|  |
| --- |
| Legal Ethics and Professionalism Summary |

Table of Contents

Ethics Introduction 8

Two Ways Lawyer’s Can Be Held Responsible 🡪 *public law and private law* 8

Law Society Act 8

Section 33 LSA 🡪 *lawyers shall not engage in professional misconduct* 8

Three offences a lawyer may commit (s.33) 8

Section 34 LSA 🡪 *power to bring lawyer to tribunal for breach of s. 33* 9

Section 35 🡪 *penalties for breach* 9

Section 62.01 🡪 *LSO can make bylaws included Rules of Professional Conduct* 9

Federation of Law Societies of Canada Model Rules of Professional Conduct: Appendix A (“FLSC”) 10

Rules of Professional Conduct 10

Duty of Confidentiality 10

Why is confidentiality important? 10

When does the lawyer’s duty of confidentiality arise? 10

Sources of Confidentiality 11

FLSC Rule 3.3-1 🡪 *Rule of Confidentiality* 11

FLSC Rule 3.3-1 Commentaries 🡪 *interpreting duty of confidentiality* 12

If Confidentiality is Broken 13

Rationale Behind Confidentiality 13

Privilege 13

Characteristics of Privilege 14

Distinguishing Privilege from Confidentiality 🡪 *Recall FLSC Rule 3.3-1 Commentary 2* 14

Boundaries of Confidentiality 14

Public Safety Exception 14

FLSC Rule 3.3-3 🡪 *may disclose in limited circumstances* 15

FLSC Rule 3.3-3 Commentary 🡪 *Interpreting when disclosure may be warranted* 15

***Smith v Jones (1991, SCC****) 🡪 an exception for public safety does exist but privilege, confidentiality, and the neutral conduit model are of the utmost importance. The exception to confidentiality can apply when the following factors are met BUT this allows a lawyer to disclose but does not require them to: 1) seriousness 2) imminence 3) clarity* 15

Textbook Definitions 16

Disclosure and Use 17

Rule 3.3-2 Commentary 🡪 *lawyer cannot benefit from confidential info* 17

***Szarfer v Chados (1986)*** *🡪(1) Trust is an essential element of solicitor-client relationship and cannot use the information of a client to benefit or detriment (2) Case stands for a breach of fiduciary duty* 17

Interests Protected –Persist after death? 18

***Geffen v Goodman Estate (1991, SCC)*** *🡪 when dealing with confidentiality after death, if unclear intentions, sometimes court will allow disclosure of information if it is 1) furthers client’s interests 2) in interest of justice* 18

***R v Jack (1992, Man. CA)*** *🡪 Graham thinks wrongly decided: exception to privilege if circumstances are in the interest of justice and the deceased* 19

Conclusion on Interests Protected 20

Duty to Assert Confidentiality 20

***Bell v Smith (1968, SCC)*** *🡪 lawyers have a duty to invoke privilege when asked a question that may invoke privilege; it is legally wrong for a judge to allow evidence that is privileged in nature* 20

***R v Fink (2002 SCC)*** *🡪 confidentiality is a constitutional principle; cannot search for documents that are protected by privilege –this fails to give clients opportunity to assert or waive privilege which is required* 21

Publicly Speaking of Cases 21

Rule 7.5-1 🡪 *speaking to media* 21

***Stewart v CBC (1997, Ont)*** *🡪 despite not disclosing confidential information, can breach fiduciary duty by re-vilifying client as part of retainer is to repair public image; 1) difference between publicly available info and publicly known 2) fiduciary relationship survives termination of lawyer/client relationship* 21

Exceptions to Confidentiality 22

Six Exceptions (or possible exceptions) to Confidentiality 22

Future Harm and Public Safety 23

*Common Law (Smith v Jones)* 23

FLSC Rule 3.3-3 23

SCC vs. Rule 3.3 23

Future Harm: Timing Issues 24

Examples 24

Lawyer Self Interest 24

Self Defence 🡪 FLSC Rule 3.3-4 25

Fee Collection 🡪 FLSC Rule 3.3-5 25

Ethical Advice 🡪 FLSC Rule 3.3-6 25

Conflict Checks 🡪 FLSC Rule 3.3-7 25

***R v Dunbar (1982, Ont CA)*** *🡪 When a client impugns a lawyer including charges of incompetence, perjury, or conduct that waives privilege, privilege may be waived. In circumstances of defending his own innocence and when a client discloses part of privileged conversation in relation to allegation against the lawyer, whole privilege is lost* 26

Innocence at Stake 26

Competing Tests 27

***R v Derby Magistrates (1995, UK)*** *🡪 UK reject the “innocence at stake exception” because it will impair the neutral conduit model and encourage clients to not be honest with their lawyers* 27

***R v McClure [2001, SCC]*** *🡪 there is an innocence at stake exception if two step test passed: 1) could cause reasonable doubt and 2) likely to cause reasonable doubt* 28

Authorized Disclosure 29

FLSC Rule 3.3-1 🡪 *can disclose if consent* 29

Express/Explicit Authorization 29

Implied Authorization/Waiver 29

Public Knowledge 30

Rule 3.3-1 Commentaries 8 🡪*public knowledge discussions* 30

***Ott v Fleishman (1983, BCSC)*** *🡪 The public could have known a fact, but it isn’t enough to bring it under the public knowledge umbrella; need some sort of proof that public knows to bring forward defence of public knowledge* 30

Disclosure Required by Law 30

FLSC Rule 3.3-1(b) 🡪 *required by law to disclose* 30

What Counts as “required by law”? 31

***R v Fink (2002, SCC)*** *🡪 Privilege is a broader constitutional right (this case expanded the notion of privilege). Privilege is a principle of fundamental justice* 31

Client Selection/Rejection 31

Part I: Barrister’s Oath (s. 21, Bylaw 4, created under LSA Ontario) 31

When does it apply? 🡪 *Two exceptions 1) competence 2) fees* 32

Financial Reasons 32

***R v Cunningham (2010, SCC) 🡪*** *lawyer may be required to work for free: 1) accused can discharge legal counsel and court cannot stop this 2) courts have jurisdiction to disallow requests for withdrawal 3) test to disallow withdrawal (but only allowed to refuse sparingly and cannot refuse withdrawal for ethical reasons)* 32

Moral Reasons 33

Cab Rank Rule 33

Role Differentiated Morality 🡪 *don’t hate the player, hate the game* 33

Neutral Conduit Model 34

***Tuckiar v The King (1934)*** *🡪 lawyers must be a neutral conduit and it is their paramount duty to respect privilege; obligation that cannot be weakened by character of the client* 34

***Rondel v Worsley (1969 UK HL) 🡪*** *1) lawyers have overriding duty to court 2) lawyers cannot refuse clients because of moral sentiments 3) lawyers must advocate for client even if they disagree with morals, but also owe a duty to the court (competing interests) 4) client cannot dictate strategy of lawyer/case* 34

***R v Murray (2000 ONT CA)*** *🡪 governed by rules of integrity; morality as lawyer is to know the limits of the law and interests of client* 35

***R v Delilsle (1999 QC CA****) 🡪 Lawyer cannot presuppose client’s guilt- there is no basis for imposing an additional barrier of their own morality that may erode client’s access to legal rights and remedies* 36

Integrity 36

Introduction 36

Sources Rule of Integrity 36

FLSC Rule 2.1-1 🡪 *integrity* 37

Rule 2.1-1 Commentaries 37

Case Law that Fleshes out Integrity 37

***Adams v Law Society of Alberta (2000, AR)*** *🡪 Violation of rules of professional conduct rooted in integrity –he used position as lawyer for sex, abused his power, and strong-armed client into situation. Big factor here is vulnerability of client and the appropriate penalty is disbarment* 37

***Law Society of BC v A Lawyer (2000, LSDD)*** *🡪 fleshes out analysis on punishment for breach of integrity; integrity appears to be about intent (purpose of violation); primary focus in sentencing is protection of public interest, SEE PRIMARY FACTORS to consider in reasoning* 38

***Law Society of New Brunswick v. Ryan (2003, SCC)*** *🡪 LS Committee has broad discretion to determine what sanctions apply; LS can ban a member from practice when his practice involved an egregious departure from rules of conduct as it had effect of undermining public confidence in basic legal institutions* 38

Conclusion on Integrity 39

Good Character 39

Integrity vs. Good Character 39

Section 27(2) Law Society Act 39

Practically how does s. 27(2) work? 39

Goals of the Good Character Requirement 40

Case Law the Fleshes out s. 27(2) “Good Character” 40

***Re P(DM) (1989, ON)*** *🡪 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?* 40

***Re D’Souza (2002, LSDD)*** *🡪 concepts of remorse and time can aid in a good character hearing; can apply for another good character hearing if you failed first time* 40

***LSUC v Aidan Christine Burgess (2006, LSDD)*** *🡪 passage of time is a critical indicator of good character as time needs to pass between dishonesty and call to the bar. Remorse + time =call to the bar* 41

***LSUC v Sharon Ellen Shore (2006, LSDD)*** *🡪 distinguishable from other cases because she owned up to bad conduct right away and did not make excuses; serious remorse + passage of time can result in good character* 41

***LSUC v James Maurice Melnick (2014, LSDD)*** *🡪 serious remorse and passage of time are the leading requirements for good character* 42

Aftermath/Policy Discussions 42

Civility Regulation 42

Introduction 42

The Golden Age of Civility? 43

FLSC Rule 6.3 🡪 *harassment and discrimination* 43

Rule 6.3 Commentaries 43

Sources of Civility 43

Criminal Code Section 9 🡪 Contempt of Court 43

FLSC Rule 5.1-5 🡪 *courtesy* 43

FLSC Rule 5.1-5 Commentary 43

FLSC Rule 7.2-1 🡪 *courtesy and good faith* 44

FLSC Rule 7.2-1 Commentaries 44

FLSC Rule 7.2-4 🡪 *communications* 44

FLSC Rule 3.2-1 🡪 *quality of service* 44

Overview of Relevant Rules 44

Tension with Other Rules 45

Rule 5.1-1 Commentary 🡪 role in adversarial proceedings 45

The “Indeterminacy Question” 45

The Regulatory Model of Ethics 45

Costs of Incivility 45

Costs of Enforcement of Civility 46

What counts as Incivility? 46

***LSUC v Clark (1995, LSDD)*** *🡪 1) 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* 46

***LSUC v Joseph Peter Paul Groia (2013, LSDD)*** *🡪 allegations of professional misconduct that question integrity of the opposing counsel must be made in good faith and have reasonable basis; look at 4 factors* 47

***LSUC v Groia (2016, ONCA)*** *🡪 duty of zealous advocacy in contrast to uncivility are important to consider; distinguishes Clark from Groia –context and facts specifically are important to consider* 47

***LSUC v Groia (SCC, 2019)*** *🡪 outlines three part test for incivility in court;* 48

Conflicts of Interest: Basics 48

Introduction 48

Two Primary Resources for Conflicts of Interest 🡪 *1) courts 2) Law societies* 49

Sources: Conflicts of Interest 49

FLSC Rule 1.1-1 🡪 *Conflict of interest defined* 49

FLSC Rule 3.4-1 🡪 *duty to avoid conflict* 49

FLSC Rule 3.4-1 Commentary 5 🡪 *duty of loyalty grounded in fiduciary duties* 49

FLSC Rule 3.4-2 🡪 *consent to act where conflict* 50

Neutral Conduit Model 50

The Duty of Loyalty 🡪 Basics 50

*McDonald Estate v Martin (1990, SCC) 🡪 three main points: 1) must balance competing policy interests 2) courts have power to remove solicitors 3) FLSC not binding on courts, but is persuasive; Two step appropriate test in conflicts of interest cases: 1) did lawyer receive confidential info attributable to solicitor/client relationship? 2) Is there a risk it will be used to prejudice of the client?* 50

Impact of Common Law Regulation 51

Conflicts: Acting Against Clients 52

Two Forms of Conflicts Acting Against Clients 52

Successive Representation 52

FLSC Rule 3.2-10 🡪 *cannot against former client without consent* 52

Rule 3.4-10 Commentaries 52

FLSC Rule 3.4-11 🡪 *another lawyer can act if* 52

FLSC Rule 3.4-11 Commentaries 53

Case Law on Successive Representation 53

***R v Zwicker (1995, NB****) 🡪 Unconflicted justice is a principle of fundamental justice –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. Successive representation in a criminal matter is a breach of s. 7.* 53

***R v J(GP) (2001, MBCA)*** *🡪 deals with lateral moves (fact based); A lateral move as counsel representing a witness or a complainant to a prosecutor is an appearance of impropriety. Cannot make lateral move if it involves a change in role/alignment* 53

Problems with Successive Representation 54

Concurrent Representation 54

*R v Neil (2002, SCC) 🡪 established “Neil Bright Line Test” and highlights two conflicting interpretations (a) prohibited where no risk of harm (b) prohibited only where substantial risk of harm; one exception =professional litigation exception* 54

*Strother v 3464920 Canada Inc. (2007 SCC) 🡪 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; must be adverse legal interest involved to trigger bright line test, not simply adverse interest generally (i.e. commercial competitors)* 55

*CNR Co v McKercher LLP (2003, SCC) 🡪 leading case; Neil Bright Line test applies as default, but if it does not meet the circumstances when the test will apply, we fall back on substantial risk test; The potential for conflicts of interest aren’t the only breaches of fiduciary duty there is also 1) duty of commitment to the client’s cause 2) duty of candor* 56

What is the Law Society’s Response to McKercher? 57

FLSC Rule 3.4-1 Commentary 🡪 *adopts SCC reasoning* 57

Conflicts: Personal Conflicts 58

When can they arise? 58

Conflict over Fees 58

Third Party Fee Payments 🡪 *Gavin McKenzie* 58

Payment Among Multiple Accused 59

***R v Stork and Toews (1975)*** *🡪 Conflicts of interest are largely based on appearance (if it looks like a conflict); no actual conflict needed, but you ask was there a substantial risk? Lawyer cannot soft pedal (do worse job) for those not paying* 59

Contingency Fees 59

FLSC Rule 3.6-1 🡪 *fees must be fair and reasonable* 59

FLSC Rule 3.6-2 🡪 *can write out contingency fee in accordance with legislation* 60

Non-Payment of Fees 60

FLSC Rule 3.3-5 🡪 *non-payment of fees recourse* 60

***R v Cunningham (2010, SCC)******🡪*** *lawyer may be required to work for free: 1) accused can discharge legal counsel and court cannot stop this 2) courts have jurisdiction to disallow requests for withdrawal 3) test to disallow withdrawal (but only allowed to refuse sparingly and cannot refuse withdrawal for ethical reasons)* 60

Other Personal Conflicts 61

FLSC Rule 3.4-1 Commentary 11 🡪 *examples of personal conflict (sexual relationship)* 61

*LSUC v Hunter (2007, LSCC) 🡪 (1) There is no absolute ban against sexual relationship with client, but they are cautioned against (2) If you are in one, you must warn from the onset, suggest they get independent legal advice (3) If the conflict is too profound, the lawyer must pass off the file* 62

Ethics of Advocacy 63

FLSC Rule 5.1-1 🡪 *The Advocacy Rules* 63

FLSC Rule 5.1-1 Commentaries 🡪 *gives insight into advocacy duty* 63

FLSC Rule 5.1-2 🡪 *When acting as advocate a lawyer cannot do the listed* 63

Defending Guilty Clients 64

FLSC Rule 5.1-1 Commentaries 🡪 *regarding representing guilty people* 65

Justification for Representing Guilty Clients 66

Cost of defending guilty clients 66

***R v Li (1993, BCCA)*** *🡪 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* 66

***United States v Wade (USSC)*** *🡪 what a defence lawyer can do is test the evidence, what they cannot do is lie/mislead* 66

Client Perjury 67

Criminal Code of Canada s. 131 67

What does the lawyer do when client announces they will perjure themselves? 67

FLSC Rule 5.1-4 🡪 *client perjury* 67

FLSC Rule 5.1-4 Commentary 🡪 *need to dissuade client first and then withdraw* 68

What if Withdrawal is impossible? 🡪 *In the face of known perjury* 68

Surprise Perjury 68

FLSC Rule 5.1-4 🡪 *must attempt to rectify* 68

***Meek v Flemming (1961)*** *🡪 If there is fresh evidence that carried a significant enough weight that it would have either led a reasonable jury to a different conclusion or that it would not have been possible for a reasonable jury to question an important witness’ character, a new trial should be ordered* 69

***Re Jenkins and The Queen (2001)****🡪 Silence constitutes deception. The judicial view on what constitutes participation in the deception of the tribunal matches up with rule 5.1-4.* 69

Emerging Topics in Ethics Law 70

Equality, Diversity and Inclusion (EDI) 70

Mental Health 71

FLSC Rule 3.1-2 🡪 *Competence* 71

FLSC Rule 3.4-1 🡪 *Conflicts of interest* 71

FLSC Rule 7.1-3 🡪 *Duty to Report (most important)* 71

Ontario Human Rights Code 🡪 s. 6 72

|  |
| --- |
| Ethics Introduction |

# Ethics Introduction

## Two Ways Lawyer’s Can Be Held Responsible 🡪 *public law and private law*

1. Private Law
	* Breach of Fiduciary Duty
	* Trial in Courts
	* Damages
2. Public Law
	* Punished by Law Society of Ontario
	* Rules of professional conduct
	* According to the Law Society Act

## 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” (a corporation). 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.

