**Fall**

19

Legal Ethics Summary

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# Confidentiality

* the duty of confidentiality is generally regarded as one of the most important duties that lawyers have
* a lot of other ethical duties and obligations that lawyers have relate in some way to their duty of confidentiality
* lawyers must keep secrets that are earned in their professional roles
* it is often said to outweigh other competing social policies
* breach of the duty of confidentiality can lead to a number of ramifications including disbarment
* we want to ensure clients have confidence that anything they say to the lawyer will remain confidential no matter what; confidentiality supersedes social values
* In Canada, we have the beginnings of disclosure of confidentiality, known as the **Innocent 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

Introductory Questions

* when does the lawyer’s duty of confidentiality arise?
  + 1) “I met with Angeline Jolie today. She wanted to retain me but I had to turn her down.”
    - No details given, not reason for turning her down
    - Can assume 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
      * If the lawyer has a speciality (i.e. divorce) and by finding out the person came to this lawyer can glean insights into the client; you do not want to give away information that the person might want to keep private
      * Going to a lawyer is something that one would want to remain private
      * People expect to have their information kept private; otherwise people might not want to come to lawyers and use their rights
  + 2) In House Lawyer Example: “Hey Mom, you know that public company you have all your savings invested in? It is going to tank tomorrow, and you are going to lost all your money unless you cash out. I know this because I am the company’s in-house lawyer”
    - This is information that the lawyer should not be disclosing; not public information as the lawyer only learned it through their career
    - Two respects in which this information is protected from disclosure:
    - **(1) Duty of confidentiality**: professional misconduct and its punishment can range from fine to disbarment
    - **(2) Inside trading**: this lawyer will be committing offence known as “tipping” which is not allowed under securities law.
    - Secret information is not only protected by the Law Society, but also by other legislative regimes
    - For public policy reasons, lawyers need to keep client secrets no matter the cost
  + 3) Murder Example: Mary Smith has just been convicted of murdering Joe Sixpack. You once represented Johnny Punchclock (now dead), 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
    - You know Jonny killed the person because he told you
    - BUT, this confidential 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 there be an exception to confidentiality here?
      * Innocence 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. You do not want clients withholding information from lawyers
      * A client need to know that EVERYTHING will remain secret
      * Can sometimes depend on the jurisdiction:
        + **UK-** even if the disclosure would save an innocent person from going to jail, lawyer-client information cannot be disclosed (strict confidentiality upheld)
        + **Canada –** as a result of recent case law, it is not that certain. There are ways to get disclosure of certain information (open area)

## Applicable Rules

* The Federation of Law Society Canada’s (FLSC) Rule of Confidentiality is set out in **Rule 3.3-1** which provides that:
  + **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

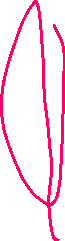
There is a subset under confidentiality called “privilege”

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
      * (d) Otherwise permitted by this rule.

## Commentaries

* Commentaries are an indication of how the law society will interpret and apply rules
* Similar status as that of case law because it is important to know what the purpose of the rules are and how they are going to be interpreted by the law society in certain circumstances
* [1] A lawyer cannot render effective professional service to a client unless there is a 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, so you need an interpretation for it
    - 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] The Rule of Confidentiality 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 the umbrella of privilege; all privileged information comes within “confidentiality”; a smaller umbrella within this is information that is both confidential and privileged
    - 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; goes on for life and beyond the death of either party
    - It doesn't end when the client or lawyer dies or when 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 received information about getting advice, the duty of confidentiality arises; as long as you are a licensed lawyer, you have the duty of confidentiality
    - Issues arise when there are conflicts of interest – simply knowing may prevent you from acting for future/potential clients; you might have learned confidential information that might deter you from taking future cases
* [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; the fact of retained is a secret
    - Cannot disclose who clients are (exceptions can be things like public information, long standing information which is publicized, etc)
    - RETAINER: Formally taking someone on as a client; the agreement between the lawyer and the client that states that the lawyer would be representing the client. This term can also relate to the money that is paid to the lawyer for the legal services
* [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 client’s affairs or business
  + - Describes how broad the reach of confidentiality is
    - No discussion in personal life either

## Protection of Confidential Information

* If the above rules are broke, lawyers can be charged under”
* Professional misconduct (under **s. 33 of LSAO**)
  + - penalties can range from reprimand or fines, to disbarment (**s. 35** of LSAO sets out the penalties that can be applied)
* Civil actions (under contract or tort law)
  + - if you disclose information and as a result the client losses money (i.e. disclosing a secret business opportunity)
    - damages payment equal to the amount lost from your disclosure
      * + This is due to a violation of one’s fiduciary duty
        + Ex. If a client told you about a business that could make them millions of dollars and you steal their idea and take the profits, the client can sue you for violating the confidentiality

## Rationale for Protecting Confidential Information

* This rule can be explained in two ways:
  + - (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 lead 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 rooting in something systemic that justified the existence of this duty; confidentiality does not only relate to clients, but there is systemic model in play (Neutral Conduit Model)

## The Neutral Conduit Models

* the systemic rationale is rooted in this model
* Access to Legally Authorized Rights and Remedies despite the complexity of the Law
* the legal system is complicated, and it actually prevents people from accessing legal rights and remedies that they have (e.g. who gets your property after you die? It is more complicated than choosing who you want to have your goods)
* barrier of complexity becomes more difficult to cross the poorer you are
* neutral conduit is lawyers, their reason to exist is to assist people in overcoming barriers of the complexity of the legal system
* system rationale: we are not entitled to impose costs on clients that they would not bear if the legal system were simple
* 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 titled neutral as they should be acting in a neutral way; they are not supposed to reject someone trying to access their rights
* When allowing someone to access the legal rights and remedies, lawyers cannot impose additional costs for their legal fee (cannot impose their own moral code, force changed behaviour)
* One of the costs lawyers could impose is the fear that secrets will be spilled. This threat is a cost because one retained held. 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 (The ‘spilling of secrets
* Should never be a possible cost of pursuing a legal remedy)
* Lawyers should not impost costs on clients that would not exist if the legal system were simple (i.e. release of confidential information)

