Ethics – Winter 2019 – Professor Graham

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Overview of Regulatory Structure

## Part I: The Law Society Act

The Law Society Act is an Ontario statute regulating the practice of law. It is the primary source of legal authority for all matters relating to the practice of law in the Province. Section 2 of the Law Society Act creates the Law Society of Ontario (which was, until 2018, known as the Law Society of Upper Canada). The Act vests this corporation with the power to govern lawyers (as well as other legal service providers) in a variety of ways that are specified throughout the Act. Some key sections of the Act include:

Section 33:

* Section 33 provides that “a licensee shall not engage in professional misconduct or conduct unbecoming a licensee”
* This is the main ‘public law offence’ with which we’re concerned in this course. Note that the Law Society Act does not define what is meant by ‘professional misconduct’ or ‘conduct unbecoming.’ These terms are defined by the Law Society of Ontario through legal authority delegated elsewhere in the Law Society Act. The source of that delegated authority is s 62.01 of The Law Society Act discussed below.

Section 34:

* Section 34 provides that ‘the Society may apply to the Tribunal for a determination by the Hearing Division of whether a licensee has contravened section 33.’
* This is the provision which empowers the Law Society to hold hearings to determine whether or not a licensee (that is, a paralegal or lawyer) has violated section 33 (by committing ‘professional misconduct’ or ‘conduct unbecoming’).

Section 35:

* Section 35 provides that, if an application is made under section 34, and the hearing panel determines that the licensee has contravened section 33, the panel ‘shall make one or more of the following orders…’ (the section goes on to list the various penalties that the Law Society may impose).
* This is the primary source of penalties for lawyers who commit professional misconduct or conduct unbecoming. Where the lawyer has, through a hearing created in section 34, been found to have violated s 33, the Hearing Panel (appointed by the Law Society under s 34) has the power to impose any of the punishments set out in s 35 (including disbarment, fines, etc.).

Note that at this stage in the Law Society Act, we still have no idea what it means to commit ‘Professional Misconduct” or “Conduct Unbecoming” – we simply know the potential consequences of committing those offences.

SO – How do we know what it means to commit these acts? This is answered in part by section 62.01:

Section 62.01

* Section 62.01 of the Law Society Act empowers the Law Society to make by-laws. This is a delegation of legislative authority from the Province of Ontario to the Law Society: in other words, this section empowers the Law Society Act, any by-laws passed by the Law Society pursuant to the authority granted in s 62.01 ‘shall be interpreted as ‘if they formed part’ of the Law Society Act. In other words, any by-laws passed by the Law Society under the authority of s 62 shall, in effect, be treated for all legal purposes as part of the Law Society Act itself.
* Paragraph 10 of section 62.01 is the most important paragraph for our purposes. It explicitly authorizes the Law Society to provide for ‘the preparation, publication and distribution of a code of professional conduct and ethics.” This is a statutory authority delegating to our Law Society the power to make the Rules of Professional Conduct. Through the action of s 62(2), any rules passed pursuant to this power shall be interpreted as though they were part of the Law Society Act.
* The Rules of Professional Conduct, described below, contain the definition of “professional misconduct” and “conduct unbecoming” for the purposes of s 33 of the Law Society Act.

## Part II: The Rules of Professional Conduct

* These rules are not created by the government of Ontario, but are nevertheless “law” in Ontario: they are created by the Law Society pursuant to delegated authority (under s 62.01, para 10, of the Law Society Act), and shall (as a result of 62(2) of the Law Society Act) be treated (for all legal purposes) as though they’re actually part of the Law Society Act. For practical purposes, you should treat these rules as though they’re part of the Law Society Act.
* For present purposes, the most important part of the Rules of Professional Conduct is the definition section in rule 1.1-1, which includes a definition of ‘professional misconduct.’ This definition provides in part, as follows:
  + Professional misconduct means conduct in a lawyer’s professional capacity that tends to bring discredit upon the legal profession including A) violating or attempting to violate one of these rules, a requirement of the Law Society Act or its regulations or by-laws.
* Since this definition is passed pursuant to the by-law making power found in s 62.01 of the Law Society Act, this definition counts as part of the Law Society Act itself. In other words, this definition defines ‘professional misconduct’ for the purposes of the Law Society Act, in particular for the purposes of s 33 of the Law Society Act. As we have seen, this definition is effectively read into the Law Society Act through the action of s 62(2) of that Act. As a result, ‘professional misconduct’, for the purposes of s 33 of the Law Society Act, includes a breach of any of the Rules of Professional Conduct.
* A violation of the Rules of Professional Conduct legally counts as a violation of s 33 of the Law Society Act, giving rise to a hearing under s 34 and potentially leading to the punishments set out is s 35.

Confidentiality:

## Introduction Questions: Where does the lawyer’s duty of confidentiality arise?

1. Pre-Retainer conversations (where an individual does not necessarily enter into an actual lawyer-client relationship) are still protected
   1. What if the lawyer is a specialist in a certain information (divorce lawyer, fraud lawyer) by sharing such information without specifications can still expose information that a potential client may want to keep private
   2. Might cause people to refrain from seeking counsel because they’re worried about such information getting out to the public before they are ready for it to.
2. Is this information confidential? Of course it is – the lawyer has learned this information by working for this client, thus it cannot be disclosed protected by duty of confidentiality + could be pursued for professional misconduct, and also protected by insider trader (tipping)
   1. When a lawyer breaches confidentiality it is likely that their behaviour will also be protected or covered legislation
3. Confidentially continues beyond the death of an individual, even after the retainer is over unless you can find an exception to confidentiality

## Applicable Rules for Confidentiality:

* Set out in Rule 3.3-1
  + A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of professional relationship and must not divulge any such information unless:
    - Expressly or impliedly authorized by the client
    - Required by law or a court to do so
    - Required to deliver the information to the Law Society
    - Or otherwise permitted by this rule
* Commentary
  + A lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that without any express request or stipulation on the client’s part, matters disclosed to or discussed with the lawyer
  + Confidentiality must be distinguished from lawyer and client privilege – **the confidentiality ethical rule is wider**
  + The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client
  + Solicitor-Client relationship is often established without formality – must really be on guard before you accept the confidential information from anyone
  + Should not expose that they have been retained or consulted by a person on a particular matter even if there is not a formal relationship established
  + Should not disclose information between confidential clients
  + **The confidential duty is incredibly wide –** should not participate in gossip, share with family etc.
* Section 33 of LSAO – **Professional Misconduct** 
  + Penalties from reprimand or fines to disbarment
* Civil Action (Under contract or Tort)
  + Damages as a result of breaching a fiduciary duty

## Why is it worth protecting confidentiality?

* Basic right to privacy
* Personal Dignity & Autonomy
* Systemic Rational – Neutral Conduit Model
  + The legal system is so complicated that is increasingly difficult for a lay person to navigate how the system works & the legal rights that they hold
  + Creating neutral conduit (lawyers) can assist people in overcoming the barrier of complexity
    - This means that lawyers must act in a neutral way as much as possible
    - Not supposed to impose additional costs to the client other than the fees associated with providing the services
      * i.e. I will only give you my services if you behave in a way that I like or abide by my moral values
      * One of those costs is the fear that your private information/secrets will be exposed
* Example: Accurate Verdicts
  + Anna Topol accused of killing her husband Mitchell who was an abusive father
    - If there was no client confidentiality then Anna will be more circumspect about the information she gives her lawyer, and particularly with probably not admit that she killed him (she’ll make up a lie etc.)
    - Her defence will then be based on a lie and leave her vulnerable to an unjustified outcome in the case because of her law
    - If she knows she can share with her lawyer secure information that she wants to keep secret – she will be more willing to be transparent which allows the defence to frame the best defence to include batter spouse syndrome self defence
  + The best case scenario is for the lawyer to be aware of all the facts of a scenario in order for them to proceed through the legal system appropriately – but without confidentiality there is no incentive for the client to be 100% transparent

## Solicitor Privilege vs. Confidentiality

* The duty of confidentiality is much broader than that of privilege
* All privileged information is confidential but not all confidential information is privileged
* Privilege = Evidentiary Doctrine
  + Allows client & requires lawyer to refuse to answer questions regarding information/knowledge the lawyer may hold
  + Simple exception to the general rule that all relevant evidence is admissible in court
* Privilege only applies to litigation whereas confidentiality applies everywhere
* Privilege covers only information communicated in confidence or by third party in reference to pending litigation
  + Whereas confidentiality is much more flexible and can include information transmitted in less formal manners
* Privilege can be lost
  + If third party present is not found to be necessary to furthering the litigation or for the purposes of the case that is enough for the information not to be considered privileged

### Smith v Jones (1999) – Boundaries of Confidentiality

**Facts:** Charged with aggravated sexual assault of a prostitute. Client was examined by a psychiatrist – effectively stands in the shoes of the lawyer with respect to the confidentiality & privilege that the lawyer holds. Client revealed his plan to kidnap & kill a prostitute. He set up his basement apartment in preparation, picked out the spot to hide the body. All information that was shared was with regard to a future plan (he hasn’t completed any of it yet). Admitted to wanting to do it more than once. Doctor wanted to disclose this information as he was worried about the potential of such crimes being committed and public safety, he thought about it for a few months and eventually did share the information. Case was brought to determine what lawyers should do in such circumstances where lawyers may be holding information that would be helpful for public safety.

**Issue:** When (If ever) can public safety or the need to save lives override privilege and confidentiality?

**Discussion:** “The solicitor-client privilege has been long regarding as fundamentally important to our judicial system. Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients. Without privilege the value of the legal system is lost. **However,** there may be situations where an exception to confidentiality may apply. Must consider the i) clarity ii) seriousness and iii) imminence of the threat.

**Held:** There was sufficient clarity & seriousness in this circumstance but there was not the imminence required for an exception to confidentiality to be allowed

**Commentary:** The decisions in this case do not directly govern the rules of confidentiality but they have been applied by law society’s across Canada in the confidentiality rules.

* There is an exception to confidentiality & privilege when there is a clear, serious and imminent threat to public safety – this has been adopted by most law societies
  + Section 3.3-3: A lawyer **may** disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death and serious bodily harm and disclosure is necessary to prevent the death or harm
  + There will almost always be at least two routes for individuals pursue action against lawyers who breach confidentiality
  + If you refuse to disclose information regarding a threat to public safety, there are no consequences
    - It is almost always better not disclose – the incentive here is to not disclose and there will be no consequences

## Disclosure & Use

* The confidentiality umbrella also extends to behaviour of the lawyer & use of the confidential information to the clients’ detriment even without complete or actual disclosure of the information
* FLSC 3.3-2: A lawyer must not use or disclose a client’s or former client’s confidential information to the disadvantage of the client or former client or for the benefit of the lawyer or a third person without the consent of the client or former client.
  + The fiduciary relationship between lawyer and client forbids the lawyer or a third party from the lawyers use of a clients’ confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain client or former client’s consent before disclosing confidential information

### Szarfer v Chodos (1986) –

**Facts:** Hairdresser gets injured and laid off because he is unable to work. He struggled with depression etc. Wife worked as a temp. legal secretary, so she encouraged him to go speak to the lawyer she worked for. The lawyer agreed to represent them, the wife confessed a list of mental suffering which included marital problems & he was impotent. Lawyer starts up an affair with the clients’ wife & starts having sex. Mr. Szarfer claimed that this affair occurred because of the confidential information shared between client & solicitor.

**Issues:**

1. What if the confidential information is shared only among people who already know the relevant information
2. What constitutes a prohibited use of confidential information?
3. What are the appropriate remedies for breach of confidentiality?

**Discussion:** The fiduciary relationship forbids a lawyer from using any confidential information obtained by him for the benefit of himself or a third person or to the disadvantage of his client. The information used by Chodos in this case put the client at a detriment for his own benefit.

**Held:** Breach of confidentiality and professional misconduct. Awarded damages $43,663 (plus interest).

## Interests Protected

* What happens when the disclosure of interests might further the client’s interest rather than detriment them?

### Geffen v Goodman Estate (1991)

**Facts:** Mother died & left the family home solely to Tzina who was ‘mentally unbalanced’. The brothers were shocked especially because they were concerned that she would sell the house and squander the money and then rely on them for support. The brothers contested the will. They agreed she would sign a trust document that would give the brothers legal ownership, and herself as the beneficiary. Tzina attempted to leave her house to her children at the time of her death, but as a beneficial owner that was not within her rights.

**Issue:** Did Tzina enter into the trust willingly and with enough legal advice & understanding for her to make a well-educated decision? Should the information about her mental health at the time of signing the document be disclosed to determine the legality of this document?

**Discussion:** The information about Tzina’s mental status when she signed the document is considered confidential information as the lawyer discovered her state of mind through his relationship to her as a lawyer/counsel. Wills exception – the only reason a lawyer would want to disclose such information to determine what the clients’ true wishes were at the time of creating the will.

The point of confidentiality is to ensure clients’ can have absolute faith and trust in their lawyer, but there is no incentive effect when preparing a will. BUT – this was a trust document not a will – so does the will exception extent?

**Held:** In my view the considerations which support admissibility of communications between solicitor and client in the wills context apply with equal force to the present case. The general policy which supports privileging such communications is not violated. The interests of the deceased are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were.

### R v Jack (1992)

**Facts:** Husband accused of murdering his wife, but there was no body. Husband argued that she just ran away. The prosecution had knowledge that the wife had gone to see a divorce lawyer about proceeding with a formal divorce. They wanted to use such evidence to exemplify that she would not have simply run away from her husband.

**Issue:** Should the prosecution be able to have the divorce lawyer testify in order to establish the guiltiness of her husband? Should discussions be protected as privilege?

**Held:** The person who benefits from the privilege being protected is the person accused of her murder.

**Discussion:** But are we not supposed to presume innocence until proven guilty

## Duty to Assert Confidentiality

### Bell v Smith (1968)

**Facts:** Bell & Smith were in a car accident. Bell’s hired a lawyer who then convinced them to accept the settlement offer from the Smith’s. They then decided they wanted to recant the acceptance – but it took too long to get the lawyer to let him know, so they advised him to increase the amount they want. Lawyer gave evidence on Bells original agreement to settlement, handed over their entire case file. Court decided that they had originally agreed to the first settlement. Bell’s appealed this breach of confidentiality.

**Issue:** Who screwed up the original trial?

**Held:** Pretty much everyone acted inappropriately by having the lawyer testify against his clients without a court order or their permission, the lawyer was wrong by accepting the call to testify & handing over all confidential information.

**Discussion:** This regrettable occurrence was occasioned by insufficient consideration of a fundamental rule, namely the duty of a solicitor to refrain from disclosing confidential information unless his client waives the privilege. It would be the duty of any Court to stop him if he was about to disclose confidential information, the court knows the privilege of the client and it must not be taken for granted that the attorney will act rightly and claim that privilege.

### Stewart v CBC (1997)

**Issue:** Was there a breach?

**Held:** There was a breach. Mr. Greenspan put his own financial interests ahead of his client’s interests in the way that he publicised the case and deprived/undercut the value of the rights his client should have been afforded.

**Remedy:** Nominal damages

Exceptions to Confidentiality

## Future Harm/Public Safety

* Sources of the Rule
  + Rule 3.3-3 – gives discretion to disclose but not requirement
    - A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm
  + Common Law – *Smith v Jones* 
    - Three Factors: Clarity, Seriousness & Imminence
  + Differences between sources
    - Clarity requirement – need for identifiable victim or group of victims
      * Code does not require an identifiable victim
    - When is each situation applicable?
      * 3.3-3 is only applicable in defense to professional misconduct
        + Would only be able to bend or stretch if there was an amendment
      * Clarity is requirement for the Smith v Jones exception
        + But it doesn’t make a ton of sense – threat of bomb in ‘major American city’ is not a clarified group or victim
    - What about suicide?
* Commentaries of FLSC –
  + Disclosure is extremely rare
    - Should be interpreted incredibly strictly – must be sure that the harm to be stopped is so serious etc.
  + Adopts SCC interpretation of ‘serious bodily harm’
  + Factors to Consider
    - Likelihood of occurrence
    - Absence of other prevention
    - Circumstance of acquiring information
  + Ethical Advice from Law Society
    - Take the appropriate steps + seek judicial order for disclosure
  + Written Notes
* **Timing Issues:** 
  + Where the harm lies entirely in the future is when the exception is applicable
    - It does not apply to harm that lies entirely in the past
  + What about ongoing harm
  + Psychological Harm
* Public Safety
  + Interpretation of Harm
    - Action causing harm may have happened in the past but the harm to the individual may not actually come to fruition until the future – did the action lay the groundwork for the ‘future ‘harm’
    - What about a repeat offender?
      * If you have no idea who the victim is or no sense of when the client may repeat an offense or a more serious offense, then you cannot invoke the exception
  + Can also ‘threaten’ clients for disclosure to incline clients to disclose themselves
  + What do lawyers actually do in situations where they know of future harm that may occur as a result
    - Most likely just educate their clients on disclosure etc. & hope they do but not force them in any way

## Lawyer Self Interest – one of most sensible exceptions

* Self-Defence – 3.3-4
  + **If it is alleged that a lawyer or the lawyer’s associates or employees:**
    - **Have committed a criminal offence involving a client’s affairs**
    - **Are civilly liable with respect to a matter involving a client’s affairs**
    - **Have committed acts of professional negligence**
    - **Have engaged in acts of professional misconduct or conduct unbecoming of a lawyer**
  + **The lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required**
  + Source of the allegation does not matter so long as the integrity has come into question
  + Does not matter if they are party to the proceedings
    - Can break confidentiality to the extent to clear own name
  + Sometimes you can discuss with your client what information would be necessary to reveal in order to clear such a claim (especially if the claim comes from a third-party) as eventually you qill have to defend why the extent of information was necessary
* Fee Collection – 3.3-5
  + Lawyers are allowed to disclose enough information in order to successfully collect
  + **A lawyer may disclose confidential information in order to establish or collect the lawyers’ fees, but must not disclose more information than is required**
* Ethical Advice – 3.3-6
  + **A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer’s proposed conduct**
* Conflict Checks – 3.3-7
  + **A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client**

### R v DUnBar (1982)

**Facts:** Three men tried together on three counts of first-degree murder. The accused for on trial for killing a drug dealer, his son & woman. All were pretty gruesome murders. One of the accused testified that he was picked up following the murders and the other accused told him they had killed the people. He was acquitted. During the other accused trial, he was called back to testify against the other accused. On the stand he said his lawyer had advised him to make up a story against the other accused to get himself acquitted.

**Issues:** In what circumstances can a lawyer defend against allegations of impropriety? Must the lawyer be facing negative consequences that flow from those allegations?

**Discussion:** “As to what is a controversy between lawyer and client the decisions do not limit their holdings to litigation between them, but have said that whenever the client even in litigation between third persons makes an imputation against the good faith of his attorney the curtain of privilege is dropped so far as necessary to enable the lawyer to defend his conduct.

“It appears to be clear where the client on direct examination testifies to a privileged communication in part, it is a waiver as to the remainder of the privileged consultation or consultations on the same subject.”

## Innocence at Stake

* Competing Tests –
  + Dunbar v Logan (no continuing interest & would prevent wrongful conviction)
  + Smith v Jones
    - Approved of the exception

### R v McClure (2001) SCR

**Facts:** Mr. Mclure was a teacher at Indian residential schools & he was charged with multiple counts of sexual assaults. Jay-C read about Mclure’s arrest in the paper and then called the police and claimed he had also been assaulted by Mcclure & was added to the action. Jay-C also set out a civil action against Mclure. Mclure in crim trial sought out the discussion between claimants and their lawyers in any civil case against him as it may provide exculpatory evidence. It is not required for complainants to disclose all information like the prosecution.

**Issue:**

**Discussion:**

* Stage 1: *Could Cause Reasonable Doubt* 
  + The person seeking disclosure must have some evidence that the confidential information is worth revealing
  + Judge needs some evidentiary basis for the claim that a solicitor client communication exists that could raise a reasonable doubt – it can’t just be a fishing expedition
  + Evidentiary basis could be anything
* Stage 2: *Likely to Cause Reasonable Doubt* 
  + Judge examines the confidential material to determine whether or not it is ‘likely to cause reasonable doubt’
  + Judge will receive information first to see
    - If the judge finds relevant or important information that could demonstrate doubt then that information only will be released

**Post McClure Position:**

* Who is the party seeking disclosure?
  + Under the McClure framework the court is assuming it is an accused who is seeking innocents
  + But under example 5.1 – that is not the case
  + Could potential harm include being wrongly convicted of a crime?
    - If a lawyers’ previously deceased client had admitted to a crime that someone else is now being prosecuted for – could this be considered under the first exception against confidentiality?
  + McClure Exception

## Authorized Disclosure

* 3.3-1(a)
  + **A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless (a) expressly or impliedly authorized by the client**
  + Could also view as not really an exception because the information was never considered confidential
  + Express
    - Should be clear and unambiguous, and should be ensured that client understands all implications of express waiver
      * Client must be made aware PRIOR to the lawyer acting on it
  + Implied
    - Any release of information to carry out the procedure of a clients needs
    - Also plea bargaining – sometimes requires disclosure of certain facts
    - Must obviously go no further
    - Client as authorized you to carry out a particular action so you can disclose as necessary but does not go further than required
    - Client can always override an implied waiver with an express limitation
    - **Commentary 9 & 10 \*\***

## Public Knowledge

* 3.3-1 Commentary 8
  + **Although the rule may not apply to facts that are public knowledge the lawyer should guard against participating in or commenting on speculation concerning client affairs or business**
  + So the rule may not apply to “public knowledge”
    - It is generally insufficient for the information to be ‘available’ to the public, instead it should be ‘widely known’ by the public before you act on it

### Ott v Fleishman (1983)

**Facts:** Fleishman was a family lawyer in Vancouver. Ott wanted to divorce her husband but she had no grounds to prove divorce. She asked lawyer to establish grounds for divorce – specifically to find evidence of adultery. Deployed a PI to find out evidence of adultery. Failed to find evidence for divorce. Was able to agree with a settlement. The firm hosted a party to celebrate & PI/Wife started an affair. PI was married at the time of affair, wife had settlement. Wife would speak about affair in Fleishman office. She continued to try and find evidence on the adultery. Husband admitted to the affair & proceedings for divorce begin. Fleishman finds out about the affair between client and PI & was not happy. He refused to be the lawyer for the client and wrote a letter to RCMP to complain about PI behaviour.