### Section 33 LSA 🡪 *lawyers shall not engage in professional misconduct*

* 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.
	+ This includes any behaviour that violates the definitions of professional misconduct
	+ LSO decides what professional misconduct constitutes

### Three offences a lawyer may commit (s.33)

1. Professional misconduct 🡪 violation of ethical norms that govern lawyers and their duties
	* + This term is not defined in the Law Society Act **but** we know that it means any breach of any of the rules of professional conduct governed by LSUC
			- E.g. The rule of confidentiality – if breached, it would become a form of professional misconduct under S.33
2. Conduct unbecoming the conduct in a lawyer’s private life that reflects badly on the profession
* Also, ill defined like professional misconduct (e.g. convicted of fraud, abuse of power under authority, or spousal abuse)
1. Breach of fiduciary duty 🡪 as a lawyer, we owe a fiduciary duty to our clients to theoretically put their interests ahead of our own
	* + This offence is not found in the LSA or any piece of legislation
		+ Instead, this is a private law breach, which is judged by common law

### Section 34 LSA 🡪 *power to bring lawyer to tribunal for breach of s. 33*

* 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”).
	+ If a lawyer does something that appears to be a wrong, instead of clients having to go after their lawyers, the LSO has the power to go after the lawyer and determine if they committed professional misconduct
	+ This is an administrative tribunal brought forward in LSO’s name
	+ It is not a judge but a panel of lawyers who decide

### Section 35 🡪 *penalties for breach*

* 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.).
	+ Can range from an angry phone call all the way to disbarment
* 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 “professional misconduct”? This is answered (in part) by section 62.01.

### Section 62.01 🡪 *LSO can make bylaws included Rules of Professional Conduct*

* 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 to make laws within the parameters set out in section 62.01.
* According to s. 62(2) of 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, shall 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 the statutory authority delegating to our Law Society the power to make the Rules of Professional Conduct. Through the action of s. 62(2) (described above), any rules passed pursuant to his 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.

## Federation of Law Societies of Canada Model Rules of Professional Conduct: Appendix A (“FLSC”)

* National rules created by provincial law societies to govern all lawyers in Canada
* Not enforceable anywhere –just a model code
* Almost all of the provinces have adopted it though and turned it into their provincial rules of professional conduct with slight differences in each province
* Ontario’s are the closest to the model rules

## 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 s. 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 (inter alia) a breach of any of the *Rules of Professional Conduct*.
* This explains why 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 under s. 35.

|  |
| --- |
| Duty of Confidentiality |

# Duty of Confidentiality

## Why is confidentiality important?

* Thought to assist the court’s ability to generate reliable verdicts
* We want to ensure clients have confidence that anything they say to a lawyer will remain confidential no matter what
* In Canada, we have the beginnings of disclosure of confidentiality, known as the Innocence at Stake Rule
	+ Works in the way that sometimes confidential information will find its way to the front of the court to prevent convictions of innocent people
* **Everything ties back to confidentiality!**

## When does the lawyer’s duty of confidentiality arise?

(1) *“I met with Angelina Jolie today. She wanted to retain me, but I had to turn her down.”*

* No details given, no reason for turning her down
* Can assume Angelina Jolie did not enter into a formal lawyer-client relationship
* Even this pre-retainer discussion is protected by the duty of confidentiality
* Information that is not public is protected by the duty of confidentiality
	+ Consider the circumstance where this lawyer has a specialty (i.e. insider trading, divorce, adoptions etc.) and by finding out this person came to this lawyer can glean insights on the client
	+ A number of instances where it is obvious that going to a lawyer is something one would want to remain private
	+ We don’t want individuals to question and be deterred from whether or not they should/ can be accessing a lawyer. We don’t want people to question ‘should I see X lawyer’

(*2) “Hey Mom, you know that public company you have all of your life savings invested in? It’s going to tank tomorrow, and you’re going to lose all your money unless you cash out. I know this because I’m the company’s in-house lawyer.”*

* This is information the lawyer should not be disclosing
* Two respects in which this information is protected from disclosure
	+ (1) Duty of confidentiality – punishment can range from fine to disbarment
	+ (2) Insider trading – this lawyer will be committing offence known as ‘tipping’ which is not allowed under securities law
* This spread of information is protected by other legislative regimes
* For public policy reasons, lawyers need to keep client secrets no matter the cost to the lawyer or others (there are some small exceptions)

*(3) Mary Smith has just been convicted of murdering Joe Sixpack. You once represented Johnny Punchclock (now deceased), and learned, during the course of your discussions with him, that he (Johnny) actually killed Joe Sixpack, and planted evidence to make it look like Mary did it*.

* “Better to acquit 10 guilty people than convict one innocent person”
* But, this information is confidential – EVEN THOUGH THE CLIENT IS DECEASED
* Even after the retainer with the client is over, the lawyer’s lips must be sealed forever
	+ Unless there is some exception to confidentiality
* Could we have an exception to confidentiality here?
	+ Innocence is at stake. The murderer is dead, and has no interest at stake.
	+ But, living people do have interests and living people will be less inclined to tell lawyer’s their stories if they know that once dead, lawyers will be able to share their secrets
	+ A client needs to know that EVERYTHING will remain secret no matter what

## Sources of Confidentiality

### FLSC Rule 3.3-1 🡪 *Rule of Confidentiality*

* **3.3-1** “A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information unless:
	+ (a) Expressly or impliedly authorized by the client;
	+ (b) Required by law or a court to do so;
		- Statutes or courts can require you to divulge confidential information
		- There is a subset under confidentiality called ‘privilege’
		- Information in ‘privilege’ you must not divulge and the court cannot order you to
	+ (c) Required to deliver the information to the Law Society; or
		- LS can’t use information against anyone but you
	+ (d) Otherwise permitted by this rule.”

### FLSC Rule 3.3-1 Commentaries 🡪 *interpreting duty of confidentiality*

* **(1)** 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 will be held in strict confidence.
	+ *This is an assertion without an explanation*
	+ *This is the law society saying that being a lawyer cannot work without confidentiality*
	+ *We need confidentiality to ensure that clients are telling us everything*
* **(2)** This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.
	+ *The umbrella of confidentiality is much broader than that of privilege*
	+ *Much less information is confidential and privileged*
* **(3)** A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them.
	+ *This duty survives the relationship*
	+ *It doesn’t end because of death, or because the retainer ends – it continues indefinitely ‘no matter what’ (- subject to exceptions)*
* **(4)** A lawyer also owes a duty of confidentiality to anyone seeking advice or assistance on a matter invoking a lawyer’s professional knowledge, although the lawyer may not render an account or agree to represent that person. A solicitor and client relationship is often established without formality. A lawyer should be cautious in accepting confidential information on an informal or preliminary basis, since possession of the information may prevent the lawyer from subsequently acting for another party in the same or a related matter (see rule 3.4-1 Conflicts).
	+ *Even when someone casually comes up to you and asks for legal advice, any information given is confidential (even if no formal lawyer-client relationship exists)*
	+ *Even if one is not currently practicing, the simple fact that one is a lawyer and when receives information about getting advice, duty of confidentiality arises*
	+ *Issues arise when there are conflicts of interest – simply knowing may prevent you from acting for future/ potential clients*
* **(5)** Generally, unless the nature of the matter requires such disclosure, a lawyer should not disclose having been: (a) retained by a person about a particular matter; or (b) consulted by a person about a particular matter, whether or not the lawyer-client relationship has been established between them.
	+ *Even if someone comes to you just about being retained, this is confidential*
	+ *Cannot disclose who clients are (give or take circumstances i.e. public information, long standing information which is publicized… etc.)*
* **(6)** A lawyer should take care to avoid disclosure to one client of confidential information concerning or received from another client and should decline employment that might require such disclosure.
* **(8)** A lawyer should avoid indiscreet conversations and other communications, even with the lawyer’s spouse or family, about a client’s affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Similarly, a lawyer should not repeat any gossip or information about the client’s business or affairs that is overheard or recounted to the lawyer … Although the rule may not apply to facts that are public knowledge, a lawyer should guard against participating in or commenting on speculation concerning clients’ affairs or business.
	+ *Describes how broad the reach of confidentiality is*

## If Confidentiality is Broken

* If the above rules are broken, can be charged under:
	+ Professional Misconduct (under s. 33 of LSAO) 🡪Penalties range from reprimand or fines to disbarment (s.35)
	+ Civil Action (under contract or tort law)
	+ Damages payment equal to the amount lost from your disclosure 🡪 This is due to a violation of one’s fiduciary duty

## Rationale Behind Confidentiality

* (1) The basic right to privacy
	+ It has gained constitutional protection over the last decade
	+ Privacy is an important right
* (2) The related matters of personal autonomy and inherent dignity (Adam Dodack)
	+ Emphasizes the notions of autonomy and dignity, this leads Dodack to the conclusion that we should have a lower duty to our client when they are corporations since corporations do not have personal autonomy and dignity (Graham disagrees with this)
	+ Graham says it is rooted in something systemic that justifies the existence of this duty
* (3) Systemic Rationale 🡪 **The Neutral Conduit Model**
	+ Access to legally authorized rights and remedies despite the complexity of the law
	+ Individuals have rights – individuals are ‘blocked’ from noise and complications of the legal system which prevent them from accessing the legal rights and remedies they have (systemic complexity acts as a barrier which is more difficult to cross the poorer you are) – through Neutral Conduits, individuals can access the rights
	+ Lawyers are the Neutral Conduits 🡪 they should act in neutral manner
	+ When allowing someone to access the legal rights and remedies, we cannot impose additional costs except for the fee [can’t impose a moral code, force changed behaviour etc.]
	+ One of the costs we could impose is the fear that secrets will be spilled. This threat is a cost because one retained help. Since the law is complex, one is required to hire a third party for help. This need should not come with the added cost. The retainer agreement should erase complexity, as well as losing control of confidentiality.
	+ We should not impose costs on clients that would not exist if the legal system were simple (such as the release of confidential information)

|  |
| --- |
| Privilege  |

# Privilege

* Privilege is a rule of law that allows the lawyer and client to refuse to answer questions that might otherwise be put to them in court
* Duty of confidentiality is much broader than privilege
* Privilege is small subset of law encapsulated by confidentiality
* **All privileged information is confidential, not all confidential information is privileged**
* Privilege is an exception to the rule that all relevant evidence is admissible in court

## Characteristics of Privilege

* **(1) Privilege is narrow** 🡪 it is a rule of evidence
	+ Only applies in respect to litigation (in court)
	+ Confidentiality pertains to all information (applied everywhere)
* **(2) Privilege only applies with respect to information communicated in confidence** by client or by related third parties for the purpose of litigation
	+ If information is covered by confidentiality and not privilege, the lawyer cannot discuss the information, but if it was court ordered, the lawyer has to disclose that information and cannot claim privilege
* **(3) Privilege only applies to communications**
	+ Confidentiality may apply to things observed, not necessarily communication between you and client (encompasses everything that you learn about your client over the course of your representation)
	+ Example 🡪 you see client kill someone = not privilege b/c not a communication (if they told you it would be privilege, but it is an observation) but is confidential because confidentiality attaches to everything you learn about your client
* **(4) Privilege can be lost** 🡪 if third party is present not for purpose of furthering litigation
	+ Information can lose this protection if is discussed with third party not needed for litigation (if third party is present during conversation/discussion)
	+ Example 🡪 talking w/ someone charged with a crime, person wants cousin there for moral support, cousin wasn’t witness or suspect or accessory, if you discuss with client and this cousin in there, discussion is no longer privilege furthering litigation)
	+ Court can then compel to give information in court – if court determines that there was a third party there, then you might be compelled to tell information!
	+ Client should be informed of this in advance by lawyer – inform what will lead to loss of privilege EX: “I am willing to talk to you in presence of your mother, but privilege will not be given to this information…”
* **(5) Privilege supersedes court order**

## Distinguishing Privilege from Confidentiality 🡪 *Recall FLSC Rule 3.3-1 Commentary 2*

* (2) This rule must be distinguished from the evidentiary rule of lawyer and client privilege, which is also a constitutionally protected right, concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.”

|  |
| --- |
| Boundaries of Confidentiality  |

# Boundaries of Confidentiality

## Public Safety Exception

* Can avoid a violation of professional conduct under FLSC but if the client sued, would still likely be guilty
* Almost always two routes to going after a lawyer who violates legal ethics:
	+ (1) By law society and
	+ (2) By Client
* **“A lawyer may disclose”** 🡪 What does may mean?
	+ May is permissive, shall is mandatory (so we know the rule is permissive); lawyer is given the discretion here; also note that there is no reference to clarity
	+ Discretionary rule, to exercise, you need to meet the test first, then you get a choice
	+ Right to disclose doesn’t arise until you’ve ticked off the boxes for the test
	+ Must not disclose more information than required, so you must not disclose, but you can but only when it is serious and only then, can you disclose minimal information
	+ Creates uncertainty, deters people from telling
	+ The lawyer in Smith v Jones cannot be punished for not telling, but can be punished for telling
	+ The test is fairly subjective, but you can’t be really off the mark (i.e. scared of everything). It is better to not disclose – showing how important privilege and confidentiality is.
* We have a rule that is highly protective of lawyers and of confidentiality and privilege

### FLSC Rule 3.3-3 🡪 *may disclose in limited circumstances*

* **FLSC 3.3-3 🡪** A lawyer ***may*** disclose confidential information, but must not disclose more information that 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
	+ Note 🡪 “Clarity” is not a requirement in the public law even though it was set up as a requirement by the common law in *Smith v Jones!*
	+ Important distinction here between public law (FLSC rules) and common law on this “clarity” requirement

### FLSC Rule 3.3-3 Commentary 🡪 *Interpreting when disclosure may be warranted*

* **[1]** Confidentiality and loyalty are fundamental to the relationship between a lawyer and a client because legal advice cannot be given and justice cannot be done unless clients have a large measure of freedom to discuss their affairs with their lawyers. However, in some very exceptional situations identified in this rule, disclosure without the client’s permission might be warranted because the lawyer is satisfied that truly serious harm of the types identified is imminent and cannot otherwise be prevented. These situations will be extremely rare.
* **[2]** The Supreme Court of Canada has considered the meaning of the words “serious bodily harm” in certain contexts, which may inform a lawyer in assessing whether disclosure of confidential information is warranted. In Smith v Jones at paragraph 83, the Court observed that serious psychological harm may constitute serious bodily harm if it substantially interferes with the health or well-being of the individual.
* **[3]** In assessing whether disclosure of confidential information is justified to prevent death or serious bodily harm, a lawyer should consider a number of factors, including:
	+ (a) The likelihood that the potential injury will occur and its imminence;
	+ (b) The apparent absence of any other feasible way to prevent the potential injury; and
	+ (c) The circumstances under which the lawyer acquired the information of the client’s intent or prospective course of action.
* **[4]** How and when disclosure should be made under this rule will depend upon the circumstances. A lawyer who believes that disclosure may be warranted should contact the local law society for ethical advice. When practicable and permitted, a judicial order may be sought for disclosure.

### *Smith v Jones (1991, SCC) 🡪 an exception for public safety does exist but privilege, confidentiality, and the neutral conduit model are of the utmost importance. The exception to confidentiality can apply when the following factors are met BUT this allows a lawyer to disclose but does not require them to: 1) seriousness 2) imminence 3) clarity*

* Facts 🡪 Jones was accused charged with sexual assault of a prostitute. Jones hired a lawyer and lawyer wanted him examined by a psychiatrist. Psychiatrist was hired and did the examination covered by privilege and confidentiality (since he was agent of lawyer). Jones told Smith of plans to kill future prostitutes. Smith told Jones’ lawyer of the dangerous plans and that Jones has acquired tools necessary and planned how to murder the prostitutes. Information wasn’t observed behavior it was *communicated* so met definition of both privilege and confidentiality (go through this like a checklist). He had not killed them yet, just planning to. Lawyer said they cannot disclose this and the psychiatrist was not happy
* Issue 🡪 can the psychiatrist disclose the information? Is disclosure mandatory, optional, disallowed?
* Held 🡪 could have disclosed here because it met the test, BUT do not required to disclose
* Reasoning
	+ Solicitor client privilege is recognized as the highest form of privilege
	+ Remember lawyers are neutral conduits and this is necessary for faith in our system
	+ This rule of confidentiality and privilege is rooted in the notion that we want lawyers to furnish appropriate advice based on the truthful facts of the case. We want the lawyer to receive the truth from clients.
* Ratio 🡪 an exception for public safety does exist but privilege, confidentiality, and the neutral conduit model are of the utmost importance. The exception to confidentiality can apply when the following factors are met BUT this allows a laweyer to disclose but does not require them to:
	+ 1) Seriousness 🡪 harm must be death or grievous bodily harm (including serious psychological harm held in *R v McCraw*)
	+ 2) Imminence 🡪 nature of threat is such that it instills in the lawyer a sense of urgency
	+ 3) Clarity 🡪 a clear risk to identifiable victim or class of victims
* Applied to case:
	+ 1) Seriousness 🡪 murder is serious and risks death/injury
	+ 2) Imminence 🡪 odd in this case because harm doesn’t seem imminent but a future date can still be imminent especially with the chilling intensity and graphic detail of plan (consider in context)
	+ 3) Clarity 🡪 defined target as “small in stature prostitute in are of Vancouver” –enough for clarity
* **NOTE 🡪 FLSC does not require the clarity step for public law test**

### Textbook Definitions

* Clarity (pg. 205)
	+ Great significance given to the particularly clear identification of a particular individual or group of intended victims. Even if the group of intended victims is large, considerable significance can be given to the threat if the identification of the group is clear and forceful.
	+ For example, a threat put forward with chilling detail, to kill or seriously injure children five years of age and under would have to be given very careful consideration. In certain circumstances it might be that a threat of death directed toward single women living in apartment buildings could in combination with other factors be sufficient in the particular circumstances to justify setting aside the privilege.
	+ At the same time, a general threat of death or violence directed to everyone in a city or community, or anyone with whom the person may come into contact, may be too vague to warrant setting aside the privilege.”
* Seriousness (pg. 206)
	+ “The "seriousness" factor requires that the threat be such that the intended victim is in danger of being killed or of suffering serious bodily harm. Many persons involved in criminal justice proceedings will have committed prior crimes or may be planning to commit crimes in the future. The disclosure of planned future crimes without an element of violence would be an insufficient reason to set aside solicitor–client privilege because of fears for public safety. For the public safety interest to be of sufficient importance to displace solicitor–client privilege, the threat must be to occasion serious bodily harm or death.
	+ It should be observed that serious psychological harm may constitute serious bodily harm, as this Court held in *R v. McCraw.”*
* Imminence (pg. 206)
	+ “The risk of serious bodily harm or death must be imminent if solicitor–client communications are to be disclosed. That is, the risk itself must be serious: a serious risk of serious bodily harm. The nature of the threat must be such that it creates a sense of urgency. This sense of urgency may be applicable to some time in the future. Depending on the seriousness and clarity of the threat, it will not always be necessary to impose a particular time limit on the risk. It is sufficient if there is a clear and imminent threat of serious bodily harm to an identifiable group, and if this threat is made in such a manner that a sense of urgency is created. A statement made in a fleeting fit of anger will usually be insufficient to disturb the solicitor–client privilege.”
		- Hardest to figure out –no specific time limit