## Anna Topel Example (page 193, Example 4.1)

* Anna Topel was accused of killing her spouse, Mitchell Smith. Mitchell was an abusive husband and father, frequently beating Anna and her two small kids. Anna felt trapped in her relationship, unable to extricate herself and her children from their terrible family situation. On November 5th, Mitchell returned drunk from a night out and began acting in a menacing, threatening manner. Anna shot him and he dead immediately. Assume the facts of Anna’s case support a successful plea of self-defence based on battered spouse’s syndrome. Further assume that Anna is aware of the fact that her actions are legally justified by virtue of the doctrine of self defence.
  + Pretend Anna does not want to tell her lawyer anything because confidentiality doesn’t exists and she thinks it will be used against her. In a work without confidentiality, she would not want to tell her lawyer what actually happened
    - She may say she wasn’t involve
    - The truth may set her free, but she doesn’t know this and doesn’t tell her lawyer because she believes her information will not be kept a secret
    - Lawyer wont be able to get proper information to give her the best defence (i.e. self defence, BWS) because she has not provided the lawyer the complete picture
  + BUT, if Anna knows that information provided to her lawyer is in strict confidence, she will be more inclined to give the relevant information that allows her lawyer to formulate the best defence available to Anna (Accurate Verdict)
  + **This is the purpose of the neutral conduit model –** Anna can’t access defence of BWS/self-defence if she doesn’t have a lawyer, you need to put her in the situation she would have been in but for complexity of law

## Comparison with Privilege

* privilege= evidentiary doctrine
* privilege has a number of limitations that do not apply to confidentiality
  + - this rule is more powerful than the rule of a court order for testimony
      * + circumstance in which lawyer is compelled to testify against his/her client, and has right or duty to say no
        + Example – lawyer is called to eh stand to testify against client, cannot testify because privilege. If a lawyer is asked “Did you client kill the individual?”, the lawyer can say “I cannot answer the S-C Privilege”
* the duty of confidentiality is much broader than the doctrine of lawyer client privilege. Confidential information is anything that comes into the lawyer’s possession through their professional relationship with the client
  + - privilege is small subset of law encapsulated by confidentiality. It 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
    - all privileged information is confidential but not all confidential information is privileged
* privilege is a rule of law that allows the lawyer and client to refuse to answer questions that may be put to them in court
* privilege is an exception to the general rule the all relevant information is admissible in court
  + - privilege applies only in respect to litigation (in court)
    - confidentiality appertains to all information (applied everywhere)
* key differences between privilege and confidentiality:
  + privilege applies only in respect of litigation or proceedings where the lawyer could be a witness or provide evidence whereas confidentiality applies to all information the solicitor receives
    - * privilege applies in Court, confidentiality applies everywhere (broad generalization)
      * 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
  + privilege covers only information that was communicated in confidence by the client or by third parties for the purpose of litigation whereas confidentiality applies regardless of source
    - * 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)
      * i.e. you see client kill someone = not privilege because not a communication (if they told you it would be privilege, but it is an observation) but is confidentiality because confidentiality attaches to everything you learn about client
* if information is protected by confidentiality but not privilege, that means that the lawyer cannot go around blabbing the information, but if a court orders the lawyer to disclose the information, then the lawyer has to disclose it, they cannot claim privilege to block the court from obtaining that information whereas if the information is privileged the lawyer can say “no, this information is privileged”
* privilege does not prevent the lawyer from divulging facts learned from a source other than communications from a client
  + e.g in house counsel or major corporation, even though you witness behavior of their representatives, that is covered by confidentiality but if you are in court and you were called as a witness to talk about the behavior you have seen, you cannot claim privilege because that observed behaviour is not communication from a client
  + privilege can be lost where other parties who are not necessary to a conversation are present or are not necessary for the purposes of furthering litigation. Therefore, the lawyer can be ordered to disclose any information that was disclosed during that conversation
* Privilege can be lost (if third party is present not for the purpose of furthering litigation)
  + - Information can lose this protection if it is discussed with 3rd party not needed for litigation (if they are present during the conversation)
    - Court can then compel to give information in court – if court determines that there was a 3rd party there, then you might be compelled to tell information! The other person being in the same room means that the client did not intend the information regarding the crime as “privilege” and the lawyer can be asked to disclose it in litigation
    - Client should be informed of this in advance by the lawyer – inform what will lead to loss of privilege (e.g. “I am willing to talk to you in presence of your mother but privilege will not be given to this information….” You have to tell the client about the loss of privilege, but confidentiality will remain
* Privilege supersedes court orders
* **Commentary 2 of the FLSC Code Rule 3.3-1**
  + “This rule [confidentiality] 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 applied without regard to the nature or source of the information or the fact that others may share the knowledge.”

