

**A**: The rule in *Browne v Dunn* is that counsel must give notice if they intend to later impeach a witness who they cross’d. This doesn’t mean that they need substantive evidence to raise a line of Qs.

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

##### *R v R(AJ)* – 1994 ONCA 🡪 *Cross-examination by Crown Counsel*

**F**: A was convicted of incest and sexual abuse of his daughter + granddaughter. A alleged that cross by CC was improper in its overall tenor and conduct, resulting in it being so prejudicial as to render the trial unfair and lead to a miscarriage of justice. CC had an aggressive + exhaustive 141pg cross with a sarcastic tone and editorial comments.

**A**: CC’s Qs were calc’d to demean and humiliate, they showed contempt and were abusive. She also repeatedly stated her opinion and engaged in extensive argument with the accused.

**R**: Cross by CC that involves argumentation with the accused, personal opinion, and abusive tone may prejudice the accused’s defence and undermine the appearance of a fair 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

### *GMAC v Isaac Estate* – 1992 ABQB (Master)

**F**: Neither counsel mentioned the *Sherwood* decision + at the end, the Master noted (s)he would reserve judgment until reading it. At that point, PC (for GMAC) had a “sudden revelation” and recalled the case (although it had come down from the CA several wks earlier and P and PC were the same in that case as the case at bar).

**D**: Costs against Plaintiff on client and solicitor basis (punitive award).

**A**: PC likely knew that the Master would read it and see PC/P’s names so PC made a belated disclosure of the authority.

**A**: E.g. of where counsel’s duty to the court > duty to the client.

**R:** It does not matter if rel case law is distinguishable, it must still be brought forward, even if it’s adverse to the lawyer’s case.

**R2**: Counsel has a duty to bring all rel case law in the rel jurisdiction (*not others*) to the attn. of the Ct so that the judge may remain restrained in their adjudication. This involves:

* Reported cases only (unless unreported known)
* On point of law (not similar facts necessarily)
* Determining relevant authority—ignorance is *not an excuse*.

## Advocacy and Civility

* Civility: politeness to others in the justice system; & acting fairly, honestly, and with the utmost integrity in dealings with other lawyers and members of the court
* 4 sources of the obligation:
  + 1) Court’s inherent jurisdiction to govern courtroom proceedings
  + 2) Model Code:
    - Lawyers should be courteous, civil, act in good faith
    - Agree to reasonable requests (e.g. procedure and formalities) that do not prejudice the rights of the client
    - Avoid sharp practice and slips not going to the merits
    - Not correspond abusively or offensively or in an improper tone
  + 3) Best practice civility codes…
  + 4) Lawyer’s own personal ethics for positive self-regulation
* Civility does not conflict w/ a lawyer’s duty of zealous rep—in fact, if uncivil, may impair client interests by forming a bad impression with the judge or the jury

## Alice Wooley: Does civility matter?

* Civility can be defined in 2 ways:
  + Politeness to other lawyers (and others) and
  + Lawyer assistance in the effective and expeditious functioning of the legal system
* The former is not the appropriate subject of professional regulation
* The latter is an omnibus term that provides insufficient guidance—obscuring real legal principles like loyalty to the client
* Courtesy as a moral good
  + Should not “be nice” when it impinges loyalty to the clients or the legal system
  + The unpleasant tasks of lit’n don’t always lead to “being nice”
* Not arguing lawyers should not be nice but that punishment on this basis may lead to negative ethical consequences
* Emphasizing civility🡪 professional protectionism rather than holding others to account, as necessary in our self-regulating system
* Particularly problematic when lawyers voice concern, re: competence or ethics of other lawyers, without perhaps supporting evidence or doing so rudely🡪 investigated for incivility
* This could be better dealt with through the law of defamation
* “civility” also imprecise and subjective
  + Also elitist and not amenable to diverse bar
* Cases, re: civility, that were decided correctly were only because of other ethical values that were implicated—not just rudeness *per se*
* Stating these cases as civility obscures and prevents lawyers from reading disciplinary decisions and knowing what was actually sanctioned and how to navigate their complicated ethical obligations
* Lawyers should be free to make comments about each other, the courts, and the functioning of the justice system🡪 hard-hitting and unvarnished critiques are essential to the justice system

### *Schreiber v Mulroney* – 2007 Ont SCJ

**F**: Despite an understanding that there would be a delay in M’s statement of defence—there was consent—PC and client, S, became annoyed and decided to seek default judgment despite agreeing not to do so. Later, they wrote to DC and did not advise of what they had done and made it seem like interlocutory issues had yet to be resolved.

**D**: Default judgment set aside and case management conference that DC had wanted was ordered.

**R**: Sharp practice is impermissible.

### *LSBC v Laarakker* – 2011

**F**: A BC lawyer, L, sent a ltr and made a blog post, criticizing an ON lawyer for sending out demand-letters to parents of shoplifting kids. The letters contained threats to sue (similar to *Zellers* case). L critiqued the letters by noting their dubious legal grounds and also launching personal insults at the ON lawyer.

**D**: $1,500 fine + costs ($3K)

**L**: Canons of legal ethics—duty to other lawyers (courtesy, good faith, should not allow ill feelings to influence demeanor and personal remarks should be scrupulously avoided)

**A**:

* Conduct unbecoming—personal life;
* Professional misconduct—conduct during the course of practice.

**A**: Even though L had issues w/ the ON lawyer, he should have taken them to the law society instead of damaging the integrity of the profession with his personal remarks.

**Test (professional misconduct)**: Marked departure from the conduct that the LawSoc expects of its members.

# Chapter 7: Counselling and Negotiation

## Counselling

* Providing info, offering an opinion, applying law to client’s factual situation
* Tension between client autonomy and decision-making and lawyers expressly or implicitly making the actual decision
* Issues: cannot tell a client what they want to hear. Must be honest and candid.

## Counselling Illegal Conduct

### LSUC v Sussman – 1995 (discipline committee)

**F**: In matrimonial proceedings, an order was made so that the wife would have children during the week and the husband would have access of both children on the weekend. Following “behavior” during access, S, counsel for the wife, wrote to B, counsel for the husband, and advised that S would be applying for an interim restraining order and that, in the meantime, he advised his client to deny access, contrary to the Order. The husband was denied access. B reported S to LSUC. The lawyer conceded that he had counselled his client to disobey the terms of a court order. He had no acceptable explanation for not having yet brought a variation appl’n for the order. There was no suggestion of imminent risk to the children.

**R**: A lawyer commits professional misconduct when he or she brings the administration of justice into disrepute by counselling a client to disobey a court order.

**R2**: There are very lmtd situations in which it is acceptable to ignore a court order—there must be a reasonable and honest belief of imminent risk or danger to the child, which must co-exist with an immediate appl’n to the court to have the issues determined. If the order remains, it must be obeyed unless and until there is a full hearing for a permanent change that finds otherwise.

### Model Code

2.02(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.

2.02(7) Lawyer must **never knowingly assist or encourage any dishonesty**, crime, fraud, or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

2.02(8) Lawyer who is employed by an **organization** and known that the org intends to act dishonestly, fraudulently, criminally, or illegally, must do the following:

a) advise the person from whom the lawyer takes instructions and the chief legal officer that the proposed conduct is, was, or would be dishonest… and must be stopped

b) if necessary, advise the next person up, including ultimately, the board of directors/trustees

c) if the org continues, withdraw.

## Other counselling issues

* If a lawyer is asked to provide non-legal advice, must differentiate b/w the advice and legal advice and make sure the client is aware of the limitations + lack of competence in non-legal matters
* If a lawyer makes an error that damages the client’s position, the lawyer should promptly notify the client and discuss how to proceed, including the possibility of suing the lawyer and must insist upon independent legal advice
* If the lawyer has an interest in any of the client’s transactions, he/she must insist that the client get independence advice

### Model Code

2.02(4) Lawyers should encourage clients to compromise and settle when it is possible to do so on a reasonable basis and discourage clients from commencing/continuing useless proceedings.

* commentary: should consider the use of ADR

### David Luban: Tales of Terror (war on terrorism)

* What are the ethical obligations of lawyers when it is obvious that a client wants to be advised that a particular course of conduct is acceptable?
* 9/11 torture memos suggested that torture did not occur unless there was a threat of organ failure. These were ultimately disavowed.
* 2 mistakes:
  + Stretching and distorting the law to reach an outcome the client wants
  + Not indicating that the lawyer’s interp is outside of the mainstream
* To clients, lawyers must be counsellors and advice should not advocate but represent the mainstream view and should not distort the law or facts🡪 it should look the same even if the client wants the exact opposite result
* To courts and opposing parties, lawyers can be advocates, exaggerating the law/merits, because it may be countered by the other side in that situation

## Negotiation

* There are view ethical obligations imposed upon lawyers (outside of law of fiduciaries, deceit, misrep, etc.) and negotiation frequently occurs in private
* Negotiation is seen as a kind of “game” where deception and bluffing are key
* Can a lawyer withhold material facts? Make untruthful statements? Are rules about negotiating different because lawyers are involved?
* Usually lawyers must act w/ integrity and in good faith when they deal w/ other lawyers and self-rep’d—cannot misrep or conceal

### Model Code

2.01(1)(c) Competent lawyers is one who can apply relevant knowledge, skills, and attributes… on behalf of the client, including… negotiation

### LS of Nflnd + Lab v Regular – 2005 (NLCA)

**F**: RR was lawyer for Petroleum Services (PS) and BJ, who held 75% of the shares in PS. RS was rep’d by the lawyer, JH, who held 25% of the shares. There we renegotiating to ascertain the value of RS’s shares. JH wrote RR advising of the rumour he heard of attempts to sell PS and reminding RR that BJ and RS had an agreement and that RS should have input. RR wrote JH to deny the rumour and express BJ’s commitment to solving the issue. That day, RR retroactively removed RS as a director and effectively sold PS.

**A**: RR deliberately intended to mislead JH with his response. It was designed to conceal the sale of assets.

**R**: RR failed in his duty not to deceive another lawyer.

### LS of AB – Code

6.02(2) – a lawyer must not lie or mislead another lawyer

* commentary: in no situation, incl negotiation, may a lawyer deliberately mislead a colleague—if asked a Q that cannot be answered due to confidentiality, the lawyer should not lie, but should decline to answer until the client consents
* If another lawyer has a misapprehension (due to a misrep by client, someone allied with, or lawyer) and a correction of same requires the disclosure of confidential info, if the client refuses the disclosure, the lawyer must withdraw.