## Disclosure and Use

* Recall that **s. 3.3-1 of the FLSC Code** requires the lawyer to “hold” the client’s information “in strict confidence” and states that the lawyer “must not divulge any such information” subject to various exceptions
	+ This clearly prohibits disclosure of confidential information
	+ It would be silly if that were the only restriction on the lawyer’s behaviour with respect to confidential information
* What about “use” of information without disclosure?
	+ Learning about opportunities and using it for yourself without disclosing it to anyone else (i.e. opportunity to make money)
* Accepted by all jurisdictions that this is a violation of the client’s trust (just as disclosure)
* Lawyer may not use any information unless otherwise instructed by the client
* Must not disclose confidential information given by the client
* Disclosure includes use (*Szarfer v Chodos)* i.e. you can’t invest your money in client’s idea
* Can be just as damaging to know information as using information

### Rule 3.3-2 Commentary 🡪 *lawyer cannot benefit from confidential info*

* [1] The fiduciary relationship between a lawyer and a client forbids the lawyer or a third person from benefiting from the lawyer’s use of a client’s confidential information. If a lawyer engages in literary works, such as a memoir or autobiography, the lawyer is required to obtain the client’s or former client’s consent before disclosing confidential information.
	+ *Lawyer will decide to violate confidentiality where benefits to lawyer of the relevant violation exceed the costs of violating the ethical norm (including the expected cost of whatever punishment will be imposed by the Law Society)*

### *Szarfer v Chados (1986) 🡪(1) Trust is an essential element of solicitor-client relationship and cannot use the information of a client to benefit or detriment (2) Case stands for a breach of fiduciary duty*

* Facts 🡪 Szarfer was recent immigrant, found work as hairdresser. He harmed hands as a result of a fall at work and couldn’t continue to work, employer fired him. Szarfer going to sue for damages in connection with the fall. His wife sometimes worked for lawyer Chodos and he represented Szarfer. Hired his wife to amend claim to account for emotional damages (mental distress) that her husband suffered as a result of the fall. Wife revealed he was impotent. Chodos and wife starting having an affair, Szarfer discovered it and sued for breach of fiduciary duty in tort law. Finding of fact that he used the information (impotence) told to him to start an affair. Chodos didn’t share or act on information to anyone that wasn’t already aware of the information. Not LSUC v Chodos, it is Szarfer – common law case for the tort of fiduciary duty
* Issue 🡪 Did Chodos use the information to his client’s benefit or detriment?
* Held 🡪 For Szafer, Chodos breached duty. He can be punished under common law and law society regulation.
* Reasoning
	+ Chodos has a duty to safeguard confidential information and not use it against his client
	+ Rules of professional conduct meant he had a duty to keep information in strict confidence and not divulge; court said you cannot disclose or use the client’s information to their benefit or detriment without their consent [he used the confidential information to obtain benefits of the affair]
	+ Fiduciary cannot permit his own interest to come into conflict with the interest of the beneficiary of the relationship. Once the fiduciary relationship is established, the onus is on the trustee to prove that he acted reasonably and made no personal use whatsoever of the confidential
	+ Because he was a lawyer, higher duty to client – must act exclusively under the duty, cannot breach
* Ratio
	+ (1) Trust is an essential element of solicitor-client relationship and cannot use the information of a client to benefit or detriment
		- Impermissible to act in your own self-interest to your client’s detriment
		- Awareness of client’s vulnerability is a requirement for breach of professional duty to client (Chodos was aware of vulnerability as a result of the information obtained about the marriage; engaging in sexual relationship was using vulnerability to lawyer’s own self interest)
	+ (2) Case stands for a breach of fiduciary duty
		- The fiduciary relationship between a lawyer and his client 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 crucial question for this decision is whether or not the defendant used confidential information for his own purposes or to the disadvantage of the plaintiff

## Interests Protected –Persist after death?

* In both *Geffen v Goodman Estate and Jack* duty of confidentiality continues even after client’s death, per **Commentary [3] of Rule 3.3-1** of FLSC code, which states that the duty “survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client”
* But, privilege of communication between solicitor and client can be divulged in some cases *(Goodman)*
	+ (1) If client waves privilege
	+ (2) If client expressly consent to lawyer disclosing information
* Do the dead really have interests to be protected? Graham says YES!
	+ This is why people write wills – would be infringement of the neutral conduit model if lawyers couldn't keep secrets after clients death because it would stop some clients from divulging information for fear would reflect badly on them after they die

### *Geffen v Goodman Estate (1991, SCC) 🡪 when dealing with confidentiality after death, if unclear intentions, sometimes court will allow disclosure of information if it is 1) furthers client’s interests 2) in the interest of justice*

* Facts **🡪**Tzina Goodman is of unsound mind; Mother dies and leaves her the family home; brothers are worried she will lose the house so they negotiate with her lawyer a trust relationship where they own for benefit of Tzina and when she dies it will be transferred to all grandchildren. Tzinz puts house up for sale which she legally can’t do indicating she doesn’t understand her ownership. She leaves house to ONLY her daughters in will. Her kids assert she was unduly influenced into this relationship but clearly never understood.
* Issues 🡪 To prove Tzina’s state of mind when she entered agreement, should her lawyer be able to break privilege?
* Argument 🡪 Brother’s argue that she understood at the time what she was getting into and health went downhill after
* Would not be in the lawyer’s interest to say that she didn’t understand it – so he for sure would go on the stand and say that (otherwise he would get in trouble for undue influence)
* Held **🡪** Testimony of Mr. Pierce was admissible
* Ratio
	+ The court said they would treat trusts like wills. If it comes to understanding a trust agreement, after death, you ordinarily cannot disclose, but if the goal is to understand ambiguous wishes of the client or to address competence the lawyer can disclose on the basis that it (1) furthers the client’s interests (2) and is in the interest of justice – in this case both are met
	+ Expands **notion of what you can do – it may be in the interests of holder of confidentiality (client) to have the information disclosed**
* Reasoning**:**
	+ General policy which supports privileging communications is not violated b/c interests of client are furthered in order to ascertain her true intentions: “in the interests of justice”
	+ long standing exception to confidentiality – in wills, lawyers are allowed to disclose information on their client’s interests, or clarify on the person’s behalf
	+ The interest in justice weighs in balance of allowing disclosure – says disclosure is okay when:
		- (1) furthers client’s interests: Tzina has no interest in retaining secrecy; no readily ascertainable secret with respect to her state of mine (in rare cases it is actually in client’s best interests to disclose)
		- (2) in the interest of justice: Disclosure is what she would probably want, might actually advance her interests (if she voluntarily entered into trust, you might actually be upholding her interests)
* Notes 🡪 this case is messy because it was also in the lawyer’s best interest to disclose that she was competent, if not he let her sign a document even though she wasn’t competent, which is an issue for him

### *R v Jack (1992, Man. CA) 🡪 Graham thinks wrongly decided: exception to privilege if circumstances are in the interest of justice and the deceased*

* Facts **🡪** Jack’s wife disappeared and he was charged with murder because they were fighting and in the midst of separating. Majority of evidence against husband was hearsay and wife’s family lawyer was allowed to testify as a witness.
* Issues **🡪**Should the testimony of Christine’s lawyer be admitted? Should privilege be waived in this case?
* Ratio
	+ Exception to privilege may exist if the circumstances are in the interest of the client and the interest of justice.
	+ Privilege exists for the benefit of the client but can be invoked by anyone whose interests might be adversely impacted by the disclosure
	+ *Graham says this is totally wrong but still arguably the law/can use it, but facts should look identical to this – does not look like court is trying to create a rule here, very unique circumstances*
* Held **🡪** Evidence admitted because it is in “the interest of justice”
* Reasoning
	+ Court assumes that she’s dead and he murdered her; by allowing the testimony you are presupposing that the lawyer will say she intended to file for divorce and wasn’t just running away; also presupposing that she would want her killer to be charged
	+ Graham: We need to bear in mind the fact of retainer is in itself confidential!
* Notes: \*\*may be similar case to Jack on a final exam \*\* dicta in this case isn’t persuasive, but it is legally available material and you could make use of it. You shouldn’t feel very safe using it though… difficult case to use
	+ Now, lawyer has discretion to tell or not (i.e. modern day)
	+ Privileged information is usually crucial to the case, but it is in the client best interest to disclose
	+ Must respect the presumption of innocence, so in this case legally she is not dead, legally he is innocent
	+ **Hinted that this would be a good exam question! Compare to *Geffen v Goodman* – Jack missing critical element that disclosure is in the client’s best interest to have their legal document in accordance with wishes**
	+ Case overrides the presumption of innocence
	+ NOW 🡪 no one has relied on Jack, probably ill decided (most commentary) but no similar cases. Can’t just generally say that disclosure is okay if it is in the client’s best interests (UK Courts have said this)

### Conclusion on Interests Protected

* Even if you know someone will die, you are incentivized to keep the secret ***(Smith v Jones)***
* We might allow some disclosure in some circumstances where we think the client would consent (after they have died) for example, with wills and trusts ***(Geffen v Goodman Estate)***
* Only in these rare circumstances are the policies protected by iron-clad confidentiality operating in favour of the secret being told

## Duty to Assert Confidentiality

* Lawyers have a positive duty to assert confidentiality
	+ Example – If they are probed for information by third party, or objecting to search warrants concerning the contents of lawyer’s files, they must raise the claim of privilege in testimony
* Positive duty to assert 🡪 *Bell v Smith*

### *Bell v Smith (1968, SCC) 🡪 lawyers have a duty to invoke privilege when asked a question that may invoke privilege; it is legally wrong for a judge to allow evidence that is privileged in nature*

* Facts **🡪** following a car accident, the defendants subpoenaed the plaintiff’s former lawyer who gave evidence against them in determining the fault of the accident, including written memorandums and other material that should have been protected by privilege
* Issues **🡪** Was it ethically/legally wrong for the court to accept this evidence and for Shriver to hand over the information on his client?
* Ratio**:**
	+ It is legally wrong for a trial judge to allow evidence privileged in nature
	+ It is lawyer’s *duty to invoke privilege* when he is asked a question that may invoke privilege
* Held:
	+ Counsel should not give a proof of evidence of what occurred at a hearing in which h was professionally engaged
	+ Judge should not have allowed testimony and other lawyer should have objected during questioning
	+ Even though Shriver was cooperating with the court, he breached privilege by handing over his client’s files
	+ Lawyer has positive duty AND the court has the duty to prevent and refuse to hear it, telling the witness to invoke privilege
* Note **🡪 This case conflicts with Jack –**How?
	+ Jack made this assertion at the CA level that the lawyer doesn’t have to assert for client (book) but that is wrong – you can’t just call the lawyer and hope the client doesn’t realize that the lawyer is about to break privilege – Graham said it is important to understand how this conflicts with Jack

### *R v Fink (2002 SCC) 🡪 confidentiality is a constitutional principle; cannot search for documents that are protected by privilege –this fails to give clients opportunity to assert or waive privilege which is required*

* Facts 🡪 Three law firms had privileged documents seized by police/RCMP and sealed and taken into custody under s. 488.1 of the *Criminal Code*. Law office searches were challenged on their constitutionality. 488.1 of the *Criminal Code* permitted law enforcement officials to seize files from a lawyer’s office for the purposes of gathering evidence against the lawyer’s clientele
* Issue 🡪 Was s. 488.1 of the *Criminal Code* constitutional?
* Held 🡪 s. 488.1 struck down because they did not follow the minimal impairment test on privilege
* Ratio
	+ Confidentiality is a constitutional principle. You can’t search for documents that are protected by privilege. Fails to ensure that clients are given reasonable opportunity to exercise their constitutional prerogative to assert or waive their privilege
* Court established a broader definition of privilege:
	+ “It is critical to emphasize here that all information protected by the solicitor-client privilege is out of reach for the state. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client that the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice”

## Publicly Speaking of Cases

### Rule 7.5-1 🡪 *speaking to media*

* “Provided that there is no infringement of the lawyer’s obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements”
	+ The Commentary also suggest that lawyers are encouraged to comment publicly on “the effectiveness of existing statutory/legal remedies or the effect of particular legislation or decided cases, or to offer an opinion about cases that have been instituted…”
	+ Society has an interest in allowing lawyers to freely discuss the judicial system and its flaws

### *Stewart v CBC (1997, Ont) 🡪 despite not disclosing confidential information, can breach fiduciary duty by re-vilifying client as part of retainer is to repair public image; 1) difference between publicly available info and publicly known 2) fiduciary relationship survives termination of lawyer/client relationship*

* Facts 🡪 Stewart killed a woman drunk driving. She was trapped under his car and he dragged her, and must have heard her screaming b/c he turned off his lights. Hired lawyer who had early onset dementia and had bizarre defense (husband left her lying in the road asking to be run over after a drug deal gone bad). S was seen as a monster and was convicted. Appealed with Greenspan as lawyer. Still served, but upon release, heard CBC program with Greenspan producing talking about his case. Sues CBC/Greenspan for breaking confidentiality. Greenspan argued he was just reading things that were already public record to educate on the judicial process.
* Issue 🡪 Did Eddie act in violation of professional duty/conduct by reading information on the case in public? Did he breach confidentiality or breach his fiduciary duty? If so, what is the appropriate remedy?
* Held 🡪 breach of fiduciary duty; had to pay nominal damages of $2,500 plus profits from show
* Ratio **🡪** Despite not disclosing “confidential information” he re-vilified Stewart, and part of his retainer was for repairing his public image
	+ 1) No duty of confidentiality to protect public information, but there is a difference between publicly available information and information that is publicly or commonly known. Owe fiduciary duty of confidentiality to retain public information out of the public sphere
	+ 2) The fiduciary relationship survives the termination of the lawyer/client relationship, and the end of the duties, which are solely part of it.
* Reasoning 🡪 **Fiduciary Duty of loyalty breached:**
	+ He favoured his financial interests over the plaintiff’s interests
	+ He put his own self-promotion before the plaintiff’s interests
	+ By the way he publicized his former client and his former client’s case in 1991, he undercut the benefits and protections he had provided as counsel, and therefore, increased the adverse public effect on the plaintiff of his crime, trial and sentencing.
* Note 🡪 Federation proposed a rule, that if you are representing a client and you are arguing a core, important argument in the case based on one precedent; that it would be a conflict of interest to take on another client arguing against the same precedent. All law societies rejected this rule. You can argue that “Jack” is the worst decision, and on the same day for a different client, you can argue that “Jack” is the best decision. Lawyer’s aren’t’ held to that standard.
	+ Waiver of confidentiality – client “turns” mind and says they don't mind if information is released
	+ Note Commentary 8 Rule 3.3-1 – general rule is that there is a difference between publically accessible and publically known – The implications of these two things will differ. In this case it has fallen out of the public consciousness that this case had happened. So it is available for the public to know but it is not in the public consciousness and therefore has different implications.

|  |
| --- |
| Exceptions to Confidentiality  |

# Exceptions to Confidentiality

## Six Exceptions (or possible exceptions) to Confidentiality

1. Future Harm/Public Safety
	1. Two sources:
		1. Common law [*Smith v Jones*] and
		2. Rules of Professional Conduct Rule 3.3-3, FLSC Model Code
2. Lawyer Self- Interest
	1. Self-defence, fee collection, ethical advice, conflict checks – Rule 3.3-5
3. Innocence-at-Stake
	1. Privilege must yield where to uphold privilege would permit the withholding of evidence from the jury which might enable an accused to establish his innocence or to resist an allegation by the crown
	2. Innocence-at-stake exception where:
		1. Client no longer has an interest in keeping the relevant information confidential
		2. Disclosure of the information would allow an accused to make full answer and defence to charge
		3. *Smith* and *McClure*
4. Authorized Disclosure
5. Public Knowledge
6. Disclosure Required by Law

Also, a general exception 🡪 Utility Maximization

## Future Harm and Public Safety

### *Common Law (Smith v Jones)*

* Future Harm Exception 🡪 from ***Smith v Jones*** [above] when public safety outweighs privilege
	+ **Clarity**🡪 clear risks to identifiable persons or groups (requirement no longer exists but SCC hasn’t commented on it)
	+ **Seriousness** 🡪 there is risk of serious bodily harm or death or serious psychological harm. Disclosure of planned future crimes without an element of violence would be insufficient to set aside privilege out of fear for public safety
	+ **Imminence** 🡪 danger must be imminent
* Subjective component because time is not a factor but remoteness appears to be
* If there are too many steps between action and effect it is not imminent
* Requires a real sense of urgency- “spidey senses”
* If a threat is made with such intensity and graphic detail that a **reasonable bystander** would be convinced that the killing would be carried out, threat could not be considered imminent

### FLSC Rule 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 seriously bodily harm, and disclosure is necessary to prevent the death or harm”
* The Law Society said that a lawyer can disclose, but lawyer ***will not fail*** by ***not*** disclosing (**Rule 3.3-3**)
* **Commentaries of 3.3-3**
	+ Disclosure is extremely rare
	+ Adopts SCC interpretation of “serious bodily harm”
	+ Factors to Consider
	+ Ethical Advice from Law Society; Seek Judicial Order
	+ Written Notes
	+ *\*Only in extraordinary situations should one disclose*.