**Discussion:** Counsel for df. Sought to justify disclosure on a number of grounds. First, he said the information was not confidential because the plaintiff had openly but discreetly kept company of PI. Df. Communication with RCMP and others went far beyond that. In any event, her admission of adultery to the df. Was expressly given in confidence and ought not to have been breached.

Df. Had a duty to disclose to prevent fraud. This argument cannot prevail because he furnished the information to others and there was no duty to breach confidentiality

## Disclosure Required By Law

* 3.3-1 (b) – unless required by law or a court to do so
  + You must comply
  + What counts though?
    - Court Order
    - Law

Integrity and Good Character

## The Rule of Integrity

Chapter Two of FLSC – Standards of the Legal Profession

2.1-1 – A Lawyer has a duty to carry on the practice of law and discharge all responsibilities, clients, tribunals, the public and other members of profession honourable and with integrity

* Must look at the commentary to determine what this actually means

1. Integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession. If a client has any doubt about his or her lawyer’s trustworthiness, the essential element of the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer’s usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be
   1. Distinguishes competence from integrity –
2. Public confidence in the admin. Of justice and in legal system may be eroded by irresponsible conduct. Accordingly, a lawyers conduct should reflect favourably on the legal profession, inspire confidence, respect and trust of clients and the community and avoid even the appearance of impropriety
3. Dishonourable or questionable conduct on the part of the lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client’s trust in the lawyer, the society may be justified in taking disciplinary action
   1. Suggests you can violate integrity in activities separate and distinct from professional setting – unique from other rules of professional conduct
4. Generally, the society will not be concerned with the purely private or extra-professional activities of the lawyer that do not bring into question the lawyer’s professional integrity
   1. So not necessarily things that are completely unrelated to the concepts of honesty, trustworthiness etc.

Focus is primarily on honest and trustworthiness to uphold the respect of the justice system.

### Adams v Law Society of Alberta [2000]

Facts: Adam had two clients a 16 year-old female incarcerated for prostitution, and her boyfriend. He got the female out on bail and she immediately resumed service as a prostitution. He asked her what services he provided to clients. When they met again he suggested they ought to have sex. Police decided to interview her about her activities as a sex-worker. At the request of the police she wore a wire when she met with the lawyer. She asked him if he ever had sex with a client before? – Reminds the lawyer of the client relationship between him and the female. He answered no. Police entered while lawyer was partially undressed and arrested him. Admitted to all the relevant facts & at the hearing acknowledged that he dishonoured the profession as a result of his conduct.

Issues: What do the Law Societies mean by the word ‘integrity’? What’s the appropriate punishment for breach of integrity?

* These are not distinct activities in terms of private and professional realms of the lawyer’s world
* There is a power imbalance between the two people
  + She reminded him of this client relationship and his relationship to her boyfriend as he still represented him

Held: Breach of integrity

Reasoning: “ Lawyers are perceived by clients to be very special people with very special powers, and this means that the client is in a very vulnerable positions…in his or her relationship with the lawyer, and its incumbent upon the lawyer to recognize the nature of this very special trust relationship…Mr. Adams set that aside, the almost sanctity of this relationship, and minimized it and discounted it and took advantage of this young woman”

* However, most of the links to integrity so far have implicated honesty – but here, Adams was not dishonest

Comparison to misappropriated trust funds – is this behaviour in the current case worse or better behaviour?

* Actions that violate a person’s dignity – demonstrate a level breach in integrity

Penalty for such behaviour: Disbarment – the focus seemed to be about the age difference, breach of trust and vulnerability of the client

* Seems the taking advantage of vulnerable individual for your own pleasure should equate to an appropriate punishment of disbarment.

### LSBC v A Laywer [2000] – Information regarding punishment of breach in integrity

Facts: AL married to another lawyer (EVL), EVL and AL were out walking one night and EVL fell into hole. EVL decided to sue the owner of the hole (property owner), the lawsuit was ongoing 5 years later when EVL & AL decided to separate. AL was still planned to be a witness in the case. In 1995, they entered into acrimonious matrimonial litigation. AL met with EVL lawyers, where he said he could be a good witness for her but only if she gave him a good settlement in the divorce proceedings or he would bring forward allegations of misappropriation of funds etc. and be a bad witness.

Issue: Does this constitute a lack of integrity?

Hearing Panel: “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”

* The practice of law requires so much more of a member than the ability to manage his or her business affairs. The respondent’s conduct suggests ignorance of his role in the process and at worst a disregard for it, I find that the accused professionally misconducted himself” The several duties to uphold integrity of the state, the law and our system of justice remain the responsibility of the lawyer at the end of the working day and a failure to perform these duties will result in a finding of professional misconduct even where the misconduct does not occur in the pursuit of the profession, in the strictest sense.
  + It was the respondent’s duty as a witness – making it personal conduct that was demonstrating a lack of integrity but it can still be considered professional misconduct because of their awareness, knowledge and understanding of their responsibility to their profession

What is the appropriate punishment here?

* In Adams the misconduct and misuse of the power dynamic between lawyer and client equated to disbarment – but here
* In courts – perjury is vulnerable to severe sentencing & punishment
* In this case the factors set out on page **30-34 of Legal Ethics Text** 
  + Advantage Sought
  + Impact on Victim
  + Etc.
* Considering all these facts – LSBC decided a 3 month suspension was appropriate

### Law Society of New Brunswick v Ryan [2003] **SCC \*\***

* A decision by any governing body is party to legislation – the statutory body only has the power to exercise the powers that are outlined in a statute
  + i.e. A law society can’t disbar someone because they find a breach of integrity
    - So in cases like this – where someone has been party to the exercised statutory power of decision from a regulated body like a law society and believe that it has exceeded their jurisdiction you can resort to the courts for the process of judicial review.
    - Generally speaking the courts act on a check of statutory power and determine whether the body has gone beyond the jurisdiction

Facts: Ryan was a lawyer in NB and was retained for a wrongful dismissal claim – (by the time the case reaches SCC Prof. Graham was involved in the case). Ryan did nothing to advance his clients’ claims, but simply pretended to, falsely told his clients that he was vigorously, he faked a meeting in a hotel & feigned the other side just didn’t show up, claimed the other side was causing delays etc. Then a limitation period passed without Ryan actually taking any action – and then he doesn’t tell his clients that this period has passed. Delivers bad news that the court of appeal decision recently meant he would have to start all over again. Presented the clients with the decision – however, it was all forged. Then informs his clients they were successful in the contempt proceedings and will receive $37,000. Almost 6 years pass, phoned up his clients and told them everything had been a lie. He explained to law society and bar officials what he had done and explained it was a result of alcoholism and depression. Appeared before law society & was disbarred.

**Issue:** What should the penalty be for Ryan’s professional misconduct? Was LS finding unreasonable?

**Ratio:** ***“There is nothing unreasonable about the Discipline Committee choosing to ban a member from practising law when his conduct involved an egregious departure from the rules of professional ethics and had the effect of undermining public confidence in basic legal institutions.”*** (121)

* + **The Law Society disciplinary committee has broad discretion to determine what sanctions to apply in order to meet the objectives of the *Law Society Act*.**

**Decision:** Disbarment following SCC review of case

* + LSNB disbarred him, but he appealed to LS sitting as committee as a whole (“benchers” meet) and judge
  + Bencher’s agreed disbarment; he sought judicial review of this decision
  + Court of Appeal overturned, and issued a suspension (he got the CA letterhead to forge decision from his Dad who sat on the Court of Appeal in NB, they knew him and his personality – subjectivity in judgement??) Suspended his license, pending treatment (they felt bad for him because they thought at core he was a man of integrity!)
  + Supreme Court held fundamental lack of integrity on Ryan’s part, the LSNB could disbar should they see fit, the decision may have been right or wrong, but was at least reasonable, so upheld
  + Integrity tends to be a tack on violation – isn’t usually the violation that is sought immediately
  + Rule of integrity is almost always applicable

**Factors to Consider:**

* + What impact should alcoholism and depression have on integrity?
  + How strictly should the duty of integrity be enforced?
  + How do these issues have an impact on how you assess a person?
  + Should the duty of integrity take impairments into account?
    - SCC said Law Society was correct, due to the extent of behavior, regardless of these factors

## Conclusion of Integrity

* These cases give us some insight, even though not completely clear
* The rule has caused little mischief; we don’t see a lot of cases where integrity is invoked
* If the rule is not doing much, do we need the rule at all? 🡪 Law Society will never abandon this rule
* Integrity used to be an interpretive principle, to use the notion of integrity to interpret rules
  + Do we need the rule?
  + Should it serve a “supplementary role” when other, more specific forms of “professional misconduct” arise?
    - Can apply when some other form of misconduct that is taken with a level of ‘intention’
  + Should it be the “mens rea” of professional misconduct?
    - Could serve as an ‘aggravating factor’

Good Character

* They must be distinguished in the legal setting – integrity is a trait you must show while practicing the law (regulated by Law Society guidelines - if you fail to show such a trait there are punishments ), while good character you must display at the time of your call to the bar (only arises at the moment – and therefore not found in rules of professional conduct)

Section 27(2) of LSA – It is a requirement for the issuance of every licence under this Act that the applicant be of good character

* Applies to all classes of licence under the act – both paralegals and lawyers
* Burden of Proof is on the applicant – and burden to demonstrate is on the balance of probabilities

So does that mean we host a character hearing for each and every applicant? No – this would be too time consuming, it will only occur where the society has reason to question your answers to the good questions in your bar application.

**Good Character Questions:**

1. Have you ever been found guilty of, or convicted of any offence under any statute?
   1. Have you ever been found guilty of, or convicted of, any offence under any statute?
   2. Are you currently the subject of criminal proceedings?
   3. Has judgment ever been entered against you in an action involving fraud?
   4. Have you ever been discharged from any employment where the employer alleged there was cause?
   5. Have you ever been suspended, disqualified, censured or otherwise disciplined as a member of any professional organization?
   6. Have you ever been refused admission as a student-at-law, articled clerk or similar position in any professional body?
   7. While attending a post-secondary institution, have allegations of misconduct ever been made against you?

### Re P(DM) [1989]

**Facts**: Good student at U of T, applied to bar, disclosed that he was convicted of sexual assault of children (daughter and other young girl)

* Called the law society when he was admitted to law school, convicted for 8 months, he claimed to understand that he had committed socially unacceptable act (they had said he wouldn’t be admitted to the bar, no way) but he went to school anyways
* He informed people interviewing him of his past, they hired him anyways, he finished his articles
* Lawyers liked him, they wrote good character references for him, disclosed conviction of offences
* Good character hearing was held, evidence given (page 125 text) [psychiatrist, no risk of re-offence, cured]

More of the view his acts were socially unacceptable, not wrong or harmful

**Issue:** Should he be admitted to the bar?

**Held:** No, he does not satisfy or exemplify the level of good character required by the law society to be admitted to the association

**Ratio: One can always show that they are of good character despite past actions. However in this case the individual did not show genuine remorse, or healing. That is the most important theme here –did you show genuine remorse? There is strong line of case law supporting the fact that remorse is the most important factor.**

* + *“The committee is not satisfied on the balance of probabilities that this applicant has truly reflected upon and altered the moral code and structure of beliefs which led or allowed him to act out his predatory assaults upon the children.”* The committee believes, in spite of his evidence, that he continues to rationalize his actions

**Decision:** Application to the law society was refused

* + Even though he wasn’t at risk of reoffending, we want (a) protect the public and (b) reputation of the administration of justice
  + Given the nature of the offences, they couldn’t declare him to be a person of good character
  + The burden of proving good character rests with the applicant; there’s no presumption of good character once the hearing starts

**Reasoning:**

* **Character Evidence from Employers:** 
  + “Mr. P. was an exceptional articling student and he will no doubt be a superb lawyer and a credit to our profession. He is possessed of superior intellectual skills, he is dedicated and hard working. Perhaps more important, Mr. P. is sympathetic, insightful and wise. His quick wit is consistently uplifting. At the risk of overstating the case for Mr. P., I am of the opinion that it would be a tragedy for him and the legal profession if such a talented person were to be shut out.”
    - Clearly had high praise!
  + “In our many lively discussions, Mr. P. showed a firm grasp of the ethics of our profession and he showed that his ethical standards are high. At our firm, he had complete trust. Mr. P had and still has a key to our offices. He knows how to operate our computers and he knows how to access substantial information. He had day to day carriage of many files over the year and the feedback from clients to the lawyer in charge was always very positive. He is a good administrator and he always seemed to get more done in a day than one expected to be done in a week.”
    - Again, this testimony is geared towards showing that he will be an excellent lawyer as he meets the competent standards, has ethical standards, etc.
  + “When Mr. P. applied to our legal firm he was interviewed by Paul B. and myself. Both of us were impressed by his academic record and he seemed to have interests and skills suited to our practice. When we offered him the position but before he accepted Mr. P. without hesitation informed us about this criminal record and he invited us to make as many inquiries as were necessary before confirming whether we wanted him to article with us. Quite frankly both Paul and I shared some anxious moments before deciding to trust our instincts and confirm his offer. Our anxiety was dispelled once Mr. P.'s articles with our firm began … I am of the opinion that given the difficulties five years ago, Mr. P. is completely rehabilitated.”
    - Saying completely rehabilitated is quite the statement..
  + There was also other evidence- psychiatrist, woman he was living with, etc.
* **Assessment of Mr. P’s Evidence:** 
  + “As Dr. Marshall observed, a pedophile realizes that it is to his advantage to say ‘I feel remorse and I'm disturbed. I know now that this is harmful behaviour.’ For Mr. P. the motivation to express remorse is very great, indeed: His admission to the Society turns on whether or not the Committee accepts his statement as true.
  + In all the circumstances, the Committee is not satisfied on the balance of probabilities that the applicant's expressions of remorse arise from a genuine regret for the manifest harm he has done to the infant victims. Nor in all the circumstances does the Committee believe that he understands his pedophilic activities to be morally reprehensible.”
  + “Mr. P.'s overall deportment throughout these proceedings is relevant to the Committee's assessment of his credibility. When pressed about whether or not he believed that his actions had caused harm to his young victims, he was defensive and evasive. He gave his evidence listlessly, in monotone, except when he spoke about his desire to practice law. Then he spoke with emotion, with conviction. By contrast, he seemed somewhat indifferent to whether or not he had done harm to the children. It had not occurred to him, he said, to compensate or to suggest compensation for either of his victims.”
    - He seemed indifferent as to whether or not he harmed the children
  + “Overall, the Committee is left with the unsettling perception of a man at once intelligent, articulate, manipulative and prone to intellectual rationalization of his past misconduct. The Committee is not satisfied on the balance of probabilities that this applicant has truly reflected upon and altered the moral code and structure of beliefs which led or allowed him to act out his predatory assaults upon the children. His personal, non-conforming views on the significance of sexual relations with children, ironically reinforced by his educational background in the teachings of ethics and philosophy, do not, to the Committee, seem to have truly changed in the aftermath of his arrest and conviction. The Committee believes, in spite of his evidence, that he continues to rationalize his actions.”
    - He does not presently have remorse- didn’t convince the committee that he is now a person of good character
* **Side Note:** He took his own life – but that is not something the law society considers in these decisions

## Goals of the Good Character Requirement:

1. Protect lawyer’s future clients
   1. i.e. working with children – can’t be called to the bar with restriction on whom you can interact with, practice with, represent etc.
2. Maintain respect for the administration of justice
   1. Enhance the public opinion of the bar – must be seen to be admitting only those of a high standard of good character

Must ask whether both of these requirements would be achieved if allowing someone to enter the bar.

### Re D’Souza [2002]

**Facts:** D’Souza now practices in Ontario – this was before second hearing. You can get a second chance, if you fail good character hearing you can come back!

* + Had a Master in law from India and practiced there, but had to complete courses at U of T to be qualified in Canada; she received B,C+,D grades; she applied to Torys, was rejected but she got a job at Korman and both articled and ran a legal document management company on the side; got a job at Torys doing non-law work in document management
  + Torys said she should complete articles at Torys; so she agreed to sign over and the lawyers got in touch with HR/Student coordinator to get started
  + She had to re-send in her transcripts, and they saw that the grades were altered (changed D to B)
  + Torys wouldn’t hire her, and they informed law society on character issue
  + Articling principle at Mitchell Korman said she was a person of good character; he said she was saddened that she went behind his back to get another job, but said she was a good person still
  + She said it was an accident; she said she wrote the grade she thought she deserved and kept it for herself, didn’t mean to give to anyone; she said she intended to appeal her grade; but never did

**Issue:**  Should D’Souza be admitted to the bar? (at the time of her hearing, is she a person of good character?)

**Ratio:** **Concepts of remorse + time can aid in good character hearing**

**Decision:** failed the character hearing on first attempt, but time became a factor

* + Timing element – Dishonesty at the time of good character hearing (they believe she gave false testimony at time of first hearing)
  + Note that candidates denied admission based on the Good Character Requirement can apply again in the future
* “*As much as individuals we can forgive and understand, our unhappy task is to assess good character at the present time. We are not satisfied that this applicant currently has the character requisite for admission to the bar. At a later time she may well be able to bring evidence that would satisfy a panel.”*
  + She got admitted to the bar eventually, but was not deemed a person of good character at time of first hearing – later on, she expressed remorse, admitted her story wasn’t defensible, and law society determined that enough time

### LSUC v Aidan Christine Burgess [2006]

**Facts:** Queen’s student, got a job at Oslers, she was convicted in an instance of academic dishonesty, in plagiarism

* + She filled out revised for, explaining in undergrad two course asked similar questions in essay assignment, and she wrote one essay and submitted them for both courses (self-plagiarism)
  + She lied, U of T said she stole someone’s paper – she lied in her explanation
  + LSUC asked why she lied, and she said I felt like if you knew you would not call me to the bar
  + People she got reference letters from found out the new story, and said that’s saddening but still she’s a person of good character; she expressed remorse at the last minute

**Issue:** Does her conduct demonstrate she is of good character?

**Ratio: Passage of time is a critical indicator of good character** - “*the relevant test is not whether there is too great of a risk of future abuse by the applicant of the public trust, but whether the applicant has established her good character at the hearing.*”

**Decision:** was not admitted to the bar

* + The best predictor of future behavior is past behavior? Economics concept- does this apply?
  + This isn’t the case in the law society- seems to be financial problems driven
  + Does this case impact the public?
    - We are talking about right now, at the time of application
    - Burden of proof is on the application, through her evidence, which was a lie
    - Law society said not enough time has passed for her
    - Remorse isn’t sufficient – need appropriate passage of time

**Remorse + Time = Good Character and ultimately Call to the Bar**; is remorse to easy to gain in the law society?

It is probably better to just be honest with the law society and give them your genuine feelings about that act now (what hurt her here is that she was dishonest basically up to the time of the hearing)

* + Most recent evidence we have is you have recently lied, so not enough passage of time
  + **Need to be person of good character, showing remorse for what you had done, and sometimes there is an element of time that is factored in and how recent it has been**

### LSUC v Sharon Ellen Short [2006]

**Facts:** Osgoode student (50 years old) case (1998), before she went to law school her daughter died; nurses charged with homicide, was supposed to be overdose of morphine; ongoing investigation while she was in law school

* + She handed over all medical reports, except one saying that her daughter was fine just needed psychological help; she shredded this document (suppression of evidence)
  + Criminal charges against the nurses had to be dropped (she stopped prosecution based on her actions, basically); she completed character form, saying that she destructed evidence in her daughter’s case, wanted to preserve her daughter’s memory; said she couldn’t forgive herself for it – asked to be called to the bar even though she said she didn’t deserve it (this was in 2001ish)
  + Very serious issue, destruction of evidence in ongoing matter

**Issue:** Should she be admitted to the bar?

**Ratio: Serious remorse and passage of time can result in good character**

**Decision:** She was called to the bar and declared person of good character

* + (1) Heartfelt remorse for past instances of bad character appears to be the most effective tool for demonstrating good character
  + (2) Law Society does not have to condone your actions for you to be accepted to the bar “we do not condone what the applicant did. It was a wrong of the most serious kind” (152)
  + (3) Do not make excuses: they seem to like the fact that she didn’t make excuses – the strategy of not defending your behaviour does seem to be a much more convincing then excuses
    - She says that there is no excuse for what she did; she didn’t even talk about her daughters memory until it came out in cross-examination
    - Fact that remorse was genuine and heartfelt was important likely why it was accepted

**Reasons for Decision:**

* + “We do not condone what the applicant did. It was a wrong of the most serious kind. The suppression of evidence in a serious criminal proceeding with the knowledge that it should have been disclosed and with the knowledge that the defence, however mistakenly, thought the document was relevant to their case, is grave conduct. The suppression of evidence is a perversion of the administration of justice and the rule of law. The consequences of such misconduct can be catastrophic, resulting in the wrongful conviction of an innocent person, and in this case, the consequences were severe in that serious criminal charges were lost, in part, because of the applicant's failure to disclose the evidence.”
  + “She has without reservation showed great remorse and shame for her actions. That remorse was genuine and heartfelt. In her evidence, she clearly, eloquently, and without qualification stated that her actions were wrong. Even when some of her character witnesses offered excuses for her wrong, she made none. We accept her evidence that she came forward to admit her wrongdoing and set the matter right for one reason—because it was wrong. The applicant clearly appreciated the effects of her wrongdoing, its negative impact on the administration of justice, and the destruction of her own credibility at the time. That she came forward in the circumstances that she did, despite the great costs of doing so, is evidence of her good character.”
    - She didn’t at all try to justify what she did- she owned her behaviour (because she knew it was wrong!)