## The Boundaries of Confidentiality

* the outer limits of information that will be protected by confidentiality

### Smith v Jones [1999] 1 SCR 455

* a common law decision, subsequently adopted by provincial rules of professional conduct and the FLSC Code
* **Issue:** When (if ever) can public safety, or the need to save lives override privilege and confidentiality? To what extent, if ever is the lawyer’s duty of confidentiality more important than saving lives?
* **Note:** this is not a decision by the Law Society so it does not directly apply to Law Society determinations as to whether a lawyer has committed professional misconduct. This was a common law decision about the extent of a lawyer’s fiduciary duty (could a client sue their lawyer under the common law?)
* **Overview:** This case serves as a block for a client suing a lawyer for breach of fiduciary duty. Deals with the nature and extent of the solicitor-client privilege. Allows disclosure in cases when death or bodily harm may flow from failure to divulge information; shows depth in court commitment to lawyer’s duty of confidentiality.
* **Facts:** James Jones is the accused in the case. James was charged with aggravated sexual assault of a prostitute. Jones’ lawyer decided to have his client examined by a psychiatrist, possibly to determine if his client could make a mental insanity claim. Psychiatrist was Jon Smith. Psychiatrist is examining him at the request of the lawyer (therefore agent of the lawyer) and so this consultation is protected by both privilege and lawyer client confidentiality. During the consultation, Jones revealed his plan to kidnap a small prostitute who he could kidnap easily and overpower, he prepared his basement to ensure privacy, he got tools, he intended to sexually assault and kill her and he picked out a spot in Stanley Park, BC where he could dispose of the body. Note: he had not done this act yet, but he is saying he is planning on doing it. Jones told the Psychiatrist he was going to do this horrible act numerous times and was going to use the first time as a trial to see if he liked it. Psychiatrist was alarmed and relayed this information to the lawyer and indicated that he wanted to divulge this information to authorities as he thought Jones was a serious risk to public safety and that he genuinely would carry out this plan. The lawyer said that he could not disclose it because it is protected by confidentiality and privilege. Dr. Smith thought he had a higher duty to the safety of the public so Smith thought about whether he could divulge this information for several months when he then sought out legal advice of his own as to whether he could.
* went all the way up to the SCC
* “Both parties made their submissions on the basis that the psychiatrist’s report was protected by solicitor-client privilege, and it should be considered on that basis. It is the highest privilege recognized by the courts. By necessary implication, if a public safety exception applies to solicitor-client privilege, it applies to all classifications of privileges and duties of confidentiality. It follows that, in these reasons, it is not necessary to consider any distinctions that may exist between a solicitor-client privilege and a litigation privilege”
  + - saying that the secrets protected by solicitor client privilege are more protected than any other privileges in law
    - since lawyer client privilege has the highest protection, if we find that that privilege gives way when confronted with issues of public safety, than that means that any other category of protected security (national security for example) would equally have to give way when faced with competing concerns regarding public safety
* “The solicitor-client privilege has long been regarded as fundamentally important to our judicial system. Well over a century ago in *Anderson v Bank of British Columbia* (1876), 2 Ch D 644 (CA), the importance of the rules was recognized:
  + - The object and meaning of the rule is this; that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers… to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defense…. that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation”
* “clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent. It cannot be forgotten that the privilege is that of the client, not the lawyer. The privilege is essential if sound legal advice is to be given in every field. It has deep significance in almost every situation where legal advice is sough whether it be with regard to corporate and commercial transactions, to family relationships, to civil litigation or to criminal charges. Family secrets, company secrets, personal foibles and indiscretions all must on occasion be revealed to the lawyer by the client. Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients.”
  + - Systemic rationale: This rule of confidentiality and privilege is root 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 truth from clients.
* **Ratio:** An exception for public safety does exist. Privilege and confidentiality is powerful and the legal system can crumble without it. Privilege is within confidentiality. Confidentiality and privilege is important because of neutral conduit model (courts think confidentiality is so important that they are willing to let people die in order for confidentiality to be preserve. Exception to confidentiality when someone’s life is certainly at risk – 3 part test that allows you to, but does not require you to, disclose. If the test is not passed, you cannot break confidentiality
  + - **(a) clarity**
    - **(b) seriousness**
    - **(c) imminence**
* Court accepts that there may be situations where public safety may justify some exception, but it will not apply broadly or in a lot of circumstances
* Court said that there were 3 factors to be weighed when considering whether confidentiality breach could be justified in favor of public safety: all must be balanced but if it is extremely dangerous for example bombing a school, they might be less strict on clarity or imminence requirement
  + - Clarity
      * “Great significance might in some situations, be 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 that 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 towards single women living in apartment buildings could in combination with other factors be sufficient in the particular circumstances to justify setting rise 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 info contract, may be too vague to warrant setting aside the privilege.”
        + require identifiable victim or group of victims
        + clear risk to identifiable victim or class of victims (size does not matter)
        + this does not include a general threat to all public
    - Seriousness
      * “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* - court held that psychological harm is serious enough to undermine the individual and so it constitutes bodily harm”
        + Harm must be death or grievous bodily harm (including psychological harm as held in *R V McCraw*) that substantially interferes with wellbeing. The disclosure of planned future crimes without an element of violence would be an insufficient reason to set aside privilege. (e.g. blowing up an empty factor would be covered under privilege as no one would be harmed)
    - Imminence
      * “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 sometime in the future. Depending on the seriousness and clarity of the threat, it will not always be necessary to impose a particular time limit on the risk. It is sufficient if there is a clear and imminent threat of serious bodily harm 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.”

most difficult to figure out, there is no time limit

nature of the threat is such that it instilled in the lawyer a sense of urgency. A statement made in a fleeting fit of anger will not be sufficient to disturb privilege. Also, there is no need to impost a particular time limit on the risk

future date can still be imminent

while this case progressed, Jones did not go through with any of his threats

court said that imminence was present because the way in which the threat was made, left the psychologist to believe that it was going to happen

imminence means that the threat is taken seriously, and you believe that there is an intent to carrying it out

imminence has to be coupled with clarity and seriousness

“chilling intensity and graphic detail” that bystander would be convinced of the threat then also considered imminent

* **Held:** A reasonable observer would consider the potential danger posed by Jones to be clear, imminent and serious, so breach of S-C privilege is allowed; privilege must be set aside for protection of members of the public. In this case, the group was identifiable: prostitutes on the street
  + - * **“When the interest in the protection of the innocent accused and the safety of members of the public is engaged, the privilege will have to be balanced against these other compelling public needs.** In rare circumstances these public interest may be so compelling that the privilege must be displaced. Yet the right to privacy in a solicitor client relationship is so fundamentally important that only a compelling public interest may justify setting aside S-C privilege”