### SCC vs. Rule 3.3

|  |  |
| --- | --- |
| SCC Smith v Jones | Rule 3.3-3 |
| Requires an identifiable victim | Does not require an identifiable victim |
| Arises when a lawyer is sued for a breach of fiduciary duty Can’t be used as defence for claim of professional misconduct claim | Arises only in a defence for a claim of professional misconduct  |
| Whether or not disclosure is discretionary is unclear  | Disclosure is discretionary |

### Future Harm: Timing Issues

* Harm in the past, exception does not apply
* What do we mean by “future” harm?
	+ The cause of the harm
* What about “ongoing” harm – that is, harm that has already started, but will continue absent disclosure?
	+ Ex. Someone murdered and loved one has future psychological harm
	+ The cause cannot lie in the past seems unlikely to qualify as future harm
	+ It needs to be the action

### Examples

* Individual struck by car in the past and was going to die absent surgical intervention
	+ The action was in the past- the harm may not come in fruition until the future
	+ The death of this man fits the language of 3.3-3 and remains an arguable case (exam case)
	+ *EXAM: Did an action in the past lay the groundwork for harm to come in the future – Aortic tear scenario*
* What about with suicide?
	+ Under the SCC decision there is clarity because you know exactly who they will kill, there is also seriousness, and the imminence checkbox is checked off as long as the lawyer believe it is carried out. So the SCC decision and 3.3-3 are met out in Ontario.
	+ However, in other provinces they have it as future crime not future harm, so suicide doesn’t apply as suicide is not a crime. But most provinces are changing to follow in line with the law society of Canada’s structure.
	+ It is the cause of the harm which you are allowed to prevent. So ongoing harm such as psychological harm to family does not qualify because the cause was the murder of the family member before. Where the action by your client was in the past you can’t use 3.3-3
* However what about the aortic tear example where you can save the child’s life even though the act was in the past and you can’t stop the cause, if you read the provision literally it talks about being able to prevent death or harm. In this case you can prevent the child’s death.
	+ So even though you cant prevent the cause you can prevent the death. So this is an area of dispute as no one is sure whether disclosure would be allowed.

## Lawyer Self Interest

* Where the lawyers personal interests are at stake, the lawyer is permitted to disclose/use client’s otherwise confidential information
* Consistent with rational choice theory 🡪 economic principle that assumes individuals always make prudent and logical decisions that provide them with the greatest benefit
	+ Graham says this isn’t a surprising rule – lawyer’s work in the legal industry and they regulate the field – they obviously want rules that are going to the further the interests of the embers in the legal profession
* Example 🡪 getting sued for incompetent representation by client and you want to prove you did everything possible
* If a client alleges breach of duty by the attorney, privilege is waived so that the lawyer can defend themselves against the claim
	+ If a client alleges that the lawyer has misappropriated money from client’s trust account, lawyer may give evidence of (i) the nature of the relationship with the client (ii) receipt of funds from the client (iii) transactions involving the use of client’s funds, and (iv) the client’s instructions with respect to use of those funds
* The client can voluntarily testify information, but once they do, that information gets a partial waiver (it is no longer covered by confidentiality (*Foley*)
	+ Partial disclosure of a communication on cross-examination constitutes a waiver of the privilege as to the balance of communication (*Dunbar*, applying *Foley*)

### Self Defence 🡪 FLSC Rule 3.3-4

* Rule 3.3-4: If it is alleged that a lawyer or the lawyer’s associates or employees:
	+ A) have committed a criminal offence involving a client’s affairs;
	+ B) are civilly liable with respect to a matter involving a client’s affairs;
	+ C) have committed acts of professional negligence; or
	+ D) have engaged in acts of professional misconduct or conduct unbecoming a lawyer,
* the lawyer may disclose confidential information in order to defend against the allegations, but must not disclose more information than is required.”
	+ “If it is alleged” – there is no agency so the source of the allegation does not matter, must just be alleged
	+ Does not matter if a lawyer is the party to the proceedings
		- Ex. Client on appeal with new lawyer arguing incompetent counsel in prior trial
	+ Some provinces say only dispute from clients but in Ontario, it does not matter who makes the allegations as it just says “if it is alleged”. But if it is from a third party, the matter should be discussed with the Client first and permission to disclosure should be asked of the Client through a waiver (this well also help from Client suing you later on).
* Third party to a claim
* In Ontario, where third party makes claims imputing lawyer’s conduct, the lawyer can defend
* But first thing lawyer ought to do when it’s a third party, discuss the matter with your client first

### Fee Collection 🡪 FLSC Rule 3.3-5

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

### Ethical Advice 🡪 FLSC Rule 3.3-6

* Rule 3.3-6 🡪 “A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer’s proposed conduct.”
	+ Can disclose to another lawyer for the purpose of assistance – that lawyer is then too bound by confidentiality

### Conflict Checks 🡪 FLSC Rule 3.3-7

* Rule 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.”
	+ When a lawyer moves firms, there is often a worry that that lawyer will cause the destination firm to have conflict – a firm does not want to close Clients for hiring a lawyer so that lawyer can mention past Clients
	+ It increases lawyer mobility but is there to prevent real conflicts of interest

### *R v Dunbar (1982, Ont CA) 🡪 When a client impugns a lawyer including charges of incompetence, perjury, or conduct that waives privilege, privilege may be waived. In circumstances of defending his own innocence and when a client discloses part of privileged conversation in relation to allegation against the lawyer, whole privilege is lost*

* Facts **🡪** Dunbar, Logan, and Bray were members of a biker gang; all charged and tried separately for same murder. Bray had been acquitted because he said other two confessed they did it. In Dunbar’s trial he said his lawyer had told him to lie to secure more favourable sentence (perjury) and he didn’t have any knowledge of the crime.
	+ The lawyer isn’t on trial, and no one believes Bray (3.3-4 to 6 are not relevant to this case)
	+ Crown wants documents to prove he’s lying that he has no knowledge and that he is lying that his lawyer told him to commit perjury
* Issues **🡪** (1) In what circumstances can a lawyer defend against allegations of impropriety (through the disclosure of confidential information)? (2) Must the lawyer be facing negative consequences that flow from the allegations?
* Ratio **🡪**
	+ When a client impugns a lawyer including charges of incompetence, perjury, or conduct that waives privilege, privilege may be waived. In circumstances of defending his own innocence and when a client discloses part of privileged conversation in relation to allegation against the lawyer, whole privilege is lost
* Held **🡪**Disclosure of confidential information allowed, admission of evidence
1. You can’t claim that the lawyer did something wrong and not let people see the file
2. If you are going to claim that your lawyer did something bad then the client becomes open for the court (only the things that are relevant)
3. This seems bigger than the public law protection where you can defend yourself against professional obligations
4. The court wants the evidence in this case.
* Question **🡪** Should the self-interest exception apply only in cases in which the lawyer actually faces a personal cost (such as a fine, a penalty, a reputational cost, or the inability to collect the lawyer’s fee)? Conversely, should confidentiality and privilege automatically disappear when the client besmirches the lawyer’s character or ethics? If so, what is the rationale for the self-interest exception? (see p. 283 of Text)
* Policy arguments for self-interest exist here
	+ (a) Makes profession of law more appealing – more lawyers = more counsel to help people
	+ (b) Lawyers may not way to act for criminal defendants of questionable character if they know that they can accuse them of anything they want or sue them and the lawyer has absolutely no option for recourse – therefore, better for the neutral conduit model if we have this rule
	+ (c) Criminal defendant could just start using this as a mechanism to get an acquittal, say they only agree b/c lawyer told them to perjure themselves, and use this to get their friends off as they did in this case

## Innocence at Stake

* Canadian principle that innocent people should not go to jail- we would rather ten guilty people go free than one innocent person got to jail
* Traditional position is to favour privilege
* Only exception in the legal system which places no control in the hands of the client
* Erosion of the neutral conduit model 🡪 client knows there are circumstances in which he may lose privilege but in theory the client is in control of these
* His control because he is impugning your credibility or integrity
* A third party can also impugn your integrity though. Neutral Conduit model being eroded for other reasons- this is because we want people to still become lawyers
* Unlike future harm exception: because you have time to seek ethical advise when he is going through the trial whereas in future harm you don’t have the time

### Competing Tests

* ***R v Dunbar* 🡪** the SCC in obiter thought that there should be a general exception to innocence (i.e. allowed to tell) when the following 2 conditions are met:
	+ **(1)** Client whose privilege is at stake has no continuing interest in the privilege information being privilege (secrecy is no longer in client’s interest and usually they are dead)
	+ **(2)** Disclosure would prevent innocent person from being wrongfully convicted of a serious crime
* ***Smith v Jones* 🡪 SCC-** agreed with this position… said in obiter that they would endorse the exception posited by the OCA (but this was said in obiter). There are some situations where SCC obiter is binding, but there is no ratio saying that obiter of the SCC is binding, it is only said that it is binding in obiter [so is it really binding?].
* **UK Position: *R v Derby Magistrates Court (UK)* 🡪** is the traditional position that still prevails in the UK
	+ No innocence at stake exception to privilege and confidentiality
	+ If your client is dead, how can they have an interest?
* ***R v McClure*** 🡪 **leading case;** says there is an innocence at stake exception in Canada
	+ Leading case 🡪 carefully articulated restrictions on the ability of lawyers to make disclosure for the purposes of promoting the acquittal of innocent people.

### *R v Derby Magistrates (1995, UK) 🡪 UK reject the “innocence at stake exception” because it will impair the neutral conduit model and encourage clients to not be honest with their lawyers*

* Facts **🡪** Accused stabbed victim, but death was caused by strangulation. Accused asserted stepfather had strangled and was acquitted. Stepfather argued that son’s lawyer could testify because the son had no continuing interest because he was no longer accused. Son acquitted and therefore can’t be tried again, however is opposing disclosure (double jeopardy).
* Issue **🡪** Should the privileged evidence between lawyer and son be admitted to prove the father’s innocence? Son might still have an interest, public would know he killed the girl
* Ratio **🡪**
	+ UK does not have a privilege exception
	+ Reason for this is policy- it will impair the neutral conduit model because people will not tell lawyers important information that is required for appropriate representation
* Decision **🡪** Court refused to order disclosure; privilege is of the upmost importance
	+ We need to make sure Clients know that anything they tell their lawyers will remain confidential and the only way it will come out is through Client permission. These exceptions will deter from full disclosure.
	+ Highest court in England saying we never need to balance privilege with other societal interests because no other interest can ever be as important
	+ Legal professional privilege is the predominant public interest – never need to balance the interests of solicitor-client privilege against public interest – privilege always wins
	+ Other exceptions (self-defence, obtaining fees) serve the ability for the lawyer to be a lawyer so they serve privilege
* Notes **🡪** The other exceptions do exist because they help advance privilege and further the policies that underscore it. Exceptions are allowed where they further privilege.

### *R v McClure [2001, SCC] 🡪 there is an innocence at stake exception if two step test passed: 1) could cause reasonable doubt and 2) likely to cause reasonable doubt*

* Facts **🡪** Aboriginal children were sent to a school away from their parents (Residential Schools for the purposes of civilizing the Indian); sexual assault was prevalent in that school by teachers and students; David McClure was a librarian/teacher at the school and charged with sexual offences of 11 students between 1962-1993 (this was not uncommon, sexual assault was rampant).
	+ JC (child) alleged crimes against McClure (indictment, criminal charge) after reading about it in the newspaper, seeks counselling, tries to bring civil claim against McClure for abuse
	+ Civil and criminal trial 🡪 McClure seeks all records between JC and counsel (from civil trial), he requires the scope of the allegations against him in order to create a full defence, but JC may not have told everything to Crown that he told counsel
	+ **Risk of innocence at stake argument here is that you will fear your lawyer will disclose information you told them and it will deter you from launching a civil claim (the reason for the neutral conduit model)**
	+ Trial judge said to disclose
* Issue **🡪** McClure is claiming his innocence is at stake and the only way to demonstrate his innocence is through civil lawyer information. Should the lawyer be required to give the information?
* Ratio **🡪 Created the innocence at stake exception, two stage test** (different than obiter from Smith/Dunbar) **TWO STEP TEST** when accused person seeks disclosure of lawyer’s material protected by privilege:
	+ **(1) “Could cause reasonable doubt”**
		- Must point to some evidence that if believed, could give rise to reasonable doubt (must give this information to the judge sitting alone without a jury, i.e. tip from lawyer’s office, or some other reason, maybe they were examined by Law Society) that there is information in the material that should be disclosed
		- What the judge is looking for at this stage is “is there some evidentiary basis for the claim that a solicitor-client communication exists that could raise a reasonable doubt?” [cannot just be a fishing expedition]
		- If you prove this, then judge gets the file and examines the evidence (examines under evidence rules)
* *Only move on to stage 2 if stage 1 is passed*
	+ **(2) “Likely to cause reasonable doubt”**
		- Judge (in capacity of trier of law, not trier of face) makes the determination of if there is material evidence or information in the file that is likely to give rise to reasonable doubt, if looked at by the jury, they may doubt the charge – if this is determined, then it is given to the jury
		- It doesn’t matter that the owner of the privilege still has a continuing interest in privilege! Doesn’t have to be a dead client anymore, it is irrelevant (even though this was said in obiter!)
		- Judge serves an important gate-keeping function here
* Held **🡪** McClure fails at step one- there is no evidence that would make the judge believe that there is information that could give rise to a reasonable doubt

## Authorized Disclosure

### FLSC Rule 3.3-1 🡪 *can disclose if consent*

* 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 the professional relationship and must not divulge any such information unless: (a) expressly or impliedly authorized by the client”

### Express/Explicit Authorization

* The lawyer must ensure the client understands the implications of express waiver (such as a loss of the availability to claim privilege)
	+ Sample scenario 🡪 Your client, at your request, prepares a document detailing his whereabouts throughout the day of a crime he is alleged to have committed. He shares that document with you, and directs you to show it to his parents (so that they know his side of the story).
	+ The client must be made aware of the implications of this directive before the lawyer acts on it. (See FLSC Code Rule 3.2-2, which requires the lawyer to provide the client with all information that may have an impact upon the client’s interests).

### Implied Authorization/Waiver

* Implied 🡪 whenever your client gives you a direction that requires disclosure of information (i.e. to do the instruction you are required to waive privilege/ disclosure)
	+ Example 🡪“defend me in court” requires that you disclose information that you are the lawyer
* A few situations where it arises automatically: to release as is necessary to pursue subject matter of retainer (agents, secretaries, etc.), during plea bargaining- sometimes requires disclosure of certain facts
* Can go no further than subject matter of the retainer
* Implied waiver can be overridden by express revocation
* It is discussed in **commentaries 9 and 10 of rule 3.3-1 of FLSC Model Code**
	+ Commentary [9] 🡪 In some situations, the authority of the client to disclose may be inferred. For example, in court proceedings some disclosure may be necessary in a pleading or other court document. Also, it is implied that a lawyer may, unless the client directs otherwise, disclose the client’s affairs to partners and associates in the law firm and, to the extent necessary, to administrative staff and to others whose services are used by the lawyer. But this implied authority to disclose places the lawyer under a duty to impress upon associates, employees, students and other lawyers engaged under contract with the lawyer or with the firm of the lawyer the importance of non disclosure (both during their employment and afterwards) and requires the lawyer to take reasonable care to prevent their disclosing or using any information that the lawyer is bound to keep in confidence.
		- Client can say do not discuss with anyone else at firm
	+ Commentary [10] 🡪 The client’s authority for the lawyer to disclose confidential information to the extent necessary to protect the client’s interest may also be inferred in some situations where the lawyer is taking action on behalf of the person lacking capacity to protect the person until a legal representative can be appointed. In determining whether a lawyer may disclose such information, the lawyer should consider all circumstances, including the reasonableness of the lawyer’s belief the person lacks capacity, the potential harm that may come to the client if no action is taken, and any instructions the client may have given the lawyer when capable of giving instructions about the authority to disclose information. Similar considerations apply to confidential information given to the lawyer by a person who lacks the capacity to become a client but nevertheless requires protection.