### LSUC v James Maurice Melnick [2013] – THE CASE OF GOOD CHARACTER IN CANADA

**Overview:** The case of good character in Canada

**Facts:** Western student, Grade 7/8 teacher beforehand befriended 12-year-old child; friend of him and wife, soon there was emails and sexual fantasies over the summer; sexual touching when the child was 14 and Melnick was 30

* + Spend night of hotel; he was charged with abduction then dropped and charged with luring and sexual exploitation of underage person (this was in 2005)
  + Fired as a teacher and license to teach was revoked- IMPORTANT
  + Pled guilty of charges, and during sentencing was admitted to law school (did not disclose this); calls dean and asked if you can defer admission during prison sentence; this was said to be fine and he went to Western
  + People who knew him said he was a good guy and worked hard
  + He wanted reference letters for articling jobs for character references, and told faculty what he did
  + They wrote references about their knowledge of him; he was hired at CLS here
  + Required to have good character hearing (2009 – 5 years from sexual offences)
  + At time of good character hearings, he said he wasn’t seeing himself as adult; he saw himself as a 16-year-old and was trying to help the young person; wife stood by him throughout;

**Issue:** Should he be called to the bar? [Can’t be a teacher but can be a lawyer?]

**Ratio:** **Serious remorse and passage of time are the leading requirements for good character**

* + “Despite the obvious attention that the hearing panel gave to this matter, it made findings that were unsupportable by the evidence. If one sets aside the unreasonable findings, the evidence overwhelmingly supports a finding that the appellant is now of good character.”

**Decision:** Initial decision said he wasn’t of good character but the decision was overturned and now he is called (Convocation overturned the prior hearing, declaring him eligible to be called to the Bar)

* + Doctor said no chance of re-offending, many other people do
  + Melnik appeals to judgement of convocation, and they say the hearing below suppressed certain points of evidence (legally allowed to challenge evidence) – and they overturned the decision and now he is a lawyer
  + Focus on express remorse and the process is broken
  + Graham’s submission to federation – the law society is not good at good character determinations; evidence is often suspect; measure based on remorse is too “gameable” and out of fairness to offenders need to have a list of things that you can’t do (i.e. offences) that you won’t be called to the bar for
  + Leading cases right now, ***Shore*** and ***Melnick*** 🡪 expression of remorse and passage of time are still requirements

## Reforming The Rule

**Establishing National Good Character Standards –**

* The Federation of Law Societies of Canada is undertaking a major initiative on behalf of law societies to develop national standards for admission to the legal profession. The development and implementation of a common standard for ensuring that applicants meet the requirement to be of good character, including the identification of appropriate methods for assessing whether applicants meet the standards, is a major part of that work.
* A working group of policy and credentialing staff from law societies across Canada has been tasked with developing a standard for approval by the Federation Council and consideration and adoption by the law societies.
* The working group has prepared a consultation report to solicit input on the issues it has considered and its preliminary views on the content of the good character/suitability to practise standard. It is available on the Federation's website.

Civility Regulation

Civility in general, seems to relate to how we treat each other, our clients and the courts.

How lawyers in firms treat each other:

* The way in which we treat each other has continued to shift over the years – if we think of a ‘golden age of civility’ in the past it would be in reference to a specific population vs. everyone treating everyone civil
* As a society we are doing a better job than we used to at treat each other equitably and addressing the ways in which we aren’t
* There are rules under the federation of law societies code of conduct

**Section 6.3-3 –** A lawyer must not sexually harass any person

**Section 6.3-4** – A lawyer must not engage in any other form of harassment of any person

**Section 6.3-5** – A lawyer must not discriminate against any person

**Commentary [1]** A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and specifically to honour the obligations enumerated in human rights laws

* But when talking about civility, are we talking about manners? And, if we are is than an area that demands regulatory influence and governance?

## Sources:

1. **Contempt of Court**

**Criminal Code of Canada, s.9** Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730

(a) of an offence at common law,

(b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

(c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or provincial court judge had, immediately before April 1, 1955, to impose punishment for contempt of court.

* This is the section that eliminates common law crime – but it carves out an exception for contempt of court
  + Is the judge finds that any one in court the judge has broad contempt powers and orders to eliminate the prohibitive behaviour & impact on de-railing the proceedings
  + Power of the court to control its own process
* Provides the backdrop for civility
  + Usually applies in the face of court – important because the rules relating to civility are more broad in the environments that they protect

1. **The Rules of Civility**

**FLSC Code, Rule 5.1-5:**

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

**Commentary**

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

* + Even if conduct hasn’t led to judge punishing, the Law Society may punish (if they have discovered/ investigated behaviour and seen a pattern of violating this rule)
  + Violation can constitute professional misconduct, giving rise to sanctions in s 35

**FLSC Code, Rule 7.2-1:**

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

**Commentary**

**[1]** The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly.

* + Provides justification for civility, suggesting it is tied to efficiency and functionality
  + Absence will impair ability to act in a civil manner
  + Interesting assertion

**[2]** Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgment to be clouded by emotional factors and hinder the proper resolution of the matter. Personal remarks or personally abusive tactics interfere with the orderly administration of justice and have no place in our legal system.

* + Again, a claim being made that there is an interference of the administration of justice

**[3]** A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer.

**[4]** A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client.

**FLSC Code, Rule 7.2-4:**

* A lawyer must not, in the course of a professional practice, send correspondence or otherwise communicate to a client, another lawyer or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.
  + Specifically aimed at communication and a more specific instance of the rules above

**FLSC Code, Rule 3.2-1** (under the heading “Quality of Service”):

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

**Overview & Tension with Other Rules**

* These rules comprise the overarching duty of civility
* Provide challenge from statutory interpretation standard
  + Courteous and civil are differentiated from one another
  + This suggests each mean something different from the other
  + But based on the limited case law we have, unlikely that this is actually the case because the two both equate to the same subject matter -
    - Seems that civility = courteous, and we are talking about manners
    - Every allegation of incivility is with regard to manners
* Politeness is the manner of presentation rather than the substance, so Graham finds this confusing
  + Note: Lawyer politeness is not the same as ‘regular’ politeness
  + Regular is typically the manner of presentation whereas lawyers are asked to act in a way that may be interpreted as incredibly rude outside the context of the profession

**Commentary [1] to Rule 5.1-1:**

Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer’s duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties’ right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

* + Bold assertion: order is maintained
  + Distinction between asking distasteful questions/ arguments and conducting self with candor, fairness, courtesy, and respect
    - Is it possible to be respectful when asserting that someone is rapist or a murderer
  + How do these duties measure up against each other? Should there be a hierarchy

## The “Indeterminancy Objection”

* If civility is suffused with indeterminacy that it provides little or no guidance, maybe it is time to get rid of the rule
  + Should there be a difference in civility or deference in respect between young and old etc.
  + It shouldn’t be left for tribunal manipulation in order to carry with it whatever weight or interpretation that the tribunal wants
* Should also think of the cost of incivility and the cost of correcting it

## The Regulatory Model

* One important element is the cost of enforcement – in practice these always need to be considered
  + i.e. preventing all the murders by having police officers outside every single house – but if we did these we would no longer be able to have hospitals etc.
  + The create an opportunity cost that prevent us from achieving other social goals
* We should only take cost justified regulatory measures – should only regulate activities that impose costs on the world but only where the costs do not exceed the benefits

## Costs of inCivility

* Court Efficiency
  + If lawyers are rude, then justice will be less efficient and we won’t be as effective in our duties, will take longer for the ‘wheels of justice’ to turn
* Reputation of the administration of justice
  + If the public observes lawyers being rude without punishment, the public will have less respect for the justice system
  + May result in people using other means in order to recover their rights than trusting in the legal system
* Hurt feelings
  + Feeling bad matters- if people are treated horribly by one another, that makes the profession less attractive and will drive individuals to a ‘less adversarial’ profession
  + People who don’t have thick enough skin may avoid a profession or people in their office because of fear of rudeness
* Might deter good people from becoming lawyers, thereby lowering the calibre of person willing to become a lawyer (and therefore the overall ‘morality’ of the legal profession)
* Incorrect verdicts: sometimes, “incivility” can prevent valid claims from going forward
  + Ex. Marie Henein prepping for Sexual assault cases – being overly aggressive may cause truthful complainants to not come forward out of fear of being ‘attacked’

## Costs of Enforcement

* Law Society and Court resources that could be spent on other matters (for example, pursuing people who defraud their clients) – less money is available to pursue other matters
  + If we are spending lots of resources on civility regulation, we cannot spend those same dollars elsewhere
  + i.e. lawyers who defraud clients – less money would be available to sure other matter or hire more judges, or other social justice projects
* We might deter socially useful activities “chilling effect” – what if Marie Henein’s actions are appropriate in a given case, such that she exposes a false accusation (or one in which the complainant is simply wrong about the identity of the perpetrator)? What if the only way to achieve justice for your client is to rattle the opposition?
  + If counsel are unsure about civility regulation and fear prosecution, they may not press witnesses as far as they should or soften examination which could again, lead to inaccurate verdicts
* Expensive proceedings (paid for by tax dollars or lawyers’ annual law society fees – money which could be deployed in other ways)
  + By law society or by lawyer
  + But who cares?
    - A lawyer should pay if he/she ‘infringes’ but this has the trickle-down effect, raise fees, etc.
    - Costs imposed on lawyers can be worn by other people like his staff and clients which means that people may have less access to representation, lose their jobs etc.

## Incivility

Is this the sort of ‘behaviour’ that ought to be regulated? To what extent does the behaviour go too far and where is it just part of the legal process and interactions surrounding the profession – where does it rise to other level that we need to combat such negative behaviour?

* Calling another lawyer an idiot
  + Context obviously matters – friendly banter or a career limiting move?
* Calling a fellow law student an idiot
* A law professor calling a judge an idiot during a lecture at which the judge isn’t present
* During negotiations at which clients and opposing counsel are present, suggesting that the document opposing counsel has drafted is “the sort of garbage I wouldn’t even expect from a summer student at your firm”
  + Calling into question competence in front of clients – is this rude enough or should we just expect this behaviour as part of the process
* During discussions with opposing counsel (at which your clients are present), suggesting that opposing counsel has a history of incompetence or unethical behaviour
  + Undermine clients confidence by making assertions when you know that they are not incompetent
* Sexual harassment
* During a trial, accusing the judge of participating in some form of criminal behaviour (such as fraud, treason, or illegal exercise of jurisdiction)

We have limited jurisprudence on civility but *LSUC v Clark* and *LSUC v Groia* provide some guidance.

### LSUC v Clark [1995] LSDD

**Overview & Facts:** Law society decided in 1999 to disbar Clark because of his ungovernable behaviour. Clark devoted his life to the study of rights of indigenous persons and the legal implications. In essence, Clark believed that a great deal of land was never properly turned over to government and contends that the indigenous people living on the land are not subject to Canadian law and its governance structures. Further, the assertion the jurisdiction over aboriginal people has amounted to complicity in genocide – which is an assertion according to Clark where there is no jurisdictional power.

* + Clark made this argument repeatedly and all the time they would ask him to sit and he wouldn’t; he would yell, threw papers at the clerk and said file this, in front of judge
  + BC Court of Appeal refused to hear his arguments, so he attempted to arrest the judge for genocide
  + He was widely known for outlandish arguments and character- basically he has a reputation for this
  + Clark actually believed his arguments; was charged with professional misconduct
    - Was “incivility” rising to level of “un-governability” so sought disbarment
  + During oral argument he would regularly accuse judges of genocide & attempt a citizen arrest on judges in BCCA
    - This sort of behaviour was frequently employed by Clark and led to a lot of complaints

**Complaints against Clark:**

In an affidavit which he swore, dated February 2, 1993, he alleged that:

1. The Attorney General of Ontario was a party to a fraud with respect to concealing relevant evidence from appellate courts, and alleged that the Attorney General of Canada was probably also a party to this fraud;
2. Chief Gary Potts fraudulently, treasonably and genocidally induced the Supreme Court of Canada to render a decision pursuant to a treaty that is demonstrably void; and
3. The leaders of the Aboriginal entities who caused a Notice of Change of Solicitors to be delivered by Blake, Cassels and Graydon on February 24, 1993, did so in an attempt to further their fraud, treason and complicity in genocide.

In an affidavit which he swore, dated March 15, 1993, he:

1. implicitly suggested that a decision made by the Honourable Mr. Justice Bolan of Ontario earlier in said litigation might constitute complicity in the crimes of fraud, treason and genocide;
2. alleged that The Honourable Mr. Justice Bolan wilfully blinded himself to precedents, statutes and facts; and
3. further alleged that The Honourable Mr. Justice Bolan's refusal to address the precedents, statutes and facts … proved his own criminal liability.

In an affidavit which he swore, dated April 20, 1993, he:

1. alleged that the Attorney General of Canada and the provinces and the judges of the courts of Canada wish to evade the questions as to whether Aboriginal courts have jurisdiction over land;
2. accused the Attorney General of Ontario of abuse of process and of invoking a criminally illegitimate aspect of non-native court jurisdiction;
3. alleged that the Attorney General had resorted to chicanery and is guilty of complicity in fraud, treason and genocide and of aiding and abetting the continuation of crimes;
4. accused The Honourable Mr. Justice Huneault of escaping with his genocidal usurped jurisdiction intact in dealing with a previous motion in the litigation;
5. alleged that the Attorney General had fraudulently breached an agreement with counsel for the Aboriginal entities;
6. accused Chief Potts and Rita O'Sullivan (the solicitor's former clients) of participating in a system of patronage and bribery;
7. accused the Attorney General of Ontario and Canada, as well as unspecified judges, of being guilty of fraud, treason and genocide;
8. accused The Honourable Mr. Justice Steele of Ontario and the Honourable Chief Justice McEachern of British Columbia of racist attitudes which are fraudulent and treasonable and amount to genocide;
9. accused the Attorney General of sharp practice and chicanery and of being engaged in a criminal conspiracy on a national scale to pre-empt the law in furtherance of the crimes of fraud, treason and genocide;
10. accused the Attorney General of cunning chicanery;
11. accused the Attorney General of sharp practice and chicanery and accused the Canadian domestic courts of racism;
12. accused the Attorney General of concealing relevant evidence from appeal courts; and
13. accused The Honourable Mr. Justice Loukidelis of Ontario of judicial complicity in the Attorney General's chicanery.

He made allegations similar to … above, while making oral arguments before The Honourable Mr. Justice Hineault on March 19, 1993.When appearing before The Honourable Mr. Justice Roberts of Ontario on June 1, 1993, he …refused a direct order from The Honourable Mr. Justice Roberts to cease argument on this point and to sit down; accused The Honourable Mr. Justice Roberts of perpetuating fraud, treason and genocide; accused The Honourable Mr. Justice Roberts of wilful blindness; stated that he intended to lay an information against Mr. Justice Roberts forthwith; alleged that The Honourable Mr. Justice Roberts was afraid to charge the solicitor with contempt; and stated that he was going to attempt to lay an information against The Honourable Mr. Justice Roberts for complicity in fraud, treason and genocide.

1. By engaging in the course of conduct referred to above, he demonstrated his unwillingness to be governed by the Law Society or its Rules and Regulations.
2. On or about June 6, 1993 in Haileybury, Ontario, the solicitor unlawfully assaulted a member of the Ontario Provincial Police.
3. On or about June 6, 1993, the solicitor unlawfully trespassed upon certain property in Haileybury, Ontario, in an unjustified and illegal attempt to carry out a citizen's arrest of one James Morrison. …
4. The discipline hearing panel found all of the 21 allegations quoted above to have been established.

**Result**: Hearing panel recommends disbarment, is recommendation as carried forward to Convocation as an ungovernable lawyer and should be denied the privilege to practice law

* Did he act with civility? IS he deserving of the punishment recommended by the hearing panel?
* Recall rule 5.1-5: A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings

**Issue:** Should Clark be disbarred? Was he uncivil? Did he act with integrity?

**Ratio:**

* + **(1) The substance of your argument will affect how “uncivil” you are allowed to act**
  + **(2) They place a high value on whether you sincerely hold belief in your argument**
  + **(3) Law society must strike balance between regulating civility and oppressing lawyer’s advocacy**

**Decision:** Disbarment was overturned, but case would likely have been decided differently today (was 1995)

* Questions Asked:Did Clark act with civility? Is he deserving of the punishment recommended by the Hearing Panel?
  + Recall rule 5. 1-5: A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.
* Not “ungovernable”
* Attempted Citizen’s arrest of the BCCA “caused only a minor disruption.”
* Assault and trespass were “technical” and “momentary”, “No harm was done.”
* His License was reinstated
* The actions above still qualify as professional misconduct
* Appropriate penalty: reprimand (requested to appear before Convocation, being told his conduct was not appropriate, he refused to attend, so they ‘left him a voicemail’)
* He continued to engage in this behaviour
* “We approach the merits of these complaints by placing great importance on the context in which these arguments are made … . As mentioned above, the discipline hearing panel acknowledged that Mr. Clark's argument (as summarized above) is at the root of the complaint of professional misconduct that the discipline hearing panel and Convocation have been called upon to adjudicate. Mr. Clark's argument is anything but frivolous. It is the product of intensive study, and reflects a belief that Mr. Clark sincerely holds.”
  + Why do we care if he sincerely holds the view? In the context of civility regulation, we care – law society may treat you differently – if you are engaging in ostensibly behaviour while making an argument the law society cares vs. when you are genuinely believing in the argument that you make
* “It would be difficult to disagree with Mr. Clark's assertion that the issue that his argument raises is "constitutionally critical." Again, the discipline hearing panel found that Mr. Clark honestly believes that the comments and conduct particularized in the complaint—which are an outgrowth of his argument—were intended to advance the cause of justice and the rule of law. The "genocide" of which Mr. Clark speaks is real, and has very nearly succeeded in destroying the Native Canadian community that flourished here when European settlers arrived. No one who has seen many of our modern First Nation communities can remain untouched by this reality.”
* “**Had this activity been engendered in a context less fraught with significance and emotion, we would take a very different view of Mr. Clark's conduct**. **The nature of Mr. Clark's argument is such that the persistent refusal of the Courts—he states, without contradiction, that he has attempted to raise this argument some forty or forty-one times—itself in part engenders his fixed and firm conclusion that his argument is correct**. The issue has not been determined by any Court. It is clear to us that the solicitor has been captured by this argument.”
  + The ‘topic’/context is relevant
  + He wasn’t given the ‘ability’ to advance his arguments
* “It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. …” J Cory, Edmonton Journal Case
* “The Law Society should be loath, in professional discipline proceedings, to become the arbiter of lawyers' advocacy techniques. Styles of advocacy vary greatly, and the effectiveness of any particular style is not a matter for Convocation to pronounce on in the context of an allegation of professional misconduct. … There is no necessary conflict between [the rules of civility] and lawyers' duties to represent their clients "resolutely" … "to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defense authorized by law" … and "to protect the client as far as possible from being convicted except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged".
  + They don’t want the law society to use professional discipline proceedings to become the arbiters of advocacy techniques
  + Characterizing what he was doing as ‘style of advocacy’ (super questionable)
* “The Law Society must always be acutely sensitive to the danger that its disciplinary process may be used to punish vigorous advocacy. The Law Society should act aggressively to protect counsel from attempts to inhibit zealous advocacy on behalf of clients. This duty flows from the Society's responsibility—confirmed in the role statement approved by Convocation—to protect the independence of the bar. It is important to our decision that the use of what would in most other circumstances rightly be regarded as extravagant, disrespectful and discourteous language, in Mr. Clark's case emanated directly from the legal argument that he was vigorously advancing on behalf of his clients. In attempting to resolve the tension between vigorous advocacy in the face of judicial resistance and the duty to treat the tribunal with courtesy and respect, much will depend on the context.” “We are sympathetic, moreover, to Mr. Clark's assertion that the courts have been unwilling to listen to his argument. Though he must accept part of the responsibility for this, it is apparent on the record that he has been prevented by the courts on a number of the occasions in issue from effectively presenting the argument summarized above.”
* “The lawyer's duty to resolutely advance every argument the lawyer thinks will help the client's case is of fundamental importance to the proper functioning of our judicial system. Failures to carry out that duty are more prevalent within the system of justice and more harmful to that system than are overzealousness and failures to treat the courts with courtesy and respect. Where the duties do come into conflict, Convocation should be reluctant to find that overzealousness constitutes professional misconduct.”
  + They are Endorsing a hierarchy of duties for lawyers: zealously represent > being courteous to the courts

### LSUC v Groia [2013] – Leading Case on Civility from ONCA Waiting from SCC

**Overview:** This is not a reprimand case -

**Facts:** Groia (lawyer)- Allegations of professional misconduct for uncivil and unprofessional courtroom submissions and statements during the trial of *R v Felderhof* on quasi-criminal charges under the *Securities Act* (this is the Briex case, and it was one of the largest securities frauds in Canadian history; John Felderhof was VP of Briex)

* OSC faced with largest fraud in history and wanted someone to prosecute; fraud wasn’t proven so they tried to prosecute using insider trading (this is just like fraud, still jail time) 🡪 Groia won, but we are looking at whether his actions to get there were civil
* Groia alleged to state the OSC was using an “unfair trap” and “convict at all costs approach” (basically alleging that the OSC was conducting an unfair prosecution, but had no evidence to support this)
* Groia said OSC (Mr. Naster) was lazy, unprofessional, dishonest; throughout trial he would accuse prosecution of using “conviction filter” and “misconduct” and challenging every piece of evidence
* Naster wanted Groia to prove the allegations, but Groia would say haven’t fully put together evidence
* OSC requested that judge make a ruling on the unprofessional nature of Groia but it declined, Naster tried to get judge removed due to handling of proceedings
* OSC brought motion saying judge had lost control of trial; “lost jurisdiction” of trial; they said no; Naster wanted judicial review of this decision – went to ON CA
* Groia won the case, and Felderhof was acquitted
* Naster brought complaint to LSUC, Groia was alleged to have violated Rules of Professional Conduct for attacks on OSC (i.e. for accusing them of prosecutorial misconduct and ability for Naster to present case)
* Original decision 2-month suspension for Groia for lacking civility; ordered costs in the amount of $246k
  + “On March 1, 2001, Day 54 of the trial, Mr. Groia submitted that he had … concluded that the prosecution's position … offended the principle that the duty of the prosecutor is not to seek a conviction. … Mr. Groia submitted that the examination-in-chief of Mr. Francisco had been "conducted in a manner intended to secure a conviction, not to tell the whole story."17 He repeatedly suggested that the prosecution was using a 'conviction filter' (discussed in more detail below) in the presentation of its evidence and that the prosecution, by failing to adduce defence evidence, was laying 'an unfair trap' for the defence consistent only with a 'convict at all costs' approach to the case.”
  + “Mr. Groia then submitted that the OSC had "demonstrated an actual disregard for the dignity of these proceedings …” … He also suggested that Mr. Naster's (counsel for OSC) conduct might form the basis for a finding of contempt of court.”
* Called Naster a liar, suggested he didn’t care about the truth but wanted a conviction, said he was the ‘government’ guided by a conviction filter (🡨 super nasty to say to prosecutor)

**Descriptions of Behaviour**

* “In his reasons, the application judge has set out many examples of Mr. Groia's conduct in the trial. The application judge described this conduct in some of the following ways:
* *"unrestrained invective" … "excessive rhetoric“ … "descended from legal argument to irony to sarcasm to petulant invective“ … “theatrical excess reach[ing] new heights” … “resemble[ing] guerilla theatre [rather] than advocacy in court“ … "unrestrained repetition of ... sarcastic attacks“ … "defence consist[ing] largely of attacks on the prosecution, including attacks on the prosecutor's integrity.”*

**Issue:** Did Groia act in an uncivil manner and engage in professional misconduct, if so when did he cross the line?

* Does it matter that his conduct was “successful”, in the sense that he won the case?
* To what extent can defense counsel impugn integrity of opposing counsel and to what extent did that occur?
* Should there be a penalty? If so, what? When addressing this issue, consider the fact that costs in this case (thus far) have already amounted to over $200,000, and Groia will be forced to bear these if he loses.