### American bar association rules

* Lawyers shall not knowingly make a false statement of material fact/law to a 3rd person
* Lawyers should be mindful of their obligations under applicable law to avoid crim’l or tortious misrep

# Ch 8: Ethics and Crim’l Law

Simplistic model:

* Crown: quasi-judicial minister of justice; cannot take purely adversarial position
  + Excludes any notion of winning or losing
  + May still be adversarial in the sense that they can advocate forcefully for a conviction, assuming that is a legit result on the evidence
    - Argue forcefully for a legit result *but* be fair, objective, and dispassionate in the presentation of the case of the Crown
* Defence: entitled to be purely adversarial; no obligation to assist prosecution
* Both: overriding duty to the court, the profession, and the public

## Ethical duties of crown counsel

* Advocate and work hard to achieve conviction when warranted
* Duty to be fair and objective towards the accused
* Need personal courage, strength of character, and institutional independence (i.e. secure from political or social pressures); make courageous decision where needed (particularly where the accused is hated and the case is high-profile) to safeguard the public interest
* Must ensure that resulting convictions are based upon facts, not emotions
* 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 Ct in eliciting truth without infringing upon legit rights of the accused
  + Exercise prosecutorial discretion w/ objectivity, impartiality, and not in a purely partisan way

## Crown disclosure

* Duty: disclose all relevant info in the Crown’s possession to DC
* Discretion: disclose any irrelevant info

### *R v Stinchcombe* – 1991 SCC

**C**: Theft, breach of trust, and fraud of a client,

**F**: S is the lawyer and trustee. DC’s position is that S was a business partner with his client whom he was charged with defrauding. S’s former secretary, W, gave evidence favourable to S at a preliminary hearing. Later but prior to trial, the RCMP took a tape-recorded statement from W during a private interview. During trial, the Crown took a further written statement from W. DC requested disclosure of both statements and was refused. The Crown also refused to call W at trial. DC made an appl’n that the Crown disclose the content of both statements. The Crown provided no basis for resisting production other than saying that W was not creditworthy.

**P/H:** The trial judge dismissed S’s application on the ground that the Crown had no obligation to disclose the contents of the statements. S was convicted.

The AB CA dismissed his appeal from conviction without issuing reasons.  
**D**: SCC allowed the appeal and ordered a new trial w/ the 2 statements disclosed.

**I**: What is the nature of the disclosure duty of the Crown?

**A (cf civil):** Even in civil proceedings, the element of surprise has been done away with. Although it’s an adversarial process, full discovery is found to better serve justice.

**A** (policy): this will decrease delays because there will be no disclosure-hearings, earlier withdrawals of charges, earlier guilty pleas, fewer wrongful convictions, & **full answer and defence (s.7).**

**A (**DC rqst): DC must request disclosure to trigger the obligation. The Crown should advise self-rep’d litigants. If there is a failure, it should be brought to the Ct ASAP to remedy any prejudice and avoid a new trial.  
**\*\*R**: There is an asymmetrical duty to disclose imposed on the Crown and triggered by the request of the accused. Disclosure should be complete (including evidence Crown won’t rely upon) with only some discretion as to timing and privilege when an informer’s identity is at stake. This duty is not imposed on DC who should maintain their adversarial role.

**\*R2** (roles of the parties): Fundamental dif b/w role of DC and Crown. The former may remain adversarial, the latter may not. **The Crown’s role is to lay before the jury all credible and relevant evidence**. **It may firmly argue but must be fair, within its public duty, with no considerations of winning or losing**. The fruits of the investigations of the Crown are public property.

### Model Code

4.01(3) When acting as a prosecutor, a lawyer must act for the public and the administration of justice resolutely and honourably w/in the limits of the law.

* Commentary:
  + Primary duty is to seek that justice is done through a fair trial on its merits—not seek a conviction
  + Must act fairly and dispassionately

### *Krieger v Law Society of Alberta* – 2002 SCC

**F**: K was Crown Counsel. The issue occurred in the post-Stinchcombe world. Preliminary blood results were released 2 weeks before the prelim inquiry. The tests implicated someone other than the accused. K did not disclose and told DC that the DNA results would not be avl for the prelim inquiry. Upon the commencement of the prelim inquiry, DC discovered that the results had come down. K claimed that he was delaying disclosure, pursuant to Stinchcombe direction, while awaiting the final results. The AG’s office reprimanded K and he was removed from the case. The accused complained to the LS. This case is about whether Crown counsel are immune from review by the LS.

**I**: Can the acts of crown counsel be reviewed by external law societies or are they immune from external review?

**A**: There is a constitutional principle that the AG must act independently as a fundamental principle of the rule of law. Therefore, the AG’s decisions are not subject to judicial review. However, prosecutorial discretion is the discretion to (a) bring the prosecutor of charges laid by police, (b) to enter a stay of proceedings, (c) to accept a guilty plea to a lesser charge, (d) to w/draw from crim’l proceedings altogether, (e) to take control of private prosecutions. However, Crown prosecutorial tactics or conduct are not within the scope of prosecutorial discretion—they fall w/in the inherent jurisdiction of the court to control its own processes.

**R**: The law society may analyze the professional ethics of crown counsel (e.g. acting in bad faith or for improper purposes) only—otherwise, the exercise of prosecutorial discretion is not reviewable.

## The Crown’s duty to call all material witnesses

* Pre-Stinchcombe, the Crown had to call all credible material witnesses, given their role as “quasi-judicial minister of justice”

### R v Cook – 1997 SCC

**F**: Accused was charged w/ assault causing bodily harm. The Crown did not call the complainant. The Crown called his ex-gf and introduced circumstantial evidence in support of her evidence.

**P/H**: Convicted at trial. Set aside at NBCA.

**I**: Does the Crown have a duty to call the victim (and all material witnesses) of an alleged crime in the post-Stinchcombe world?

**D**: No, appeal allowed, conviction restored.

**A**: The calling of witnesses goes to the Crown’s ability to conduct its own case. Any prior rationale for compelling the Crown to call all witnesses was based upon the need to bring forward all material facts. However, that has been extinguished by the developments in the law of disclosure. There is no basis for suggesting that DC will ever be “ambushed” by the Crown’s failure to call a material witness. It’s better for the Crown not to call a witness who they believe will mislead the court and leave it open to DC to call the witness if they so choose. This is necessary to achieve a fair balance b/w the interests of the accused and those of society.

**R**: There is no duty upon the Crown to call witnesses, nor specifically the complainant or victim. Decisions of how to present the case must be left to the Crown’s discretion, absent evidence that such discretion is being abused.

## Overzealous advocacy by Crown Counsel

* *R v Boucher* was the inflammatory jury address case (involving personal opinion, inflammatory and vindictive language, suggesting the conclusion had already been reached due to Crown investigations)
* Should not appeal to “passion”—should be “dignified”
* Should not make the Crown into a witness

## Ethical duties of “officers of the court”

* This duty applies to both parties—they are constrained from highly adversarial behavior as “officers of the court”
* The purpose of both is to “seek justice and truth” (prof disagrees that you can really say that for DC)
* DC is a rep’ve—not a delegate—must give client the benefit of his/her 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 civility—otherwise, that lowers public respect for the administration of criminal justice and undermines the legitimacy of the results (*Felderhof*)

## Ethical duties of DC

* Fearlessly raise every issue, advance every argument, and ask every Q, however distasteful🡪 represent the client resolutely

## DC: defending the guilty client + not misleading the court

* Avoid forming any opinions on the subject of guilt or innocence in the 1st place—counsel’s opinion is generally irrelevant and might actual cause counsel to fail in carrying out their partisan duty of resolutely defending the client (e.g. Donald Marshall – DC thought he was guilty and didn’t take even “rudimentary steps” towards a defence)
* When counsel knows the client is guilty, there are ethical constraints to not mislead the court—accused must be made aware of same
  + If convinced post-confession to 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 (e.g. alibi evidence)
  + They may still test evidence (admissibility, sufficiency), jurisdiction, form of indictment, etc.

### R v Tuckiar – 1934 Australia

**F**: Accused was aboriginal. He was charged w/ murder of a p.o. There were 2 confessions coming from the accused (T). T did not speak English and req’d a translator. Given the discrepancy, counsel spoke again to T, found out that the exculpatory confession was false and then advised the judge of same. The judge then gave highly prejudicial instructions to the jury.

**D**: Appeal allowed, charges stayed b/c small community.

Note: DC should have upheld T’s confidences even after the guilty verdict had been given.

## Taking custody and control of real evidence

* Model Code: cannot knowingly attempt to influence the course of justice by suppressing what ought to be disclosed or otherwise assisting in any fraud, crime, or illegal conduct.
* Generally, DC does not have to disclose anything to the Crown except: (i) alibi evidence, (ii) notice of a psychiatric defence, and (c) any expert opinion evidence.
* Client’s generally think that their lawyer cannot disclose anything and must keep confidences, so assume that giving the “bloody shirt” to their lawyer is the same as throwing it into a swamp
* Obstruction of justice, s. 139 CC
  + Actus reus: obstructing the course of justice
  + Mens rea: wilful
* *R v Murray*: from a crim’l law perspective:
  + DC can take possession and conceal the real evidence during pre-trail period if DC honestly believes that it has exculpatory uses at trial and if counsel intends to so use it at trial. (then no mens rea)
  + DC cannot take possession of real evidence and conceal it if counsel realizes that the evidence is inculpatory.
    - This creates a large loophole—honest mistake of fact
    - Not satisfactory for regulatory regime of lawyer’s ethics
* Ethics: when DC obtains potentially inculpatory real evidence, she must at a min:
  + Review material immediately and refuse to accept instructions not to review it
  + Advise client that accepting such instructions is unethical
  + Advise the client that if material, once reviewed, is substantially or predominately inculpatory, it is illegal and unethical for counsel to conceal it from the authorities
  + If exculpatory uses are not plain and obvious, or are not clearly the predominate use, counsel must consult immediately w/ a panel of sr. lawyers
* Lawyers can turn over such evidence
  + To prosecution, directly or anonymously
  + Deposit it with the trial judge
  + Deposit it with the court to facilitate access for testing by both DC and CC
  + Disclose its existence to CC and prepare arguments

## Negotiating a guilty plea

* Model Code
  + Before a charge is laid or any time after, a lawyer of accused or potential-accused may discuss w/ prosecutor the possible disposition of the case, unless client instructs otherwise
  + Lawyer may enter into an agreement w/ prosecutor about a guilty plea if:
    - Lawyer advises client about prospects of an acquittal or finding of guilt
    - Lawyer advises client of implications and possible consequences of a guilty plea, particularly that the court is not bound by an agreement about a guilty plea and sentencing is at discretion of the court
    - The client voluntarily is prepared to admit the necessary factual and mental elements of the offence charged; and [*this used to require the lawyer to believe it was true*]
    - The client voluntarily instructs the lawyer to enter into the agreement
* 4 main ethical rules:
  + Not conclude plea or sentence discussions w/o 1st completing a thorough analysis of the facts and law applicable to the case
  + Post-investigation, client is entitled to skilled advice from counsel about prospects and implications of guilty plea
  + The decision must be the client’s and must be made voluntarily
  + Must be based upon an admission the necessary factual and mental elements of the offence charged

### R v K(S) – 1995 ONCA

**F**: A youth was charged w/ 10 counts of sexual offences against 5 young girls. He (and his parents) denied the charges throughout. After serving his sentence, he appealed the original charges and wanted to set aside his guilty plea. DC spoke to parents and accused about likelihood of significant custodial sentence. He did not advise accused of implications of guilty plea and the impossibility of carrying out his probation while maintaining his protestations of innocence.