## The Public Safety Exception

* The ratio of Smith and Jones has been accepted by the *Rules of Professional Conduct*
* **FLSC Model Code, s. 3.3-3**
  + **3.3-3 -** A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and the disclosure is necessary to prevent the death or harm
    - * courts have since abandoned the identifiable victim provision and now state that you only need a reasonable expectation that there is imminent bodily harm or risk in order to break confidentiality
      * The lawyer need only see imminent risk of death or serious harm. Clarity criteria has been abandoned; you need to know that your client is going to carry out a violent action that is imminent and serious
      * “A lawyer MAY disclose” gives lawyers the option but does not mandate that they have to disclose. They have to be able to meet the test first then they can choose whether or not to disclose
      * Right to disclose does not arise until test has been satisfied
      * 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
      * Lawyers cannot be punished for not telling, but they can be punished for telling
      * The test is subjective, but you can’t really be off the mark. It is better to not disclose since while you could be successful in the FSLC case, but not in the tort case

## Rule 3.3-3 Commentary

* [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 permissions 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 SCC 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

## Disclosure and Use

* **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 but there are other restrictions on how the lawyer can use that information
* all jurisdictions agree that use is prohibited in addition to disclosure, the lawyer may not use the information in any other way than permitted by the client unless otherwise permitted or required by law
* Disclosure includes use (*Szarfer v Chodos*). It can be just as damaging to know information as using information (i.e. you cannot invest your money in a client’s idea)
* **Rule 3.3-2 of the FLSC Model Code** addresses “use”:
  + **3.3-2** A lawyer must not use or disclose a client’s or former client’s confidential information to the disadvantage of the client or former client, or for the benefit of the lawyer or a third person without the consent of the client or former client
  + Commentary [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 costs of whatever punishment will be imposed by Law Society)

### Szarfer v Chodos (1986) 54 OR (2d) 663

* **Overview:** The court’s response to cases in which a lawyer benefits (a client is harmed) through lawyer’s access to the client’s information, despite the fact that the lawyer keeps the information confidential
* **Issues:** Use and Disclosure: What if the confidential information of the client is shared only among people who already known the relevant information? Does this count as use and disclosure? What constitutes a prohibited “Use” of confidential information? What are the appropriate (common law) remedies for breach where a lawyer uses confidential information to the clients detriment?
* **Facts:** Szarfer was a Polish immigrant living in North York, Ontario in the early 80’s. He had only grade 8 education but found work as an apolster and a hairdresser. While Szarfer was working as a hairdresser he suffered a fall and sustained injuries and he was no longer able to cut hair. He tried to go back to work but the fall interfered with his skill as a hairdresser and he was fired. Szarfer went home to his spouse and told her that he had been fired. His wife knew about the law from her work as a legal secretary for Mr. Chodos. Chodos agreed to represent them. Wrongful dismissal proceedings were started. Chodos attended a Law Society Continuing Education course on the topic of damages for mental suffering relating to wrongful dismals. He learned that where mental suffering was incurred from wrongful dismissal it was a viable head of damages. He spoke with Ms. Szarfer and asked her to prepare a list of mental suffering including a lisp, minor psychiatric conditions and marital problems. She revealed that they argued constantly and that he was no longer capable of having sex or attaining an erection. Chodos decided to add all this to the claim and increased the damages. Chodos hired Ms. Szarfer to help with the administrative work specific to the claim. Mr. Szarfer was walking on the streets of North York and pulls into a hotel and while he is in the parking lot, he sees Ms. Szarfer and Mr. Chodos coming out of the hotel where they had been having an affair. After Mr. Chodos learned that Mr. Szarfer could not have sex with his wife, he started to do it for him two or three times a week. Szarfer claimed that this only happened because Chodos learned that his clients were no longer having sex. He claimed Chodos used the confidential information of him not being able to have sex with his wife to start the affair which contributed to more feelings of depression. He argued that Chodos used this information to his detriment therefore violating the rules of professional misconduct. Szarfer knew that her husband was impotent, therefore this was not a case about disclosure of information.
* **Analysis:**
  + “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 decision is whether or not the defendant used confidential information for his own purposes or to the disadvantage of the plaintiff.”
  + Use without disclosure of the client’s information constitutes professional misconduct in public law but ALSO breaches the fiduciary duty in public law
  + 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. 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 eh acted reasonable and made no personal use of the confidential info. Chodos violate the fiduciary duty.
  + “I am satisfied that he [Chodos] used confidential information for his own purposes in order to obtain the delights and benefits of the affair. The defendant had known Mrs. Szarfer since 1977 but had no sexual relationship with her until May of 1981. He did not acquire details of the Szarfers’ martial and sexual problems until March or April of 1981. At that time he obtained the intimate knowledge of the emotional and mental problems of both the plaintiff and his wife. He obtained such information as part of the process of the wrongful dismissal action. The plaintiff’s mental state and the plaintiff’s sexual problem were issues in that action. As a solicitor he undertook to prosecute the claim for wrongful dismissal including a claim for damages for mental distress and the state of the marriage and all information related above was an indivisible part of the task undertaken by him as a solicitor. Again, he was aware of Mrs. Szarfer’s vulnerability as a result of the information he obtained about the marriage.”
    - * court here found causal connection between the acquisition of the information and the commencement of the affair
      * court found it was the use of this information that led to the affair and therefore there is a breach of fiduciary duty
* Law Society charged Mr. Chodos with professional misconduct and suspended him briefly from the practice of law
* but common law is not punitive, instead it creates a compensatory response therefore Chodos had to compensate Szarfer.
* The Law Society aims at deterrence, rather than compensation
* **Court’s order in this case:** $43, 663 in damages. These damages happen independently from the Law Society’s punishment of Mr. Chodos
* **Note:** This case set the private law precedent in Canada for imposing liability for wrongful use of confidential info
* **Ratio:** Both disclosure of confidential information and use of confidential information are prohibited. Trust is an element of the S-C relationship; cannot use information of 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. Case stands for a breach of fiduciary duty.