**Ratio:** **Allegations of professional misconduct that impugn integrity of opposing counsel unless they are both made in good faith and have a reasonable basis**

* + **Look at whether isolated event or pattern of behaviour**
  + **Looks to whether the accused was provoked**
  + **Looks at remorse during sentencing to determine whether**
  + **Looks at prior discipline record during sentencing as well as public nature of misconduct having an impact on Groia’s career**

**Decision** (pg 185)

* “Taken as a whole, the submissions we have excerpted can best be described as a relentless personal attack on the integrity and the *bona fides* of the prosecutors. It is important to emphasize that the examples we have selected provide some flavour, but it is difficult to convey the cumulative effect of the unabated repetition over the course of 10 hearing days of Mr. Groia's vehement and very lengthy attacks on the prosecutors. These attacks were personal in nature. In Mr. Groia's testimony before the hearing panel, he suggested that he never attacked the prosecutors, but merely the way in which the prosecution was being handled by the OSC. We disagree. Some of these comments taken in isolation could arguably be seen as directed at the OSC or the Crown, not the individuals who were representing it in court. Taken together, in context, over the course of this lengthy trial, it is very clear that they were decidedly personal.”
* “These attacks were aimed at the integrity of the prosecutors, by repeatedly asserting that they had broken their 'promises' and could not be relied on to do what they represented to the court and were, in a word, untrustworthy. These attacks also included numerous allegations of deliberate prosecutorial misconduct: that the prosecutors intended to 'win at all costs', that their conduct offended the ethical principle that the duty of the Crown is not to seek a conviction, that they were deliberately putting the evidence through a 'conviction filter', and, most troubling, that they were intentionally acting so as to ensure that Mr. Felderhof did not obtain a fair trial. Nothing the prosecutors did justified this onslaught. These attacks on their integrity and *bona fides* did not have a reasonable basis.”
* “We have little sympathy for Mr. Groia's arguments regarding the 'civility movement' and the supposed retroactive application of a higher standard to his conduct. As outlined earlier, the rules of professional conduct at the time leading up to the trial, contained clear rules regarding a lawyer's obligation to avoid "ill-considered or uninformed criticism of the competence, conduct, advice or charges of other legal practitioners.”
  + Groia brought in people to testify to the alleged fact that they were getting unduly interested in civility (‘the civility movement’). Wohley was called in as an ‘expert’ and that with this rise in expectation of civility is retroactive application of civility rules
  + Court said this is not retroactive

**Held:** He engaged in professional misconduct, violating the rules of civility subject to penalties – one-month suspension (not reprimand like Clark)

* “Finally, Mr. Groia's position that any obligation of civility had to yield to his primary duty of zealous advocacy towards his client is misplaced. In the context of this trial, zealous advocacy did not require Mr. Groia to make unfounded allegations of prosecutorial misconduct. Zealous advocacy did not dictate that Mr. Groia improperly impugn the integrity of his opponents. Zealous advocacy did not require Mr. Groia to frequently resort to invective in describing opponents who were trying to do their jobs. In conclusion, on the basis of the record, which we were invited by both parties to independently examine, we are satisfied that Mr. Groia engaged in professional misconduct as alleged.”
* “In our view, taking into account all the relevant factors, this is not a reprimand case. Rather, we conclude that a one-month suspension is justified and appropriate in light of the relevant factors. This suspension shall commence 30 days after the release of the appeal panel's order with respect to costs.”

**Notes:** In this case, clearly advocacy styles were in play – was appealed to ONCA (below)

## Should we regulate?

Should we Regulation Watch: <https://www.youtube.com/watch?v=PgkiMvMuVCg> (they argued for side they didn’t believe in)

* What are the benefits of regulating civility?
* What are the costs?
* Do courts have adequate tools, through the contempt power, to deal with incivility?
* What about incivility outside of the courtroom?
* Are “reputational costs” enough?
* What should Law Societies do?
* Think about these questions while watching Western Law’s “Civility Debates”:

Conflicts [1] – Introduction to Conflicts

Most complicated and technical part of the course as a result of its Inherent complexity in rules and regulations and have given rise to litigation in recent years

Comes from two primary resources: **A. The Courts B. The Law Societies**

* 1. Regulated by Courts (via private law disputes and the courts’ inherent jurisdiction)
     + Lawyer acting in way that gives rise to dispute
     + Inherent jurisdiction- power to control process and the people who can appear in court and serve a representative function
       - Ensure council appearing before the court do not have a conflict of interest
       - Courts reserve the right to remove any counsel if they believe that they may be operating under conflict of interest
  2. Regulated by Law Societies (through professional conduct rules)
     + Recall relationship to s 33 of the Law Society Act (Ontario)
       - Finding of professional misconduct leads to punishment
     + Law societies have adopted judicial language and definitions when it comes to conflicts & rules of professional misconduct have been amended to reflect SCC language

## Duty of Loyalty

* Root of conflict of interest is often rooted in broader duty of loyalty
  + A lawyer has a fiduciary duty to put his/her client first
  + Lawyers owe clients loyalty and part of this loyalty is for the lawyer to avoid conflicts of interests
  + Generally flow from competing loyalties
    - Between two different clients
    - Between a client and some third party, or
    - Between the lawyer’s personal interests and the interests of the client
      * Lawyer asked to argue in favour of a policy they don’t agree with, or represent a corporation that could impact their own financial interests
    - Further Examples at 6.2-4 of Text
* Conflict exists when there is a material impact or conflict- not simply trivial

## Sources: Conflicts of Interest

Rule 1.1-1 of the FLSC Model Code defines “Conflict of Interest” as follows:

* “A “conflict of interest” means the existence of a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person.”
  + - Note: substantial risk, must be materially and adversely affected for a conflict of interest to exist (need this to fit the definition)
    - If there is a situation where there is a risk of this you are at risk of being in conflict
    - Adverse- a negative impact on loyalty or representation to client
    - Material- something that is more than trivial
* This simply provides the definitions for conflicts but does not regulate conflict of interest

Rules 3.4-1 and 3.4-2 of the FLSC Model Code set out the basic rules:

**3.4-1 Duty to Avoid Conflict**- A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

* + Can’t act for a client where this a conflict of interest as explained in rule 1.1-1
  + It is allowed in some situations- where set out in the Code
  + Acknowledges the possibility for acting in the face of certain conflicts of interests

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

* + Practicing in the face of a conflict, provides the broadest outline of conflict
  + Does not match what is in the textbook – the rule has recently be amended because wording in textbook is outdated

Result of interaction between these two rules, if you disclose the conflict of interest to all those involved you cant be found guilty by any regulatory body – but when must such a disclosure be made? What is the threshold?

* The definition in 1.1-1 indicates where a substantial risk is present –

## Neutral Conduit Model

Access to legally authorized rights and remedies despite the complexity of the law:

* In a perfect world every single person would be able to access these legal rights and remedies at any time and for any reason
  + But this is not the case, trying to accomplish or access these legal rights and remedies is very complicated! **So lawyers exist to help lay people overcome this complexity** and overcome the barriers to access legal rights that are provided
    - Nothing but antidotes for complexity
  + **However, this creates an ‘agency conflict’** 
    - The antidote to complexity is a human, and every human has their own ideas, values, practices etc. which can give rise to conflict
      * i.e. sometimes the rights or remedies the clients want may conflict with the thing that the neutral conduits want or believe in
    - **To add to this,** there are more clients than lawyers
      * So what happens when rights and remedies are scarce and multiple clients want to access these scarce resources?
      * **i.e.** Party A wants rights that conflict with Party B – so the lawyer could be serving another clients interests over a different client
    - **Imposes costs on the clients** that wouldn’t be there if they could easily access the legal system without a neutral conduit’s assistance
* We try to minimize these agency conflicts by disclosing possible conflicts when necessary
  + And by regulating the conflicts with rules and punishments to prevent certain behaviours like using information provided by client against their best interest

## Duty of Loyalty

* Fiduciary obligations
  + The lawyer owes fiduciary duties to clients- the duty to be loyal, the duty to act in the client’s interest even when the lawyer may be inclined to subordinate those interest to their own or to another client’s
* Recall **Szarfer v Chodos**
  + Where use of confidential information to Client’s detriment
  + **Lawyer cannot ‘damage’ client, and will need to pay to make up for deviation from fiduciary duty**
  + Result of disloyalty= damages
* Specialized use of the word “loyalty” in the lawyer’s context
  + Paradox: lawyer happy when guilty Client gets sentenced but still presented strongest argument to help Client at the same time
    - Lawyer seems to be loyal to the client, but is more personally loyal to their own practice of law rather than the client in particular
  + Lots of commentators use loyalty in strict terms
    - Lawyers are always in a conflict of interest position- duty to Clients and a duty to the courts
    - We are opposing parties to a retainer agreement (we want money, they want to pay as little as possible)
* Ways in which we navigate duty of loyalty is important

**FLSC Code: rule 3.4-1, Commentary [5]**

“The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is based on trust. It is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client’s cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests.”

* The duty of loyalty is the broader base from which the other duties are drawn
* Failure to discharge this duty: Must think about the distinguishing features between common law sanctions & Law Society – **However abiding by one set of these sanctions does not necessarily protect you from the other** 
  + Sanctions at common law (breach of fiduciary duty, removal of counsel as record)
  + Sanctions by Law Society (professional misconduct under s 33 of the LSA)
    - Common law and Law Society = different, therefore different sanctions
    - Compliance with one does not mean compliance with the other

## Overview of Common Law Approach to Conflicts

### **MacDonald Estate v Martin [1990] 3 SCR 1235**

**Facts:** Lawsuit called A versus B. A retained a small firm named Twaddle with a few lawyers, and one person there is Kristine Dangerfield (KD, articling student). B represented by Thompson, large firm. Another small firm lures KD away, to Scarth Duley (small litigation firm that everyone likes). Thompson acquires Scarth Duley as well as KD. KD known as ‘plague Mary’.

* Thompson knows KD worked on *A v B* so they say they’ll isolate her from the engagement and have her sign affidavit saying she won’t say anything, and they will have all lawyers at Thompson sign affidavits saying they won’t discuss *A v B* with KD (lying on affidavit is perjury, 14 years in prison)
* Clearly KD cannot act for B in the same *A v B* dispute (Rule 3.4-3 she cannot violate this rule)
* A wanted Thompson removed as a whole, not just KD
* Crux of the issue: confidentiality
* Note that it is an advantage for A to have Thompson removed as counsel because would cost B a lot of money to change counsel and keep them from having big (assumingly good) counsel that knows the file
* Arguments in favour for exclusion:
  + (a) She is young and could be persuaded to act in the best interests of the employer (pleasing employer)
  + (b) Future clients should feel free to share everything, and have confidence in secrecy
* Arguments against:
  + (a) Affidavit was signed

**Issue:** Should the other lawyers from Thompson be disqualified from acting for B in the A versus B matter? Should the whole firm be removed as counsel of record because they hired this ‘plague/typhoid Mary’?

**Ratio:**

* + **(1) Balancing Competing Policy Interests**
    - *“The court is concerned with at least there competing values” (1) the concern to maintain high standards of the legal profession and the integrity of the system of justice (2) a litigant should not be deprived of his or her choice of counsel (3) the desirability of permitting the reasonable mobility in the legal profession”*
  + **(2) Courts have Power to Remove Solicitors** *“The courts have the inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics.”*
  + **(3) The FLSC is NOT binding on the Courts, BUT is PERSUASIVE**
    - *“Their jurisdiction (LSUC) stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. Nonetheless, an expression of professional standing in a code of ethics relating to a matter before the court should be considered an important statement of public policy*”
  + **(4) Appropriate test for conflict of interest in this circumstance (See below)**

**Decision:** SCC excluded KD and Thompson from acting

* + Recall that the Court is exercising its inherent jurisdiction to control counsel of record. The appropriate remedy in these cases (where an impermissible conflict is found) is generally disqualification.

**Reasons for the Decision**

* + “In resolving this issue, the Court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. **Finally, there is the desirability of permitting reasonable mobility in the legal profession.”** 
    - Think about B, B wanted to hire Thompson and should be able to do so
      * Not just punishing Thompson, significantly imposing a cost on party B
    - Firms will be hesitant to hire laterally
  + “Merger, partial merger and the movement of lawyers from one firm to another are familiar features of the modern practice of law. They bring with them the thorny problem of conflicts of interest. When one of these events is planned, consideration must be given to the consequences which will flow from loss of clients through conflicts of interest. To facilitate this process some would urge a slackening of the standard with respect to what constitutes a conflict of interest. In my view, to do so at the present time would serve the interest of neither the public nor the profession.”
    - Signal from SCC: we know it becomes harder to move from firm to firm, but we are not going to lower the standards because it created too great of a cost for clients
  + “Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client. The legal profession has distinguished itself from other professions by the sanctity with which these communications are treated. The law, too, perhaps unduly, has protected solicitor and client exchanges while denying the same protection to others. This tradition assumes particular importance when a client bares his or her soul in civil or criminal litigation. Clients do this in the justifiable belief that nothing they say will be used against them and to the advantage of the adversary. Loss of this confidence would deliver a serious blow to the integrity of the profession and to the public's confidence in the administration of justice.”
    - Value of public’s confidence: if people are afraid that their lawyer will move firms and use confidential information against the client, that is the loss of loyalty we worry about
  + “A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. See, for example, *Law Society of Manitoba v. Giesbrecht* (1983), 24 Man. R (2d) 228 (CA). **The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy.”**
    - When the courts are trying to determine whether a lawyer has a conflict of interest, the court may refer to the definition of conflict of interest, but they might not. They may have their own, a more robust, definition.
    - Court reminding: don’t forget the court is not bound by law society definitions
    - The Court is free to create own common law definitions
  + **The Court creates what it calls “The Appropriate Test” for conflicts of interest:** pg 332 “… the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest?”
    - Court is saying: the main thing they are worrying about is whether there is a risk that confidential information will be spilled/ used
  + “Typically, these cases require two questions to be answered: **(1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?”**
  + “In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.”
    - All that party A needs to show is that a relationship with KD existed pertinent to this matter
    - Once you show a previous relationship, the court should infer that confidential information was imparted
    - There may be some way to show you were a lawyer at a firm but had no involvement/ received no information in regards to this matter (ex. Seconded away)
  + “The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client.”
    - Assuming the lawyer transferring has confidential information
    - Will the confidential information be misused?
    - Will the lawyer be able to partition where the information was learned from?
    - If you have confidential information from the other side, you cannot represent.
  + This answers whether KD can partake, but what about the rest of the Lawyers at Thompson?
    - “The answer is less clear with respect to the partners or associates in the firm. Some courts have applied the concept of imputed knowledge. This assumes that the knowledge of one member of the firm is the knowledge of all. If one lawyer cannot act, no member of the firm can act. This is a rule that has been applied by some law firms as their particular brand of ethics. While this is commendable and is to be encouraged, it is, in my opinion, an assumption which is unrealistic in the era of the mega-firm. Furthermore, if the presumption that the knowledge of one is the knowledge of all is to be applied, it must be applied with respect to both the former firm and the firm which the moving lawyer joins. Thus there is a conflict with respect to every matter handled by the old firm that has a substantial relationship with any matter handled by the new firm irrespective of whether the moving lawyer had any involvement with it. This is the "overkill" which has drawn so much criticism in the United States to which I have referred above.”
      * This imputed knowledge is too strict
    - “Moreover, I am not convinced that a reasonable member of the public would necessarily conclude that confidences are likely to be disclosed in every case despite institutional efforts to prevent it. There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence. These concepts are not familiar to Canadian courts and indeed do not seem to have been adopted by the governing bodies of the legal profession.”
      * When a lawyer moves from one firm to another, we will not automatically infect the destination firm. We will have an inference that the lawyer will share the information, but room to say that no confidences have been shared- can provide court with evidence
    - “*A fortiori* undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me." This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used.”
      * An affidavit is not enough

## Impact of Common Law Regulation

* Motion for disqualification
  + A party who fears a lawyer is infecting from confidential information, can bring a motion for disqualification
  + Courts will disqualify
* Action for Breach of Fiduciary Duty
  + If confidential information was used against Client
* **Recall: distinguish from Law Society Regulation via prosecutions for “Professional Misconduct”, which may happen in parallel to private law proceedings.**
* Consider the incentives created by the Common Law approach
  + Lawyers use to their advantage
* “Motions for disqualification orders may not always be sought for the purest of motives. Many such motions are undoubtedly brought by reason of genuine concerns about lawyers' loyalty or breaches of confidence. Others may be brought, however, to gain a tactical advantage by burdening a less well-financed adversary with additional costs, or by depriving the adversary of the services of a lawyer who is known to be effective in a particular type of case.” (Gavin MacKenzie, “Lawyers and Ethics,” quoted at p. 339 of “Legal Ethics”).

Conflicts 2 – acting Against Clients

Two Forms of Conflicts:

1. Successive Representation (Acting against former client)
2. Concurrent Representations (Against current client)

## Successive Representaion

A problem of “successive representation” may arise where counsel has previously acted for an individual who is now connected to a new matter in which counsel now represents someone else

* Acted for X in the past, working for party Y now, party Y is now against party x
* Two most common examples in the criminal context:
  + A “***jailhouse informant***” comes to testify ***against your client,*** and you acted on behalf of that informant on a previous occasion (clothing you with information that could undermine his credibility in the current matter);
  + Former defence counsel moves to a Crown law office, and must now prosecute a former client
    - Both: acting against the interests of someone you represented in the past and this relationship was categorized by a duty of loyalty which still continues on in some extent

**Rules of Successive Representation:**

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

1. the same matter,
2. any related matter, or
3. any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.
   * + **\***A former client can waive the issue of successive representation (usually you want express consent from client) and can authorize the lawyer to act against you
     + (C) bit of a ‘catch all’
       - Can’t act in any action at all against former client if you have any prior information that could prejudice the action

**Rule 3.4-10, Commentary**: [1] This rule guards against the misuse of confidential information from a previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client’s position on a matter that was central to a previous retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter.

**FLSC Code, Rule 3.4-11:** When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer (“the other lawyer”) in the lawyer’s firm may act in the new matter against the former client if: (a) the former client consents to the other lawyer acting; or (b) the law firm has:

* + (i) taken reasonable measures to ensure that there will be no disclosure of the former client’s confidential information by the lawyer to any other lawyer, any other member or employee of the law firm, or any other person whose services the lawyer or the law firm has retained in the new matter; and
  + (ii) advised the lawyer’s former client, if requested by the client, of the measures taken.
    - Think about Macdonald case
      * Would have needed to ensure (a) OR (b)(i)(ii) were fulfilled

**Rule 3.4-11, Commentary:** [1] The Commentary to rules 3.4-17 to 3.4-23 regarding conflicts from transfer between law firms provide valuable guidance for the protection of confidential information in the rare cases in which it is appropriate for another lawyer in the lawyer’s firm to act against the former client.