## Public Knowledge

### Rule 3.3-1 Commentaries 8 🡪*public knowledge discussions*

* “Although the rule may not apply to facts that are public knowledge, a lawyer should guard against participating in or commenting on speculation concerning clients’ affairs or business.”
	+ **MAY NOT** so it may apply to facts that are public knowledge
	+ How public is the information? Extraordinary effort to find/access versus notoriously public information (well-known in the community)
	+ Not enough that the information is available, it has to be widely known by the public before relying on this exception
* Closest case to this is ***Stewart v CBC*** 🡪careful about making “public information” **more** public (***Ott v Fleishman***)

### *Ott v Fleishman (1983, BCSC) 🡪 The public could have known a fact, but it isn’t enough to bring it under the public knowledge umbrella; need some sort of proof that public knows to bring forward defence of public knowledge*

* Facts **🡪** Defendant, the plaintiff’s lawyer in her divorce, disclosed the name of a man that the plaintiff was dating “openly but discreetly” while both were still married to someone else.
* Issue **🡪** Should Fleishman be held liable? Should he owe damages?
* Ratio
	+ The public could have known a fact, but it isn’t enough to bring it under the public knowledge umbrella; need some sort of proof that public knows to bring forward defence of public knowledge
* Obiter **🡪** it is not just info given from the client that is confidential, it is everything received on behalf of the client in a professional capacity, even anonymous
* Held **🡪** breach of duty of confidentiality to the P; contractual breach and damages of $500
* Reasoning **🡪** For plaintiff, damages awarded for breach of contract
	+ Ott and PI were “discrete but open” about relationship; Ott’s children did not know, for example
	+ Fleishman used the “public knowledge” defence – but this fails because lawyer went above and beyond. Ott asserted confidentiality when she said “I don't want PI Mr. Britton to get in trouble”
	+ Competing duties here – safeguard secrets of client, as well as judicial clarity
		- Lawyers primary duty is to keep secret, and this lawyer saw himself too much as an agent of the court rather than a keeper of secret
	+ **Just because someone COULD find out was not enough – most people did not know**

## Disclosure Required by Law

### FLSC Rule 3.3-1(b) 🡪 *required by law to disclose*

* “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” **(b) required by law to do so**

### What Counts as “required by law”?

* Generally speaking, a law specifically in statutory form dictates an instance where disclosure is required i.e. *R v Fink* which authorizes searches of lawyers’ offices
* What should you do if you doubt the authority of the law or the court (e.g. e law may be unconstitutional or the court may have overstepped its authority?)
	+ Rule 3.3-1 includes caveat 🡪 Court can tell you to disclose information, but lawyer still has positive duty to defend right to keep secret
		- Step 1 🡪 challenge court, make them force you in ruling (after taking submissions on confidentiality)
		- Step 2 🡪 lawyer relies on court ruling, and won’t be punished for breach of duty
	+ Even if the ruling if overturned on appeal, you won’t be punished
	+ Common law crime – contempt of court (punishment is anything)
* Rationale for this rule is clear 🡪 it is unfair to face difficult choice of violating rules of professional conduct or violating a court order by refusing to disclose information (great burden for lawyer to face)

### *R v Fink (2002, SCC) 🡪 Privilege is a broader constitutional right (this case expanded the notion of privilege). Privilege is a principle of fundamental justice*

* Facts **🡪** Legislation about searches in lawyer’s offices (to make the case or prove that a crime has been committed)
	+ Privilege and confidentiality exist – if a lawyer claims privilege over the document police and crown can’t have immediate access (must be sealed and taped and then arguments made about privilege)
	+ Legislation said that you can search lawyer’s office unless something was explicitly stated as privilege
	+ Constitutionally challenge of legislation under Section 7 (right to life, liberty and security of person) which includes a substantive right to privilege (lawyer to entrust all information); can only be broken when it is upheld under Section 1 of the Charter
* Issues **🡪** Is the legislation unconstitutional?
* Ratio 🡪 **Privilege is a broader constitutional right (this case expanded the notion of privilege). Privilege is a principle of fundamental justice**
* Held **🡪** Legislation held to be unconstitutional
	+ An attempt at legislative erosion was held to be unconstitutional – privilege defined more broadly
	+ Constitutional duty to protect privilege
* Notes 🡪  ***Jack*** is the outlier in all the privilege cases – wills cases seem to be geared toward ascertaining the interests of the privilege holder, that's fine. ***Fink*** is the better expression of how we should treat confidentiality

|  |
| --- |
| Client Selection/Rejection |

# Client Selection/Rejection

* What level of autonomy do we have in selecting clients?

## Part I: Barrister’s Oath (s. 21, Bylaw 4, created under LSA Ontario)

* I accept the honour and privilege, duty and responsibility of practicing 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 pretenses. 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.
* Notes:
	+ Many indicators that suggest you cannot just pick and choose clients
	+ Oath does not say “the clients I choose”
	+ “Shall not refuse causes of complaint reasonably founded”

## When does it apply? 🡪 *Two exceptions 1) competence 2) fees*

* For the most part you must take on clients that come to you.
* Two exceptions to this:
	+ 1) Competence
		- If taking on the client would do a disservice to client, you are not promoting access to justice by taking on the client
		- But if you cannot do it you must point them to competent counsel
		- Or you can do a disservice by taking on a client when you owe a service to another –no conflicts of interest, this means you are not competent to take on the client
	+ 2) Fees
		- Until 2010, you could refuse to take on a client who would not afford you
		- See *R v Cunningham*

## Financial Reasons

### *R v Cunningham (2010, SCC) 🡪 lawyer may be required to work for free: 1) accused can discharge legal counsel and court cannot stop this 2) courts have jurisdiction to disallow requests for withdrawal 3) test to disallow withdrawal (but only allowed to refuse sparingly and cannot refuse withdrawal for ethical reasons)*

* Facts 🡪 lawyer working for client in the Yukon who was accused of child sexual assault. The accused was not wealthy and he qualified for legal aid. Cunningham, the lawyer, was a legal aid lawyer. Cunningham worked for months on his case and at some point while she was working on his defence, the accused was required to re-certify for legal aid to ensure he still qualified. The accused refused to fill out the forms. So legal aid called Cunningham and said he no longer qualifies for legal aid. So she scheduled an appearance and brought an application to be removed from record. The reason being she is no longer being paid. The judge refused saying the proceedings had started and if she is removed as counsel, it would prejudice the accused. She appeals all the way up to SCC
* Issue 🡪 Should a lawyer be required to continue to work for free (because the accused has not complied with the financial terms). Does a court have the jurisdiction to obligate counsel to continue?
* Held 🡪 lawyer must work for free and court has jurisdiction to disallow the lawyer to request for withdrawal
* 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 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.”***
* Reasoning:
	+ “If a lawyer appears before the court and seeks to withdrawal, if the lawyer must withdraw for ethical reasons, two things happen: (1) The court asks no further questions (2) They allow the withdrawal
		- No further questions because of confidentiality
		- For ethical reasons, one can withdraw – BUT the real reason cannot be non-payment fees
	+ This case enables lawyers to just say I cannot represent because of **ethical reasons**
	+ Note: “nudge nudge” decision 🡪 because if you say **ethical reasons**, you are out. By ethical, they meant in relation to the rules of professional conduct (not moral reasons)
* Note 🡪 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 too honest and said it was about being paid not simply ethical reasons

## Moral Reasons

* Relates to whether one can withdraw or refuse to act when you just do not like a client

### Cab Rank Rule

* **Rule** 🡪 Notion that lawyers, like taxis, must take clients on a first come first serve basis and must take them where they want to go
* NOTE:
	+ No real way to enforce this rule because you can say you have a full case load and cannot take on a client because too busy
	+ This information is confidential and privileged so court cannot just force you to take on a client
* Only way around this is that law society can audit your practice but this is expensive and impractical

### Role Differentiated Morality 🡪 *don’t hate the player, hate the game*

* Premised on the notion that you are not your arguments – you cannot be blamed for the causes you represent
* The moral choices you take are premised on the ‘game’ not your personal opinion
	+ This lawyer is making the arguments they are legally authorized to make
	+ Page 50 quotes: “Once he has accepted a client’s case…”
* Traditional model of ethics is that lawyers bear no blame for pursuing client goals
	+ Lawyers are well advised to set aside personal morality
	+ Issue with this per Graham- the model is flawed, in reality lawyers are not morally sterile
	+ There are ethical questions to be answered, cannot simply disregard all of morality
* The lawyers’ moral universe knows two limits: (1) the limits of the law and (2) the self-identified interests of the client
	+ If the thing is arguably legal, the lawyer MUST do it
	+ Not just about accepting a client, but taking positions for the client
	+ This makes the lawyer’s universe simpler and less complicated than the moral world of ordinary life
	+ Competence- competence is an easy out

### Neutral Conduit Model

* Again, important to note here
* All people have the right to be defended from charges, but this is complicated, and therefore lawyers have the duty to provide counsel/access and be neutral conduits

### *Tuckiar v The King (1934) 🡪 lawyers must be a neutral conduit and it is their paramount duty to respect privilege; obligation that cannot be weakened by character of the client*

* Overview 🡪 For present purposes, however, the most important elements of the decision involve (1) the lawyer’s duty of confidentiality, and (2) the role of a lawyer in defending a client whom the lawyer knows to be guilty. Focus on the moral choices faced by Tuckiar’s lawyer and consider the extent to which that lawyer was insulated from ethical issues.
* Facts 🡪 Aboriginal man in Australia accused of killing police officer. He had two confessions of different stories and second story made police officer look bad (claims he shot at Tuckair first). TJ asked that the lawyer figure out which confession is true. Tuckair told lawyer he made up second story because he is afraid of being convicted of murder. Judge told courtroom that if they find him not guilty he cannot be tried again and it would slander a dead man. Jury found him guilty and sentenced to death; after this the lawyer stands up and tells jury that the client told him he was guilty (basically, good job jury you made the right choice); Tuckiar appealed
* Issue 🡪 were Tuckair’s lawyer and TJ behaving wrongly?
* Ratio 🡪 It is the laweyr’s paramount duty to respect the privilege… a duty the obligation of which was by no means weakened by the character of his client, or the moment at which he chose to make the disclosure.”
	+ “Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to acquittal from any charge which the evidence fails to establish that he committed, and it is not incumbent on his counsel by abandoning his defence to deprive him of the benefit of such rational arguments as fairly arise on the proofs submitted
* Reasoning **🡪** T got complete acquittal due to actions of the lawyer (and judge as well)
	+ This is generally thought to be the foundation of how lawyers should practice, so important
		- “In pursuit of duty on behalf of the client, lawyer’s duty is the neutral conduit model”
		- Duty to your client to represent them as completely as possible – to extent it is arguably legal
		- There is no reason lawyer should have thought he was in a dilemma; there was no dilemma; you don’t get to weigh the value of guilt (lawyer basically imposed his morality here)
* It doesn’t matter that the defense defames some third party- if the lawyer had clear evidence that the client was trying to mislead the court, there would be limits placed. But the fact that your defense will harm another party to does not matter- regardless of the destruction you may bring upon another

### *Rondel v Worsley (1969 UK HL) 🡪 1) lawyers have overriding duty to court 2) lawyers cannot refuse clients because of moral sentiments 3) lawyers must advocate for client even if they disagree with morals, but also owe a duty to the court (competing interests) 4) client cannot dictate strategy of lawyer/case*

* Overview 🡪limits on directives you must follow from client, suing lawyer for negligent misrepresentation
* Facts 🡪 Guy charged with assault causing grievous bodily harm, was convicted; sued his lawyer. Sued because lawyer didn’t conduct case the way he had directed (i.e. strategy); man wanted lawyer to present case where he did the entire assault with his bare hands
* Issue 🡪 Can you sue your lawyer for poor strategic advice? (more concerned here with ethical obligations to client)
* Ratio:
	+ 1) Lawyers have an overriding duty to the court. Lawyers are immune to suits of professional negligence; so that they can be comfortable fearlessly raising every issue they think is necessary.
	+ 2) Lawyers cannot refuse clients because of moral sentiments
	+ 3) Lawyers must advocate on behalf of every client even if they disagree with morals, but also owe a duty to the court. This shows the competing interest that lawyers often have.
* Decision: Client cannot dictate strategy for lawyer to take
	+ “Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case... BUT… “as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client’s wishes or with what the client thinks are his personal interests.”
		- Counsel cannot however, mislead the court, withhold information, or lie etc.
		- If we could be painted with same moral brushes as clients, clients wouldn’t get our best assistance
		- Every counsel has duty to client to advance every argument, even if distasteful, advance every theory, if it will help clients cause but client doesn’t get to tell you how to present case- up to you to determine best way or best legal strategy (client can’t force you to make dumb arguments)
	+ “It has long been recognized that no counsel is entitled to refuse to act in a sphere in which he practices, and on being tendered a proper fee, for any person however unpopular or even offensive he or his opinions may be, and it is essential that that duty must continue: justice cannot be done and certainly cannot be seen to be done otherwise. If counsel is bound to act for such a person, no reasonable man could think the less of any counsel because of his association with such a client, but, if counsel could pick and choose, his reputation might suffer if he chose to act for such a client, and the client might have great difficulty in obtaining proper legal assistance.” (58)
		- Classic statement of lawyer’s ethics
		- This is basically reiteration of the cab rank rule- cannot choose clients because people will look down on you if you choose to represent murderer, rapist, etc.

### *R v Murray (2000 ONT CA) 🡪 governed by rules of integrity; morality as lawyer is to know the limits of the law and interests of client*

* Facts **🡪** Murray didn’t know Bernardo was actually guilty. Bernardo sends tip to lawyer about evidence that would be useful for his defence and Murray goes to house to get video tapes (illegal). Murray doesn’t watch until Bernardo asked him. Murray later decides he can’t defend him, so consults with Rosen, without mention of the tapes. Rosen views the tapes and realized he has to disclose tapes to the Crown. Rosen thought that the tapes would be so humiliating to families of the victims that the R would offer something not to show them in court.
* Issues **🡪** Was Murray justified in concealing tapes? Did Rosen act with integrity?
* Held **🡪** Murray acquitted because no reasonable doubt. Rosen not charged.
* Reasoning **🡪** We are governed by rule of integrity – morality as lawyer is so know the limits of the law and interest of client
* Was it legal for Rosen to say he would change his tactic for a plea bargain? Didn’t work, but might have. Overprotection of the guilty in favour of spillover protection of the innocent

### *R v Delilsle (1999 QC CA) 🡪 Lawyer cannot presuppose client’s guilt- there is no basis for imposing an additional barrier of their own morality that may erode client’s access to legal rights and remedies*

* Overview **🡪 Good case for exams**
* Facts 🡪D charged with assault causing bodily harm; first lawyer got sick and was replaced; D claimed innocence and maintained crime was committed by someone else (Kevin Carl, who lawyer didn’t think existed because all evidence pointed to D); lawyer didn’t try to find Kevin Carl or pursue the lead
	+ Lawyer had D plead guilty to minimize jail time; D was convicted and went to jail
	+ Kevin Carl called lawyer then confessed to crime; isn’t in the jurisdiction so can’t be taken to trial
* Issue **🡪** Using this case to demonstrate how a lawyer’s judgment of the client’s morality can seriously affect the outcome of a case
* Ratio **🡪** Lawyer cannot presuppose client’s guilt- there is no basis for imposing an additional barrier of their own morality that may erode client’s access to legal rights and remedies
* Decision **🡪**  new trial ordered due to counsel’s incompetence
	+ Court calls counsel “flagrantly incompetent”
		- *“The appellant always maintained that he was innocent. He had indicated to his lawyer the identity of the guilty party and, is it necessary to mention, wanted to testify in his own defence. These instructions of the client were never respected by the lawyer. He thereby imposed in his client his decision not to call him and not to attempt to meet the witness Carl. The lawyer committed a first significant error.”*
	+ Lawyers are advocates not judges- don’t get to judge or ask moral questions
	+ If the client wants to plead not guilty, you should let them- not entitled to judge morality
	+ 2 questions for lawyer to ask: (1) arguably legal? (2) within client’s identified self-interest?
* Notes 🡪 The court quoted an 1871 case ***Johnson v Emerson and Sparrow, which*** stated, “*A man’s rights are to be determined by the Court, not by his attorney or counsel. It is for want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, I want your advocacy, not your judgment”*
* **Do not assume client is guilty!**

|  |
| --- |
| Integrity  |

# Integrity

## Introduction

* Strange rules with integrity and good character
* These rules govern the ‘type’ of person the lawyer is rather than prohibiting conduct
* These rules of integrity are subject to ideological appropriation
	+ Tied to policy preferences- can be dangerous as it is tied to ideological interpretation
	+ Court or law society years ago would exclude certain religious affiliations, sexual orientation, etc.

## Sources Rule of Integrity

* Outlined in Chapter 2 of FLSC Code 🡪 “Standards of Legal Profession”
	+ Part 2.1 of the Code is entitled “Integrity”

### FLSC Rule 2.1-1 🡪 *integrity*

* “A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honorably and with integrity”

### Rule 2.1-1 Commentaries

* (1) Integrity is a fundamental quality
	+ Focuses on client’s trustworthiness,
	+ Integrity translates into honesty/believability
	+ Distinguished from competence
* (2) Public confidence in administration of justice is eroded by lawyers’ irresponsible conduct
	+ Conduct should reflect on legal profession (reputation is important)
	+ We should not be irresponsible and behaviour should not show impropriety
* (3) Dishonorable or questionable conduct in either private or professional practice reflects adversely on integrity of the profession
	+ “This rule applies to personal life, but is restricted in how far it goes
	+ Not usually purely private activities that don’t impair integrity
	+ Can violate integrity in personal life, not just practicing 🡪 expands to catch conduct in both spheres
* (4) Generally Society not overly concerned with purely private activities that do not call integrity into question
	+ Worried of personal activities speaking to whether one has integrity
	+ Limit on how far it can go into private life

**Overall** 🡪 integrity focuses on dishonesty, causing clients or society to question us/the legal system

## Case Law that Fleshes out Integrity

### *Adams v Law Society of Alberta (2000, AR) 🡪 Violation of rules of professional conduct rooted in integrity –he used position as lawyer for sex, abused his power, and strong-armed client into situation. Big factor here is vulnerability of client and the appropriate penalty is disbarment*

* Facts 🡪 Adams is criminal defence lawyer in Alberta. Represented 16 year old in jail for prostitution and her boyfriend currently in prison. He secured her release and she resumed being a sex worker. He bumped into the girl one day, mentioned boyfriend’s case, and asked her what services she provided, asked to have sex once. She went to police and agreed to be fitted with a wire. Police caught Adams with pants down, he was charged. He was disbarred by law society (rooted in his lack of integrity) and appealed
* Issues
	+ What do the Law Societies mean by the word “integrity”?
	+ What’s the appropriate punishment for an “integrity” violation?
* Ratio 🡪 Insight into how LSUC punishes people- here, the entire violation of rules of professional misconduct rooted in integrity (how he used his position as the lawyer, abused his power, and strong-armed client into situation that the LSA saw as worse than meddling with trust funds)
	+ Relevant consideration: vulnerability
	+ Penalty: disbarment
* Reasoning
	+ Lawyer is in a special position of trust and he dishonoured profession with his conduct
	+ By violating integrity he violated professional misconduct

### *Law Society of BC v A Lawyer (2000, LSDD) 🡪 fleshes out analysis on punishment for breach of integrity; integrity appears to be about intent (purpose of violation); primary focus in sentencing is protection of public interest, SEE PRIMARY FACTORS to consider in reasoning*