## Confidentiality: The Interests Protected

* sometimes lawyers may want to disclose information because they think that disclosure is actually the best way to advance their clients interest
* In both *Geffen v Goodman Estate* and *Jack*, the duty of confidentiality continues even after the client’s death, per **Commentary 3 of Rules 3.3-1 of the FLSC code** which states that the duty of confidentiality “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 the client waives privilege
  + (2) if the client expressly consents to the lawyer disclosing iformation

### Geffen v Goodman Estate [1991] 2 SCR 363

* **Facts:** Geffen’s are brothers and they have a sister, Tzina Goodman, who was mentally unbalanced. When their mother died, she left the family home to Tzina alone, disinheriting the brothers as they expected the mother to leave it to all of them. Brothers feared that due to her mental instability, she would squander the house, spend all the proceeds and then have to rely on the brothers for a place to live and for financial support. Brothers disputed the will. They negotiated directly with Tzina who was represented by counsel and came to an agreement where Tzina would sign a trust document in which the house would be transferred to the brother’s in trust for her for the duration for her life. This means that the Geffen brothers were the legal owners of the home and Tzina was the beneficial owner of the home. The legal owners are allowed to act towards the trust property as owners of property, but every decision has to be for the benefit of the beneficial owner. The bothers get to manage the property for the benefit of their sister, they cannot make self-interested decisions about the house. When Tzina dies, the trust property will be sold off and the proceeds would be split between Tzina’s children and her brother’s children. The arrangement worked well until Tzina died, but in Tzina’s will, she said that she left her house to her children. Tzina was the beneficial owner, not the legal owner, and you cannot leave property to which you are only the beneficial owner. Tzina clearly did not understand her legal rights. An application was brought to determine whether the trust agreement was legal, whether she entered it legally or whether she was pressured by her brothers.
* **Geffen brothers Argument**: wants the court to uphold the trust agreement. They argue that she understood at the time what she was getting into (although health may have gone downhill after) and they can prove this through her lawyer.
* **Tina’s kids Argument:** want the court to say that she could not have voluntary entered into it and brought in evidence to suggest that she was not in the appropriate state of mind at the time she entered into it including the fact that on 2 occasions while she was alive and living in the house, she had put the house up for sale.
* Geffen brothers wanted to submit evidence which proved that she was of sound mind when she signed the agreement and so they wanted to enter witness testimony of her own lawyer. But, this information, whether or not she was signing this document in a state of sound mind is confidential information.
* **Issue:** How do we prove Tzina’s state of mine – that she understood or did not understand the trust agreement when she entered into it> Should Tzina’s lawyer be allowed to give this information about his former client?
* We know that confidentially and privilege carry out indefinitely, they survive the end of a retainer or the client passing away. However, the argument here is that the client’s wishes are already recorded in the will and all the lawyer would be doing is casting light on those wishes since the client is dead and cannot explain those wishes themselves
* **Exception:** When a lawyer has drafted a will for a client, they are after able to come in and explain the meaning of its provisions with a view of giving effect to the client’s provisions BUT a trust document is not a will!
* “In my view, the considerations which support the admissibility of communications between solicitor and client in the wills context apply with equal force to the present case. The general policy which supports privileging such communications is not violated. The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were. And the principle of extending the privilege to the heirs or successors in title of the deceased is promoted by focusing on the inquiry on who those heirs or successors properly are. In summary, it is, the words of Anderson Surr. Ct. J in *Re Ott, supra*, ‘[i]n the interests of justice’ to admit such evidence.”
* **Held:** The testimony of Mr. Pierce was admissible, he was entitled to come in and give evidence casting light on her state of mind. When ordered to testify, the lawyer claimed privilege. But, there is a long standing exception to confidentiality – in will, lawyers are allowed to disclose information on their client’s interests, or clarify on the person’s behalf
* **Ratio:** Treats trusts like wills. If it comes to understanding a trust agreement, after death, your 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 and (2) is in the interests of justice
* **Analysis:** (i) this disclosure does not impair Tzina’s interests in any way as she has no interest in retaining secrecy, no readily ascertainable secret with respect to her state of mind and (ii) it furthered the interests of justice because disclosure is what she would probably want as it may actually advance her interests
* When dealing with a client who is deceased, sometimes the court will allow disclosure of information where that disclosure would further the interests of the client, or cast light upon their interests and further the interests of justice