* + - * Reminds us we have promulgated several rules about tainted lawyers transferring
      * Conflicts of interest rules keep going back to confidentiality- what we are worried about is lawyers who have obtained confidential information and has the opportunity to use that information against the client

We care a lot about confidential information – need to protect our clients – accurate verdicts can be generated only when client gives lawyer all confidential information.

### **R v Zwicker [1995] NBCA**

**Facts:** Bucky Zwicker stole fishing boat and was riding around harbor drunk and did a lot of damage. He was arrested and charged with a variety of crimes; represented by Randal Wilson at trial (found guilty). RW advised Bucky to plea guilty. RW made a plea for non-custodial sentence during sentencing:

* + *“[Mr. Zwicker] realizes that the owner has had substantial losses; had substantial downtime. He knows that the people on Grand Manan are outraged at his behaviour and he thinks this is an opportunity for himself to go back to Grand Manan and to get to work and to pay this individual back which he fully intends to do. And he wishes that in lieu of incarceration”*
  + Judge sets sentencing to resume in a couple weeks. When trial resumes, RW is now Crown and says:
    - *This man should go to jail, Your Honour. He should go to jail for a long time…”*
  + In the same case, RW acted as defence counsel, and a few weeks later he acted as the Crown

**Issue:** Is RW allowed to do this?

**Ratio: “A conviction in these circumstances violates Section 7 of the Charter” – if court is taking away the liberty of a person, they must do it in accordance with principles of fundamental justice, one of which is un-conflicted justice**

* + **Un-conflicted justice is a principle of fundamental justice**

**Held:** Successive representation in a criminal matter = breach of section 7 of the *Charter*

**Results:** Can’t act against client in the same matter!

* + Sentence Reduced (common law) – he had pleaded, time-served
  + Lawyer Penalized (law society)
    - He has obviously committed professional misconduct and was easily in violation of the relevant rules
    - Cannot be deprives of liberty (s7) – we have a right to un-conflicted counsel
    - RW engaged in prosecutorial misconduct

**Note:** Common law doing one thing, law society doing another.

### **R v J(GP) [2001] MBCA 18 -** Deals with so-called “lateral” moves (A vs B and C 🡪 can lawyer from B/C interchange? Depends on the facts of the case)

**Facts:** Sexual assault case where women alleges she was assaulted by uncle who is now married; she is specific in allegations of abuse and said they had sex weekly from age 11-21, she claimed he ejaculated in her always but no pregnancy ensued

* + J admits it happened once when she was 17 but no abuse and nothing when she was a minor
  + To prove claim, J sought production of counselling/ psychologist records to demonstrate that this notion of alleged abuse was planted by counselor and didn’t really happen
    - She hadn’t brought the claim for 17 years and prior she saw a therapist who used alternative methods, and eventually “informed” her that she had been abused (she had numerous mental disorders as well); accused said abuse was false memories implanted by psychologist
  + When hearing motions for disclosure, parties were (1) crown (2) lawyer for J GP (3) lawyer for complainant
  + Based off records, accused was acquitted
  + Disclosure order granted but appealed by Crown based on rape myths, J argued disclosure was correct
  + On appeal, *lawyer for crown was lawyer for complainant at trial* (same side of the issue, both sides opposed disclosure) – this wasn’t the other side, was the same side (didn’t “jump the v”)

**Issue:** Is this a problem of successive representation?

**Ratio:** **Crown’s duty is to the judicial system *“his duty is not so much to obtain a conviction as to assist the judge and jury in ensuring that the fullest possible justice is done. His conduct before the court must always be characterized by moderation and impartiality*”**

* + **Example of a lateral move that cannot be made**

**Decision:** Yes, this is a conflict of interest

* + Crown’s duty is to judicial system, to have a fair trial and drop case if they have doubts of guilt of accused
  + Plaintiff’s lawyer’s position is adversarial (advocacy)
  + Lawyer representing complainant is perceived as *person pursuing conviction*- protection individual’ to see that individual who hired them gets justice (this is public perception)
  + Cannot represent Crown interest + complainant interests (incompatible at least by perception of the public)
  + In criminal cases, this isn’t allowed because Crown represents public and has very special ethical duties
  + Crown’s duty isn’t purely partisan- Crown has a ministerial role that is seen as adversarial
* p. 363 of “Legal Ethics”, quoting *Boucher v. The Queen [1955] SCR 16*:
  + “The position held by counsel for the Crown is not that of a lawyer in civil litigation. His functions are quasi-judicial. His duty is not so much to obtain a conviction as to assist the judge and jury in ensuring that the fullest possible justice is done. His conduct before the Court must always be characterized by moderation and impartiality. He will have properly performed his duty and will be beyond all reproach if, eschewing any appeal to passion, and employing a dignified manner suited to his function, he presents the evidence to the jury without going beyond what it discloses.”
    - The Crown never seeks to convict, Crown seeks to assist the judge but the complainant on the other hand usually seeks a conviction
  + “There is, in my view, flowing from counsel's latter role the likely perception both in the eyes of the accused and in those of the informed and reasonable person, that the Crown and the complainant share a common purpose in seeking the conviction of the accused. That may well be the purpose of the complainant, but it is no part of the public duty of a prosecutor exercising his quasi-judicial functions.”
    - Think about decision of Groia- was a gross insult to say the Crown only cares about conviction
* **Notes:** Lawyer’s cannot make this lateral move if you go from being a fierce advocate to a neutral arbitrator. We don’t want the Crown to owe a duty of allegiance to the complainant.

Problems with Successive Representation

* Most of these problems relate to confidential information
  + Know what buttons to push, what questions to ask etc. thereby creating a significant disadvantage to former client and creating opportunity to violate duty of confidentiality
* May deter others from divulging confidential information to lawyers
* May cause clients to alter strategies in trial, which would not lead to the optimal outcome
* Abuse of former relationship that we want to closely regulate

## Concurrent Representation

* Why would a lawyer ever act *against* the interests of a *current* client?
  + Imagine a case where acting for a bank in one matter. Also acting for a personal injury case in another matter. The person from personal injury matter is against the bank.
  + Should you be allowed to act in that scenario?
* What if the lawyer represents a particular client in “Matter A”, and is asked to sue that client in a completely unrelated matter (“Matter B”)?
* Is the lawyer allowed to act in Matter B? What if Matters A and B are *not* completely unrelated?
  + Example (p366) Conflicting Business Interests: Brent is a young articling student with the law firm of Drekken LLP. Brent is currently working on the files of two clients, LeVar and Candice. They have both recently entered the cat food business. Both clients employ Drekken LLP on a non-exclusive retainer to provide them with information and legal advice pertaining to the cat food industry. The industry is highly competitive. LeVar has recently approached the firm with a new business model that would allow cat food producers to avoid certain regulations governing the industry. He has retained Brent to determine whether or not this new business model is legal. Brent assessed the applicable law, and discovered LeVar's new plan was, in fact, legal. Furthermore, the idea could allow whoever employed it to dominate the cat food industry.
    - What should Brent do? Should he discharge his duty of confidentiality to LeVar, and refrain from telling Candice about the new scheme? Should he discharge his duty of loyalty to Candice by telling her about the new business model, and thus compromise his duty of confidentiality to LeVar?
    - Whichever he chooses, acting against one of the clients.
  + Example (p367): BigLaw, LLP (“BigLaw”) is a 200 lawyer firm in Calgary, Alberta. BigLaw has dozens of clients, including A.Co and B.Co. Ian Brown and Sarah Choudhury are two of BigLaw’s most talented lawyers. Ian (a securities lawyer) is representing A.Co in the planned acquisition of another business. Sarah (an intellectual property lawyer) is representing B.Co in a patent dispute. While Ian and Sarah know each other, they work in different departments of the firm (on different floors of the firm’s office tower), and they rarely bump into each other during the course of a normal week.
    - It turns out that A.Co and B.Co own plots of land beside each other somewhere in Northern Ontario. Neither Ian nor Sarah knows about these plots of land. In connection with these plots of land in Northern Ontario, B.Co brings a nuisance action against A.Co (stemming from a disturbance allegedly caused by A.Co’s noisy machinery). BigLaw isn’t involved in this nuisance action: both clients are using local counsel to handle this nuisance claim. (cont …)
    - While reading a newspaper, Ian learns about the nuisance action between A.Co and B.Co. He now realizes that his firm (BigLaw) is representing two companies that are suing each other in tort.
    - ***Assuming that this nuisance action has absolutely no bearing*** on BigLaw’s representation of A.Co and B.Co in their securities and patent matters, is BigLaw now in a conflict position?
    - If in a conflict position, would need consent?
    - Must BigLaw disclose its representation of B.Co to A.Co (and vice versa)? Does BigLaw need B.Co’s consent to continue representing A.Co (and vice versa)?
    - Each Client of every partner = a client of every person in the firm.
    - Graham doesn’t think this is a conflict of interest problem

The Neil Bright Line Test:

### **R v Neil [2002] SCC**

***2 statements in Neil***

* “… it is the firm, not just the individual lawyer, that owes a fiduciary duty to its clients, and a bright line is required. The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client – *even if the two mandates are unrelated*- unless both clients consent after receiving full disclosure (and preferably independent legal advice), and the lawyer reasonably believes that he or she is able to represent each client without adversely affecting the other.” (at para 29)
  + This says that even if lawsuits are unrelated and cannot have impact on the two files for which the firm is acting, they are disqualified from acting and there is a conflict of interest
  + Even if there is no chance of harm, if you are serving two clients with diverse interests, you are disqualified
* “I adopt, in this respect, the [following] notion of a “conflict” … a “substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another client, a former client, or a third person.” (at para 31)
  + This is adopting the substantial risk test
  + This says that you need a **substantial possibility of harm**- if there is no conflict, why would you be excluded… there is a contradiction between the two quotes
  + If you are acting for two clients, you are disqualified BUT ONLY if there is a substantial risk that the conflict harms them in some way
  + This was endorsed by Canadian Bar Association and Graham. Interpretation A is much more protective of clients, B is more protective of lawyers.
* Competing Interpretations of the Neil Test:
  + Is a lawyer precluded from acting only where there was a “substantial risk that the lawyer’s representation of the client would be materially and adversely affected” by conflicting interests, or was the lawyer precluded from acting in all cases captured by the “bright line” test, whether or not the case in question gave rise to a “substantial risk” that the lawyer’s representation of the client would be affected in any way?

Competing Interpretations

**Interpretation A**: Lawyer prohibited from acting in “bright line” cases even where there is no possibility of harm.

**Interpretation B**: Lawyer prohibited from acting in “bright line” cases (even where cases are unrelated) only where there is a substantial risk of a material, adverse impact on the lawyer’s representation of the client.

* + Federation of Law Society adopted A
  + Canadian Bar Association adopted B – you can act for two clients if there is no foreseeable/ substantial risk of harm
* **Exception:** **Professional (or sophisticated) Litigant Exception**
  + “In exceptional cases, consent of the client may be inferred. For example, governments generally accept that private practitioners who do their civil or criminal work will act against them in unrelated matters, and a contrary position in a particular case may, depending on the circumstances, be seen as tactical rather than principled. Chartered banks and entities that could be described as professional litigants may have a similarly broad-minded attitude where the matters are sufficiently unrelated that there is no danger of confidential information being abused. These exceptional cases are explained by the notion of informed consent, express or implied.” (*Neil*, at para 28)
    - You are a big bank, the government, etc. You are a very sophisticated party with hundreds of transactions, lawsuits, etc. You use lots of counsel and know some will be acting for you and some will be acting against you. You have your own in-house counsel. We are going to infer that since you are aware you have so many matters, there is no risk, we will take you to have given consent to have your own counsel work against you in unrelated matters.
    - Still need to seek consent in related matters.
    - They don’t feel the same kind of subjective loyalty an individual may feel.

### **Strother v 3464920 Canada Inc [2007] SCC**

**Facts:** Strother was top tax lawyer, acting for Monarch, which is a tax shelter film production company; they have an exclusive retainer and have been advising them on how to use the tax shelter to save money for a few years; but in 1997 government closed the tax shelters Monarch sold; Storther tells Monarch this and they start winding up their business because that’s all that Monarch did… as they did this, Monarch changed the terms of the retainer so it was no longer exclusive. **Note:** S was wrong about this, there still was a way but he didn’t notice it.

* + S was still their tax advisor, but was allowed to provide tax services to other people with new retainer
  + Darc ((D) used to work at Monarch and figured out a way to modify the tax structures so they fit within the Income Tax Act, so he went to Strother to get an advance tax ruling on the issue to ensure loophole was legal and viable
  + D didn’t have money to retain Strother, so they set up agreement where Strother got 50% of business interest
  + Strother gets the advance tax ruling, so D sets up new company and made Strother shareholder
  + Business carries on for a few years ($60M revenue, very profitable!) and Monarch gets wind of this
  + Monarch tries to get business up and running but it wasn’t as profitable as D’s
  + Monarch sued Strother for breach of fiduciary duty, stating he wasn’t free to set up business with D
    - ‘Why didn’t you tell us your initial advice was wrong’? You discovered you gave us wrong advice and then pursued the business!
    - Wrinkle: lawyers do not owe a duty to correct bad/incorrect advice given in the past, unless you fell below the duty of care owed to clients
  + Sue for all profits earned while in business with D (note- no duty to update client on this)

**Issue:** Does the change in retainer mean anything? Doesn’t this mean you can act for other people? Should Strother be guilty for breach of fiduciary duty in regards to conflicts of interest?

**Ratio: Law firms may act concurrently for different clients in the same line of business when (1) the relationship with the former client is terminated or (2) when the new representation does not put the former client in a vulnerable position (here Strother had a financial interest in the new representation which was enhanced by keeping the former client in the dark).**

* + **Conflict of interest principles do not generally preclude a law firm or lawyer from acting concurrently for different clients who are in the same line of business or who compete with each other for business**
  + **Adverse interests are adverse LEGAL interest, not adverse BUSINESS interests (so Neil doesn’t apply)**

**Decision:** split 5-4 SCC decision; Strother forced to disgorge the profits

* + The duty here wasn’t just the retainer, it was the relationship of trust and confidence which obligations flow
  + Because pre-retainer discussions are confidential, Strother wouldn’t be able to tell Monarch about it
  + Pre-retainer discussion is under confidentiality with Darc- so he wouldn’t be able to even tell Monarch… confused here

**Reasons for the Decision:**

* + p. 371 – 372 of “Legal Ethics”: “Monarch's tax business was in a jam. Strother was still its tax lawyer. There was a continuing "relationship of trust and confidence." Monarch was dealing with professional advisors, not used car salesmen or pawnbrokers whom the public may expect to operate on the basis of "didn't ask, didn't tell," and who collectively suffer a corresponding deficit in trust and confidence. Therein lies one of the differences between a profession and some businesses.In my view, subject to confidentiality considerations for other clients, if Strother knew there was still a way to continue to syndicate US studio film production expenses to Canadian investors on a tax-efficient basis, the 1998 retainer entitled Monarch to be told that Strother's previous negative advice was now subject to reconsideration.”
    - You are still their tax lawyer, you knew they wanted to be in the business, you told them they couldn’t be and that the only reason they weren’t in the business.
  + p. 372 of “Legal Ethics”: “It is this contractual duty that came into conflict with Strother's personal financial interest when he took a major stake in Sentinel which was, as Newbury JA pointed out, a competitor in a small market where experience showed that, even limited, competition could lead to a rapid erosion of market share.”
    - It was his ongoing duty to Monarch that he violated when he took a stake
    - But what about his duty to D? Would it not breach confidentiality if he told Monarch?
  + p. 373 of “Legal Ethics”: “Of course, it was not open to Strother to share with Monarch any *confidential* information received from Darc. He could nevertheless have advised Monarch that his earlier view was too emphatic, that there may yet be life in a modified form of syndicating film production services expenses for tax benefits, but that because his change of view was based at least in part on information confidential to another client on a transaction unrelated to Monarch, he could not advise further except to suggest that Monarch consult another law firm. Moreover, there is no excuse at all for Strother not advising Monarch of the successful tax ruling when it was made public in October 1998. As it turned out, Monarch did not find out about it until February or March 1999. I therefore conclude that Davis (and Strother) failed to provide candid and proper legal advice in breach of the 1998 retainer. …”
    - He should have gone to Monarch, said he screwed up, but because of confidentiality he cannot divulge more and that they should go to another law firm to consult.
  + p. 374 of “Legal Ethics”: “I agree with Strother's counsel when he writes that "[t]he retainer by Sentinel Hill was … not 'directly adverse' to any 'immediate interest' of Monarch." On the contrary, as Strother argues, "Sentinel Hill created a business opportunity which Monarch could have sought to exploit" (Strother factum, at para. 66).” ***Note: this means that, according to the Court in Strother, these facts do not trigger the “Bright Line Test”.***
    - Court is saying that Sentinnel and Monarch are not two clients with adverse immediate interests
    - This does not trigger the bright line test!
  + p. 375 of “Legal Ethics”: “The clients' respective "interests" that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity. … [C]ommercial conflicts between clients that do *not* impair a lawyer's ability to properly represent the legal interests of both clients will not generally present a conflict problem. Whether or not a real risk of impairment exists will be a question of fact. In my judgment, the risk did not exist here provided the necessary even-handed representation had not been skewed by Strother's personal undisclosed financial interest. Condominium lawyers act with undiminished vigour for numerous entrepreneurs competing in the same housing market; oil and gas lawyers advise without hesitation exploration firms competing in the oil patch, provided, of course, that information confidential to a particular client is kept confidential. There is no reason in general why a tax practitioner such as Strother should not take on different clients syndicating tax schemes to the same investor community, notwithstanding the restricted market for these services in a business in which Sentinel and Monarch competed.”
    - Simply because they are competitors does not mean they are adverse in interest
    - It may be adverse in business interest, but not LEGAL interest (they need to be suing each other!) Must be legal in nature, not commercial
  + p. 375 of “Legal Ethics”: “… The more sophisticated the client, the more readily the inference of implied consent may be drawn. The thing the lawyer must *not* do is keep the client in the dark about matters he or she knows to be relevant to the retainer: *Neil* at para 19…”
    - Addressed professional litigant exception
    - Monarch is a sophisticated client – but the court says this doesn’t matter
    - Cannot keep the client in the dark about matters you know are relevant to the retainer
    - Storther knew something they wanted to know and kept it in the dark
  + p. 377 – 378 of “Legal Ethics”: “In these circumstances, taking a direct and significant interest in the potential profits of Monarch's "commercial competito[r]." … created a substantial risk that his representation of Monarch would be materially and adversely affected by consideration of his own interests (*Neil*, at para. 31). … Strother could not with equal loyalty serve Monarch and pursue his own financial interest which stood in obvious conflict with Monarch making a quick re-entry into the tax-assisted film financing business. As stated in *Neil*, at para. 24, "[l]oyalty includes putting the client's business ahead of the lawyer's business." It is therefore my view that Strother's failure to revisit his 1997 advice in 1998 at a time when he had a personal, undisclosed financial interest in Sentinel Hill breached his duty of loyalty to Monarch.”
    - There is a conflict flowing from the substantial risk language
    - Seems like there may be a conflict even if outside the bright line test
    - What matters here is that Storther wasn’t just being paid, he had a personal financial stake which gave him a temptation to keep Monarch out of the business
    - This temptation created a substantial risk that Monarch would be adversely affected
  + p. 377 – 378 of “Legal Ethics”: “The duty was further breached when he did not advise Monarch of the successful tax ruling when it became public on October 6, 1998. Why would a rainmaker like Strother not make rain with as many clients (or potential clients) as possible when the opportunity presented itself (whether or not existing retainers required him to do so)? The unfortunate inference is that Strother did not tell Monarch because he did not think it was in his personal financial interest to do so...”
    - He didn’t want to undercut his own profits
    - Violation of conflict of interests

**Remedy:** Monarch gets Strother’s share of the profits because the measure is not the loss to the beneficiary but the gain to the fiduciary

* Even though it is more money than Monarch would have made had Strother informed!
  + (p. 378 of “Legal Ethics”): “Where, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant's gain (not the plaintiff's loss). Denying Strother profit generated by the financial interest that constituted his conflict teaches faithless fiduciaries that conflicts of interest do not pay. The *prophylactic* purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary.”

**Dissent:** Legal obligation goes to the extent of the retainer. No more exclusivity so it was not his job to comprise advice to other clients.

* **Note:** No real resolution here because SCC changed the test from adverse interest to adverse legal interests (No ***Neil***)

### **Canadian National railway Co.v McKercher LLP [2013] SCC –** Leading case on confict of interest in Canada from SCC (especially for Concurrent Rep)

**Facts:** McKercher (MCK) was ‘go-to law firm’ for CNR when they needed a lawyer in Saskatchewan; client relationship was strong; in 2008 MCK had three CNR cases ongoing- personal injury, real estate purchase, and claim in receivership proceedings

* + In 2008, Wallace went to MCK for help suing CNR (basis was systematic overcharge of grain charges in the prairies, wanted to bring class action suit against them) (fee based on % of proceeds if won)
  + Legally and factually unrelated to all of CNR’s dealings with MCK
  + Amount of class action was $1.75B, which would amount to 583M for lawyers; MCK accepted
  + None of the confidential information MCK has of CNR would come into play – there is no substantial risk here
  + MCK did not tell CNR and started working on the file against them, until the statement of claim date when the lawyers on either side were identified
  + MCK on that date dropped 2 of the CNR cases; CNR ultimately pulled the third from them
  + CNR applied to court to have MCK removed applying **Neil** Bright Line test
  + When statement of claim was served, MCK had two clients adverse in legal interest, and although MCK wasn’t representing CNR in the case – bright line test says you need permission
    - You took on two clients whose interests were directly adverse – clearly bright line- even if there was no substantial risk (pushing interpretation A)
  + CNR also doesn’t want MCK to act against them because they are a large financially stable firm, so there is a less likely chance they’d settle immediately, whereas a small firm may
  + MCK said that grain farmer case has nothing to do with personal injury, real estate, or receivership manner- none of the files were implicated in any way; none of the confidential information received was relevant to the matter- all the matters were legally unrelated
  + TJ disagrees and disqualifies MCK – Court of Appeal overturned because no substantial risk and mandates were not related (CN likely sophisticated litigant too) there was a minor breach of fiduciary duty only (for dumping the 2 outstanding cases)

**Issue:** Can a law firm accept a retainer to act against a current client on a matter unrelated to the client’s existing files? More specifically, can a firm bring a lawsuit against a current client on behalf of another client?