* Facts 🡪 A lawyer married to another lawyer EVL. EVL falls in a hole so they sued the owner of the hole (minor injuries, sued in tort). Marriage between A lawyer and EVL ended and A lawyer was the only witness to her injuries. A lawyer blackmailed her on this fact (said he could be a good or bad witness). Her lawyers reported him to LSBC and he was charged with a violation of rules of integrity.
* Issue 🡪 is he found to have a lack of integrity and if so, should he be punished for his behaviour?
* Held 🡪 lawyer was suspended for 3 months for lack of integrity
* Ratio
	+ Integrity appears to be about intent –purpose of the violation
	+ The primary focus when sentencing a lawyer is protection of public interest –appropriate penalty must ensure that public is protected.
	+ Primary factors to consider when punishing a lawyer 🡪 see in reasoning
* Reasoning 🡪 **Factors to be taken into account in determining penalty:**
	+ (a) Nature and gravity of proven conduct
	+ (b) Age and experience of respondent
	+ (c) Previous character of the respondent, including details of prior discipline
	+ (d) Impact upon the victim
	+ (e) Advantage gained or to be gained by respondent
	+ (f) Number of times offending conduct occurred
	+ (g) Whether respondent has acknowledged misconduct and taken steps to disclose/address the wrong and the presence or absence of other mitigating circumstances
	+ (h) Possibility of remediating or rehabilitating the respondent
	+ (i) Impact on respondent of criminal or other sanctions or penalties
	+ (j) Impact of proposed penalty on respondent
	+ (k) Need for specific and general deterrence
	+ (l) Need to ensure the public’s confidence in the integrity of the profession
	+ (m) Range of penalties imposed in similar cases

### *Law Society of New Brunswick v. Ryan (2003, SCC) 🡪 LS Committee has broad discretion to determine what sanctions apply; LS can ban a member from practice when his practice involved an egregious departure from rules of conduct as it had effect of undermining public confidence in basic legal institutions*

* Facts 🡪 Ryan was lawyer in NB, representing clients in wrongful dismissal suits. Tells clients they have strong chance of winning. Over 5 years he told client he was working on case but did not advance it at all (lied about delays, etc.) Limitation period for claim passes and Ryan says he won $37k but tells client delay in payment. Later said CA overturned decision and lost payment. Later tells his clients the truth based on alcoholism and depression, and reporting self to law society (claims these conditions were the cause of the misdeeds). Went all the way up to SCC
* Issue 🡪 what should the penalty be for Ryan’s professional misconduct? Was LS finding unreasonable?
* Prior proceedings 🡪 CA overturned board decision since he was alcoholic, troubled, and needs help so he deserved punishment but disbarment too harsh. They suspended his license pending treatment.
* Held 🡪 disbarment upheld –decision to disbar is reasonable and Ryan showed lack of integrity
* Ratio 🡪 there is nothing unreasonable about LS choosing to ban a member from practice when his practice involved an egregious departure from rules of professional conduct as it had the effect of undermining public confidence in basic legal institutions. LS had broad discretion to determine what sanctions apply to meet objective of LSA.
* What to think about at SCC level?
	+ How much does alcoholism and depression impact 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?

## Conclusion on 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 |

# Good Character

## Integrity vs. Good Character

* Relationship to “Integrity”
	+ Aren’t’ they the same thing?
	+ Integrity is a trait you must show while practicing law
	+ Good character is a trait you must show at time of call to the Bar
* Good character not found in the Rules of Professional Conduct
* Pre-condition for Call to the Bar
* Therefore, found in the Law Society Act (Ontario) (similar versions in other jurisdictions)

## Section 27(2) Law Society Act

* S. 27 (2) 🡪 “It is a requirement for the issuance of every license under this Act that the applicant be of good character”
	+ Note: “every license” 🡪 this applies to all classes of license under the Act: both lawyers and paralegals
	+ If you lack good character, you can be denied license to practice law
	+ Burden is on the person applying, on a balance of probabilities

### Practically how does s. 27(2) work?

* Does this mean we hold a hearing for everyone wanting to be called to the Bar?
	+ No, you receive form and you must answer questions relating to good character
	+ Examples:
		- Have you ever been found guilty of, or convicted of, any offence under any statute?
		- Are you currently the subject of criminal proceedings?
		- Has judgment ever been entered against you in an action involving fraud?
		- Have you ever been discharged from any employment where the employer alleged there was cause?
		- Have you ever been suspended, disqualified, censured or otherwise disciplined as a member of any professional organization?
		- Have you ever been refused admission as a student-at-law, articled clerk or similar position in any professional body?
		- While attending a post-secondary institution, have allegations of misconduct ever been made against you?
	+ If answers set off Law Society ‘radar’, a hearing will occur
	+ Law Society does not blindly accept answers, sometimes they hold random audits to answers of these question – Answer them truthfully!
* When do you need to be a person of ‘good character’?
	+ Just at the time of application – for that moment (issuance)
	+ Doesn’t say ‘has always been of good character’
	+ It is settled law that the timing of good character = at the time of call to the bar
* Once you get license, need to be a person of integrity

### Goals of the Good Character Requirement

1. Protect lawyer’s future clients
2. Maintain (or increase) respect for the administration of justice

## Case Law the Fleshes out s. 27(2) “Good Character”

### *Re P(DM) (1989, ON) 🡪 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?*

* Facts 🡪 U of T law student completed school, applied to bar, disclosed that he was convicted of sexual assault of children (his daughter, another 4 year old). He completed his articling an his principles wrote him references of good character. Good character hearing was held.
* Issue 🡪 should he be admitted to the law society/bar?
* Held 🡪 application to the law society was refused
* 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?
* Reasoning
	+ 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
	+ Regarding evidence submitted 🡪 the evidence and letters shows he would be a good lawyer but does not speak to whether he is a person of good character specifically
* Side note 🡪 he took his own life –but that is not something the law society considers

### *Re D’Souza (2002, LSDD) 🡪 concepts of remorse and time can aid in a good character hearing; can apply for another good character hearing if you failed first time*

* 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. She had a master of law from India, and then went to UofT to get three credits for accreditation. She falsified her academic transcripts and firm found out. They told her they were reporting her to the law society.
* Issue 🡪 Should she be admitted to the bar?
* Held 🡪 failed the character hearing on first hearing because she gave dishonest testimony. But time was a factor in the second hearing.
* Ratio 🡪 concepts of remorse and time can aid in a good character hearing; can apply for another good character hearing if you failed first time.
* Reasoning
	+ 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, LSDD) 🡪 passage of time is a critical indicator of good character as time needs to pass between dishonesty and call to the bar. Remorse + time =call to the bar*

* Facts 🡪 Queen student who got job at Osler’s. Convicted of academic dishonesty in her undergrad. She lied saying it was self-plagiarism but in reality she stole someone else’s paper. LSUC asked why she lied and she said she did not think she would be called to the bar if they knew the truth.
* Issue 🡪 does her conduct demonstrate she is of good character?
* Held 🡪 was not admitted to the bar first time because she was dishonest at time of hearing
* Ratio 🡪 passage of time is a critical indicator of good character. Remorse + time =call to the bar
* Reasoning
	+ “**Remorse + Time = 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 Shore (2006, LSDD) 🡪 distinguishable from other cases because she owned up to her bad conduct right away and did not make excuses; serious remorse and passage of time can result in good character*

* Facts 🡪 Osgoode student (50 years old), before she went to law school her daughter died. Nurses were charged with homicide, was supposed to be overdose of morphine. The investigation was ongoing into law school. Sharon handed over all medical reports except she shredded one report that said her daughter was fine just needed psychological help (destruction of evidence). Charges against nurses dropped and she admitted to destruction of evidence to preserve daughter’s memory.
* Issue 🡪 should she be admitted to the bar?
* Ratio 🡪 serious remorse and passage of time can result in good character
* Held🡪 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

### *LSUC v James Maurice Melnick (2014, LSDD) 🡪 serious remorse and passage of time are the leading requirements for good character*

* Facts 🡪 Western student of law. He used to be a teacher and taught grades 7 and 8. He became friendly with a student and after she graduated. They exchanged sexual fantasies over email and they became intimate. He took her to a hotel. He was charged with abduction (later dropped) and luring and sexual exploitation of an underage person. He was fired as a teacher and his license was revoked. He plead guilty to the charge and was convicted -6 months in prison and on sex registry.
* Issue 🡪 should he be called to the bar?
* Ratio 🡪 serious remorse and passage of time are the leading requirements for good character
* Held 🡪 rejected from joining bar, later appealed and overturned –now practicing
* Reasoning
	+ 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 judgment 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
	+ Leading cases right now, ***Shore*** and ***Melnick*** 🡪 expression of remorse and passage of time are still requirements

### Aftermath/Policy Discussions

* Should this rule be reformed?
* Where do we draw the line? Should certain crimes automatically discount you from joining the bar?
	+ This would discourage those who would fail good character test from going to law school
	+ Protect the administration of justice
* Do we need the “good character” rule?
* Is the emphasis on “remorse” appropriate?

|  |
| --- |
| Civility Regulation |

# Civility Regulation

## Introduction

* Civility is important, the regulation of it is complicated
* Issue 🡪 Civility regulation is a limit on a constitutionally protected right. All expression is supposed to be protected under the Constitution, and as lawyers we should be protecting this right
* Why the interest in civility?
	+ Recent requests have been premised on the ‘crisis in civility’
	+ People have forgotten how to behave, we are much less civil than society once was
	+ Examples: “Fight over Costco parking spot turns bloody” “Pedestrian bitten by driver during road rage incident” ‘trump quotes’ etc.
* How do we regulate?
* Why do we bother?

## The Golden Age of Civility?

* Today’s lawyers are said to be less civil than those of the past
* Civility-v🡪relates to how we treat each other, clients, and the courts
* Example *🡪* Focusing on how people in law firms treat each other- how do they treat each other? How about 60 years ago, how would you have been treated then? We are thinking of how men in a certain social class treated each other then and now (obviously race and religion have progressed)

### FLSC Rule 6.3 🡪 *harassment and discrimination*

* 6.3-3 🡪 “A lawyer must not sexually harass any person”
* 6.3-4 🡪 “A lawyer must not engage in any other form of harassment of any person”
* 6.3-5 🡪 “A lawyer must not discriminate against any person”

### Rule 6.3 Commentaries

* (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.
	+ These laws are important
	+ Sexism, racism, are less tolerated than in the recent past
	+ As a society we are doing a ‘better’ job at regulating specific civility

## Sources of Civility

### Criminal Code Section 9 🡪 Contempt of Court

* Contempt of court is the only common law crime in Canada (power of court to control its own process- judge has broad contempt based powers ordering fines or jail)
	+ Seen as first power by court that allows regulation created by law society
	+ Usually applies in face of court –when they commit action in court before judge that disrupts proceedings
	+ Rules relating to civility by FLSC apply more broadly than this but this is a helpful backdrop

### FLSC Rule 5.1-5 🡪 *courtesy*

* A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.
* In adversarial proceedings, must raise arguments no matter how distasteful, but in a way that maintains dignity, decorum, and courtesy in the courtroom.
	+ Bold assertion 🡪 order is maintained
	+ Distinction between asking distasteful questions/ arguments and conducting self with candor, fairness, courtesy, and respect
	+ If these duties come into conflict, is there a hierarchy?

### FLSC Rule 5.1-5 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 Rule 7.2-1 🡪 *courtesy and good faith*

* “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.”

### FLSC Rule 7.2-1 Commentaries

* **(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
	+ 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 demeanor 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 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 Rule 7.2-4 🡪 *communications*

* 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 between lawyer and others

### FLSC Rule 3.2-1 🡪 *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 of Relevant 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
* Seems that civility = courteous, and we are talking about 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

## Tension with Other Rules

### Rule 5.1-1 Commentary 🡪 role in adversarial proceedings

* **(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 endeavor to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honorable means, without illegality and in a manner that is consistent with the lawyer’s duty to treat the tribunal with candor, 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
	+ If these duties come into conflict, is there a hierarchy?

## The “Indeterminacy Question”

* If civility is suffused with indeterminacy that it provides little or no guidance, maybe it is time to get rid of the rule
* As it is too ripe for manipulation
* Think of the cost of incivility and the cost of correcting it

## The Regulatory Model of Ethics

* More than any rule, the rule of civility call upon one to consider the regulatory model of legal ethics
* Costs of enforcement is relevant – there is a social cost for everything (an opportunity cost as resources are limited)
* Regulatory efforts should not exceed the cost of what we are preventing
	+ We shouldn’t spend $100 to prevent the theft of $0.10
* Costs of incivility therefore needs to be looked at

### 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
* 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
* 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. Sexual assault cases – being overly aggressive may cause truthful complainants to not come forward out of fear of being ‘attacked’

### Costs of Enforcement of Civility

* Law Society and Court resources that could be spent on other matters (for example, pursuing people who defraud their clients)
	+ 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
* We might deter socially useful activities 🡪 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?
	+ The “chilling effect”
	+ If counsel are unsure about civility regulation, they may not press witnesses
* 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.

## What counts as Incivility?

* 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”
* During discussions with opposing counsel (at which your clients are present), suggesting that opposing counsel has a history of incompetence or unethical behaviour
* 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)

NOTE: limited case law on civility but see *LSUC v Clark and LSUC v Groia*

### *LSUC v Clark (1995, LSDD) 🡪 1) 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*

* Facts 🡪 Clark devoted career to advancement of Aboriginal rights. Argument was treaties that surrendered land from aboriginals to Crown were improper and therefore the land is aboriginal land. He accused Crown/gov’s assertion that aboriginal property was theirs as treason and complicity in genocide. He made this argument constantly, yelled, wouldn’t sit down, etc. One time he attempted to arrest a judge for genocide. Known for his outlandish character and lack of compliance. He had 21 complaints made about him
* Issue 🡪 should Clark be disbarred? Was he uncivil?
* Held 🡪 Hearing panel recommends disbarment but this recommendation was not carried forward (NOTE –he was later disbarred in 1999 after behaviour did not approve and he would have been disbarred on the first try if this was heard today)
* 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
* Reasoning
	+ Clark was not “ungovernable” –his actions still qualify as professional misconduct
	+ His attempt at citizen’s arrest caused only a minor disruption
	+ The activity he was concerned with, Aboriginal rights, is emotional and significant so his conduct is a bit more excusable because of the importance of this issue

### *LSUC v Joseph Peter Paul Groia (2013, LSDD) 🡪 allegations of professional misconduct that question integrity of the opposing counsel must be made in good faith and have reasonable basis; look at 4 factors*

* Facts 🡪 Groia had allegations of professional misconduct for uncivil and unprofessional courtroom submissions and statements during the trial of R v Felderhof on quasi-criminal charges under Securities Act. Groia claimed during trial that the OSC was using an unfair trap and “convict at all costs” approach. Claimed the prosecutor was dishonest, unprofessional and lazy. Prosecutor asked judge to make a ruling on Groia’s conduct and the judge refused. Groia won his case and prosecutor made complaint to LSUC.
* Issue 🡪 Did Groia act in an uncivil manner and engage in professional misconduct? When did his conduct cross the line? Should there be a penalty?
* Held 🡪 original decision was for a 2 month suspension for Groia’s uncivil conduct, ordered costs in amount of $246k
* Ratio 🡪 Allegations of professional misconduct that question 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
* Reasoning:
	+ Relentless personal attack on the prosecutor
	+ Weighing of civility and resolute advocacy 🡪 sometimes at odds with one another. We should not give robust definition to civility that it chills resolute advocacy
	+ How does this relate to s. 2(b)? 🡪 Rational balancing of objectives vs. your own rights

### *LSUC v Groia (2016, ONCA) 🡪 duty of zealous advocacy in contrast to uncivility are important to consider; distinguishes Clark from Groia –context and facts specifically are important to consider*

* Issue 🡪 How can we justify the outcome in Groia when Clark just received a reprimand?
* Held 🡪 LSO’s decision upheld –it was reasonable
* Reasoning
	+ Decisions must be highly contextual and fact specific
	+ Key Difference between Clark and Groia was the substantive nature of the arguments being made, where Clark vehemently believed and could defend his arguments substantively while Groia was making empty assertions that even he did not believe in order to try to disrupt the court in a way that would favour his client. Also said Clark is 20 years old and our views on civility have evolved.
	+ The Law Society’s decisions in both cases were about protecting a lawyer, in Clark’s case they were protecting him while in Grioa’s case they were protecting the prosecutor opposing him

### *LSUC v Groia (SCC, 2019) 🡪 outlines three part test for incivility in court*

* Issue 🡪 was decision reasonable? This is important to ask because LSO assumed to be experts so decision will only be overturned if unreasonable
* Defendants’ argument 🡪 in court incivility should only be prosecuted if it rises to the level of threatening administration of justice or trial fairness
* Reasoning:
	+ Addresses standard of review –how much do they have to agree with LSO on matter of civility? 🡪 SCC agrees with the lower courts in that the standard is reasonableness
	+ Next, addresses what matter of civility looks like under professional code –made four points here:
		- **1)** When lawyers are uncivil, it may prejudice courts or jury against the client
		- **2)** Incivility might be so distracting, that court may fail in its fact finding duty
		- **3)** Witness seeing lawyers’ incivility may be unduly stressed by it and impact their ability to testify
		- **4)** Makes the law profession look bad and may hurt public perception of the administration of justice
	+ What is appropriate balance between civility and resolute advocacy?
		- Civility should not have such a robust definition that it diminishes advocacy
		- We want to be reluctant to find someone engaged in incivility and here it was appropriate to find incivility
* Ratio 🡪 Test for incivility in court:
	+ **1)** Must assess what the lawyer said
		- **a)** Did the lawyer have a good faith basis for what they said? (Subjective)
		- **b)** Did the lawyer have a reasonable basis for what they said? (Objective)
	+ **2)** Must assess the manner and frequency of what was said
		- Were they yelling, making a scene, interrupt proceedings, etc.
	+ **3)** Must assess trial judge’s response
		- Did trial judge intervene and ask the lawyer to stop, if so, did the lawyer continue?
		- Was it enough for the trial judge to take note
* Application of test to Groia:
	+ 1) Lawyer claimed prosecutor was engaged in witch hunt and prosecutorial misconduct
		- a) He had a good faith basis for thinking this
		- b) However it was unreasonable because prosecutor had properly disclosed all documents and abided by rules and Groia had misunderstood the rules of evidence entirely
	+ 2) His manner was not great and he acted out frequently
	+ 3) Trial transcript shows trial judge only told Goira to stop it and when he did, Groia would stop –trial judge did not find it so bad that it warranted a side bar
* OVERALL DID NOT MEET POINTS OF INCIVILITY TEST
* Held 🡪 it was NOTreasonable to find Groia was uncivil and broke the rules of professional conduct. They ruled FOR Groia –he did not meet the test for incivility and ONCA decision was overturned

|  |
| --- |
| Conflicts of Interest |

# Conflicts of Interest: Basics

## Introduction

* Most complicated and technical part of course 🡪 a lot of litigation in this area in recent years
* Rules of professional conduct have been amended to SCC language