### R v Jack (1992), 70 CCC (3d) 67 (Man. CA)

* **Overview:** Cases where interests of deceased and interests of justice seem to allign
* **Facts:** Mr. Jack is on trial for the murder of his wife, Christine Jack. No body was ever found, they were trying to try him without actually proving that she was killed. Jack is asserting that he never killed her and that she simply took off leaving him and her children. Prosecution is saying she never would have left her children and that Jack killed her. Trial was based on hearsay evidence based on the wife’s state of mind. Prosecution sought to bring evidence that prior to her death, she had seen a lawyer to discuss divorcing her husband. Prosecution believed that they could prove that she had the intention of formally divorcing her husband and would not have run off if they could bring her divorce lawyer in to discuss their interactions and the nature of her apparent intentions.
* **Jack’s argument:** That Christine Jack’s lawyer should be prohibited from testifying due to confidential and privilege.
* **Issue:** Should Christine Jack’s lawyer be allowed to testify about their meetings, about possible divorce proceedings or should any discussions be protected as privilege? Should we lift the privilege in order to help determine whether her husband murdered her?
* **Ratio:** Exception to privilege may exist if the circumstances are on point to those in this case and thus in the interests of justice (Graham thinks this is wrong but the if the facts are IDENTICAL to this case then can use it). Where the interests of the deceased client and the interest of the administration of justice weigh against the application of privilege, we can require the production of evidence and cast aside privilege and require the production of evidence.
* **Held:** Evidence admitted because it is “in the interests of justice”
  + the interests of the client: finding out who murdered her
  + interests of the administration of justice: preventing someone who committed murder from getting away with murder
* “In the unique circumstances of this case, I am of the opinion that the evidence given by Christine Jack’s lawyer did not constitute a communication of confidential information received by the lawyer from the client. In its context, it was simply a recitation of the lawyer’s advice and opinion as to the general tenor of the meeting, and her conclusion as to the client’s state of mind and future plans”
  + - Graham thinks this is incorrect because saying this does not breach confidentiality is opposite of the law. What happens in a meeting is always confidential!
    - We have to bear in mind that the fact of retainer is itself confidential information as is pre retainer information
* “In my opinion, the accused’s position is not tenable. In this case the person in whose favor the privilege exists is alleged to have been killed by the very person who claims to benefit from the privilege. It is clearly in the best interests of Christine Jack, and in the “interests of justice,” that the privilege be waived as it was in this case by her lawyer”
  + - however, the court’s analysis in this case is based on the assumption that Mr. Jack is not innocent, which goes against innocent until proven guilty requirement section 11(d) of the *Charter.* Ugly case because he did kill her and justice was served. It assumes that she would want justice on her husband.
* Must respect the presumption of innocence, so in this case legally she is not dead, legally he is innocent

## Confidentiality: Duty to Assert

* this is the lawyer’s positive duty to assert confidentiality in circumstances where the duty arises
  + - example: if they are probed for information by a 3rd party, or objecting to search warrants concerning the contents of the lawyer’s files, they MUST raise the claim of privilege in testimony
* Positive duty to assert -> *Bell v Smith*

### Bell v Smith [1968] SCR 664

* **Facts:** The Bell’s and the Smith’s had a car accident in 1962. Bell’s attained a lawyer named Henry Schreiber. During pretrial proceedings, the defendant offered to settle but Schreiber convinced the Bell’s to accept the offer. They accepted the offer. Schreiber wrote a letter to the defendant lawyer, Mr. Agro, notifying him that he would be accepting the offer on behalf of the Bell’s. Within a few hours, the Bell’s phoned Schreiber and wanted to back out of the agreement, they no longer wanted to settle. The Bell’s went to meet with Schreiber and instructed him to increase the amount of their claim by $75, 000. A few weeks later, the Bell’s receive a notice of motion to have the courts enforce the original settlement along with an affidavit from Mr. Agro which contained misstatement of fact concerning statements of their acceptance of the original offer. Bell’s wrote to Schreiber and complained about the affidavit. Schreiber filed a defence against the motion but the Bell’s were still not happy so they filed a motion to have Schreiber removed as their counsel and to retain counsel from another firm, namely Mr. Balacki, their new lawyer. First witness called by the defendants was the Bell’s original lawyer, Mr. Schreiber in order to give evidence regarding the circumstances of their initial acceptance of the offer to settle. He gave the evidence and handed over the plaintiff’s entire file handing over all of the confidential information. The court agreed that the Bell’s had accepted the initial offer to settle and that in the circumstances, that offer could not be set aside and that the original settlement had to be enforced.
* The Bell’s appealed up to the SCC.
* **Issue:** Was it ethically/legally wrong for the court to accept this evidence and for Shriver to hand over the information on his client?
* **Held:** SCC overturned the decision. Bell’s win.
* **Ratio:** It is legally wrong for a TJ to allow evidence privileged in nature. It is the lawyer’s duty to invoke privilege when he is asked a question that may involve privilege. Lawyer has a positive duty to assert privilege AND the court has a duty to prevent and refuse to hear it.
* **Analysis:** Court said that all parties messed up here. Mr. Agro should not have called upon Shriver because a lawyer cannot be called upon to violate privilege. Shriver was wrong to take the stand and to fail to assert privilege, he has a positive duty to assert privilege. SCC said that trial judge was wrong to accept the evidence, even if no-one objected. Everyone involved had a duty to safeguard the privilege information of the Bell’s.
* “This regrettable occurrence was occasioned by insufficient concern for a fundamental rule, namely, the duty of a solicitor to refrain from disclosing confidential information unless his client waves the privilege. It is rather astounding that Mr. Schreiber should be subpoenaed to give evidence on behalf go the defendants as against his former clients and that he should produce his complete file including name memoranda and other material all of which were privileged as against the plaintiffs and whether the plaintiff’s counsel objected or not that he should be permitted to so testify and so produce without the consent of the plaintiffs being requested and obtained. Lord Chancellor Eldon said in *Beer v Ward* (1821): “It would be the duty of any Court to stop him if he was about to disclose confidential matters…. the Court knows the privilege of the client, and it must be taken for granted that the attorney will act rightly, and claim that privilege, or that if he does not, the Court will make him claim it.”
* “Because the solicitor owes to his former client a duty to claim the privilege when applicable, it is improper for him not to claim it without showing that it has been properly waived. Especially is this so when, as here, the circumstances are such as to make it most unlikely that a waiver would be given. Also, because it is improper to induce a breach of duty, I have serious doubts about the property of putting to a solicitor questions that involve the disclosure of confidential information without first bringing in evidence of a proper waiver. In any case, because the client’s privilege is a duty owed to the Court, no objection ought to be necessary and the evidence in violation of the privilege should not be received. ….. In view of this state of most regrettable confusion, I am of the opinion that the plaintiffs should have a right to have their action tried in open Court and that the appeal must be allowed.”
  + - There is no requirement to invoke privilege- clients simply reap the benefits because it always exists
    - A lawyer cannot call another lawyer for client information
    - It is the lawyer’s duty to invoke privilege when he is asked a question that may invoke privilege; the lawyer has a positive duty to assert privilege
    - Shriver had a positive duty to assert privilege – prosecution (Smith’s lawyer) had a duty to not call testimony that was privileged; unethical and a malpractice to agreed to be called to the stand
    - Even though Shriver was cooperating with the court, he breached privilege by handing over his client’s files and he should have rejected to appear in court
    - Trial judge failed by not refusing to hear the privileged testimony (this was judicial misconduct)
    - Shriver should be punished in tort and by the law society for violating privilege