**Ratio:** **The Neil Bright Line test applies as a default, but there are 3 circumstances when the test will not apply, and we fall back on substantial risk test** (see below)

* + **Neil Bright line test and substantial risk test are 2 different things- distinct tests**
  + **The potential for conflicts of interest aren’t the only breaches of fiduciary duty- court tells us two more:**
    - **The duty of commitment to the client’s cause (369)**
    - **The duty of Candor (397)**

**Decision** (unanimous decision)**:** Sent back to trial and eventual settlement

* + Bright line test DID apply
  + SCC says clearly Neil test (clients adverse in interest) but fight is between interpretation 1 versus 2

**Reasons for the Decision**

* + p. 390 of “Legal Ethics”: “As we held in *R. v. Neil*, 2002 SCC 70, [2002] 3 S.C.R. 631, the general “bright line” rule is that a lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without obtaining their consent — regardless of whether the client matters are related or unrelated: para. 29. However, when the bright line rule is inapplicable, the question becomes whether the concurrent representation of clients creates a “substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person”: *Neil*, at para. 31. This appeal turns on the scope of the bright line rule: Did it apply to McKercher’s concurrent representation of CN and Wallace? Or is the applicable test instead whether the concurrent representation of CN and Wallace created a substantial risk of impaired representation?”
    - The court is saying substantial risk test and bright line test are two different tests. Sometimes one applies, and sometimes the other applies.
  + “The law of conflicts is mainly concerned with two types of prejudice: prejudice as a result of the lawyer’s misuse of confidential information obtained from a client; and prejudice arising where the lawyer “soft peddles” his representation of a client in order to serve his own interests, those of another client, or those of a third person. As regards these concerns, the law distinguishes between former clients and current clients. The lawyer’s main duty to a former client is to refrain from misusing confidential information. With respect to a current client, for whom representation is ongoing, the lawyer must neither misuse confidential information, nor place himself in a situation that jeopardizes effective representation.”
    - There are two things we are protecting: both following under duty of loyalty (1) duty of not misusing confidential information (2) not soft peddling a client
  + “The [bright line] rule expressly applies to both related *and* unrelated matters. It is possible to argue that a blanket prohibition against concurrent representation is not warranted with respect to unrelated matters, where the concrete duties owed by the lawyer to each client may not actually enter into conflict. However, the rule provides a number of advantages. It is clear. It recognizes that it is difficult — often impossible — for a lawyer or law firm to neatly compartmentalize the interests of different clients when those interests are fundamentally adverse. Finally, it reflects the fact that the lawyer-client relationship is a relationship based on trust. The reality is that “the client’s faith in the lawyer’s loyalty to the client’s interests will be severely tried whenever the lawyer must be loyal to another client whose interests are materially adverse””
    - Court is acknowledging it may not make sense to have a blanket prohibition of concurrent representation but no, it exists!
  + “The parties and interveners to this appeal disagreed over the substance of the bright line rule. It was variously suggested that the bright line rule is only a rebuttable presumption of conflict, that it does not apply to unrelated matters, and that it attracts a balancing of various circumstantial factors that may give rise to a conflict. These suggestions must be rejected. Where applicable, the bright line rule prohibits concurrent representation. It does not invite further considerations. As Binnie J. stated in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, “[t]he ‘bright line’ rule is the product of the balancing of interests not the gateway to further internal balancing”: para. 51. To turn the rule into a rebuttable presumption or a balancing exercise would be tantamount to overruling *Neil* and *Strother*. I am not persuaded that it would be appropriate here to depart from the rule of precedent. … However, the bright line rule is not a rule of unlimited application. The real issue raised by this appeal is the scope of the rule. I now turn to this issue.”
    - Seems to be an indorsement of interpretation A. Bright line rule is the rule for concurrent interpretation. But the rule does not always apply.
  + p. 394 of “Legal Ethics”: “*Neil* and *Strother* make it clear that the scope of the rule is not unlimited. The rule applies where the *immediate legal* interests of clients are *directly* adverse. It does not apply to condone tactical abuses. And it does not apply in circumstances where it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters.”
    - Limitation on the scope- the rule does not apply in three distinct instances:
      * **(1) Adverse in legal interests**
      * **(2) Constitutes tactical abuse rather than ‘ethically’**
        + Using it to get counsel excluded to gain an advantage
      * **(3) Where its application would be unreasonable** 
        + Cites professional litigant exception
  + p. 394 of “Legal Ethics”: “First, the bright line rule applies only where the *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting. In *Neil*, a law firm was concurrently representing Mr. Neil in criminal proceedings and Ms. Lambert in divorce proceedings, when it was foreseeable that Lambert would eventually become Neil’s co-accused in the criminal proceedings. … This Court did not apply the bright line rule to the facts in *Neil*, because of the nature of the conflict. Neither Neil and Lambert, nor Neil and Doblanko, were *directly* adverse to one another in the legal matters on which the law firm represented them. Neil was not a party to Lambert’s divorce, nor to any action in which Doblanko was involved. The adversity of interests was *indirect*: it stemmed from the strategic linkage between the matters, rather than from Neil being directly pitted against Lambert or Doblanko in either of the matters.”
    - ***Note: this quote may resolve the problem raised in example 6.6***
    - Adverse legal interests elsewhere, but you are representing them in two different matters where adverse legal interests do not exist
    - You can have clients who are suing each other, so long as they are not suing each other on matters you are acting as counsel for
    - Adversity has to be with respect to the files you are working with
    - Interests have to be ***directly*** adverse – both clients need to be involved
  + p. 394 of “Legal Ethics”: “Second, the bright line rule applies only when clients are adverse in *legal* interest. The main area of application of the bright line rule is in civil and criminal proceedings. *Neil* and *Strother* illustrate this limitation. The interests in *Neil* were not legal, but rather strategic. In *Strother*, they were commercial.”
    - Business competitors does not make them adverse in interest
    - Must be adverse in legal interest in order to invoke bright line test
  + p. 395 of “Legal Ethics”: “Third, the bright line rule cannot be successfully raised by a party who seeks to abuse it. In some circumstances, a party may seek to rely on the bright line rule in a manner that is “tactical rather than principled”: *Neil*, at para. 28. The possibility of tactical abuse is especially high in the case of institutional clients dealing with large national law firms. Indeed, institutional clients have the resources to retain a significant number of firms, and the retention of a single partner in any Canadian city can disqualify all other lawyers within the firm nation-wide from acting against that client.”
    - If we have interpretation A, one problem is that you can spread legal work everywhere, preventing all ‘good’ lawyers and firms for taking claims against you
    - If it is found that someone is engaging in tactical abuse, the bright line rule doesn’t apply and would not be suitable for a remedy
    - Big institutional clients!
  + p. 395 of “Legal Ethics”: “Finally, the bright line rule 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. … .” In some cases, it is simply not reasonable for a client to claim that it expected a law firm to owe it exclusive loyalty and to refrain from acting against it in unrelated matters. As Binnie J. stated in *Neil*, these cases are the exception, rather than the norm. Factors such as the nature of the relationship between the law firm and the client, the terms of the retainer, as well as the types of matters involved, may be relevant to consider when determining whether there was a reasonable expectation that the law firm would not act against the client in unrelated matters. Ultimately, courts must conduct a case-by-case assessment, and set aside the bright line rule when it appears that a client could not reasonably expect its application.”
    - On a case by case basis will analyze relationship between firm and client
    - Sometimes it would be unreasonable to expect that this firm would never act against you
  + ***What do we do when “Bright Line” doesn’t apply?***
    - **We return to “Substantial Risk”,** p. 395 of “Legal Ethics”: “When a situation falls outside the scope of the bright line rule for any of the reasons discussed above, the question becomes whether the concurrent representation of clients creates a substantial risk that the lawyer’s representation of the client would be materially and adversely affected.”
      * Court set up bright line test as default conflict of interest rule for concurrent representation. It is ‘always yes, unless’ one of the conditions applies.
      * If ‘unless’ turn to the substantial risk test
  + p. 396 of “Legal Ethics”: “The bright line rule is precisely what its name implies: a bright line rule. It cannot be rebutted or otherwise attenuated. It applies to concurrent representation in both related *and* unrelated matters. However, the rule is limited in scope. It applies only where the *immediate* interests of clients are *directly* adverse in the matters on which the lawyer is acting. It applies only to legal — as opposed to commercial or strategic — interests. It cannot be raised tactically. And it does not apply in circumstances where it is unreasonable for a client to expect that a law firm will not act against it in unrelated matters. If a situation falls outside the scope of the rule, the applicable test is whether there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected.”
    - When it doesn’t apply, we turn to substantial risk test- generates a substantial risk making representation of client materially and adversely affected

**Expanding on other aspects of duty of loyalty- not just duty to avoid conflicts of interest, but also duty of commitment to client’s cause.**

* + p. 396 – 397 of “Legal Ethics”: “The duty of commitment is closely related to the duty to avoid conflicting interests. In fact, the lawyer must avoid conflicting interests precisely so that he can remain committed to the client. Together, these duties ensure “that a divided loyalty does not cause the lawyer to ‘soft peddle’ his or her [representation] of a client out of concern for another client”: *Neil*, at para. 19. The duty of commitment prevents the lawyer from undermining the lawyer-client relationship. As a general rule, a lawyer or law firm should not summarily and unexpectedly drop a client simply in order to avoid conflicts of interest with existing or future clients. This is subject to law society rules, which may, for example, allow law firms to end their involvement in a case under the terms of a limited scope retainer.”
    - Duty to be committed to client’s cause
    - Duty of commitment prevents lawyer from dropping a case because of fear of conflict of interest
    - It is an aspect of duty of loyalty- duty of loyalty= avoid conflict of interest+ commitment to client’s cause + duty of candour
  + p. 397 of “Legal Ethics”: “A lawyer or law firm owes a duty of candour to the client. This requires the law firm to disclose any factors relevant to the lawyer’s ability to provide effective representation. As Binnie J. stated in *Strother*, at para. 55: “The thing the lawyer must not do is keep the client in the dark about matters he or she knows to be relevant to the retainer” … It follows that as a general rule a lawyer should advise an existing client before accepting a retainer that will require him to act against the client, even if he considers the situation to fall outside the scope of the bright line rule. At the very least, the existing client may feel that the personal relationship with the lawyer has been damaged and may wish to take its business elsewhere. … I add this. The lawyer’s duty of candour towards the existing client must be reconciled with the lawyer’s obligation of confidentiality towards his new client. In order to provide full disclosure to the existing client, the lawyer must first obtain the consent of the new client to disclose the existence, nature and scope of the new retainer. If the new client refuses to grant this consent, the lawyer will be unable to fulfill his duty of candour and, consequently, must decline to act for the new client.”
  + Even if this case falls offside bright line rule, the way MCK advised was improper. A lawyer should advise an existing client before accepting a retainer.
  + Need to inform client you will be asking against them – even if bright line doesn’t apply.
    - Ex. Wallace comes into office- says he wants to sue CNR- duty of candour says you need to tell CNR- can’t disclose retainer because it is confidential- so you need to tell Wallace that we need permission to disclose to CNR before taking on as client- if no, cannot take on the retainer, another firm would need to act on Wallace’s behalf- can’t just drop CNR as client, because violation of duty of commitment.
* **Results:**
  + Bright line was engaged- when you took on Wallace, they were directly adverse, wasn’t tactical, and wasn’t unreasonable because of the longstanding relationship with MCK
  + Remedy: there was no likelihood of confidential information being misused, no likelihood CNR would be put at disadvantage, only reason to disqualify if continued representation would undermine the administration of justice. Sent back to trial for re-hearing.
  + Not sure that disqualification is the appropriate remedy- only appropriate if it would undermine the administration of justice
  + Disqualification may or may not be the appropriate remedy.

**What is the Law Society’s Response to McKercher?**

* Has adopted the analysis from the SCC

**Law Society Regulation of Concurrent Representation**

FLSC Code, Rule 3.4-1: A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.

**Commentary [1]** Lawyers have an ethical duty to avoid conflicts of interest. Some cases involving conflicts of interest will fall within the scope of the bright line rule as articulated by the Supreme Court of Canada. The bright line rule prohibits a lawyer or law firm from representing one client whose legal interests are directly adverse to the immediate legal interests of another client even if the matters are unrelated unless the clients consent. However, the bright line rule cannot be used to support tactical abuses and will not apply in the exceptional cases where it is unreasonable for the client to expect that the lawyer or law firm will not act against it in unrelated matters. See also rule 3.4-2 and commentary [6].

* *Law society will not find conflict of interest in circumstances where SCC wouldn’t*
* *Bright line = default*

**[2]** In cases where the bright line rule is inapplicable, the lawyer or law firm will still be prevented from acting if representation of the client would create a substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

* *Adopting the analysis from the SCC*

**[3]** This rule applies to a lawyer's representation of a client in all circumstances in which the lawyer acts for, provides advice to or exercises judgment on behalf of a client. Effective representation may be threatened where a lawyer is tempted to prefer other interests over those of his or her own client: the lawyer's own interests, those of a current client, a former client, or a third party.

* *If the issue is one of concurrent representation, the analysis will be the same as SCC*
* *Application of bright line from Neil and applied as done in McKercher.*

Conflicts 3 – Personal Conflicts

## Personal Conflicts

*Can arise in a number of ways*.

* Looking at instances where lawyer’s own interest conflicts with client’s
* Situations in which the lawyer’s own interests (including financial interests, personal preferences, friendships or sexual relationships) generate a “substantial risk” that the lawyer’s loyalty to (or representation of) a client will be compromised in some material way.
  + **Most examples relate to the lawyer’s fees**
    - Lawyer wants as much as possible for services, clients want to pay as little as possible for lawyer – in a sense their interests conflict
    - Both parties to a contract, to a retainer, which involve the possibility of dispute
* Recall Rule 3.4-1 “Duty to Avoid Conflicts of Interest”

“A lawyer must not act or continue to act for a client where there is a conflict of interest, excepts as permitted under the code”

## Third Party Fee Payments

* **Some person other than client is paying for the lawyer**
  + The lawyer is representing X, but Y is paying the bills. (Y has retained the lawyer to represent X).
  + The lawyer has a contract with Y to represent X. To whom does the lawyer owe his or her “duty of loyalty”?
  + Consideration flows from Y to the lawyer in the form of money, and consideration flows to Y as a promise to represent interests
  + There are basic contractual duties: Y has obligation to pay, lawyer has obligation to represent X
* All of the legal ethics duties we have examined is owed to X, the client, and X alone
* The contractual relationship to Y has no bearing on the duties owed to X
  + Just because Y is paying the bills, doesn’t mean anything changes
    - Ex: Legal Aid- representing someone who can’t pay, government is paying – the only duty you owe to government is to diligently represent, everything else is owed to the client
* “Lawyers must be vigilant in such cases to ensure that their loyalty to their clients is not compromised by loyalty to the interests of the persons who are paying their fees. The lawyer's duty in such [a] case is to pursue the client's interests singlemindedly. To pursue the interests of the party who is paying the lawyer's fee to the detriment of the client would be improper.” - Gavin MacKenzie, Lawyers & Ethics (2001) at 5-37.
* Some specific situations where potential of conflict is quite high
  + Ex. Young person involved in offence, reveals uncomfortable fact about the family, parents may not want that information divulged, but the lawyer owes obligation to client, not parents. But this will not necessarily stop the parents.
  + Legislatively there is now a directive for this:
    - **Section 25(8) of Canada’s *Youth Criminal Justice Act*:**
    - (8) If it appears to a youth justice court judge or a justice that the interests of a young person and the interests of a parent are in conflict or that it would be in the best interests of the young person to be represented by his or her own counsel, the judge or justice shall ensure that the young person is represented by counsel independent of the parent.
      * Where the judge senses a conflict as a result of the involvement of the parent, judge has the authority and duty to exclude conflicted counsel
      * Lawyer’s duty is always to client regardless of who will pay the bills

Payment Among Multiple Accused

*Version of third party payment*

* When the lawyer represents multiple parties in a single matter
* What happens when only one of the parties is responsible for the fees?
  + Ex. Representing A, B, C but A is paying the fees
    - What happens with B and C? They are the ‘third party’ because someone else is paying their fees.

### **R v Stork and Toews** (1975) 24 CCC (2d) 210

* **Facts:** Conspiracy for cocaine distribution/ trafficking, 4 accused persons, 3 of them (Stenson, Stork, Toews) represented by Mr. N.
  + Stenson was paying retainer (Stork & Toews weren’t paying)
  + At Stenson’s request, N convinced RCMP to stay charges against Stenson and convinced free riders to plead guilty- they were convicted on the basis of their guilty pela
  + On appeal, N admitted to convincing them to plea as per direction of Stenson
* **Issue:** Was that the optimal legal strategy? Was there a reason to throw Stork/Toews under the bus? Was this a conflict of interest? Was the lawyer under conflict of interest?
* **Ratio:** **Conflicts of interest are largely based on appearance (if it looks like a conflict); no actual conflict needed, was there a substantial risk?**
* **Decision:** verdicts cannot stand; new trial for Stork and Toews
  + We don’t know if conflict of interest caused anything bad, but it looked bad, so re-trial
  + It looked like Stenson was getting preferential treatment because he was paying the bills (whether or not he was)
  + The result may have been justified in law, but the appearance of impropriety in these circumstances justified retrial
  + The pay situation coupled with the different outcomes generated a substantial risk.
    - N’s admission: “in fairness to the accused, STORK and TOEWS, I believe that they accepted my estimation of the case and accepted my advice that they should plead guilty. I believe that I influenced them in this regard and that they relied upon my judgment and upon my advice in deciding to plead guilty.” – Mr. N
    - “In my opinion, Mr. N was in a position of hopeless conflict of interest. Here, the man who was paying him goes free while the other two accused go to jail for five or eight years. While there is no attack on Mr. N's good faith, or indeed, upon the soundness of his advice, it does not seem to me that the plea of guilty obtained under such circumstances can stand when the accused ask to withdraw it”
* **Remedy:** Allow accused to revoke pleas, and new trial.

## Thoughts on Third Party Fee Payments

* Should we ban them?
  + **Availability of third party fee payments increases access to justice** 
    - People who can’t afford to hire own council will still have access to representation
* Do they increase access to justice?
* Should the “third party” simply give the money to the client, who then pays the lawyer? (This may not always be a solution).
  + Payer should be told his/her interests would be ‘ignored’ and interest of the client would be paramount
  + Third party should just give the money to the client- but this is not always possible
    - Often some people shouldn’t have the money

## Contingency Fees

* Ability of lawyers to receive contingency fees when representing
  + Recall brief discussion of contingency fees in *CNR v. McKercher* (Conflicts II).
* Only received if a specified result is obtained
  + All or part of the lawyer’s fee is “contingent” on achieving a particular result
  + Payment is contingent on the lawyer obtaining the result – no result, no payment
* Often pursued in connection with class action claims, in which lawyer receives some percentage of the client’s final award (often 33.3%).
* Potential for enhancing access to justice, which is why we allow them
  + People who may not be able to afford, can afford through this method (might not have the cash on hand, but if client wins case, will then have the available funds)
  + Removes the risk on a client who wouldn’t be able to afford the lost
* Potential for conflicts – Consider a lawyer who is in immediate need of funds
* Ontario was the last jurisdiction to accept this type of fee
  + Arising from language of Barrister’s Oath which precluded contingency fees
  + Ethically problematic- cost benefit analysis, how much work compared to size of payment
    - Might be more ***obvious***- all cases generally have some cost-benefit analysis to determine what work is done

**Regulated by rules 3.6-1 and 3.6-2 of the FLSC Code:**

Reasonable Fees and Disbursements

* 3.6-1 A lawyer must not charge or accept a fee or disbursement, including interest, ***unless it is fair and reasonable*** and has been disclosed in a timely fashion.
  + Starts out seeming like a prohibition, until the latter half.
  + (emphasis added) \*(also see the commentaries under rule 3.6-1)
* 3.6-2 Subject to rule 3.6-1, a lawyer may enter into a written agreement in accordance with governing legislation\* that provides that the lawyer’s fee is contingent, in whole or in part, on the outcome of the matter for which the lawyer’s services are to be provided.
  + Must be fair and reasonable
  + Law Society gives ‘official’ permission, subject to it being fair and reasonable
  + \*NB – In Ontario, the governing legislation is *The Solicitor’s Act*
    - So contingency fees are subject to legislation, specifically not allowed Criminal Law in ON
    - Every jurisdiction that allows contingency fees has legislation saying what it can and cannot be
      * Must be A. in accordance with this legislation B. ensure that the fees are fair and reasonable

## Non-Payment of Fees

* What do you do when your client fails to pay?
* You can sue the client for payment, and even release confidential info supporting your claim (rule 3.3-5).
* What if you’re in the middle of representing a client and the client stops paying?
* Recall your duty of loyalty, which includes a duty of commitment to the client’s cause.
  + Lawyers do not have the unlimited ability to just stop representing clients
* Entire chapter devoted: section 3.7 FLSC Model Code: Withdrawal from Representation
  + Must not withdraw except for good cause and reasonable notice
  + But non-payment seems to be good cause?
  + It is more complicated than that.
  + Not just regulated by law society, but by the courts too.
* Can you bail on the non-paying client? Does this give rise to conflicts of interest?