**D**: The guilty plea was set aside

**R**: Lawyers must be assured that the client is prepared to admit the necessary factual and mental elements of a guilty plea before permitting the client to enter a guilty plea.

Note: this is a “plea of convenience” scenario

# ch. 9: Lawyers in Organizational settings (Corp Counsel)

* Post-Enron, rules of professional conduct for lawyers in organizational settings were changed in Canada (and US, obv)
* Q that emerged: should lawyers be gatekeepers? Are they responsible for protecting the public against malfeasance of their corporate clients? Does that not conflict with their duty of loyalty (to be zealous advocates)?
* Tension: maintaining independence and integrity as professionals while functioning as an employee of the organization that they are advising
  + Client = organization (not necessarily the person who speaks for the org)
  + Often, these lawyers conform to the org’s cultural norms – they bond socially and professionally with other employees
  + To walk away from this client when there is only one client—your employer—would be to walk away from a job🡪 independence?
* What about instances where lawyers are asked to give advice on non-legal matters (e.g. business, strategic)?

### Milton Regan Jr. – Professional Responsibility + Corp Lawyer

* Increased reliance on in-house legal depts.
* How do you rep one client when the client is an abstraction—it’s an organization—and various actors within that organization may be in disagreement—therefore, the lines of authority are sometimes unclear
* Usually ethical provisions + business judgment rule dictate that lawyers defer to the decisions of their clients—but that presumption of deference to managerial decisions evaporates when the lawyer knows that the corporate official is violating a duty to the entity or is acting illegally
* Most ethical rules have been formulated with the litigator in mind—how do you adapt them to in-house counsel?
  + Disclose obligations tend to be far more relaxed in transactional settings without judicial involvement. They are based primarily on CL fraud stnds, which look to the conventional expectations of typical parties engaged in negotiation.
  + This may create a downward spiral as aggressive practices provoke aggressive responses.
  + Cumulative effect may be the lowering of expectations of fair dealing, increase bargaining costs, etc.
* Providing non-legal advice, e.g. providing advice to anticipate future legal issues and other proactive measures—do you get to a place where counsel is integrally involved in formulating company goals and structuring its operations—are they simply legal technicians, morally unaccountable for the consequences of their clients from whom they have very little independence?
* Which ethical rules apply to lawyers engaging in cross-boarder practice? This creates unpredictability and complexity.
* Seeking to make in-house counsel gatekeepers or whistleblowers conflicts with the notion that the lawyer’s sole obligation is to the client
* The function of business corporations in the market democracy give in-house counsel some sort of private-public dimension—how far may they push the letter of the law regardless of its spirit for the sake of their client? Their quasi-public role means that sometimes they may have to prevail upon their clients to forbear from exploiting every possible legal advantage for the sake of the client’s long-term interests and that of society as a whole

### Paul D Paton: Corporate Counsel as Corp Conscience

* Enron and other scandals were major impetus for *Sarbanes-Oxley Act*, 2002
* The scandals involved both internal and external lawyer involvement
* There are particular challenges when you only have 1 client—saying “no” on legal and ethical grounds may require you to withdraw from representation which requires significant personal sacrifice
* These scandals have shown that legislators and regulators are no longer content to simply permit the self-regulation of the legal profession
  + Senator John Edwards (re: Sarbanes-Oxley) – “for the sake of investors and regular employees, ordinary shareholders, we have to make sure… that the lawyers do what they are responsible for doing as members of the bar and as citizens of the country.”

### Rhode + Paton – Lawyers, Ethics and Enron

* Enron shifted from its core energy business to using Special Purpose Entitles (SPEs) or Special Purpose Vehicles (SPVs) and off-balance-sheet partnerships to enter into transactions generally considered too risky or controversial for ordinary commercial entities
  + It allows Enron’s sig losses and debts to be concealed
* The saga underscored the need for unbiased professional judgment by lawyers as well as accountants
* V&E (outside law firm) was responsible for advising on legal and accounting requirements governing SPEs/SPVs and whether same had been met. Transactions were designed for the effect they’d produce on financial statements, not for legitimate economic objectives—they were not adequately disclosed
* After “accounting errors” were announced by Enron, reported shareholder equity of over $2 billion was lost—this was so despite several Enron employees involved in the partnerships being enriched at Enron’s expense
  + E.g. in-house lawyer had a conflict of interest—she invested her own money ($5,800) and rec’d $1 mil in return
* At least 2 Enron lawyers were seriously concerned about the company’s financial conduct but were stymied by other Enron lawyers or managers
* Outside counsel, V&E also failed to investigate allegations about the impropriety of Enron’s disclose statements and accounting treatment—released a 9-pg report recommending no additional scrutiny; suggested covering up “bad cosmetics” and “possible adverse publicity” but was wholly inadequate in reviewing the facts and investigating
  + 2 weeks later, the Powers Committee undertook the same investigation that V&E found unnecessary by retaining a different outside law firm and produced a scathing 200pg report
* In-house counsel at the accounting firm encouraged staff to “consider the documentation and retention policy” which resulted in the destruction of loads of documents, despite her awareness that they would likely be subject to lit’n and that there was clearly a problem with Enron. She anticipated an SEC investigation into Enron at the time.

### American response to Enron

* Sarbanes-Oxley Act (2002) had provisions requiring “minimum standards of professional conduct” of lawyers who practice before the SEC so that:
  + Any lawyer appearing and practicing before the SEC would need to report evidence of a material violation of securities law or a breach of a fid duty or similar violation by the company or any agent thereof to the CLO and CEO, and
  + If ignored, go up the ladder all the way to the board of directors

### Paton: Corporate Counsel as Corp Conscience… Post-Enron Era

* Tension b/w disclosing to public official corporate misconduct of one’s client and the duty of loyalty to an organizational client
* As of 2004, Ontario Security Commission has similar ability
* Some have wanted the SEC rule to go further—imputing knowledge within law firms; some have thought it has gone too far—infringing upon self-regulation tradition of the bar and its independence
* The SEC rules apply to foreign lawyers equally (some concern about otherwise prejudicing domestic securities bar)
* Noisy withdrawal provisions (notifying SEC of withdrawn indicating it is based upon professional considerations and disaffirming any filings with the SEC) was originally proposed but never made the cut
  + It goes to the heart of S-C privilege, making lawyers into quasi-governmental inspectors or regulators
* Other provisions allow the lawyer to disclose confidential info w/o issuer’s consent
  + To prevent the issuer from committing an illegal act that the lawyer reasonable believes is likely to result in substantial injury to the financial interest or property of the issuer or investors
  + To prevent the commission of an illegal act that the lawyer reasonable believes is likely to perpetuate fraud on the Commission
  + Rectify the consequences of the issuer’s illegal act in the furtherance of which the lawyer has been used
  + Lawyers may also use any report under this sxn for self-defence
* The final rules backed down significantly so that “evidence of a material violation” in the up-the-ladder reporting provisions went from being relatively straightforward to very convoluted and enabling the lawyer to back down if another lawyer opines that there is a “colourable defence” to the company’s actions
* CBA continues to stress that it’s unacceptable for any gov’t agency to dictate ethical stnds for Cdn laywers

## The Canadian response

* The Ontario Securities Commission is given the mandante and responsibility for administering its act—it has jurisdiction over the practice of lawyers in relation to the Commission’s statute and regulations

### Model Code

2.02(3) **When the client is an org** – although a lawyer may receive instructions from an officer, etc., when a lawyer is employed or retained by an organization, the lawyer must act for the organization in exercising his or her duties and providing professional services.

2.02(8) **dishonesty, fraud, when client an org** – A laywer who is employed or retained by an org to act in a matter for which the lawyer knows that the org has acted, is acting, or intends to act dishonestly, fraudulently, criminally, or illegally, must do the following, in addition to her subrule 7 obligations:

1. **advise the person from whom the lawyer takes instructions** and the CLO (or both CEO and CLO) that the proposed conduct is, was, or would be dishonest, etc. and should be stopped
2. if necessary b/c the person from whom the lawyer takes instructions, the CLO or CEO refuses to cause the proposed conduct to be stopped, advise progressively **up the ladder**, incl ultimately the board (of directors, trustees) that the proposed conduct was, is, or would be dishonest, etc. and should be stopped, and
3. if the org continues with or intends to pursue the proposed wrongful conduct, **w/draw** from acting in the matter in accordance w/ Rule 2.07

Commentary:

* Misconduct may have harmful consequences for the org, but also the public
* Misconduct of publicly-traded corps has serious consequences for the public-at-large
* Conduct likely to result in substantial harm to the org invokes these rules (*cf* genuinely trivial misconduct)
* In some cases, lawyers will have to resign from her position or rel’nship with the organization all-together—not simply w/ respect to that individual matter
* In-house counsel has a **central position to encourage** compliance with the law and to advise that it is in the org’s and the public’s interest that organization do not violate the law

2.03(3) **Future harm exception** – a lawyer may disclose confidential info, but must not disclose more info than is req’d, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclose is necessary to prevent the death or harm.

### Wilder v Ontario (Securities Commission) – 2001 ONCA

**I**: Does the OSC have a statutory mandate to reprimand a lawyer in his/her professional capacity?

**D**: Yes; appeal dismissed

**A**: The OSC regulates in the public interest. Law Societies don’t have exclusion jurisdiction to regulate professional conduct. Both have import roles in acting for the public interest. The OSC protects investors and the proper functioning of ON’s capital markets, ensuring proper disclosure and maintaining the integrity of the processes. Lawyers are not immune from OSC scrutiny and regulatory powers. This is not usurping the LS role of governing the legal profession in the public interest.