## Summary of Guiding Principles

* **Rule 7.5-1** “Provided that there is no infringement of the lawyer’s obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements”
  + Commentary also suggests 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
* Conclusions on confidentiality:
  + 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 we think the client would consent (after they have died) for example, with wills and trusts (Geffen v Goodman Estate)
  + Only in rare circumstances are the policies protected by iron-clad confidentiality operating in favor of the secret being told

### Stewart v CBC [1997] 150 DLR (4th) 24

* **Facts:** Robert Stewart was a 30 year old family man living in Toronto. He had an unblemished record but unfortunately on one night in 1978 he had some beers with some friends and got behind the wheel. He took an indirect route home to avoid police. Around midnight he needed to use the restroom so he pulled into an apartment building. He was driving fairly quickly and he struck Judy Jordan, a dancing instructor. She fell and became entangled in the undercarriage of his car and he dragged her 1/4 mile until she died. She was screaming the whole time. The only indication that Stewart knew something was wrong is that he turned his lights off and continued driving. Stewart was charged with criminal negligence causing death. His trial was a mess. He retained very senior counsel to represent him but it was unknown that the lawyer’s health was ailing and his mental condition was deteriorating rapidly. As a result, the defense was bizarre. He tried to suggest that Jordan was already lying down injured when the car ran over her, he also argued that Jordan’s husband or drug dealers were responsible, nothing made any sense. Stewart was convicted. It seemed Stewart did not want his lawyer to make these crazy accusations. However, the media believed that he came up with this defense himself and portrayed him as cool and calculating. After his conviction he discharged his lawyer and hired a new lawyer to help him with the sentencing portion of the trial. New lawyer was Eddie Greenspan. Eddie understood that Stewart’s reputation had been tarnished because of the argument advanced at trial and the media coverage. Stewart apologized at the sentencing hearing and it was made clear the cruel tactics were not his doing.
* Greenspan saw his duty as three fold, (i) to help Mr. Stewart in the appeal, (ii) to help with issues involving sentencing and (iii) to correct his damaged reputation.
* Stewart was sentenced to three years in prison which he served.
* **Fast forward to 1991:** many years after he finishes serving his sentence, Stewart is driving along and he decides to listen to CBC radio where they were airing a Scales of Justice podcast and the one that happened to be on at the time was called Regina v Stewart and it was a radio program about his case, relaying all the terrible tactics but it did not discuss the fact that Stewart had nothing to do with these tactics. The narrator and host of the program was Eddie Greenspan, his former lawyer. Greenspan did not write the script, and provided no new information that was not part of public record.
* Stewart sued CBC and Greenspan for both breach of contract and a tort of breach of fiduciary duty
* Greenspan’s statement of defense contains the following assertions:
  + The script for the enactment of the plaintiff’s crime and trial were taken solely from the public record and not from any confidential information from Greenspan
  + Greenspan’s participation in the program was for the primary purpose of educating the public as to the judicial process
  + In his capacity as plaintiff’s former solicitor, Greenspan acted fairly, reasonably and prudently and fulfilled his obligations to the plaintiff
  + Neither the rules of professional conduct of the Law Society of Upper Canada, nor any professional ethical rules made it improper for Greenspan to appear in and take part in the broadcast
  + He just voiced the show but everything was public knowledge. His voice on the show is not connected to any fiduciary duty
* Greenspan is saying, this is public information already available, I am not telling anyone anything public did not know, I am not disclosing anything
* **Issue:** Did Eddie act in violation of professional duty/conduct by reading information on the case in public? Was there a breach of confidentiality? If so, what is the appropriate remedy?
* **Held:** There was a breach of fiduciary duty of loyalty. He put his own financial interests and self-promotion over his client’s interests. The remedy is $2,500 and Greenspan had to give up the money he was paid to participate in this program which as $3, 250.
* **Ratio:** There is no duty of confidentiality to protect public information (there is a difference between publicly available information and information that is publicly known, or common knowledge). The fiduciary relationship survives the termination of the lawyer and client relationship and the end of the duties which are solely a part of it.
* **Analysis:** Greenspan put his own financial interests ahead of those of his client, found that he put his own self-promotion before the client’s interests and in the way that he publicized the case he undercut the value of his retainer.
* **Confidentiality Issue:**
  + - No breach of confidentiality because it was public information
    - “The confidentiality obligation does not depend on the information being received from the client. It applies without regard to the “nature or source” of the information. It does not depend on the information being unknown to others. Widely known information may still be confidential information within this rule. At the same time, commentary 8 recognizes that the rule may not apply to facts which are public knowledge” (263)
    - “Mr. Greenspan did not disclose secret information, as I have held. All information which was broadcast except for the exaggerated distance Mrs. Jordan was dragged screaming had been known to the public for years, through coverage of Mr. Stewart’s crime, its investigation and prosecution. All of that information was public knowledge within the meaning of commentary 8 and did not fall within rule 4’s constraining language.” (264)
    - Be careful here: even though this information was in the public record, by **drawing public attention** to the information, Eddie Greenspan was using confidential information to client’s detriment and benefit. The fact that information was known, in general, wasn’t enough to reduce the confidential nature. Eddie publicized the information and by drawing the public’s attention to the public information, he damaged Stewart. Even when information is publically available, if not publically known, you will breach confidentiality requirement to client.
      * + So the court said you probably didn’t breach confidentiality because the case was so famous so it falls within the public knowledge exception. But you did use your relationship with this guy to advantage yourself and undermine the client (See fiduciary below) —especially since he was supposed to protect his reputational damage from this crime—this is a crux of fiduciary duty – so he did tort him and had to pay damages
* **Fiduciary Duty Issue:**
  + - “The fiduciary duty in issue therefore arises in part from what Mr. Greenspan said and did in public as counsel, it applies to what he said and did in public as a broadcaster, and in my opinion, it is not defeated by what others said and did publicly before that fiduciary duty of loyalty arose. ” (267)
    - Greenspan breached fiduciary duty of loyalty because (267)
      * (1) He favoured his financial interests over the plaintiff’s interests
      * (2) He put his own self-promotion before the plaintiff’s interests
      * (3) 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 Commentary 8 to Rule 3.3-1** – the general rule is that there is a difference between publicly accessible and publicly known. The implications of these 2 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