### **R v Cunningham** [2010] 1 SCR 331

* **Facts:** Jenny Cunningham, criminal defence lawyer in Yukon worked for Legal Aid, representing Morgan who was charged with serious sexual assault of children; JC was paid through Legal Aid; Legal Aid said in order for Morgan to qualify for legal aid, you must file updated information with clinic, and Clinton Morgan refused to file, and didn’t take action
  + JC works for Legal Aid, they called and said you can’t do work for Mr. Morgan, he isn’t paying
  + Proceedings had already started and if JC disappeared, Mr. Morgan would prejudice
  + Morgan said “I’m not filling financial information, but would like JC to work for me”
  + JC appeared and requested to be removed, be he isn’t paying… TJ said too bad, work for free
  + JC said TJ didn’t have jurisdiction to do that but court said they did if the interest of justice demand that the lawyer act for free
* **Issue:** “Whether in a criminal matter, a court has the authority to refuse to grant defence counsel’s request to withdraw because the accused has not complied with the financial terms of the retainer?” Can lawyers withdraw or can the courts force continuing to work for client?
  + Could she be tempted to soft peddle, work harder for paying clients, etc. demonstrating a substantial risk to the client? If acting in this case of non-payment is a conflict of interest- what happens?
  + Impact of confidentiality- can you tell the court you want to withdraw because the client is not paying? What if the financial status is relevant to the case?
  + What if there are multiple ways to handle the case: long vs short 🡪 would make you inclined to take the ‘easy way out’ which may not necessarily be the best interest of the client
* **Ratio:** **(1) Accused can discharge legal counsel and court cannot stop this**

**(2) Courts do have jurisdiction to disallow requests for withdraw**

**(3) Test to disallow withdrawal from the case:**

* + *“The Supreme Court of the Yukon Territory correctly concluded that the territorial court had the jurisdiction to refuse to grant counsel’s request to withdraw. This jurisdiction, however, should be exercised* ***exceedingly sparingly.*** *It is not appropriate for the court to refuse withdrawal where an adjournment will not be necessary nor where counsel seeks withdrawal for* ***ethical reasons.”***
    - This is the way out—all the lawyers have to do is tell the court that they have ethical reasons and thus have to withdraw; Jenny Cunningham’s problem is that she was to honest and said it was about being paid not simply ethical reasons
    - \*Ability to withdraw is restrained by 3.7, court has jurisdiction to refuse, but no jurisdiction where ethical reasons lead to request for withdrawal. In some situations, non-payment leads to ethical reasons. \*
* **Decision:**  Court has jurisdiction to allow JC request for withdrawal and forced her to act
* **Reasons for the decision:** 
  + p. 407 of “Legal Ethics”: “An accused has an unfettered right to discharge his or her legal counsel at any time and for any reason. A court may not interfere with this decision and cannot force counsel upon an unwilling accused … Counsel, on the other hand, does not have an unfettered right to withdraw. The fiduciary nature of the solicitor-client relationship means that counsel is constrained in his or her ability to withdraw from a case once he or she has chosen to represent an accused. These constraints are thoroughly outlined in the rules of professional conduct issued by the provincial or territorial law societies.\* This appeal raises the issue of whether a court’s jurisdiction to control its own process imposes a further constraint on counsel’s ability to withdraw. …”
  + Note that the FLSC deals with withdrawal in chapter 3.7 of the FLSC Code
* (1) Addressing the court’s jurisdiction
  + p. 408 of “Legal Ethics” (addressing the court’s jurisdiction): “… It would seem to follow that just as the court, in the exercise of its inherent jurisdiction, may remove counsel from the record, it also may refuse to grant counsel’s application for withdrawal.”
    - Does this logic flow? The court is saying it has the right but is looking at the limited situation where a lawyer wants to withdraw.
    - Not necessarily a logical conclusion with a strong defence.
    - But they say they have the jurisdiction.
  + p. 408 of “Legal Ethics”: “The reasons in favour of courts exercising this jurisdiction are numerous. An accused, who becomes unable to pay his lawyer, may be prejudiced if he is abandoned by counsel in the midst of criminal proceedings. Proceedings may need to be adjourned to allow the accused to obtain new counsel. This delay may prejudice the accused, who is stigmatized by the unresolved criminal charges and who may be in custody awaiting trial. It may also prejudice the Crown’s case. Additional delay also affects complainants, witnesses and jurors involved in the matter, and society’s interest in the expedient administration of justice. Where these types of interests are engaged, they may outweigh counsel’s interest in withdrawing from a matter in which he or she is not being paid.”
    - All of these issues do arise- delay of proceedings, ongoing stigma for accused, quality of evidence may deteriorate, etc.
    - But: Why these problems lead to the conclusion that defence counsel who is not being paid needs to continue to represent. Why not other alternatives?
    - Court just saying: if we let you withdraw, problems arise.
* (2) Should counsel have to explain the reason for withdrawal? If counsel has to explain that he or she isn’t being paid, does that disclose confidential or privileged information?
  + p. 409-410 of “Legal Ethics”: “The only information revealed by counsel seeking to withdraw is the sliver of information that the accused has not paid or will not be paying fees. It has not been explained how, in this case, this sliver of information could be prejudicial to the accused. Indeed, it is hard to see how this simple fact alone could be used against the accused on the merits of the criminal proceeding: it is unrelated to the information given by the client to the lawyer, and unrelated to the advice given by the lawyer to the client. It would not be possible to infer from the bare fact of non-payment of fees any particular activities of the accused that pertain to the criminal charges against him. …. To be sure, this is the case where non-payment of fees is not linked to the merits of the matter and disclosure of non-payment will not cause prejudice to the accused. However, in other legal contexts, payment or non-payment of fees may be relevant to the merits of the case, for example, in a family law dispute where support payments are at issue and a client is alleging inability to pay. Or disclosure of non-payment of fees may cause prejudice to the client, for example, where the opposing party may be prompted to bring a motion for security for costs after finding out that the other party is unable to pay its legal fees. Where payment or non-payment of fees is relevant to the merits of the case, or disclosure of such information may cause prejudice to the client, solicitor-client privilege may attach.”
    - In the cases where disclosure of non-payment will disclose something pertinent to the case (confidential or privileged), then counsel would be prevented to say the reason why
      * This may actually be beneficial for the lawyer!
* (3) Conflicts of interest
  + p. 412 of “Legal Ethics” (on the issue of Conflicts of Interest): “I am also unpersuaded … that forcing unwilling counsel to continue may create a conflict between the client’s and lawyer’s interests. It is argued that where counsel is compelled to work for free, he or she may be tempted to give legal advice which will expedite the process in order to cut counsel’s financial losses even though wrapping up a criminal matter as quickly as possible may not be in the best interests of the accused. This argument, however, is inconsistent with the Law Society’s position … that the court should presume that lawyers act ethically. There are many situations where counsel’s personal or professional interests may be in tension with an individual client’s interest, for example where counsel acquires an interesting new file that requires immediate attention, or has vacation plans that conflict with the timing of court proceedings affecting the client. Counsel is obligated to be diligent, thorough and to act in the client’s best interest. … When the court requires counsel to continue to represent an accused, counsel must do so competently and diligently. Both the integrity of the profession and the administration of justice require nothing less.”
    - Saying we should presume lawyers act ethically
    - But the courts often don’t assume this (ex. McDonald)
    - If the court is creating the possibility of conflict of interest, if the court is creating this substantial risk, the court is responsible and can safely presume the lawyer will act ethically (even though there is the temptation for the lawyer to act unethically)
    - Strange because they are generating a conflict/ substantial risk – but the court is content that the lawyer will not yield to the temptation
* Ordering Counsel to Work for Free
  + “… ordering counsel to work for free is not a decision that should be made lightly. Though criminal defence counsel may be in the best position to assess the financial risk in taking on a client, only in the most serious circumstances should counsel alone be required to bear this financial burden. In general, access to justice should not fall solely on the shoulders of the criminal defence bar and, in particular, legal aid lawyers. Refusing to allow counsel to withdraw should truly be a remedy of last resort and should only be relied upon where it is necessary to prevent serious harm to the administration of justice.”
    - Raises interesting questions- requiring counsel to solely bear the burden of risk of non-payment
    - Why can’t prosecutor pay defence counsel? Why doesn’t the judge waive salary for proceedings? None of this arising in this instance! No one else has risk of not being paid except for the lawyer- the entire burden is on defence counsel.
    - Are we decreasing the pool of lawyers who would take on this role, the number of lawyers who would take a position knowing the burden may exist.
    - Result of decision is generating disincentives!
    - This should be an order of last resort but Graham questions whether this is an order the court should make at all.
* How and When can the court make such orders?
  + p. 413 of “Legal Ethics”: “If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel’s reasons for seeking to withdraw or require counsel to continue to act.”
    - If early in the proceedings, and will not require a trial to be paused/ delayed, the court should allow withdrawal
  + p. 413 of “Legal Ethics”: “Assuming that timing is an issue, the court is entitled to enquire further. Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused. Counsel may cite “ethical reasons” as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations … or if the accused refuses to accept counsel’s advice on an important trial issue … If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for “ethical reasons”. However, in either the case of ethical reasons or non-payment of fees, the court must accept counsel’s answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.”
    - To the extent privilege is not engaged, you can explain your reasoning
    - When you say ‘ethical reasons’, the court must accept that as true
    - When you say ‘non-payment’, the court must accept that as true
  + p. 414 of “Legal Ethics”: “If withdrawal is sought for an ethical reason, then the court must grant withdrawal ... Where an ethical issue has arisen in the relationship, counsel may be *required* to withdraw in order to comply with his or her professional obligations. It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.”
    - Court must accept stated reasons as true, and so if ethical reasons, the court must grant it and not inquire further
    - This leaves loophole for lawyers to say ethical reasons instead of non-payment
  + p. 414 of “Legal Ethics”: “If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel’s request. The court’s order refusing counsel’s request to withdraw may be enforced by the court’s contempt power.”
    - You can be put in jail for refusing to act for free
      * *This means that you could be put in jail for refusing to act for free. What incentives does this create? Do you want to be criminal defence counsel? Do you want to be defense counsel in an underserved, remote, rural area? Do you want to serve impoverished clients? Does the possibility of being forced to work for free have an impact on any of these decisions?* 🡨 the existence of discretion generates these perverse incentives
* **Factors to Consider Before Refusing Withdrawal** pg 414
  + Whether it is feasible for the accused to represent himself or herself;
  + Other means of obtaining representation;
  + Impact on the accused from delay in proceedings, particularly if the accused is in custody;
  + Conduct of counsel, e.g. if counsel gave reasonable notice to the accused to allow the accused to seek other means of representation, or if counsel sought leave of the court to withdraw at the earliest possible time;
  + Impact on the Crown and any co‑accused;
  + Impact on complainants, witnesses and jurors;
  + Fairness to defence counsel, including consideration of the expected length and complexity of the proceedings;
  + The history of the proceedings, e.g. if the accused has changed lawyers repeatedly.”
    - We don’t force people to work for free, and Graham says it seems like this is happening in the case.
    - But, if you say ethical reasons, the court will believe you and grant it
* **Questions:**
  + What if counsel in Cunningham’s position genuinely feels that acting in the face of non-payment will create a conflict-of-interest? Can counsel cite “ethical reasons”?
  + What about disbursements? Will Cunningham have an incentive not to bring in (expensive) expert witnesses? Eye witnesses who now live far away and have high travel expenses
  + Would Cunningham have requested withdrawal if her client had planned to plead guilty? What if her client had a very simple defence, that would take little time to muster? Does a motion to withdraw (for non-payment) reveal something about the defence strategy (e.g., length and complexity)?
    - Will cause soft peddling, etc. There is a genuine possibility representation will be undercut, so saying ethical reasons can be true! For ethical reasons, cannot adequately represent – conflicts of interest exist.

## Other Personal Conflicts

* Personal Conflicts aren’t only caused by fees
  + Ex. Sexual relationships with clients
* Rule **3.4-1, Commentary 11**, provides other examples of circumstances in which the lawyer’s personal interests may give rise to conflicts-of-interest.
* Note that Rule 3.4-1, Commentary 11 was formerly Rule 3.4-1, Commentary 8 (in the version of the FLSC Code found in your textbook). Be sure you’re referring to the up-to-date, online version of the FLSC Code. Read this before exam!
* **3.4-1, Commentary 11:** 
  + Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances that may give rise to conflicts of interest. The examples are not exhaustive ...
  + A lawyer has a sexual or close personal relationship with a client.
    - i. Such a relationship may conflict with the lawyer’s duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardize the client’s right to have all information concerning his or her affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by his or her lawyer. If the lawyer is a member of a firm and concludes that a conflict exists, the conflict is not imputed to the lawyer’s firm, but would be cured if another lawyer in the firm who is not involved in such a relationship with the client handled the client’s work.
      * If you have a sexual relationship/ close relationship – it can undermine lawyer- client relationship, the quality of service, etc. Can give that person on another person at your firm.

### LSUC v Hunter [2007] LSCC No 8

* **Facts:** GH leading partner/ excellent lawyer in family law; in 2002 he had a female client XY and husband ZZ who were no longer together, XY has sole custody, XY enhanced GH to end supervisory access that husband has (legal work).
  + Financial issues arose between ZZ and XY, further custody and access questions; GH did a good job
  + 2003: GH and XY developed friendly relationship, starting hanging out with her, at dinner they discussed the case, ZZ is alcoholic and on child was injured in a pool due to ZZ negligence
  + At dinner, GH says marriage is a sham, and only stayed with wife b/c of child
  + XY and GH enter into sexual relationship and GH continued to act
  + In November 2005, dinner with XY, GH says improper relationship, wanted to go over rules with XY
  + She initials the pages, indicating she read them; GH mentions has other affairs, and disclosed affairs to wife, and they are trying to make it work – GH ends relationship with XY
  + Evidence that she is distressed by breakup primarily
  + GH went to firm with rules of professional conduct, discussed with client and she consented
  + November, he appeared before law society and told them about it (he was the head lawyer on it)
    - Disclosed actions and tendered resignation
  + 2006: XY gets what she wants, sole custody of the kids
  + He was the head of the Law Society at a regular meeting, resigned from position.
  + GH admitted to professional misconduct in this case
  + LS Prosecution sought $2.5k fine and probation for 4 months, GH requests admonition (just say bad, don’t do it again) in front of society
* **Issue:** Should there be punishment? Was there a conflict of interest?
  + **Note:** No evidence suggesting work was impacted and he didn’t adequately do his job, he took responsibility, he was unlikely to do it again
* **Ratio: (1) There is no absolute ban against sexual relationship with client, but they are cautioned against**
  + - *“the rules of professional conduct do not create an absolute prohibition against initiating or continuing a sexual/romantic relationship with a client. […] however it can be fairly said that any sexual/romantic relationship with a client, at the very least, raises serious questions about whether the lawyer is thereby placed in a conflict of interest or is otherwise jeopardising the solicitor-client relationship.”*

**(2) If you are in one, you must warn from the onset**

* + - *“Given the conflict of interest, the member was obliged to discuss with his client at the outset of their sexual/romantic relationship whether he should continue to act on her behalf. The member should have referred at minimum, to the circumstances that created the conflict of interest, and the dangers associated with that conflict of interest. The factors articulated in the Commentary to 3.4-1 should have figured prominently in that discussion.”*

**(3) If the conflict is too profound, the lawyer must pass off the file**

* + - *“it should be noted that, in some circumstances, the conflict created by the existence of a sexual/romantic relationship will be so profound and irreconcilable with the lawyer’s ability to provide objective, disinterested professional advice that the lawyer simply cannot continue to act, and must recommend that the client retain a different lawyer.”* (431)
* **Decision:** There was a conflict of interest, GH suspended for 60 days and $2,500 fine
* **Reasons for the Decision:**
  + p. 430 – 431 of “Legal Ethics”: “There is no doubt … that the sexual/romantic relationship between the member and XY created a conflict of interest. The member had a duty to provide objective, disinterested professional advice to XY. The sexual/romantic relationship had the significant potential of jeopardizing the member's ability to provide such advice. It also had the significant potential of inhibiting the client from challenging or even questioning the advice being given by someone who was not only her lawyer, but an intimate partner. The fact that XY viewed the relationship as serious and committed reinforced this potential danger. As well, the nature of the work being performed by the member on XY's behalf—involving a dispute with XY's former husband and access issues—further underscores that danger.”
  + p. 430 – 431 of “Legal Ethics”: “The *Rules of Professional Conduct* do not create an absolute prohibition against initiating or continuing a sexual/romantic relationship with a client. This is not the case or the forum to debate whether the existing Rule is sufficiently broad or inclusive. However, it can fairly be said that any sexual/romantic relationship with a client, at the very least, raises serious questions about whether the lawyer is thereby placed in a conflict of interest or is otherwise jeopardizing the solicitor–client relationship. … Given the conflict of interest, the member was obligated to discuss with his client at the outset of their sexual/romantic relationship whether he should continue to act on her behalf. The member should have referred, at a minimum, to the circumstances that created the conflict of interest, and the dangers associated with that conflict of interest.”
    - The rules do not prohibit having sex with clients, having a relationship with clients, etc. But the law society is saying that the presence of the relationship gives rise to obligations to the lawyer
    - Lawyer should point out potential conflicts of interest, get consent, make client aware of the professional downside, recommend independent legal advice, etc.
  + p. 430 – 431 of “Legal Ethics”: “[The applicable rule] does not compel a lawyer to advise the client to obtain independent legal advice about the conflicting interest in all cases. However, where the client is unsophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client's consent is informed, genuine and uncoerced. Here, the client was emotionally vulnerable (whether as a result of the family law dispute, her new, intimate relationship with the member or both), and the member should have recommended independent legal advice. Any uncertainty on the member's part as to whether the circumstances compelled him to recommend independent legal advice should have been resolved in favour of such a recommendation.”
    - Can have relationships- just need to tell client about professional downsides and if vulnerabilities exist, recommend the client gets independent legal advice
  + p. 430 – 431 of “Legal Ethics”: “It should be noted that, in some circumstances, the conflict of interest created by the existence of a sexual/romantic relationship will be so profound and irreconcilable with the lawyer's ability to provide objective, disinterested professional advice that the lawyer simply cannot continue to act, and must recommend that the client retain a different lawyer.”
    - Should match up with conflict of interest in rule 1.1-1
    - If lawyer believes it gives rise to substantial risk of loyalty to or representation to client, the lawyer should tell client he/she cannot continue to act and the client should retain a different lawyer
* **Question:**
  + Should we prohibit sexual relationships between lawyers and clients? Why or why not?
  + Consider lawyers in rural centers, who may act (in minor ways) for most of the people in the area (can you then not have a relationship in your town…)
    - This would create a disincentive for lawyers to move/ work in underserved areas

Ethics of Advocacy

* These apply only when lawyers act as advocates
* Not defined but context clarifies

## Ethics of Advocacy

* Professional Conduct Obligations that arise only where the lawyer acts “as an advocate”.
* Acting “as an advocate” is not defined by the relevant rules.
* Relates to representation of clients before courts, administrative tribunals, mediators, etc.
* Some of the most in-determinative rules we have

## The Advocacy Rules

* Chapter 5.1 of the FLSC Model Code:

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

* + Refers to lawyers as advocates, but by context we understand in tribunal before a decision-making official (mediator, judge, etc.)
  + What does candour, fairness, courtesy and respect mean? We looked at it with civility a little. These are all imposing manners on lawyers.

|  |
| --- |
| * **Commentaries Rule 5.1-1**   [1] Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer’s duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties’ right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.   * + Consider bribing a judge – that would give favourable ruling but go against fair and legality   [2] This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures.   * + Where the rules apply ^   [3] The lawyer’s function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client’s case. …  [8] In civil proceedings, a lawyer should avoid and discourage the client from resorting to frivolous or vexatious objections, attempts to gain advantage from slips or oversights not going to the merits or tactics that will merely delay or harass the other side. Such practices can readily bring the administration of justice and the legal profession into disrepute.   * + Theme that we are balancing zealous advocacy and neutral conduit with the boundaries created and our duty to the court   + Be partisan/zealous and fair/honest |

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

* + (a) Abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;
  + (b) Knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;
    - appears very subjective
  + (c) appear before a judicial officer when the lawyer, the lawyer’s associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;
    - Personal relationship would need to be disclosed and consent obtained from all parties. Would need to be in the interest of justice.
  + (d) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter by any means other than open persuasion as an advocate;
    - Specific rule that catches things like bribery
  + (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
  + (f) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;
    - Can’t lie to the judge – need to be accurate in all recitations of evidence made to the court
  + (g) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal;
  + (h) make suggestions to a witness recklessly or knowing them to be false;
    - ex. If you know the witness isn’t guilty, you can’t try to get them to say they are on the stand
  + (i) deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;
    - If you notice pertinent authority was not brought forward, even if it harms your argument, you NEED to bring it to the court’s attention
    - You have a positive duty to bring this information forward
  + (j) improperly dissuade a witness from giving evidence or advise a witness to be absent;
  + (k) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;
  + (l) knowingly misrepresent the client’s position in the litigation or the issues to be determined in the litigation;
  + (m) needlessly abuse, hector or harass a witness;
  + (n) when representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal or quasicriminal charge or complaint to a regulatory authority or by offering to seek or to procure the withdrawal of a criminal or quasi-criminal charge or complaint to a regulatory authority;
  + (o) needlessly inconvenience a witness; or
  + (p) appear before a court or tribunal while under the influence of alcohol or a drug.