**A**: When a lawyer is reprimanded by the OSC, the lawyer is entitled to be dealt with fairly and is permitted to answer allegations, evening where same involves revealing the confidence of a client. That being said, the OSC must ensure on a case-by-case basis that the substantive legal right of S-C priv. is respected by exercising caution each time it proceedings against a lawyer and that lawyer’s client—there is an inherent danger that the lawyer will have to reveal the client’s confidence in order to mount a full defence. The OSC may need to forgo proceedings against the lawyer in some cases, or at a min, take adequate steps to ensure that the proceedings are conducted in a fashion that fully respects the procedural rights of the lawyer and the substantive legal rights of the client—that’s in the public interest

**R**: The acts of corporate counsel may be regulated by the securities commission in the public interest, which may have implications for client confidentiality when both counsel and their client are subject to commission scrutiny

## Privilege for Corporate Counsel + The Euro Approach

* Corp. counsel sometimes hold non-legal management or officer positions or have non-legal duties
* The fact that there is this non-legal and legal capacity may have implications for whether or not communications are privileged
  + *Pritchard v ON (HRC)* – SCC: each situation must be assessed on a case-by-case basis to determine if privilege arose in the circs. – this depends on the nature of the rel’nship, the subject matter of the advice, and the circs. In which advice was sought and rendered
  + *Potash Corp of Sask* v *Barton* (2002 Sask QB): when corporate counsel is working in some other capacity, there is no S-C rel’nship and privilege does not attach
  + Generally, if in-house counsel is giving legal advice, in Canada, privilege still applies🡪 not so in Europe (=insufficient independence)

### Paton: The Future of Privilege

* Legal professional privilege doesn’t apply to communications w/ in-house lawyers in a competition law investigation
* In-house lawyers are economically dependent and have close ties with their employer so that they do not have the level of professional independence comparable to that of an external lawyer🡪 position of employee, cannot ignore commercial strategies pursued by the employer
  + Q remains of whether this is restricted to competition law matters
  + Definitely locked-in that the ECJ does not think that in-house lawyers are capable of independent judgment on EU professional standards—this also applies to foreign in-house counsel which might have a significant effect on companies with transnational business (e.g. international subsidiaries)
* Critique: ECJ is ignoring the reality that many in-house lawyers are top legal practitioners who are just as capable as their outside counterparts—this shows deep misunderstanding of legal professionalism and lawyers

# ch 10: gov’t lawyers

* The picture of lawyer as zealous advocate does not fit well with the reality of gov’t lawyers
* 2008-09: 15-25% of Canadian lawyers work in the public section. Gov’t lawyers are a subset of the public sector

## Do gov’t lawyers have special obligations that lend to higher ethical duties?

* This Q is more general than just Crown prosecutorial duties

### *Everingham v ON* – 1991 Ont General Division

**F**: Mental health patient that was involuntarily detained brought an appl’n that *Charter* rights were being detained. The day before the cross, the Crown Counsel who was supposed to cross was getting a tour of the hospital. Along the way, CC ran into the plaintiff-patient. CC introduced himself and said that he was the lawyer doing the cross and went his separate way. P brought a different story—of being kept in an interview room with CC without his counsel present.

**COA**: P brought a motion seeking to have the AG(ON) removed as solicitor-of-record.

**D**: The individual CC, Mr. W, was disqualified, but not the AG as a whole.

**L**: An opposite party who is professionally rep’d should not be approached or dealt with save for through or with the consent of that party’s lawyer.

**A (remedy)**: It would not be appropriate to remove the AG (ON) entirely for following reasons (i) not a deliberate breach—purely accidental/coincidental, (ii) there were no oblique motives—merely advising of identity, (iii) there was nothing substantive discussed b/w CC and P, (iv) there is no conflict pvt interests in the usual sense—this is *Charter* lit’n, (v) the meeting was brief and innocent-in-nature, and (vi) there was no prejudice caused.

**A**: Although CC did not breach the spirit of the Rule, nor did he obtain any advantage, it was a serious indiscretion and he should have been more sensitive and should not have been touring the hospital at that critical time. Despite his good intentions, the result was profound on P who has lost his confidence in CC, justifying disqualification of the individual CC.

**R (stnd of gov’t lawyer – higher)**: A government lawyer must be particularly sensitive to rule of professional conduct—they have a special responsibility and a higher ethical obligation than lawyers generally. They assume a public trust b/c the gov’t is responsible to the people and they are lawyers for the public interest.

### *Everingham v Ontario* – 1992 Ont General Division

**COA**: AG appealing against an order disqualifying a Crown solicitor, Mr. W., from further involvement in the lawsuit.

**A**: There was no basis to find that the rule was breached because (i) meeting coincidental, unprejudicial, innocent, (ii) no substance of lit’n discussed, + (iii) spirit of the rule not breached. 🡪 finding otherwise was an error in law. No lawyer can completely avoid contact with every party against who he or she acts. The rule targets those who “approach or deal with” other parties (sans counsel) about the subject-matter or lit’n process.

**R (stnd of gov’t lawyer – same)**: There is no authority for the proposition that gov’t lawyers have greater ethical obligations than other lawyers.

**R** (standard to remove a lawyer): objective – what would a fair-minded and reasonably informed member of the public think? It’s not just what the patient thinks. Would that objective person think that the proper administration of justice req’d removal of the solicitor?

* In this case, obvious appearance of unfairness with institutionalize mental patients + their vulnerable position + have opposing counsel visit the facility🡪 obvious appearance of compulsion and deprivation, even if it was actually innocent 🡪 therefore, removing the lawyer was in the interests of protecting public confidence in the administration of justice

### Adam Dodek: public law + legal ethics, gov’t lawyers are custodians of RoL

* Gov’t lawyers should owe higher ethical duties than pvt lawyers b/c they exercise public power
* They interpret, advise, advocate for the powers and duties of the Crown and in so doing, they **exercise public power**
* They are **guardians of the public interest**
* They have a positive duty to ensure that the administration of public affairs complies w/ the law
  + Other lawyers do not have a duty to ensure that their clients comply w the law
* They must exercise constant vigilance to defend the RoL against departmental attempts to grasp unhampered arbitrary powers
* Gov’t lawyers must be animated by an “unshakable conviction” about the importance and primacy of the law, seeking to uphold it with integrity, impartiality, and judgment
* 3 elements of gov’t lawyers’ identity: public servants, lawyers, delegates of the AG
  + Although in some ways they must be independent from the state (as lawyers)—their client is the state
* Also involved in creating law in a way that the pvt sector is not
  + Minister of Justice is supposed to examine every draft regulation and Bill introduced to the House to make sure that it complies with the *Bill of Rights*
  + The Minister is supposed to do the same for the *Charter* under the *DOJ Act*
    - Never a single report of an issue since enacted in 82 (nor 60 for Bill of Rights)
    - This is b/c some interpret the req as only reporting where “manifestly unconstitutional” (*this means that if things are only arguably unconstitutional, may not interpret as having to report*)
* Specific areas: crim’l law, Aboriginal law, child protection, charities, expropriation, etc.
* When gov’t dealing w/ vulnerable parties, even higher stnd of conduct expected
  + Even if not vulnerable, still restrained from doing things like taking an adversarial stance in lit’n b/c the opposing side’s argument is poorly framed
  + Crown also routinely forgoes its right to seek costs against the losing party
* Mission statement: provide high-quality legal services while upholding the highest stnd of integrity and fairness

### Wilson, Wong, Hille: professionalism + public interest

* Lawyers for the gov’t advise on a wide range—you cannot impose a higher duty without sensitivity to those different practices and contexts
  + You also don’t want to impede the delivery of legal services by the gov’t
* It’s public officials who wield public power—it’s not the lawyers who advise them
  + Their discretion is greatly circumscribed by institutional and constitutional confines
* The AG needs to discharge those duties by upholding the RoL and protecting the public interest by providing thorough, balance, and independent (of partisan considerations) advice
  + You cannot say AG wields public power because the constitution, institutional hierarchy of the gov’t and democratic ideals require separation of AG and gov’t
* To say that gov’t lawyers serve the public interest exclusively is wrong—the public interest is amorphous and represents a plurality of voices and conflicting values—that cannot be translated neatly into a clear ethical obligation
* Some argue that gov’t lawyers should be allowed to exercise at least as much zeal as their pvt counterparts, as is the case in the US, so that they can “seek justice” for the higher purpose of the justice system (Catherine Lactot)

## Nature of the gov’t lawyer’s duties

* Must provide honest, objective, and non-frivolous arguments, regardless of subject matter
* But it’s inescapable that the subject matter of the advice also matters b/c it provides the legal guidelines upon which the gov’t exercises state power (e.g. water boarding)
  + There are additional moral, political, and ethical dimensions to the lawyer’s conduct that are absent for pvt practice lawyers
  + They work at the intersection of citizen rights and state powers

### Brent Cotter

* The gov’t has a special “duty of fair dealing” which should inform their conduct
* They have public interest responsibilities—these are derived from the gov’t’s obligations to the public interest
* Pvt: client-centred, duty of loyalty
  + Owes a duty only to the client; “enlightened self-interest”
* Public: the gov’t is a representational entity, and it has a different purpose than sheer self-interest
  + They represent many different, competing interests from a large community
  + Although gov’t represents all of itz citizens:
    - Cannot possibly consult or take instructions from all of them
    - Context involves making decisions in scarcity—allocating public resources to certain initiatives, and not others, which pisses some people off
  + Therefore, gov’t is necessarily in a conflict given its representational nature
* What duties does the public gov’t owe to the “other” that it represents but with whom its decisions conflict?
  + You cannot let public policy to be derailed by illegitimate claims, some of which are contrary to the public interest
  + But: ensure fair dealings
    - Exceeding the minimum req’d in legal proceedings
    - Providing disclosures, conceding what can be reasonably conceded, accommodating what can be reasonably accommodated, admitting what can be reasonably admitted
    - Also constrained w certain legal tools that don’t meet the duty of fair dealing
* **Thesis**: Because of the fundamental public value at stake with work done by gov’t lawyers and the representational nature of the Canadian gov’t, gov’t lawyers owe a duty of fair dealing beyond that required of pvt lawyers and a resulting moderating in zealous advocacy.

## Organizational pressures

* Employees are socially and culturally embedded in the norms of the orgs for which they work—may cease to be independent and candid
  + E.g. torture memos of US gov’t lawyers
* Withdrawal for a gov’t lawyer means quitting

### *GMC v Canada* – 2008 Tax Ct Canada

**F:** When a fact is assumed by the Minister of National Revenue, the onus is on the taxpayer to demonstrate that it’s false. But if assumption is not made, then the Crown has the onus of showing that the fact is true. GM alleged that Minister had never made the assumption, despite the Crown’s submissions.

**COA**: GM appealing a tax assessment.

**A**: Crown counsel’s actions were “tantamount to cuing and coaching Mr. Wong” to state the same answer over and over.

**D**: Award of elevated costs made to address misbehavior.

**A**: The respondent-Crown cannot trivialize the inclusion of the assumption and should not have plead (or allowed something to remain in pleadings) that was not honest and was clearly false—this is flagrant and reprehensible behaviour.