## Two Primary Resources for Conflicts of Interest 🡪 *1) courts 2) Law societies*

1. Regulated by Courts 🡪 regulated by courts via disputes and the courts’ inherent jurisdiction
	1. Lawyer acting in a way that gives rise to disputes
	2. Inherent jurisdiction 🡪power to control the process and people who appear in court
2. Regulated by Law Societies 🡪 through professional conduct rules
	1. Recall relationship to s. 33 of Law Society Act
	2. Finding of professional misconduct leads to punishment

## Sources: Conflicts of Interest

### FLSC Rule 1.1-1 🡪 *Conflict of interest defined*

* **1.1-1 Conflict of Interest** 🡪 “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)
	+ Adverse 🡪 a negative impact on loyalty or representation to client
	+ Material 🡪 something that is more than trivial

### FLSC Rule 3.4-1 🡪 *duty to avoid conflict*

* **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 🡪 but only where set out in the Code

### FLSC Rule 3.4-1 Commentary 5 🡪 *duty of loyalty grounded in fiduciary duties*

* 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

### FLSC Rule 3.4-2 🡪 *consent to act where conflict*

* 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

## Neutral Conduit Model

* We don’t want the law to be complex, there is an unintentional inherent complexity
* Lawyers exist to overcome this complexity- to be the antidote and enable others to access their rights
* All people have the right to be defended from charges, but this is complicated, and therefore lawyers have the duty to provide counsel/access
* This creates “agency conflict”
	+ The human baggage that human beings have
	+ Sometimes the things the clients want may conflict with the thing that the ‘tube’, the ‘neutral conduits’ want
	+ Also there are more clients than lawyers – each tube will represent multiple clients
	+ This imposes costs on the clients
	+ We try to minimize these agency conflicts
* Even where a client may be ‘guilty’ they have the right to defence counsel

## The Duty of Loyalty 🡪 Basics

* The lawyer owes fiduciary duties to clients 🡪 the duty to be loyalty, the duty to act in the client’s interest
* Root of conflict of interest is often rooted in 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
* The lawyer may have competing loyalties:
	+ A) Between two different clients
	+ B) Between a client and some third party, or
	+ C) Between the lawyer’s personal interests and the interests of the client
* Conflict exists when there is a material impact or conflict- not simply trivial
* 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
	+ 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)

## *McDonald Estate v Martin (1990, SCC) 🡪 three main points: 1) must balance competing policy interests 2) courts have power to remove solicitors 3) FLSC not binding on courts, but is persuasive; Two step appropriate test in conflicts of interest cases: 1) did lawyer receive confidential info attributable to solicitor/client relationship? 2) Is there a risk it will be used to prejudice of the client?*

* Facts 🡪 Lawsuit called A versus B. A retained X and B retained Y. Articling student from X transferred to a firm and ended up at Y. A complained that Y should be removed as counsel because Y had access to confidential information from articling student. Lawyers at Y signed affidavits saying articling student wouldn’t work on the file.
* Issue 🡪 should the other lawyers from Y be able to act for B in the matter A v. B?
* Held 🡪 Y removed as counsel for B
* 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)
* **Appropriate Test 🡪** two step inquiry in conflict of interest cases where on a balance of probabilities:
	+ **1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? 🡪**  All you need to show is that a relationship existed because court should infer confidential information passed. Lawyer cannot act against client or former client; automatic disqualification
	+ **2) Is there a risk that it will be used to the prejudice of the client?** Assuming transferring lawyer has confidential information; will the information be misused? If one lawyer cannot act, that doesn’t mean the whole firm cannot act. Imputed knowledge model says that you know everything from A so when you move to B you infect every lawyer. OVERKILL
* Reasoning:
	+ Presumption that when a lawyer joins a new firm that they will disclose all they know, so up to new first to refute the presumption with high standard of evidence by
		- Circulating firm-wide memos warning non-communication to impugned lawyer
		- Physically segregating working files and information
		- Placing impugned lawyer in remote location
	+ 3 competing values at play in court’s decision:
		- Maintain high standards of legal profession and integrity of system of justice
		- Litigant shouldn’t be deprived of his or her choice of counsel without good cause
		- Desire to permit reasonable mobility in legal profession
	+ Courts are not bound to apply a code of ethics; their jurisdiction covers ability of lawyers to perform their duties within the court; it’s for the law societies to judge the ethics standard which they set

## 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
	+ Can make a motion for breach of fiduciary duty and get damages
	+ 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

|  |
| --- |
| Conflicts: Acting Against Clients |

# Conflicts: Acting Against Clients

## Two Forms of Conflicts Acting Against Clients

1. Successive Representation 🡪 acting against a former client
2. Concurrent representation 🡪 acting against a current client

# Successive Representation

* 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

## FLSC Rule 3.2-10 🡪 *cannot against former client without consent*

* 3.2-10 🡪 Unless the former client consents, a lawyer must not act against a former client in:
	+ a) The same matter,
	+ b) Any related matter, or
	+ c) Any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice that client.
* **NOTE 🡪** 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) Is a bit of a ‘catch all’

## Rule 3.4-10 Commentaries

* (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 Rule 3.4-11 🡪 *another lawyer can act if*

* 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.
* **NOTE**: Think of McDonald –did not meet steps in ensuring no confidential information was shared

## FLSC Rule 3.4-11 Commentaries

* (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.

## Case Law on Successive Representation

### *R v Zwicker (1995, NB) 🡪 Conflicted justice is a principle of fundamental justice –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. Successive representation in a criminal matter is a breach of s. 7.*

* 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). Wilson advised Bucky to plea guilty. Wilson made a plea for non-custodial sentence during sentencing. Judge said sentencing should come back in a couple weeks. When the case resumes, Wilson was now a Crown on the case and said he should go to jail
* Issue 🡪 Can Wilson do this?
* Held 🡪 successive representation in a criminal matter =breach of section 7 of the Charter
* Ratio 🡪 Unconflicted justice is a principle of fundamental justice –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. Successive representation in a criminal matter is a breach of s. 7.
* Results
	+ Cannot act against client in the same matter!
	+ Sentence reduced –he had pleaded, time served
	+ Lawyer penalized by Law Society 🡪 he committed professional misconduct
* NOTE 🡪 courts did one thing, law society did another

### *R v J(GP) (2001, MBCA) 🡪 deals with lateral moves (fact based); A lateral move as counsel representing a witness or a complainant to a prosecutor is an appearance of impropriety. Cannot make lateral move if it involves a change in role/alignment*

* 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. Accused admits it happened once when she was 17 but no abuse. To prove claim, accused sough counselling records that it did not really happen. There were 3 lawyers involved (Crown, complainant lawyer, defence lawyer). Issue was appealed, lawyer for the Crown was the lawyer who was acting for the complainant at trial. They made a unilateral move but was still on the same side (opposed disclosure)
* Issue 🡪 is this a problem of successive representation?
* Ratio 🡪 Crown’s duty is to judicial system –not to obtain conviction but to assist in justice. A lateral move as counsel representing a witness or a complainant to a prosecutor is an appearance of impropriety. Lawyers cannot make a lateral move if it involves a change in role/alignment
* Held 🡪 Yes, this is a conflict of interest
* Reasoning
	+ Crown’s duty isn’t purely partisan- Crown has a ministerial role that is seen as adversarial
	+ Lawyers should not be allowed to make lateral move if it involves change in role/ alignment
		- So this only really applies to criminal cases like this probably
		- Maybe some tax HR or admin cases 🡪 anything with a quasi-judicial function (not adversarial but an administration of justice)
	+ No confidential info at risk but still a conflict of interest problem

## 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?

## *R v Neil (2002, SCC) 🡪 established “Neil Bright Line Test” and highlights two conflicting interpretations (a) prohibited where no risk of harm (b) prohibited only where substantial risk of harm; one exception =professional litigation exception*

* Reasoning
	+ Bright line test 🡪 “… 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)
* Two Conflicting interpretations of Bright Line Test
	+ **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)

## *Strother v 3464920 Canada Inc. (2007 SCC) 🡪 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; must be adverse legal interest involved to trigger bright line test, not simply adverse interest generally (i.e. commercial competitors)*

* Facts 🡪 Stother was top tax lawyer acting for Monarch (tax shelter film company). They have an exclusive retainer and have been advising for years. In 1977, government closed the tax shelters Monarch sold. Sother told Monarch this and they starting winding down their business. As a result, changed terms of retainer. (NOTE: Turns out Stother was wrong about advice)Darc used to work for Monarch and figured out solution. Went to Stother with this loop hole but Darc didn’t have money to retain Stother so set up agreement where Stother gets 50% of their business. Stother later set up as shareholder. Monarch caught wind of this. Monarch sued Stother for breach of fiduciary duty stating it was not free to set up business with Darc.
* Issue 🡪 did the change in retainer mean anything? Should Stother be guilty of breach of fiduciary duty in regards to conflicts of interest?
* Held 🡪 split 5-4 decision 🡪 Strother forced to disgorge profits
* 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)
* Reasoning:
	+ 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.
	+ The duty here wasn’t just the retainer, it was the relationship of trust and confidence which obligations flow
	+ His duty to Monarch was ongoing and he violated this when he took a stake in Darc
	+ 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.
	+ Addresses 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
* NOTE: this did not trigger the bright line test –simply because they are competitors does not mean they are adverse in interest –must be adverse legal interest, not simply adverse interest
	+ Real risk of impairment is question of fact 🡪 Commercial 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.
* No real resolution here because SCC changed the test from adverse interest to adverse legal interests (No ***Neil***)

## *CNR Co v McKercher LLP (2003, SCC) 🡪 leading case; Neil Bright Line test applies as default, but if it does not meet the circumstances when the test will apply, we fall back on substantial risk test; The potential for conflicts of interest aren’t the only breaches of fiduciary duty there is also 1) duty of commitment to the client’s cause 2) duty of candor*

* Facts 🡪 McKercher (MCK) was a go to law firm for CNR when they needed a lawyer in Saskatchewan. They had a strong relationship. In 2008, MCK had three CNR cases ongoing. One for personal injury, a real estate purchase and a claim in receivership. In 2008, Wallace went to MCK for help suing CNR. This was 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. No substantial risk here because no confidential info they have on CNR came into play. But MCK started working on case against CNR without telling them. CNR found out when statement of claim made. MCK on that date dropped two of CNR’s cases, CNR later pulled the third. CNR applied to court to have MCK removed citing Neil Bright Line Test. MCK argued the new case had noting to do with three files they represented CNR on.
* Prior proceedings 🡪 trial judge disagrees and disqualified MCK; CA overturned because no substantial risk and mandates were not related. Said there was only a minor breach of fiduciary duty
* 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?
* Held 🡪 bright line test applies and MCK breached this test; sent back to TJ for remedy
* 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 two 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
		- The duty of Candor
* Reasoning:
	+ The law of conflicts is mainly concerned with protecting two types of prejudice:
		- (1) Prejudice as a result of the lawyer’s misuse of confidential information obtained from a client;
		- (2) 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.
	+ The bright line rule is not a rule of universal application; the rule applies where **the immediate legal interests of clients are adversely affected**.
* **Bright line test applies when:**
	+ (1) The immediate interest of clients are **directly adverse** in the matters on which the lawyer is acting
		- In *Neil*, a firm was representing Neil in criminal proceedings and Lambert in divorce, when it was foreseeable that Lambert would become Neil’s co-accused in the criminal proceedings. The court didn’t apply Bright Line because of the nature of the conflict. Neither Neil nor lambert were directly adverse to one another in matters which the law firm represented them in. The adversity of the interests was indirect and stemmed from strategic linkage between the matters, rather than Neil being directly pitted against Lambert in either of the matters
		- Note: This solves the problem from 6.6 (You represent A and B on non-adverse matters; they sue each other on unrelated matter with other counsel; adversity HAS to be with respect to matters you’re representing them on)
	+ (2) Clients are adverse **in legal interests**
		- Interests in *Neil* were strategic, and in *Strother* were strategic
	+ (3) The party seeking to raise the bright line test **does not seek to abuse by using it in a way that is “tactical rather than principled”** (think motive)
		- Ex. Large institutional clients who also have a nuisance claim against each other in northern Ontario, the court might declare this to be a tactical abuse
	+ (4) Where it is not unreasonable for a client to expect that its law firm will not act against it in unrelated matters – cites the professional litigant exception; must analyze firm/client relationship on case by case basis
* **Only where bright line test doesn’t apply do we return to the substantial risk test:**
	+ **We return to “Substantial Risk” 🡪** 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

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

* Adopted the analysis from the SCC 🡪 see how it is incorporated into rule 3.4-1 commentary
* Reminder **FLSC 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.

## FLSC Rule 3.4-1 Commentary 🡪 *adopts SCC reasoning*

* **(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.
	+ 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: Personal Conflicts  |

# Conflicts: Personal Conflicts

## When can they arise?

* 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”

# Conflict over Fees

## Third Party Fee Payments 🡪 *Gavin McKenzie*

* Duty to client supersedes any duty owed to third party paying fees –they do not get access to confidential information or privy to privileged information
* 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).
	+ 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
* **Gavin McKenzie** 🡪 “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 single-mindedly. To pursue the interests of the party who is paying the lawyer's fee to the detriment of the client would be improper.”
	+ Example 🡪 legal aid, where the government is paying the bills to the client. The only duties here are owed to the client, and not in any way to the government.
	+ Example 🡪 S. 25(8) of Canada’s Youth Criminal Justice Act, where young persons parents usually pay the legal bill. Consider the circumstance where a young person has been charged with an offence, and part of the involvement has an uncomfortable fact about the parents, the provision holds that if it appears that the interests of a young person and a parent are in conflict, then the judge or justice shall ensure that the person is represented independent of a parent

## 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) 🡪 Conflicts of interest are largely based on appearance (if it looks like a conflict); no actual conflict needed, but you ask was there a substantial risk? Lawyer cannot soft pedal (do worse job) for those not paying*

* Facts **🡪** Three accused were represented by a lawyer, two of them were getting a free ride paid by the third person. At the third’s direction, the lawyer influenced Stork & Toews to plead guilty (whereas the third got off). They all agreed and were convicted on a guilty plea. There was a conflict of interest here. Accused allowed to revoke their pleas and get a new trial, problem of third party fee payments, result is a conflict of interest and a need for a judicial remedy.
	+ Concern 🡪 lawyer soft peddling for other two; third party getting better treatment than the others
* 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.