**\*This is not an exhaustive list, just examples of the type of behaviour that would be caught by the rule!**

Examples of Specific Duties

1. Defending the guilty
2. Client perjury

**[1] Defending Guilty Clients**

* Should defense counsel defend clients who they know to be “guilty”
  + (meaning that the client did in fact commit the actus reus of the crime with which he or she has been charged while also having the related mens rea)?
  + Not formally guilty- but you know your client did the thing and meant to do the thing they are charged with.
* Hard to justify given the **Barrister and Solicitor’s Oath**
  + “I accept the honour and privilege, duty and responsibility of practising law as a barrister and solicitor in the Province of Ontario. ***I shall protect and defend the rights and interests of such persons as may employ me***. I shall conduct all cases faithfully and to the best of my ability. I shall neglect no one's interest and shall faithfully serve and diligently represent the best interests of my client. ***I shall not refuse causes of complaint reasonably founded***, nor shall I promote suits upon frivolous pretences. I shall not pervert the law to favour or prejudice any one, but in all things I shall conduct myself honestly and with integrity and civility. ***I shall seek to ensure access to justice and access to legal services.*** I shall seek to improve the administration of justice. I shall champion the rule of law and ***safeguard the rights and freedoms of all persons***. I shall strictly observe and uphold the ethical standards that govern my profession. All this I do swear or affirm to observe and perform to the best of my knowledge and ability.” (Emphasis added)
    - All underlined contradict the notion that you can turn someone away for being ‘guilty’
    - Everyone has a reasonably founded claim that they have a right not to be deprived of s 7 rights
* Even harder to justify given **The Neutral Conduit Model** 
  + Access to Legally Authorized Rights and Remedies despite the complexity of the Law
  + Lawyers= antidote to the complexity of the law
  + All people have the right to be defended from charges, but this is complicated, and therefore lawyers have the duty to provide counsel/access
  + Even where a client may be ‘guilty’ they have the right to defence counsel
    - “The lawyer who vigorously defends the accused who is known to be guilty sends a message to police and prosecution alike that fair and complete evidence will be needed if they hope to secure a conviction, with an attendant benefit for all accused. Such a defence also recognizes an inherent dignity and autonomy in even the culpable accused, who is deserving of fair procedures as he or she goes through the criminal justice process. The result may be the acquittal of persons who have committed criminal offences—in a sense, the overprotection of the guilty—but society has deemed this to be an acceptable price to pay in exchange for the adequate protection of individual rights.” - Proulx and Layton (p. 439 of “Legal Ethics”)
    - “Resolute partisan advocacy on behalf of those accused of crimes is the *greatest safeguard against encroachment by the state*. The right to counsel is essential whether or not the accused person is guilty. To suggest that defence counsel represent only people who are innocent (or any other category of people) is to open the door to a system in which the government decides who is, and who is not, entitled to a defence.” Gavin MacKenzie (p. 439 of “Legal Ethics”)

**Commentaries to Rule 5.1-1**

* Representing guilty people

[9] Duty as Defence Counsel – When defending an accused person, a lawyer’s duty is to protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged. Accordingly, and notwithstanding the lawyer's private opinion on credibility or the merits, a lawyer may properly rely on any evidence or defences, including soc alled technicalities, not known to be false or fraudulent.

[10] Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.

* + - Because of admissions from client, you know the client is guilty. You cannot set up an affirmative defense (setting up someone else)
    - Accused should be made aware of these limitations
    - Can’t take any form of action suggesting to client that they are better off lying to you
    - Tell clients, I cannot lie for you, present false evidence, claim a false alibi, etc.
    - Do not give clients the suggestion that defence will be more robust if they refrain from providing a through account of the case

### **R v Li** [1993] BCJ 2312 (BCCA)

*What counts as misleading/ deceiving the tribunal?*

**Facts:** Li (Asian) robbed a jewelry store, admitted to lawyer, he is represented by Brookes.

* + Witness against Li is clerk who worked at jewelry store; they give evidence to appearance (hairstyle, fluency, and proficiency in English); Brookes knows his client did it and knows the clerk saw this happen
  + In challenging their testimony, he calls in other witnesses who will testify (a) that Li never wore his hair that way that is being described (b) his level of proficiency in English is incompatible with the story being told by the prosecution (He is bringing in evidence to make it appear that clerks are unreliable)

**Note:** recall, a lawyer must not knowingly deceive… etc.

**Issue:** Is this okay? To challenge the credibility of witnesses you know are telling the truth? Is Brookes deceiving the tribunal? Brookes received to let Li testify- didn’t want to deceive that way.

**Ratio: As long as you don’t say something that is untrue (i.e. blame a third party) you are allowed to challenge the prosecution by disproving elements of their case**

**Decision:** No issues here with the way the defence is forwarded

**Reasons for the Decision:**

* p. 445 of “Legal Ethics”: “Having received an admission from the accused that he robbed the store, Mr. Brooks was required to refrain from setting up any inconsistent defence. He was entitled, however, indeed under a duty, to test the proof of the case in every proper way. Thus, in my view, it was not improper for Mr. Brooks to call two independent witnesses who gave uncontroversial evidence about the hairstyle of the accused, and about his fluency in English. Those matters might have raised a doubt about the reliability of the identification evidence given by the jewelry store clerks.”
  + Note: speaking to the reliability of evidence
* p. 446 of “Legal Ethics”: “Thus, it does not appear that Mr. Brooks breached any ethical rule by continuing to act after the accused admitted he participated in the Burnaby robbery. He cross-examined the witnesses and sought to raise a doubt about identification (which was the only hope the accused had). He did not call the accused or put up any defence inconsistent with the facts believed by him to be true. ….”
  + What Brookes wasn’t deceptive, he was testing the quality of evidence
  + He wasn’t asserting that they didn’t see him, he was suggesting their memory was not necessarily reliable
  + Trying to poke holes at assertions made

### United States v Wade (USSC) (pg. 466)

* “If [the lawyer] can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly, there are some limits which defence counsel must observe but more often than not, defence counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness whom he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honourable defence counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.”
  + **Despite permission to test evidence, it is accepted in the US and Canada, you cannot assert a witness is lying UNLESS you have a good faith basis**

**\*What we can do is TEST the evidence, but we cannot lie/ mislead\***

**[2] Client Perjury**

What does a lawyer do when a client commits or threatens to commit perjury?

**Criminal Code of Canada**

* **131** (1)  … every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.
* **132** Every one who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years

**Possible Strategies**

* What the lawyer can do when a client announces they will perjure themselves:
  + ***Proceed as usual*** (leading to violations of FLSC Code s. 5.1). The lawyer would even rely on the client’s testimony when summing up to the jury.
    - Prohibited by law! Would lead to lawyer’s involvement.
  + ***Free and open narrative*** (ordinary questioning on other issues – when ‘perjury’ issue arises, ask the client if he has anything to add). Refrain from relying on perjury in summing up.
  + ***Refuse to call client*** (this is what happened in Li). (Right to testify vs. Right to testify falsely).
    - May interfere with right to testify- but there is no right to testify falsely
  + ***Steer client away*** from the relevant issues (for example, never ask the client “Where were you on the night in question”). This has the problem of leaving “gaps” in the client’s testimony.
    - Could put client at disadvantage and doesn’t prevent
  + ***Dissuade or withdraw*.** Note that withdrawal might be prevented by rule 3.7 of the FLSC Code or its provincial equivalents.
    - If precluded from withdrawing, will need to select another option
  + ***Expose the client’s intention*.** [Excludes the possibility of a “change of heart”, and also violates confidentiality].
    - Client may have had a last minute change of heart
    - May break confidentiality
* With all of these options the lawyer must balance several important considerations including (1) loyalty to the client (2) the duty of confidentiality (3) the duty to render competent service (4) the client’s constitutional right to testify on her own behalf (5) the lawyer’s role as officer of the court (6) the lawyer’s potential liability for assisting in the commission of an offence (namely, perjury)

**Client Perjury Rule 5.1-4**

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

|  |
| --- |
| **Commentary [1]** If a client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done, the lawyer should, subject to rule 3.7-1 (Withdrawal from Representation), withdraw or seek leave to do so.   * + *Need to dissuade client first and then withdraw* |

**What if Withdrawal is Impossible?**

* Because of ***Cunningham***, not clear that this would be a problem if “ethical reasons” is the reason given
  + **Monroe Freedman** (Harvard Professor of Ethics) – he argues that a lawyer who can neither withdraw from the case or dissuade a client from committing perjury is required to proceed as if the client’s testimony is true 🡪you should elicit the testimony in the normal manner relying on that evidence when summing up the case for the trier of fact. Why? Because if you don’t it would be a violation of the lawyer’s duty of loyalty to the client and unduly prejudices the client’s interests.
  + “The duty of confidentiality, like the client-lawyer privilege, does not extend to clients' intentions to commit crimes [including the crime of perjury]. For policy reasons, moreover, lawyers should not have any duty to assist clients to carry out their expressed intentions to commit crimes. To require lawyers to do so is to corrupt the appropriate role of criminal defence lawyers in the administration of criminal justice.” - Gavin MacKenzie (p. 449 of “Legal Ethics”)
    - This is a good point per Graham – perjury is a crime! Freedman left this out, you would assist the client in the commission of an offence!
    - This is the general view – dissuade and withdraw (we can always withdraw in Canada per ***Cunningham***) you could expose your client (lie and say you could)
    - If the option of withdrawal is possible,
    - The pre-condition for Cunningham is ethical dilemma – what if you don’t have one?
      * If the lawyer believed that ethical choice is one of the options outlined above, then there is no ethical reason to withdraw if the lawyer doesn’t believe there is
      * Arguable the other options can be pursued

**Surprise Perjury:** When your client does not announce intention to perjure ahead of time but does it on the stand

**Rule 5.1-4**

* + A lawyer who has unknowingly done or failed to do something that, if done or omitted knowingly, would have been in breach of this rule and who discovers it, must, ***subject to section 3.3 (Confidentiality),*** disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it. (Emphasis added)
  + Note the unclear relationship between this rule and the rule of Confidentiality. See p. 450 of “Legal Ethics”.
    - Failed to prevent something you would have prevented had it happened
    - You are supposed to disclose error/ omission and do all that can be done to rectify it
    - If a client perjures, the lawyer knows due to the confidential information the lawyer has
    - Any disclosure of perjury is a violation of confidentiality
    - Lawyer must attempt to convince client to correct evidence, if not, lawyer must have to disclose (despite confidentiality)

### **Meek v Flemming** [1961] 2 QB 366 (AC)

**Facts:** Chief inspector Fleming was inspector in the UK Police, and was involved with paparazzi; he arrested the guy and allegedly beat the guy up

* + Evidence was largely witness based, and a couple police officers support the Chief Inspector’s account
  + The inspector’s position is no excessive force and everything was reasonable
  + At trial, he was ‘won’ but he was demoted and the court did not know this
  + Credibility was an issue here- he was demoted to Staff Inspector (another judicial proceeding, he couldn’t make it to court so he directed someone else to suborn perjury and say other guy was arresting person- this caused him to be demoted)
  + Durand Durand + Stab were the lawyer for Fleming; they know about the reduction in rank
  + Durand makes tactical decision, and the Crown doesn’t know the inspector was reduced in rank
  + If we elude to the fact that he was reduced in rank, then that will look bad on inspector
  + All the other inspectors came in uniforms, but the inspector came in plain clothes and was addressed by Mr.
  + Counsel never addressed Fleming by title but slyly included his title in while asking questions
  + Court says Fleming intentionally mislead the court – but is that Durand did okay? He just buried rank

**Issue:** Did the lawyer do anything wrong here? Did perjury happen?

**Ratio: “In every case it must be a question of degree, weighing one principle against the other. In this case it is clear that the judge and jury were misled on an important matter. I appreciate that it is very hard at times for the advocate to see his path clearly between failure in his duty to the court, and failure in his duty to his client. I accept that in the present case the decision to conceal the facts was not made lightly, but after anxious consideration. But in my judgment the duty to the court was here unwarrantably subordinated to the duty to the client. It is no less surprising that this should be done when the defendant is a member of the Metropolitan Police Force on whose integrity the public are accustomed to rely”**

**Decision:** No perjury, but the court condemns the way the lawyer behaved. New trial ordered.

**Reason for the Decision:**

* + p. 452 of “Legal Ethics”:“It having been decided not to reveal these facts, the following things occurred at the trial. The defendant attended the trial not in uniform, but in plain clothes, whereas all the other police witnesses were in uniform. Thus there was no visible sign of the defendant's altered status. He was constantly addressed by his counsel as "Mr." and not by his rank of sergeant. Counsel tells us that he would so address a sergeant in the normal case. When the defendant entered the witness-box, he was not asked his name and rank in the usual manner. No suspicions were aroused since no one had any reason to suspect. The plaintiff's counsel, however, and the judge frequently addressed the defendant, or referred to him, as "inspector" or "chief inspector," and nothing was done to disabuse them.”
    - Counsel did all of this intentionally
    - Whereas usually used to gain credibility, they allowed the suggestion to stand that he was chief without saying it
  + p. 452 – 453 of “Legal Ethics”: “The defendant started his evidence with a brief summary of his career up to the time when he was chief inspector at Cannon Row police station, but no reference was made to his reduction in rank. In cross-examination he was asked: "You are a chief inspector, and you have been in the force, you told us, since 1938? (A) Yes, that is true." That answer was a lie. Later: "(Q) You realise, as chief inspector, the importance of the note being accurate? (A) The importance of it conveying to me what I want to give in evidence." He was asked further: "Let us understand this. You are a chief inspector. How old are you? (A) I am forty-six years of age." and again: "(Q) I am not asking you whether you took part in the inquiries, but whether you as a responsible and senior adult man—never mind about your being a chief inspector—had no anxiety about this case, no concern or interest? (A) No. I can only repeat I have nothing to fear."”
    - Multiple assertions that he was a chief inspector and nothing was done to correct it
  + p. 453 of “Legal Ethics”: “The judge referred to the defendant as "inspector" or "chief inspector Fleming" many times in his summing-up to the jury. It is clear that he reasonably considered that the defendant's rank and status were relevant on credibility in a case where there was oath against oath, and where there was a question of the defendant's conduct in the course of his duty. … Nor was the defendant's counsel prepared to forgo the advantage to be derived from the status in the police force of his witnesses in general.”
    - Case of oath vs oath (it was a he said – he said case)
    - Credibility was the most important issue in this case and a reduction in rank carries a deficit in credibility (further deceiving the court)!
  + p. 455 of “Legal Ethics”: “Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so), it would be wrong to allow him to retain the judgment thus unfairly procured. *Finis litium* is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials … In every case it must be a question of degree, weighing one principle against the other. In this case it is clear that the judge and jury were misled on an important matter. I appreciate that it is very hard at times for the advocate to see his path clearly between failure in his duty to the court, and failure in his duty to his client. I accept that in the present case the decision to conceal the facts was not made lightly, but after anxious consideration. But in my judgment the duty to the court was here unwarrantably subordinated to the duty to the client.”
    - Balancing of interests – partisan/zealous vs duty of candour
    - Here, the wrong balance was struck – the actions went too far, they were offside the rules of ethics/ proper courtside behaviour
  + p. 455 of “Legal Ethics”: “It was argued that the defendant was justified in that a party need not reveal something to his discredit; but that does not mean that he can by implication falsely pretend (where it is a material matter) to a rank and status that are not his, and, when he knows that the court is so deluded, foster and confirm that delusion by answers such as the defendant gave. *Suggestio falsi* went hand in hand with *suppressio veri*. It may well be that it was not so clear in prospect as it is in retrospect how wide the web of deceit would be woven before the verdict came to be given. But in the event it spread over all the evidence of the defendant. It affected the summing-up of the judge, and it must have affected the deliberations of the jury.”
  + p. 455 of “Legal Ethics”: “It would be an intolerable infraction of the principles of justice to allow the defendant to retain a verdict thus obtained. I would, accordingly, allow the appeal with costs, and order a new trial.”
  + p. 456 of “Legal Ethics”: ““In the discharge of his office the advocate has a duty to his client, a duty to his opponent, a duty to the court, a duty to the State and a duty to himself." It seems to me that the decision which was taken involved insufficient regard being paid to the duty owed to the court and to the plaintiff and his advisers.”
    - You have duty to opposing parties, and that duty as well as duty to the court was subordinated
  + Counsel took stance after verdict
    - p. 456 – 457 of “Legal Ethics”: DURAND QC: “I indicated last week in the course of my argument before your Lordships that I took responsibility for the decision; I hope that the words I used then left the court under no misunderstanding as to my personal responsibility. It is right that I should say as emphatically and clearly as I can that the decision not to make disclosure of the defendant's change of status was mine, and mine alone. Having come to the conclusion that this course was justifiable, I determined and dictated the policy which was thereafter followed during the course of the trial. Neither my learned junior counsel, Mr. Stabb, nor my instructing solicitor was responsible for initiating or pursuing that policy, and indeed they expressed their disapproval of it. I thought it right, having regard to the observations made last week, to make that statement before your Lordships in open court, and I am very grateful to your Lordships for allowing me to make it.”
      * This was the lawyer’s idea!
      * Should he have been punished for professional misconduct?

### Re Jenkins and The Queen (2001) 152 CCC (3d) 426

*When continued representation would result in perjury*

**Overview:** this case would be really interesting based on Cunningham or Jordan (***Jordan*** said if there was an unreasonable delay in getting to court, you would go home free… Crown doesn’t like this b/c this isn’t always their fault – case going on right now is client wants specific defence lawyer, and they can’t go to trial until March 2018 which is in violation of ***Jordan***!)

**Facts:** Jenkins charged w/ first degree murder, on third trial

* + Trial 1 was aborted when crown had Jenkins lawyer booted for conflict of interest
  + Trial 2 Jenkins fired lawyer 2, attributable to Jenkins
  + Trial 3 lawyer is Mr. Powell, 8 weeks into complicated murder trial, and about 1-2 weeks from trial’s conclusion; Powell sough adjournment and the next day, Mr. Peel comes in as counsel for Powell and says Powell wants to be removed as counsel of record
  + Powell gave a lengthy statement basically saying that if he did anything that counsel generally does, he would be assisting perjury – Peel doesn’t know the facts of the perjury, see 462)

**Issue:** Should court allow him to withdraw as counsel?

**Ratio:** **Silence constitutes deception. The judicial view on what constitutes participation in the deception of the tribunal matches up with rule 5.1-4.**

**Decision:** Entitled to withdraw for ethical reasons

**Reasons for the Decision:**

* + p. 462 of “Legal Ethics”: “Mr. Peel, in his submissions to me, emphasized that the information which the accused had conveyed to Mr. Powell was such that it was fundamentally inconsistent with the very essence of the case which had been advanced to the jury on behalf of the accused. It was his view that, should Mr. Powell be required to continue his representation of the accused, any active participation whatsoever would raise the potential of Mr. Powell misleading the court.”
    - Client seems to have given a set of facts to Powell under which Powell created representation, found out entire case was based on a lie because Jenkins had been lying
  + p. 463 of “Legal Ethics”: “Mr. Peel was in the awkward position of being unable to set forward the precise factual underpinning for the application. He could go no further than to say to me that the information communicated by the accused was such that any involvement by Mr. Powell in the continuation of this trial would raise the hazard of a deception of the court.”
    - Judge was reluctant to allow Powell to withdrawal
    - Should the court allow the application for withdrawal where continuance of representation will result in deception of tribunal? Note: before Cunningham
  + p. 464 of “Legal Ethics”: “It was the position of the Crown that, even should the accused, in the continuation of this trial, testify contrary to the disclosure made to Mr. Powell, the duty which Mr. Powell owes to the court would be fulfilled provided he did not, to use the Crown's words, advance the lie. As I understood his position, it was that as long as Mr. Powell remained silent it would not matter that silence in the face of what had gone before would have the effect of deceiving the court nor would it matter that even further testimony would have that effect, so long as Mr. Powell did not actively do anything to advance the deception.
    - As long as Powell doesn’t advance the lie, he is fine
  + Respectfully, I disagree. It is important to note that this was not a case where the application was made before trial so that deception might be avoided by counsel, to borrow the Crown's words, not advancing the lie in the way in which the case was then presented. Rather, the deception in this case would arise from silence alone on the part of counsel in the face of what had already been presented to the court.”
    - This is a case where remaining silent would result in a misapprehension of the facts
    - The court will be deceived and the verdict will not be reliable
  + p. 464 – 465 of “Legal Ethics”: “My view is that, quite apart from the obvious prejudicial inferences that might be taken by the jury as a result of Mr. Powell continuing as counsel while virtually tied to his chair, even silence on the part of Mr. Powell would have the potential of placing him in jeopardy in respect to his duty to the court, remembering that the communication made to Mr. Powell cuts to the very core and essence of the defence that had been presented in the trial. Silence on the part of counsel may not in all circumstances be deception, but in these circumstances, I believe that it would be. Limited representation on the part of Mr. Powell would not be an acceptable alternative. To borrow the words of Mr. Martin (as he then was) from 1969, the application has been made in good faith, there is a serious problem and counsel has acted promptly. I am, therefore, reluctantly compelled to the conclusion that the application must be granted.”
    - Silence of counsel would be participating in deception
    - **If you find out factual assertions are untrue, such that case is inconsistent with true state of affairs, silence counts as deception of tribunal**
    - Procedure has been simplified because of ***Cunningham***
* **Note:** Jenkins is a really useful case
  + The judicial view regarding what counts as deception matches up with rule in 5.1-4
    - Disclosure must be given and an effort must be made to rectify
  + No duty to correct perjury but duty to withdraw, and will be allowed to withdraw