# Ch 11: Judge Ethics + Lawyer dilemmas

## Introduction

* Five core principles of judge’s world: **impartiality, independence, integrity, diligence and equality**
* Focus on the *relationship between judges and lawyers*
* Dilemmas arise on the level of principle and practical reality: lawyers have a duty of loyalty to their clients, as may be on collegial terms with judges, also find themselves in hierarchical structure of judicial system

## The Governing Regime

* Three mechanisms:
  + **Constitutional norms** – values like *independence and order* are part of the constitutional order, written and unwritten
  + **Case law** – some development of legal rules wrt issues such as bias and recusal
  + **Ethical guidelines** – developed by the judiciary themselves
* Only provinces with provincial codes: Quebec and BC
* Federal judges = *Ethical Principles for Judges*
  + Para 2 = advisory in nature, are not standards for the definition of judicial conduct

### The Honourable Georgina R. Jackson, “The Mystery of Judicial Ethics: Deciphering the ‘Code’”

* 1st – not necessary to interpret the *Ethical Principles* as a code b/c it was written for an independent judiciary
* 2nd – available test for sanctionable conduct maximizes the exercise of impartial judicial thought
* 3rd – Can accomplish more with a list of ethical principles than a code of prohibited behaviours; reinforced by osmosis and through professional conscience
* 4th – *Ethical Principles* addresses more nuanced issues and does not seek to discuss obvious sanctionable conduct

## Impartiality

* In *Ethical Principles*: “Judges **must be and should appear to be** impartial with respect to their decision and decision-making”
  + Then divided into five categories of impartiality:
    - **General**
    - **Judicial Demeanour**
    - **Civic and Charitable Activities**
    - **Political Activity; +**
    - **Conflicts of Interest**

### Canadian Judicial Council, Report of the Canadian Judicial Council to the Minister of Justice in the Matter Concerning Justice Cosgrove

* Inquiry: Failure of Cosgrove in the due execution of his office to such an extent that public confidence in his ability to properly discharge his judicial duties cannot be restored
* Background: When presiding over murder trial of Julia Elliot, concluded over 150 violations of the *Charter* rights of Elliot. On appeal, found that many of these findings of *Charter* violations were the result of legal error. Conduct included: inappropriate aligning of judge with defence counsel giving rise to an apprehension of bias; abuse of judicial powers by a deliberate, repeated and unwarranted interference in the presentation of the Crown’s case; abuse of judicial powers by inappropriate interference with RCMP activities; misuse of judicial power by repeated inappropriate threats of citations or contempt or arrest without foundation; use of rude, abusive or intemperate language; arbitrary quashing of a federal immigration warrant. Conduct all giving rise to a reasonable and irremediable apprehension of bias.
* Issues: Consideration of whether public confidence in Cosgrove has been so undermined that his removal is warranted. Apology given not sufficient to restore public confidence, given too late to be relevant or show true remorse.
* Decision: No alternative but to remove under s. 67 of the *Judges Act*

### *Arsenault-Cameron v Prince Edward Island* – 1999 SCC

**F**: French PEI family wanted local French-language instruction for their children. Gov’t refused; offered transportation instead. The decision went up to the SCC. Bastarache J was a known French-language rights advocate.

**COA**: A motion went before Bastarache, directed as B, to have him recuse himself on the basis that he was a known French-language rights supporter and his presence on the bench gave a reasonable apprehension of bias (RAB)

**D**: Bastarache decided this himself and decided not to refuse himself—“no evidence that my beliefs or opinions expresses as counsel, law prof, or otherwise would prevent me from coming to a decision on the basis of the evidence”

**A**: Every human being has sympathies and different backgrounds—the test does not seek to eliminate those. It needs something more: a state of mind towards the issues that shows a real predisposition to a particular result.

**R**: The reasonable apprehension of bias test operates by presuming impartiality and then requiring a real probability of bias, demonstrated through evidence of wrongful or inappropriate declarations indicating a a real predisposition towards a particular result.

### *Wewaykum Indian Band v Canada* – 2003 SCC

**F**: In the early ‘80s, Binnie was the Assoc. Deputy Minister of the DoJ and dealt with the early stages of the plaintiff Indian Bands’ claims. The SCC decision (on the merits) was written by Binnie and rec’d unanimous approval. Only afterwards, the plaintiffs app’d to have the decision set aside upon learning of Binnie’s prior role and alleging a reasonable apprehension of bias that warranted disqualification of the Court’s decision.

**COA**: This was the motion to set aside the prior substantive SCC decision. Binnie J. recused himself for this motion and the remaining 8 justices decided.

**D**: Motion dismissed; no RAB.

**I**: Would a

**A:** Public confidence relies upon the fundamental belief that those who adjudicate in law do so without bias or prejudice—and must be perceived as doing so without prejudice or bias.

**A**: The essence of impartiality lies in the requirement of judges to approach cases with open minds. A bias or prejudice is described as an “inclination, leaning, predisposition” towards one side or a particular result—it sways judgment and prevents a judge from exercising her function of impartiality in a case.

**A (**applying RAB test): Three things militated against RAB (no one alleged actual bias)—(i) his supervisory or administrative role (only), (ii) Binnie was never counsel of record, and (iii) this occurred 15 years ago (*most persuasive factor*).

**R**: Impartiality is presumed—it is the fundamental qualification and core attribute of the judiciary.

**R2** (Test for RAB): What would an informed person, viewing the matter realistically and practically, and having through the matter through, conlude?

### *Doré v Barreau du Quebec* – 2012 SCC

**F**: Gilles Doré (GD) was counsel in a criminal proceeding. He appeared before Boilard J. at the Superior Ct of Quebec. Boilard, J. insulted GD in the course of the proceedings and later in his written reasons. GD wrote a private letter to Boilard, J. GD wrote to the Chief Justice requesting that he not have to appear in front of Boilard in the future. He also filed a complaint with the Canadian Judicial Council (CJC). The Chief Justice then sent a copy of GD’s letter to Boilard to the disciplinary body for lawyers in Quebec (Syndic du Barreau). The Asisstant Syndic filed a complaint against GD on the basis of the letter. He was alleged to have violated article 2.03 of the *Code of ethics of advocates* as well as his oath of office. Before GD’s proceedings, the committee of judges on the CJC concluded that Boilard J. was unnecessarily derogatory and impatient and they reprimanded his behavior and reminded him of his duty as a judge.

**P/H:**

Disciplinary council (DC)

In January 2006, the DC concluded that GD’s letter had little expressive value, as it contained mere opinions, perceptions and insults. It rejected GD’s argument that art. 2.03 violated s. 2(b) of the *Charter*. It found an infringement on freedom of expression that was “entirely reasonable, even necessary, in the CDN legal system, where lawyers and judges must work together in the interest of justice.” They also found that GD willingly entered a profession that was subject to rules that would limit his expression. The panel suspended -GD’s ability to practice law for 21 days.

Tribunal des professions

GD appealed the DC’s decision. He argued that the manner that the leg’n was app’d by the DC was unconstitutional b/c his comments were protected by s. 2(b) of the *Charter*. The Tribunal rejected GD’s arguments about the private-nature of the letter or the provocation by Boilard J. It thought the remedy was harsh but not unreasonable.

Judicial review – SC of QB

Upheld Tribunal decision

QB CA

Found that the DC violated GD’s s. 2(b). They applied a full s. 1 analysis and concluded that GD’s letter was a less important/valuable form of expression. The s. 1 justification analysis was met.

SCC

Argued only that the finding by the DC that he breached the *Code* violates s. 2(b) of the *Charter*. He did not argue about the penalty as it had already been served.

**D**: Appeal dismissed—decision (21 days suspension—already served) upheld.

**L**: *Code of ethics of advocates*, article 2.03: “[T]he conduct of an advocate must bear the stamp of objectivity, moderation and dignity.”

**A**: A lawyer criticizing a judge does not automatically lead to a reprimand—but the critique must be made within generally accepted norms of moderation and dignity. It can be robust and constructive, but it must also conform to the public’s reasonable expectations of a lawyer’s professionalism.

**R**: Lawyers have a duty to speak their minds freely and have a critical role to play in keeping the tenured the institution of the courts and the judiciary accountable—but that duty must be exercised with “transcendent civility” in order to meet the public’s reasonable expectations of legal professionalism, ensuring civility and respect for the justice system.

### Edward L. Greenspan, “Judges Have No Right to Be Bullies”

* Written in response to Justice L’Hereux-Dube’s comments against Justice McClung of the Alberta Court of Appeal’s decision, *Ewanchuk (recall this was the AB 17yo sexual assault case where the complainant said no many times + was stuck in the accused’s trailer, the accused continued many times, and the judge used the term “implied consent”)*
* Recall L’H-D’s response to this—“no such thing as implied consent”, doesn’t matter if the girl has had sex before, etc. 🡪 the judge whom she was critiquing (Judge McClung) looked like a real ass + a chauvinist pig
  1. Although he wrote her a letter complaining, that will not be recorded in judicial history as will her SCC decision which tore his theory of implied consent to shreds🡪 she was “hell bent on re-educating and bullying and coercing him”
* The SCC should have made her rewrite her decision so as not to disgrace the court + hurts its reputation (as well as McClure’s)

## Independence

* Balance between **independence** and **judicial accountability** key.
* Foundational principle, statement and five principles:
  + Indispensible to impartial justice under law. Judges should, therefore, uphold and exemplify judicial independence in both its individual and institutional aspects.
    - Judges must exercise their judicial functions independently and **free of extraneous influence.**
    - ... must **firmly reject** an attempt to **influence** their decisions in any matter before the Court outside of the proper process of the Court.
    - … should **encourage** and uphold arrangements and **safeguards** to maintain and enhance institutional and operational independence of the judiciary.
    - … should **exhibit** and **promote high standards** of judicial **conduct** so as to **reinforce public confidence** which is the cornerstone of judicial independence.

### *Re Ruffo* – 2005 QBCA

**F**: The judge + the expert witness were pals. Judge did not disclose friendship to the parties prior to testimony. Judge R had breached the *Judicial Code of Ethics* several times in her 15 years as a judge. She mocked attempts to reprimand her. She was very committed to the cause of children and commented on her cases, claiming publically that she would come to the right decision, regardless of legality.

**D**: Recommended that Judge R be removed.

**L**: s. 95 of the *Courts of Justice Act*: “The Gov’t may remove a judge only upon a report of the CA made after an inquiry at the rqst of the Minister of Justice.”

**A**: The Conseil de la magistrature du Quebec found that she could no longer faithfully carry out her judicial functions, so the MoJ followed up on this. The Conseil held that her conduct was “manifestly and totally contrary to the impartiality and independence of the judiciary and undermines confidence of the public in the justice system”. Based upon her prior history and her public comments, they concluded that she could not change or did not want to change and a reprimand was no longer appropriate.

**A**: The right of freedom of individual judges must be reconciled with the need for institutional protection of the judiciary as a whole. This extends so that outside-the-courtroom activity must also avoid identifying conflicting values and relationships so as not to undermine public confidence or their belief that judges may entertain their cases with “open minds”.