## Contingency Fees

* Where all or part of lawyer’s fee is contingent on achieving a particular result specified by the client
* Often pursued in connection with class actions; lawyer often receives 33% of final award
* Potential for enhancing access to justice
* Potential for conflicts 🡪 lawyer who is in need of immediate funds may be inclined to settle rather than risk a trial
* 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

### FLSC Rule 3.6-1 🡪 *fees must be fair and reasonable*

* **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.
	+ Commentary [1] In determining appropriate percentage, should consider factors including likelihood of success, complexity of charge, amount of expected recovery, expense and risk of pursuing. If you charge fee, then agree on smaller % for contingency

### FLSC Rule 3.6-2 🡪 *can write out contingency fee in accordance with legislation*

* **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

* You can sue your client, and even release confidential information 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
* Can you bail on the non-paying client? Does this give rise to conflicts of interest? – covered in s. 3.7 of FLSC – a lawyer must not withdraw from representation of client, except for good cause and on reasonable notice to the client…
	+ Is non-payment of fees good cause… it is more complicated than yes or no… arose in Cunningham

### FLSC Rule 3.3-5 🡪 *non-payment of fees recourse*

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

### *R v Cunningham (2010, SCC) 🡪 lawyer may be required to work for free: 1) accused can discharge legal counsel and court cannot stop this 2) courts have jurisdiction to disallow requests for withdrawal 3) test to disallow withdrawal (but only allowed to refuse sparingly and cannot refuse withdrawal for ethical reasons)*

* Facts 🡪 lawyer working for client in the Yukon who was accused of child sexual assault. The accused was not wealthy and he qualified for legal aid. Cunningham, the lawyer, was a legal aid lawyer. Cunningham worked for months on his case and at some point while she was working on his defence, the accused was required to re-certify for legal aid to ensure he still qualified. The accused refused to fill out the forms. So legal aid called Cunningham and said he no longer qualifies for legal aid. So she scheduled an appearance and brought an application to be removed from record. The reason being she is no longer being paid. The judge refused saying the proceedings had started and if she is removed as counsel, it would prejudice the accused. She appeals all the way up to SCC
* Issue 🡪 Should a lawyer be required to continue to work for free (because the accused has not complied with the financial terms). Does a court have the jurisdiction to obligate counsel to continue?
* Held 🡪 lawyer must work for free and court has jurisdiction to disallow the lawyer to request for withdrawal
* 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 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.”***
* Reasoning:
	+ “If a lawyer appears before the court and seeks to withdrawal, if the lawyer must withdraw for ethical reasons, two things happen: (1) The court asks no further questions (2) They allow the withdrawal
		- No further questions because of confidentiality
		- For ethical reasons, one can withdraw – BUT the real reason cannot be non-payment fees
	+ This case enables lawyers to just say I cannot represent because of **ethical reasons**
	+ Note: “nudge nudge” decision 🡪 because if you say **ethical reasons**, you are out. By ethical, they meant in relation to the rules of professional conduct (not moral reasons)
* Factors to consider before refusing withdrawal:
	+ 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
* Note 🡪 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 too honest and said it was about being paid not simply ethical reasons

# Other Personal Conflicts

* Do not always arise over fees
* Can also concern for example, sexual relationships with clients

## FLSC Rule 3.4-1 Commentary 11 🡪 *examples of personal conflict (sexual relationship)*

* 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.
	+ 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) 🡪 (1) There is no absolute ban against sexual relationship with client, but they are cautioned against (2) If you are in one, you must warn from the onset, suggest they get independent legal advice (3) If the conflict is too profound, the lawyer must pass off the file*

* Facts **🡪** Complainant hired Hunter in divorce proceedings. Hunter and the complainant become romantically involved. Always consensual, lasted for 2.5 years. The complainant asserted that she was reluctant to press Hunter on advancing her problems because of the risk of threatening their relationship. But she did get the results she wanted. Hunter had the complainant sign a document acknowledging the conflict of interest. Unknown to the complainant at the time, Hunter was also married and seeing two other women.
* 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
* Held **🡪**There was a conflict of interest, GH suspended for 60 days and $2,500 fine
* Ratio:
	+ (1) There is no absolute ban against sexual relationship with client, but they are cautioned against
	+ (2) If you are in one, you must warn from the onset, suggest they get independent legal advice
	+ (3) If the conflict is too profound, the lawyer must pass off the file
* This goes back to Rule 1.1-1. If it gives rise to a substantial risk that the relationship will be materially and adversely affected, then they should not act.
* Reasoning
	+ The penalty was relatively modest given that Hunter self-reported the problem and was remorseful and respectful of the complainant. Hunter did not force the complainant to testify. The impact of the relationship was that Hunter’s advice may not have been objective and emotions prevented the client from asking questions of the lawyer. **Hunter was obliged to discuss with the client whether he should continue to represent her at the outset of the relationship** and throughout given that the nature of the relationship could change over time. The nature of the work being performed involving a spousal dispute underscores the danger of the conflict of interest further.
	+ Not absolute prohibition BUT lawyer obligated to inform client of the professional downside of having a sexual/romantic relationship with their lawyer. The client does NEED to get independent legal advice about it – but where unsophisticated or vulnerable party the lawyer should recommend independent legal advice. Conflicts with the lawyer’s ability to provide objective, disinterested professional advice.

|  |
| --- |
| Ethics of Advocacy |

# Ethics of Advocacy

* Rules of advocacy only apply when there is an “umpire” of some sort as part of the proceedings, meaning some judge, tribunal, arbitrator, etc. The rules do not explicitly state this but it can be inferred from the context in which they are made

## FLSC Rule 5.1-1 🡪 *The Advocacy Rules*

* **The Lawyer as Advocate rule 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.

## FLSC Rule 5.1-1 Commentaries 🡪 *gives insight into advocacy duty*

* **[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
* [9] If a lawyer knows their client is guilty, they can’t suggest someone else committed the crime or call evidence to support an alibi. The accused must be made aware of these limitations

## FLSC Rule 5.1-2 🡪 *When acting as advocate a lawyer cannot do the listed*

1. Abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;
2. Knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;
	1. appears very subjective
3. Appear before a judicial officer when the lawyer, the lawyer’s associates or the client have business or personal relationships with the officer that give rise to or might reasonably appear to give rise to pressure, influence or inducement affecting the impartiality of the officer, unless all parties consent and it is in the interests of justice;
	1. Personal relationship would need to be disclosed and consent obtained from all parties. Would need to be in the interest of justice.
4. Endeavor 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;
	1. Specific rule that catches things like bribery
5. Knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
6. Knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority;
	1. Can’t lie to the judge – need to be accurate in all recitations of evidence made to the court
7. 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;
8. Make suggestions to a witness recklessly or knowing them to be false;
	1. ex. If you know the witness isn’t guilty, you can’t try to get them to say they are on the stand
9. Deliberately refrain from informing a tribunal of any binding authority that the lawyer considers to be directly on point and that has not been mentioned by another party;
	1. 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
	2. You have a positive duty to bring this information forward
10. Improperly dissuade a witness from giving evidence or advise a witness to be absent;
11. Knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another;
12. Knowingly misrepresent the client’s position in the litigation or the issues to be determined in the litigation;
13. Needlessly abuse, hector or harass a witness;
14. When representing a complainant or potential complainant, attempt to gain a benefit for the complainant by threatening the laying of a criminal or quasi-criminal 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;
15. Needlessly inconvenience a witness; or
16. Appear before a court or tribunal while under the influence of alcohol or a drug.

**NOTE:** this is not an exhaustive list

## 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

### FLSC Rule 5.1-1 Commentaries 🡪 *regarding 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 so called technicalities, not known to be false or fraudulent.
* **[10]** Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary, may properly take objection to the jurisdiction of the court, the form of the indictment or the admissibility or sufficiency of the evidence, but must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act. Such admissions will also impose a limit on the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, but the lawyer should go no further than that.
	+ 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

### Justification for Representing Guilty Clients

* The defense lawyer doesn’t have the option to not defend a client simply b/c he’s factually guilty
	+ Not simply attempting to help a villain avoid a just penalty, but rather trying to ensure the fair and efficient functioning of the criminal justice system by helping the client take advantage of rts that are guaranteed by law but obscured by the law’s complexity (neutral conduit)
* Protection of the innocent
* Enhanced dignity and autonomy for participants in the criminal justice system
* Enhances wealth for criminal defence lawyers (client-base increase)
* Fewer tax dollars spent on imprisonment

### Cost of defending guilty clients

* Increased danger that dangerous offenders will go free
* Lost fines where guilty escape punishment
* Diminished deterrence

### *R v Li (1993, BCCA) 🡪 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*

* Facts **🡪** Li was a jewel thief, admitted to guilt to his lawyer. Crown disclosed their evidence, which was based on two witnesses who would describe Li. Defence counsel brought in other witnesses to undermine their descriptions of Li.
* Note **🡪**recall, a lawyer must not knowingly deceive… etc.
* Issue **🡪** did bringing in the witnesses violate the duty to not introduce evidence known to be false?
* 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**
* Reasoning:
	+ Once he knew of client’s guilt, limited to refrain from setting up inconsistent defence
	+ Calling witnesses was not inconsistent to what he knew to be true; was questioning credibility of Crown’s witness
	+ Entitled to test the proof in every proper way

### *United States v Wade (USSC) 🡪 what a defence lawyer can do is test the evidence, what they cannot do is lie/mislead*

* 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 honorable defence counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.”
	+ - Not always about the search for truth- you get to test the evidence – try to undermine witness
		- 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 a defence lawyer can do is test the evidence, they cannot lie/mislead

## Client Perjury

* What does a lawyer do when a client commits or threatens to commit perjury?
	+ When lawyer lies to judge, it is NOT perjury, it is a lack of candor
	+ You must be a witness under oath for it to be perjury

### Criminal Code of Canada s. 131

* **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

### What does the lawyer do when client announces they will perjure themselves?

* ***Proceed as usual***
	+ Leads 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)

### FLSC Rule 5.1-4 🡪 *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.”

### FLSC Rule 5.1-4 Commentary 🡪 *need to dissuade client first and then withdraw*

* **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? 🡪 *In the face of known perjury*

* **Monroe Freeman** 🡪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.
* **Gavin McKenzie** 🡪 the lawyer should not have any duty to assist client to carry out their intentions to commit a crime; the duty of confidentiality does not extend to the clients’ intentions to commit crimes (Graham thinks this view is right)
	+ The Lawyer should inform the client that all lawyers are prohibited from participating in the commission of perjury
	+ The lawyer can also threaten to expose any false evidence that the client ultimately leads
	+ Lawyer’s exposure of perjury will undermine client’s credibility and expose them to prosecution for perjury
	+ Once counsel has made the threat, the client can fire the lawyer or adopt another strategy
* **Randall Graham** 🡪 lie to client saying you *have* to tell tribunal/court if they perjure. If client calls bluff and lies anyways, then you must defend the client. If client perjures by surprise and you were not aware it would happen, tell client they have to go back on the stand and correct themselves or else you will have to tell the tribunal/court (again, if the client calls your blue and refuses then you must defend the client).

## Surprise Perjury

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

### FLSC Rule 5.1-4 🡪 *must attempt to rectify*

* “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.
	+ Note 🡪 the unclear relationship between this rule and the rule of Confidentiality.
	+ 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)
* Dissuade and withdraw is the most common “best option”, others have argued that you could lie to your client and tell them you would notify the judge if you commit perjury, or should allow your client to commit perjury without being a party to it.
	+ This fits well with Cunningham but raises the question of the best way to withdraw.
	+ *Cunningham* suggests it isn’t impossible – you can withdraw for ETHICAL REASONS

### *Meek v Flemming (1961) 🡪 If there is fresh evidence that carried a significant enough weight that it would have either led a reasonable jury to a different conclusion or that it would not have been possible for a reasonable jury to question an important witness’ character, a new trial should be ordered*

* Facts **🡪** Defendant charged with assault and wrongful imprisonment and his counsel allowed the court to proceed on the assumption that the defendant was the police chief inspector when he had in fact been demoted to sergeant for committing perjury in another case (with similar facts, improper arrest). Defendant’s counsel did not directly mention the client’s rank nor did they rely on his rank or status in their submissions. The judge referred to him as “inspector” many times and no one stopped him
* Issue **🡪** Did the lawyer do anything wrong here? Did perjury happen?
* Held **🡪** no perjury but court condemns the way the lawyer behaved. New trial ordered
* Ratio **🡪 If there is fresh evidence that carried a significant enough weight that it would have either led a reasonable jury to a different conclusion or that it would not have been possible for a reasonable jury to question an important witness’ character, a new trial should be ordered**
* Reasoning
	+ Degree must be considered: Degree of deception, knowledge of lawyer, importance of evidence, effect of credibility, breach of confidentiality. Where there is fresh evidence that is relevant to the issue, the court will not order a new trial unless such evidence would probably have an important influence on the result of the case. Such evidence must be credible and such that is could not have been obtained with diligence. Where fresh evidence is irrelevant to an issue but merely goes to the credibility of a witness, the court must apply stricter test.
	+ Only allow admission of evidence where evidence and circumstances are such that no reasonable jury could have been expected to act upon the evidence of that witness, or where evidence must have led reasonable jury to different conclusion. The lawyer treated the duty to the court “unwarrantably subordinate” to the duty of the client. The fact that the lawyer was prepared to act as he did showed the great importance, which he attached to the concealed evidence.
* Note**🡪** It’s generally accepted that this is the right approach. You’re under a duty to know something that was from the past that is misunderstood by the jury/court, this should be rectified in the proceedings of the trial – it probably would have been ok if the courts didn’t refer to him as inspector and confuse him as such
	+ 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! 🡪 The court needed to be deceived – definitely not in line with the rules we listed in this section
		- Should he have been punished for professional misconduct?
		- EXAM Question??

### *Re Jenkins and The Queen (2001)🡪 Silence constitutes deception. The judicial view on what constitutes participation in the deception of the tribunal matches up with rule 5.1-4.*

* Facts **🡪** Murder charge brought against Jenkins who undergoes three trials. Jenkins’ first lawyer is kicked off the case and then he fires his second lawyer. In the third trial Jenkins’ new lawyer, Powell, seeks an adjournment and then hires his own lawyer to get him removed from the case, stating that he cannot continue without violating his duty to the court (basically he finds out that his client has been lying to him and so he can’t continue on without allowing perjury to continue and advance a strategy based on lies)
* 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.**
* Held **🡪** Entitled to withdraw for ethical reasons
* Reasoning**:**
	+ Powell has competing duties here, one to the client not to withdraw without good cause and upon appropriate notice, and one to the court not to mislead the court. It is accepted that if the client commits perjury, the lawyer must notify the court of the lie or withdraw, he cannot sit in silence without being a party to the lie.
	+ The Court has suggested that withdrawal is not optional (unlike *Cunningham*). Lawyer is not committing perjury, but professional misconduct by “continuing to advance the lie through silence”
	+ If you build your case on a set of facts you believe to be true, and then you find out in the midst of trial they are not, the act of silently letting the court to continue on this basis is lie, will account as deception – DUTY OF COUNSEL TO CORRECT AND ERROR OR MISAPPREHENSION **(5.1-4) – doesn’t allow passive involvement in the lie**
		- Take this with a grain of salt: the court is not interpreting FLSC 5.1 in this case, it is simply asserting the duty of counsel in such a situation.
		- Tells us that the judicial view of what constitutes participation in deceiving the tribunal matches up with rule 5.1-4

|  |
| --- |
| Emerging Topics in Ethics Law |

# Emerging Topics in Ethics Law

## Equality, Diversity and Inclusion (EDI)

* Three years ago lawyers got an email from the law society to update lawyers stating that starting next year on the annual report you have to report whether or not you created a statement of principles demonstrating the lawyer’s personal valuing of equality, diversity and inclusion in the provision and committed to promote this both in your personal and professional life
	+ Two conflicting thoughts 🡪 (1) love EDI and (2) don’t tell me what to do
	+ Law Society walked back on statement of principles after criticism:
		- Don’t want to see this but have to tick a box saying you wrote it (must be written)
		- For the first year, there will be no punishment if you don’t tick that box
		- Took back “personal valuing” - What we want is for you to acknowledge the legal duty to promote diversity, equality and inclusion
		- Prof G 🡪 started to feel that what Law Society was doing was to make themselves look good and then turning to “grumpy old white dudes” saying don’t worry all you have to say is that you abide by human rights laws etc.
	+ Bencher election
		- Some ran under the heading STOP Statement of Principles and won (just over 50% of STOP Statement of Principles); some of the anti-EDI roster thought systemic racism didn’t exist (racism)
		- Starting this summer when new Benchers took office, governed by chaos (very split opinions within the Benchers)
		- Prof G 🡪 point to how hard it is to regulate in a self-regulating profession
	+ Now we are required to tick a box to acknowledge that EDI exists and required to have 3 hours of EDI continuing legal education

## Mental Health

* **What does the law society do when the breach of the rules of professional conduct is rooted in a mental health concern?**
	+ Overarching framework is established by Law Society Act
	+ Primary section is Section 33 (Professional Misconduct and Conduct Unbecoming)
	+ If you are found guilty of a violation of Section 33, this will be determined by a hearing and punishments are set out in section 35 of LSA (punishments aim from angry phone call and disbarment)
	+ Professional Misconduct not defined in Act but authority has been given to define it through the Relevant Rules of Professional Misconduct

### FLSC Rule 3.1-2 🡪 *Competence*

* **Rule 3.1-2** 🡪 A lawyer shall perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.
* **[13]** The lawyer should refrain from conduct that may interfere with or compromise their capacity or motivation to provide competent legal services to the client and be aware of any factor or circumstance that may have that effect.
	+ Essentially a negligence standard – don’t be incompetent; if you violate this you have committed professional misconduct
	+ [13] “Self-awareness requirement” – suffering then you should seek treatment

### FLSC Rule 3.4-1 🡪 *Conflicts of interest*

* **Rule 3.4-1** 🡪 A lawyer shall not act or continue to act for a client where there is a conflict of interest, except as permitted under the rules in this Section.
* **[1]** As defined in rule 1.1-1, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person.
	+ Graham 🡪 see how suffering from substance abuse can lead to materially and adversely affecting representation but this rule points to duty of loyalty being compromised so doesn’t think this rule applies

### FLSC Rule 7.1-3 🡪 *Duty to Report (most important)*

* **Rule 7.1-3** 🡪 Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer **shall** report to the Law Society …
	+ (d) Conduct that raises a substantial question as to another licensee's honesty, trustworthiness, or competency as a licensee;
	+ (e) Conduct that raises a substantial question about the licensee's capacity to provide professional services; and
	+ (f) Any situation where a licensee's clients are likely to be severely prejudiced
* [3] Instances of conduct described in this rule can arise from a variety of stressors, physical, mental or emotional conditions, disorders, or addictions. Lawyers who face such challenges should be encouraged by other lawyers to seek assistance as early as possible. The Law Society supports ***Homewood Human Solutions (HHS)*** and similar support services that are committed to the provision of confidential counselling for licensees. Therefore, lawyers acting in the capacity of peer counsellors for HHS, the ***Ontario Lawyers Assistance Program (OLAP)*** or corporations providing similar support services will not be called by the Law Society or by any investigation committee to testify at any conduct, capacity, or competence hearing without the consent of the lawyer from whom the information was received. Notwithstanding the above, a lawyer counselling another lawyer has an ethical obligation to report to the Law Society upon learning that the lawyer being assisted is engaging in or may in the future engage in serious misconduct or criminal activity related to the lawyer's practice or there is a substantial risk that the lawyer may in the future engage in such conduct or activity. The Law Society cannot countenance such conduct regardless of a lawyer's attempts at rehabilitation.
	+ Required to keep information confidential if you are involved in peer counselling but creating new ethical duty – have to report if there is serious misconduct or criminal activity

### Ontario Human Rights Code 🡪 s. 6

* **Membership Section 6** 🡪 Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.
	+ Membership cannot be affected because of your disability
* **Disability section 17**(1) 🡪 A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of disability.
	+ But you can be kicked out if that disability makes you unable to fulfill essential functions
* **Accommodation** (2) 🡪 No tribunal or court shall find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.