**A (may/may not)**: Judges may: (i) engage in CPD, (ii) defend judicial independence, (iii) making general observations in proper forums about points of law (not bills, etc.), (iv) denounce gaps in the admin of justice related to the proper functioning of courts, and (v) participate in civil, charitable and religious activities (*therefore R could have participated in the cause of children but would have had to do so with “discrimination and skill*). Judges may not: (i) comment on their own decisions, (ii) refuse an ethical sanction, (iii) be a member of an assn. whose membership hinders the dignity of judicial functions, (iv) be a member of a political org, (v) fund raise, (vi) sign petitions to influence political decisions, and (vii) make vexatious remarks regarding someone’s appearance before the court.

**R (right to impartial DM)**: The right of having an impartial judge, secured through the foundation of judicial independence, is the right of the citizenry, not the judge.

**R2**: Judges must have integrity (be above reproach), be diligent (enhance their knowledge), be egalitarian (i.e. aware of differences), and be impartial (minimize possibility of conflict).

**R3**: Fundamental principles of judicial ethics:

1. Commitment to the law;
2. Adherence to typical judicial modes of operation and thought;
3. Preservation of impartiality; and
4. Prohibition against using prestige of judicial fn for other purposes

## Integrity

* Judges should strive to conduct themselves with integrity so as to sustain and enhance public confidence in the judiciary.
  + Judges should make every effort to ensure that their conduct is **above reproach** in the view of the reasonable, fair minded and informed persons.
  + Judges, in addition to observing this high standard personally, should encourage and support its observance by their judicial colleagues.

## Diligence

* Judges should be diligent in the performance of their judicial duties.
  + Judges should **devote their professional activit**y 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.
  + Judges should take **reasonable steps to maintain and enhance knowledge,** skills and personal qualities necessary for judicial office.
  + Judges should **endeavour to perform all judicial duties**, including the delivery of reserved judgments, with reasonable **promptness**.
  + Judges should **not engage in conduct incompatible** with the diligent discharge of judicial duties or condone such conduct in colleagues.

### *Leader Media Productions v Sentinel Hill* – 2008 ONCA, leave to appeal SCC refused

**F**: Trial judge apparently fell asleep—briefly—but several times throughout the trial; the party that lost out on a K-battle claimed that there was a mistrial because of the judge’s inability to follow the evidence (and sought a fresh evidence appl’n). The P did not bring it up *during* trial though, despite conversations about the significance of their dozing judge. At the lower court, they brought a mistrial motion on other grounds—denial of opportunity to give oral arguments. Suggested that this was a tactical move…

**D**: appeal dismissed

**A**: Although counsel was inexperienced (1st trial), she consulted w/ sr. counsel and they decided not to do anything about sleeping judge + “roll the dice”.

**R**: If judicial inattention (or any other objection to the fairness of the process) is noted by counsel, it must be raised immediately in order to give the judge the opportunity to correct the behavior or to adjourn the proceedings. Counsel must not hedge their bets with such a complaint by using it as grounds for an “automatic appeal/mistrial” if the result is unfavourable.

## Equality

* Judges should conduct themselves and proceedings before them so far as to **ensure equality before the law.**
  + Judges should carry out their duties with appropriate **consideration for all persons** (parties, witnesses, court personnel and judicial colleagues) **without discrimination.**
  + Judges should **strive to be aware of and understand difference** arising from, for example, gender, race, religious conviction, culture, ethnic background, sexual orientation or disability.
  + Judges should **avoid membership in any organization** that they **know currently practices any form of discrimination** that contravenes the law.
  + Judges in the course of the 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.

### *R v RDS* – 1997 SCC

**F**: Judge Sparks did not find that the p.o. overreacted to a non-white person or was actually bias/racist, but found that such things do occur, that it’s the “prevalent attitude of the day”, and that there was a “questionable state of mind”—this is judicial notice of racism and police overreaction; she found the accused’s testimony (conflicting with that of the p.o.) to be honest and reliable and she therefore found a reasonable doubt + entered an acquittal. Upon the basis, Crown appealed, alleging RAB.

**P/H**: Trial div. found RAB; 2-1 CA agreed; accused appealed to SCC.

**D**: Appeal allowed, 6-3.

**L’H-D + McLachlin**: RAB based upon reasonably informed person, who would have community knowledge of things like racism. Considering this context allows for an impartial decision—that is beyond the narrow subjective scope of the judge. Reiterates that impartiality is strongly presumed and that to find otherwise, there needs to be clear evidence—awareness of the social conditions based upon judicial understanding and community experience is not such evidence.

**Cory + Iacobucci**: Impartiality is the mindset of an adjudicator which is disinterested in the outcome and open to persuasion. Bias is a state of mind that is predisposed and closed with respect to particular issues.

* + Recognition that judicial diversity important but also judicial integrity, no room for assumption of bias
  + Appropriateness of references to social realities depends on facts of each case, context and fact specific
  + General deference to a judge’s findings of fact on credibility’ generalizations wrt credibility may be appropriate in some circumstances, but again, context specific
  + Conclusion that remarks, when viewed in context, do not give rise to reasonable apprehension of bias
  + Concur with principles of LHD and McL

**Major (dissent**): Although life experience of J. important, it has no value when there is no evidence to support same + results in stereotyping (in this case of p.o.).

# Chapter 12: Access to Justice

## Introduction

* Access to justice at general level of professional obligation
* What the profession as a whole does, and should do, to foster access to justice

## Constitutional Right of Access to Justice?

### *British Columbia (Attorney General) v Christie* – 2007 SCC

**F**: C was a lawyer who provided no-to-low cost legal services to persons in the DTE of Vancouver. He never had an income in excess of $30K. The Province imposed a 7% tax on legal services. C’s practice ran into financial difficulties as a result. Because C doesn’t get paid by his clients, he couldn’t pay the tax as it became due and the gov’t seized the funds in his bank account. He argued that everyone has a constitutional right to legal services.

**I**: Is there a gen’l constitutional right to counsel (in proceedings before courts and tribunals, legal advice, services, disbursements) when an individual’s legal rights and obligations are affected?

**D**: No

**A**: What does the proposed right entail?

* Court proceedings, legal advice, services and disbursements; this would result in a constitutionally mandated legal aid system for all proceedings
* Judicial notice of perceived numerosity of self-rep’d litigants + assumption that more people would seek to bring court claims if cost=0 🡪 “huge change to legal landscape… not inconsiderable burden on taxpayers”

**A:** Does the constitution support the right intended?

* Argued that constitution embraces right to have a lawyer in court an tribunal proceedings as part of access to justice; however, right is not absolute
* Also argued that it is protected as aspect of rule of law or precondition to it
* *Imperial Tobacco*, court left open possibility that rule of law may include additional principles
* Review of constitutional text, jurisprudence, rule of law principles does not support this argument
* Although access to justice is a fundamental constitutional right, it’s not absolute and limits (e.g. taxes) are not auto unconstitutional

**R**: No gen’l right to counsel wherever rights and obligations exist (i.e. *all cases before tribunals and courts*); but right to counsel may be recognized in specific and varied situations.

## What is the “access to justice” problem?

* To say there is a problem assumed 3 things:
  + That the **justice system is important**
  + That **to access** the justice system effectively, **we need lawyers**
  + That **lawyers are not accessible to everyone**, costs more than most people can afford
* Main problem: people in society who cannot afford to have a lawyer and want one
  + To protect an establish rights, these people need to be able to access the justice system

## Solving the access to justice problem

* + **Introduction:** How do we ameliorate the different between the cost of services and the great demand for people who need them?
    1. **Brent Cotter, “Thoughts on a coordinated and comprehensive approach to access to justice in Canada”**
       1. Range of needs of citizens in relation to access to justice varies
       2. Can be summed up as access to **knowledge**, **resources** or **services** as need to address the individual’s particular circumstances
       3. **Assumptions about the problem:**
          - Justice if fundamental to the lives of citizens in respectful society governed by the RoL
          - Lack of access to justice undermines our confidence in fairness, justice and the RoL
          - Ensuring access to justice is getting harder
          - We all have a responsibility to ensure access to justice
          - Those associated with the law have been given trust to create access
       4. **Legal Education**
          - Need to reorient it with public service values

Must teach law students about AtoJ

Must be proactive in requiring learning about AtoJ, like Osgoode’s public interest requirement

Rethink law school curriculum with an emphasis on service, like clinical terms, pro bono assignments, etc.

Make sure legal education is responsive to AtoJ initiatives

Attract people to the study of law with a public service inclination

* + - 1. **Legal Profession**
         * Needs to be bolder in asserting requirement for facilitating AtoJ, through mandatory pro bono or something
         * May require bureaucracy but this is necessary
         * Also need to consider monopoly on the market and allowing ways for non-lawyers to contribute
      2. **Judiciary**
         * Court processes can be simplified; rough justice is better than no justice at all.
         * Need to be open to more dispute resolution processes in certain types of conflict
         * Judges must be mindful when making orders for the provision of legal services to certain parties that this may be affecting subsidized legal services for all
         * Reconsidering the role of judges in proceedings, especially in the case of unrepresented litigants
      3. **Governments**
         * Have great interest in the provision of legal services to the public
         * Should not be accepting charitable donations from anyone to support this 🡪 this is b/c it is an essential public legal service and gov’t responsibilities to delivery core services should never depend upon charitable donations
         * In the absence of financial contributions, gov’ts can:

Simplify laws

Legal information services

Court-based strategies to assist self rep’d litigants

Develop policy screens that would consider whether laws either encourages or discourage AtoJ; *any laws impeding access would require special justification*

* + **Government**
    1. Acceptance of gov’t role in facilitating AtoJ; have they gone far enough?
    2. **Public Commission on Legal Aid in British Columbia, *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia***
       1. Law Services Society (LSS) established in 1979 by statute to assist in the provision of legal aid in BC; previously just pro bono work
       2. BC one of most robust Canadian programs in 90s, but need outstripped budget allocations
       3. Changes to the transfer payment structure of the 80s and 90s, then in early 2000s, 40% cut to budget, consolidation of offices into regional centers across BC, poverty law and family law services eliminated
       4. Even though focus on crucial services, further reductions in 2009
       5. Now really behind
       6. It should be considered a public service in order to reduce strains on health care and social assistance systems; key with poverty law
       7. Recommendations:
          - Recognize legal aid as an essential public service
          - Develop new approach to define core services and priorities
          - Modernize and expand financial eligibility
          - Establish regional legal aid centres and modernize eligibility
          - Expand public engagement and political dialogue
          - Increase long term, stable funding through multiyear granting process
          - Program must be proactive, dynamic and strategic
          - Greater collaboration between private and public legal aid service providers
          - Provide more support to legal aid providers
  + **Lawyers and the Legal Profession**
    1. Obvious gaps in the operation of legal aid programs that make it difficult for lawyers to participate; how can they be fixed?
    2. **Devlin, “Breach of contract?: The new economy, access to justice, and ethical responsibilities of the legal profession”**
       1. Arguments for mandatory pro bono
          - Rights based 🡪 monopoly and the juridical context

Because of the monopoly over legal services held by lawyers and the corresponding support of the public through the subsidization of legal education, corresponding obligation on legal profession to ensure equal access to justice for all member of the community

* + - * + Utilitarian based 🡪

Distributive benefits of ensuring legal services for all ; may be good for lawyers themselves, also firms and the image of the profession at large.

* + - 1. Arguments against mandatory pro bono
         * Autonomy - Lawyers should not be conscripted to provide legal services, against their own right to self determination
         * Necessity – No tangible benefit for firms to take on pro bono work into their practice
         * Unfairness – Necessity and also many lawyers already engaged in pro bono; need to engage in system of professional cross subsidization
         * Competency – Codes of ethics hold that lawyers should only engage in areas of practice in which they are suitably competent; may not actually assist the disadvantaged (i.e. types of issues)
         * Inefficency/Impractical – Administratively impractical given previous concerns and unlikely to be implemented in current socio-economic climate
         * Inherently contradictory – Pro bono should be voluntary
         * Scope – Some lawyers do not fit into the firm/pro bono model but still benefit from the legal regime
         * The Soup Kitchen Argument: Why Legal Services? – Why not other socially positive contributions to society? However, counterarguments to this including that legal services are not morally fungible with other charitable contributions.
    1. **Wooley, “Imperfect Obligation: Lawyer’s obligation to foster access to justice”**
* **To be perfectly competitive, a mkt needs**
  + Numerous buyers/sellers
  + Product homogeneity (producers are meaningfully competitive w/ each other)
    - Nature of legal work: competition; job is to do *better work* than the next lawyer🡪 this tends towards price escalation b/c clients have so much at stake that they don’t just want someone who is good and competent *but the best*
  + Complete info held by all economic actors
    - The reason people go to lawyers is advice—they do not know, without a lawyer, what the problem entirely is (legally) and how to solve it
  + Free entry and exist (responsiveness to shifts in supply/demand)
  + Absence of externalities
    - None of these are satisfied w/ exception of #1 (number of sellers/buyers)
    - There is a **special obligation on lawyers** to foster access b/c of market imperfections in the mkt for legal services
* The consequences of the imperfections could be a race to the bottom for legal services, or alternatively, a jump in prices
  + Race to the bottom: the difference in price may mean way more to some clients + they may lack knowledge of the importance of quality
    - No empirical evidence
  + Price escalation: For those clients who think that quality is disproportionately important will pay way more when the difference in quality does not justify that much more money (e.g. requiring sr. lawyer (+their rates) rather than a jr)
    - Only *weak* empirical evidence
* Any public policy response increasing lawyer’s access to justice should be modest (*given lack of evidence above*)

## Initiatives to Foster Access to Justice

* **No Canadian law society** has taken the position that pro bono activities should be mandatory

# Undertakings (not txtbk)

* **What is an undertaking?**
  + A promise and responsibility of a lawyer to do something, engaging both **professional** **responsibilities** and **legal obligations**
  + Undertakings dealing with **management of property are** **called “trust conditions”**
  + **Terms** of undertakings are specified in **writing**
* **How do you breach an undertaking?**
  + By not **observing the promise or conditions** the undertaking is concerned with
  + Can be breached in relation to:
    - A lawyer’s relationship to the **profession** (through the Law Society of B.C.);
    - A lawyer’s relationship with their **client**;
    - During the course of **litigation**; or
    - To **another lawyer**
* **Who do undertakings apply to according to…**
* **The Law Society Rules?**
  + Lawyers who don’t practice [2-3(1)] and lawyers who retire [2-4(1)] can remain member to the LSBC if they **undertake** in writing to the Executive Director **not to engage in the practice of law.**
    - These members may **apply** to the Executive Director under 2.4-1(1) to be **released** from their undertaking and **begin** **practicing again.**
    - If not released, these members can continue to provide pro bono legal services or act as a **paralegal** [2-4.2].
  + Articling students
    - Under 2-32.01(2), an articled student must not:
      * (b) **give an undertaking** unless the student’s principal or another practicing lawyer supervising the student has also signed the undertaking, or
      * (c) **accept an undertaking** unless the student’s principal or another practicing lawyer supervising the student also accepts the undertaking.
  + Returning to the practice of law
    - 2-57(1) states that a lawyer who has not been practicing for a period of 3 years or more must pass a qualification exam or obtain permission of the Credentials Committee.
    - (3) A lawyer can apply in writing to the Committee for permission to practice law without taking the exam.
    - (4) The Committee must consider whether the lawyer applying for reinstatement has
      * (a) engaged in activities that have kept the lawyer current with substantive law and practice skills, or
      * (b) the public interest does not require the lawyer to pass the qualification examination.
    - **Most importantly…**
    - (5) Before approving an application under subrule (4), the Committee may require the lawyer to enter into a **written undertaking to do any of the things set out in Rule 2-59(2)(b)**
    - **2-59** 
      * (2) As a **condition of permission to practise law** under subrule (1), the Credentials Committee may require one or more of the following in addition to passing the qualification examination:
        + (b) a written undertaking to do any or all of the following:

(i) practise law in **BC** immediately on being granted permission;

(ii) not practise law as a **sole practitioner**;

(iii) practise law **only in a situation approved** by the Committee for a period set by the Committee, not exceeding 2 years;

(iv) [rescinded]

(v) practise only in **specified areas of law;**

(vi) **not practise in specified areas** of law.

* + - * (3) Despite Rule 2-26(3), the Credentials Committee may vary a condition under subrule (2)(a) without the consent of the lawyer concerned.
      * (4) On the written application of the lawyer, the Credentials Committee may allow a variation of an undertaking given under subrule (2)(b).
* **The Code of Professional Conduct**
  + **Chapter 2 – Standards of the Legal Profession**
    - **2.1-5 To oneself**
      * (e) A lawyer should recognize that the oaths taken upon admission to the Bar are **solemn undertakings** to be strictly observed.
  + **Chapter 3 – Withdrawal From Representation**
    - **3.7 (Commentary)**
      * [8] Lawyers whose clients are affected by changes in a law firm have a continuing obligation to protect client information and property, and must minimize any adverse effect on the interests of clients.
      * This obligation generally includes an obligation to ensure that files transferred to a new lawyer or law firm are **properly transitioned,** including, when necessary, describing the status of the file and **noting any unfulfilled undertakings** and other outstanding commitments.
  + **Chapter 5 – Relationship to the Administration of Justice**
    - **5.1-6 Undertakings**
      * A lawyer must strictly and **scrupulously fulfill any undertakings** given and **honour any trust conditions** accepted in the course of litigation.
      * **Commentary** 
        + [1] A lawyer should also be guided by the provisions of rule 7.2-11 (Undertakings and trust conditions).
  + **Chapter 6 – Relationship to students, employees and others**
    - **6.1 Supervision**
      * **6.1-3 Delegation**
        + **A lawyer must not permit a non-lawyer to**

(c) **give or accept undertakings** or accept trust conditions, except at the direction of and under the supervision of a lawyer responsible for the legal matter, **providing that**, in any communications, the **fact** that the **person giving or accepting the undertaking** or accepting the trust condition is a **non-lawyer is disclosed**, the **capacity** of the person is **indicated** and the **lawyer** who is **responsible** for the legal matter is identified;

* + **Chapter 7 – Relationship to the Society and Other Lawyers**
    - **7.2 Responsibility to lawyers and others**
      * **7.2-11 Undertakings and trust conditions**
        + A lawyer must:

(a) not give an undertaking that cannot be fulfilled;

(b) fulfill every undertaking given; and

(c) honour every trust condition once accepted.

* + - * **Commentary**
        + [1] Undertakings should be **written or confirmed in writing** and should be absolutely unambiguous in their terms.

If a lawyer giving an undertaking **does not intend to accept personal responsibility, this should be stated clearly** in the undertaking itself.

In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will **honour it personally**.

The use of such words as “on behalf of my client” or “on behalf of the vendor” does **not relieve the lawyer giving the undertaking** of personal responsibility.

* + - * + [2] Trust conditions, which are **equivalent to undertakings**, should be **clear, unambiguous and explicit** and should **state the time** within which the conditions must be met.

Trust conditions should be **imposed** **in writing** and **communicated** to the other **party at the time the property is delivered**.

Trust conditions should be **accepted in writing** and, **once accepted, constitute an obligation** on the accepting lawyer that the lawyer must **honour personally**.

The lawyer who delivers property without any trust condition **cannot retroactively impose trust conditions** on the use of that property by the other party.

* + - * + [3] The lawyer should not impose or accept trust conditions that are **unreasonable**, nor accept trust conditions that cannot be fulfilled personally.

When a lawyer accepts property subject to trust conditions, the lawyer **must fully comply** with such conditions, **even if the conditions subsequently appear unreasonable**.

It is improper for a lawyer to **ignore or breach** a trust condition he or she has accepted on the basis that the condition is **not in accordance with the contractual obligations** of the clients.

It is also improper to **unilaterally impose cross conditions** respecting one’s compliance with the original trust conditions.

* + - * + [4] If a lawyer is unable or **unwilling to honour a trust** condition imposed by someone else, the subject of the trust condition should be **immediately returned** to the person imposing the trust condition, **unless** its terms can be forthwith **amended in writing on a mutually agreeable basis**.
        + [5] Trust conditions **can be varied with the consent of the person imposing them**. Any **variation should be confirmed** in **writing**.

Clients or others are **not entitled** to require a variation of trust conditions **without the consent of the lawyer** who has imposed the conditions and the lawyer who has accepted them.

* + - * + [6] Any trust condition that is **accepted is binding** upon a lawyer, **whether imposed by** another **lawyer** or by a **lay person**.

A lawyer may seek to impose trust conditions upon a non-lawyer, whether an individual or a corporation or other organization, **but great caution should be exercised** in so doing since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical obligations that exist between lawyers.

# Ch. 13: Issues with Regulation

## The “Good Character” Requirement

* Law societies require a demonstration of a lack of bad character, namely an absence of criminal convictions, academic dishonesty, attempts to deceive the law society
  + If it has occurred, the law societies want to see repentance and rehabilitation—that the applicant has recovered from the behaviour which raised a (-)ve inference about their character
* Aim is to protect the public, maintain high ethical standards and maintain public confidence in the legal profession
  + Relies on assumption that character determines conduct

### *Preyra v Law Society of Upper Canada* – 2000 Law Soc Upper Canada

**F**: Completed law school at Queen’s in 1994. Completed one phase of bar exam, unable to find articling job. Intentionally falsified documents, academic credentials, awards and 11 law school marks, to perspective employers (e.g. Rhodes candidate, was accepted to Harvard, etc.). The misrepresentations uncovered in 1994, then continued (total at least 4 years). As recently as 1 year before the hearing he cont’d to lie. He offered some excuse about the stresses of his big-successful family + entered therapy (6 sessions). He was not found to have a mental illness but a sense of entitlement + a blow to the self-esteem. His principals were just learning about the details of his misbehavior for the 1st time at the hearing.

**D**: Applicant did not satisfy the Panel that on a balance he was of good character… not admitted.

**R**: The purpose of the good character req. is to ensure that the LawSoc can protect the public and maintain high ethical standards in the lawyers admitted to practice.

**R2**: Good character is judged at the time of appl’n—“risk of reoffending” and forgiveness have no bearing—and the onus rests on the applicant on a balance of probabilities.

Note: Ultimately admitted after improved rehabilitation evidence.

### *Law Soc of Upper Canada v Burgess* – 2006 LSUC

**F**: B plagiarized on an essay in her 4th year undergrad at the UofT. At the time of application, she was 27, had finished her bar admission course and her articles. She kept up persistent and ongoing lies to LSUC and others (incl character refs) about the plagiarism and came up with an elaborate exculpatory lie. She submitted about 2.5 pages to the LSUC about this lie (it was a false account of the plagiarism incident). Only upon being confronted by LSUC did she confess that they had the right facts.

**D**: Not admitted. B did not establish herself to be of good character.

**A:** There were tons of good things about her, including being smart and working at Osler… but the panel took the sophistication of her lie very seriously. The Panel didn’t think that a sufficient amount of time had passed. She had demonstrated serious deception.

**R**: The transition from being “of bad character” to of “good character” is a process, not an event. It may never happen. And the LawSoc is unlikely to be satisfied that it happened during a short passage of time.

### *LSUC v Manilla* – 2011

Not admitted on the basis of the character requirement for*, inter alia*, making ethnic slurs, posting defamatory letters, other offensive conduct, and dropped crim’l charges.

## Extra-Professional Misconduct

Regulation of conduct by lawyers outside of their legal practice, which may be technically but not substantially related to their practice of law🡪 conduct unbecoming (public nudity, failing to care for animals, writing a bad cheque to a landlord)—all real e.g.s).

### *LSUC v Budd* – 2009

**F**: Lawyer, B, was convicted of crim’l exploitation in relation to sexually exploiting 2 underage girls who were the daughters of one of his friends. He had minimized the significance of same and had very little remorse. The trial judge (for cirm’l convictions) viewed his sexual exploitation as “an error in judgment” by a “normal, heterosexual man who happened to have access to teenage girls”! The lawyer had rec’d counselling as a result of the emotional impact of his crim’l conviction, incarceration, career + relationship implications, and adjusting to the destruction of his life…

**A**: The lawyer was convicted of committing these offences over a prolonged period of time (3 years) and had no remorse. The incidents were premeditated and the lawyer encouraged the dependency, reliance, and trust of the underage girls and their mother. The consent of the girls and the otherwise “outstanding citizenship” were mitigating factors…

**A**: No need for specific deterrence (*not going to do it again*)—only gen’l + protection of public interest.

**D**: Lawyer license was revoked.

**R**: In determining whether a lawyer should be found to have committed conduct unbecoming: (i) protection of the public, (ii) preservation of public confidence in the legal profession, and (iii) maintenance of high professional standards.

**R2**: In determining just and appropriate conduct order to serve disciplinary objectives, must consider gravity of misconduct, need for specific and general deterrence, particular circumstances of the offending lawyer and context of the misconduct.

### LS Alberta v Sychuk – 1999 Hearing Committee

**F**: Applicant, S, was generally an alcoholic, abusive monster, albeit a law prof, bencher, and reputable lawyer. In 1988, S murdered his wife (+ mother of his children) by stabbing her 22 times (and breaking her arm) + was convicted of 2nd degree murder + imprisoned for life w/o possibility of parole for 10 years. S evidentially felt bad about it all and tried to kill himself and became very depressed. He underwent a “difficult journey of rehab” which involved a lot of psychiatric treatment and counselling. There was convincing evidence of his rehabilitation and regret. He didn’t work as a lawyer for 11 years (after disbarment) and now is reapplying. He had been a model inmate but had not been out on parole for very long at all. He wanted to be part of LSA so that he could have some acceptability and accessibility to programming that was otherwise difficult for him to access. There was a lot of controversy surrounding his appl’n to be readmitted. There were *a ton* of letters urging the LSA not to readmitted—including many of S’s former UofA colleagues.

**I**: Is the commission of a serious offence resulting in disbarment an absolute bar from readmission? No.

**D**: Appl’n denied.

**A**: The LaSoc is not in the business of forgiveness and mercy—it cannot allow such considerations to prevail over the public respect for the profession, which was seriously tarnished by the enormity of S’s crimes.

**R**: The commission of a serious offence is no bar to admission; rehabilitation is a controlling factor. But the more serious the crime, the more necessary evidence of rehab.

**R2**: Rehabilitation is not paramount and does not overtake the need to protect the standing of the profession given its self-regulating status. Good character without good reputation is insufficient.

**R3**: An appl’n for reinstatement is much different than an appl’n for admission b/c it implies that the oath of office has been broken + the oath to be an officer of the court has been violated—in addition to the serious offence. This is an exacerbating factor given that the lawyer who commits an offence was, at the time, sworn to uphold the law.

## Sanctioning lawyers for misconduct

Fines 🡪 orders 🡪 disbarment 🡪 RANGE

### *Adams v LSA* – 2000 ABCA

**F**: There were 4 complaints, 2 of which arose out of A’s sexual exploitation of a 16yo client. He persuaded her to have sex w him, despite being 2x her age and fully aware of her strong desire to have her bf released from jail.

**PH**: Hearing Committee disbarred. Benchers dismissed appeal.

**A**: Adams felt that based on evidence produced that this sanction was manifestly unreasonable; overemphasized impact on the legal profession and ignored character reference.

**I**: Was the sanction of disbarment manifestly unreasonable for sexual exploitation?

**A**: It was not appropriate for the dissenting committee member or Adams to try to suggest the complainant’s apparent “lack of vulnerability” as a mitigating factor—the facts of age and legal situation suggested the vulnerability.

**R**: Trust is the overarching foundation of the legal profession. It’s difficult to measure the precise impact of misconduct on the profession, but there’s little doubt that public confidence and trust in the legal profession will be eroded.

**R2**: Disbarment is not restricted to the most serious cases. It’s one of a range of sanctions available for disciplinary decisions.

Note: CA made note of how, in the past, “some professions” have sought to minimize and excuse sexual conduct b/w members and clients.

### *LSUC v Hunter* – 2007 Hearing Panel

**F**: H, a former bencher, was disciplined for having sex w a client and the ensuing conflict of interest. There were 27 character references sent to LSUC, describing his professionalism.

**D**: member given $2,500 fine and 65 day suspension

**A**: In deciding the proper sanction, the LawSoc will consider: the severity of the conduct, the lawyer’s remorse, the need for deterrence, and the need to sanction conduct to ensure cont’d public respect for the profession.

* In this case, did not try to minimize or excuse his conduct or the problems he caused for his client
* There was no importance placed upon what other lawyers recommended as sanctions.

## Regulating the Unauthorized Practice of Law

* Law societies able to regulate the practice of law and assign fines and other forms of punishment to the unregulated practice of law. Is this being done in the public interest?
* Requires a balance between: protecting public from harm from non-lawyers and promoting access to justice

### *LSUC v Boldt* – 2006 Ont SCJ

**F**: B was a mediator and a paralegal. He had been ordered by Bolan J. (and had agreed) not to do so after previously being prosecuted for conduct from 1995-98. This decision follows another incident of unsanctioned practice (2003). B claims that her mediation is not regulated by the LSUC. She helped clients make “memos of understanding”—these were found to be separation agreements.

**A**: Evidence that Boldt had prepared what clients understood to be legally enforceable agreements (incorporations and agreements to separate, also wills). Found that the “Memoranda of Understanding”, notwithstanding its title, was prepared for the parties receiving them with the intention of effecting legal rights and obligations on the parties who signed them. Mediation, though do not have to be a lawyer to do so, benefits from legal knowledge of the mediator and the insurance that independent legal advice is being given

**D**: Fined 35K, prohibited from working as a paralegal, and put on house arrest for 4 months. 🡪 found to be engaging unauthorized practice by dispensing legal advice and preparing separation agreements. Also in contempt of court.

**L**: Except where provided otherwise by law, no person, other than a member whose rights and privileges are not suspended, shall act as a barrister or solicitor or hold themselves out as representing a barr/solicitor or practicing as a barr/solicitor. (*Law Society Act*)

**R**: Although mediation is a valuable service to the public and in a family law context, a non-adversarial approach to conflict resolution, it’s “form cannot be used as a shield to protect those who are carrying out unauthorized practice”. Despite issues with access to justice, mediators cannot be used as low-price alternatives to lawyers.

Note: She later app’d for reinstatement as a paralegal and was refused.

### *Lameman v AB* – 2011 ABQB

**F**: P was a member of Beaver Lake Cree Nation. P claimed fed’l and prov’l gov’t infringed their treaty rights by taking up their traditional territory and giving no meaningful right to hunt, trap, or fish. P wanted the “right of audience” to have a UK firm, Tooks, assist them in their case against the Defendant. P had negligible *pro bono* help. P was impecunious. T (a law firm) agreed to provide entirely-free assistance. P wanted T to be able to Q witnesses and help provide briefs. There was no Canadian counsel on record. Nobody had an issue with behind-the-scenes help; issues arose (from D and the LawSoc) about calling witnesses and the right of audience b/c that = practicing law. All of T’s lawyers were called to the Bar in England or Wales but not BC.

**COA**: D sought to strike the action b/c P impecunious.

**A**: Although T lawyers are competent and proficient, there’s no evidence that they are insured.

**A**: The Ct can exercise its jurisdiction to grant an order of expanded participation of non-lawyers beyond that to which the parties have agreed but refused to do so.

**R**: Whether a non-lawyers is practicing law is a Q of degrees.

## Alts. To Self-Regulation

### Devlin and Hefferman, “The End of Self-Regulation”

* Arguments in favour of splitting the **regulatory** and **representative** functions of legal oversight on a provincial level
  + Key concern is that **one organization** – provincial law societies in Canada as they are currently structured – **cannot maintain both functions**
  + Not able to **maintain judicial independence** or effectively **capture lawyer misconduct** when functions are collapsed and reporting within the profession does not occur as often as desired
* Would be following the lead of other common law jurisdictions that have split the functions entirely, or at the very least creating a **two-tiered complaint system** with **one level responsive to consumer** complaints and the other dealing with **high level discipline and regulatory function**
* Turn towards a model of calibrated regulation that would separate rule creation and enforcement from discipline
* Some traces of this calibrated regulation model in B.C. with ability to make complaints regarding consumer complaints about the actions of public bodies, including the Law Society