* Circumstances in which the courts of Law Society have decided that the ordinary value of confidentiality yield in favour of other social policies
* there are 6 exceptions (or possible exceptions) to confidentiality, namely:
  + - (1) future harm,
    - (2) lawyer self interest,
    - (3) innocence at stake
    - (4) authorized disclosure
    - (5) public knowledge, and
    - (6) disclosure required by law

## Future Harm and Public Safety

* two sources: Common Law (*Smith v Jones*) and Rules of Professional Conduct (**rule 3.3-3**, FLSC Model Code)
* *Smith v Jones*: Clarity, Seriousness, Imminence
  + lawyer would have to satisfy clarity (clear risks to identifiable persons or groups – requirement no longer exists but SCC has not commented on it), seriousness (meaning victim would suffer death or bodily harm or significant psychological harm) and imminence (meaning the threat was likely to be carried out, danger must be imminent)
  + Time is not a factor, but remoteness appears to be
  + If there are too many steps between action and effect, then it is not imminent
  + 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
* **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 death or serious bodily harm, and disclosure is necessary to prevent the death or harm
  + - gives the lawyer the discretion to disclose but they are not required to disclose. Law Society said that a lawyer can disclose but lawyer will not fail by not disclosing
* **Commentaries on Rule 3.3-3**
  + 1) Disclosure will be extremely rare
    - * the rule should be interpreted in a way that makes disclosure under the rule very rare.
      * the lawyer has to be sure that the harm to be stopped is truly serious, that the possible harm is imminent, and that the harm cannot otherwise be prevented
  + 2) Adopts SCC interpretation of “serious bodily harm” (*Smith v Jones*)
    - * invokes *Smith and Jones* and shows that the court accepts that serious psychological harm can qualify as serious bodily harm if it substantially interferes with the health or wellbeing of the individual
  + 3) Factors to consider
    - * “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 potential injury will occur and its imminence, (b) the apparent absence of any other feasible way to prevent the initial injury and (c) the circumstances under which the lawyer acquired the information of the client’s intent or prospective course of action”
  + 4) Ethical advice from Law Society should be sought about the disclosure; Seek Judicial Order
  + 5) Written Notes about the disclosure should be made
  + \*\* Only in extraordinary situations should one disclose

#### SCC vs. **Rule 3.3-3**

* differences between *Smith v Jones* and **Rule 3.3-3**
  + which version requires an identifiable victim?
    - the Clarity argument outlined in *Smith v Jones* requires there to be an identifiable victim or group of victims
    - **3.3-3** does not have this requirement is
  + when does each version apply?
    - **3.3-3** arises in only one scenario, as a defense to a claim of professional misconduct
      * + You CANNOT rely on *Smith v Jones* as a defense for a claim of professional misconduct
    - *Smith v Jones* arises only where a lawyer is sued for breach of fiduciary duty
  + stability of each version?
    - clear that the clarity requirement is in fact a requirement for the *Smith v Jones* exception, but it does not make a whole lot of sense which is likely why it is absent in **Rule 3.3-3**
  + is disclosure mandatory, or discretionary?
    - **Under 3.3-3** disclosure is discretionary, “the lawyer may disclose”
    - Under *Smith and Jones*, it is less clear whether disclosure is mandatory or discretionary.

#### Future Harm: Timing Issues

* What do we mean by “future” harm?
  + - where the harm lies in the past “I have harmed someone” would not lead to this exception
    - The cause of the harm has to be prevented by disclosure
* What about “on going” harm - that is, harm that has already started, but will continue absent disclosure
  + - The cause cannot lie in the past seem unlikely to qualify as future harm
    - It needs to be the action that is going to happen in the future

#### Future Harm and Public Shaming

* the “Aortic Tear” scenario
* What should a lawyer do in that situation?
  + *Zimmerman* case: should not disclose
* What do lawyers actually do in that situation?
* Under any rule, commentators are under the view that your first approach should always be to seek the client’s authorization to disclose

## Example: Aortic Tear Example from Week 1

* 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)
  + **Here, the action lied in the past, but the death could be saved; so, disclosure could be possible. But, the vast majority of the lawyers would not disclose it and would ask their client to disclose it**
  + *EXAM: Did an action in the past lay the groundwork for harm to come in the future – Aortic tear scenario*

**First approach should usually be approaching the Client about the threat and whether there is authorization to disclose and/or if their actions will change because of that.**

* [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.

## Lawyer Self-Interest

* Most well established and sensical exceptions
* Where the lawyers personal interests are at stake, the lawyer is permitted to disclose/use the client’s otherwise confidential information. You are allowed to save yourself
  + i.e. getting sued for incompetent representation by client and you want to prove you did everything possible by disclosing information – SAVED
* Self-Defense
* Fee Collection
* Ethical Advice
* Conflict Checks

#### Self Defence

**Rule 3.3-4 and 3.3-5**

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

* + - * There is no agency in “if it is alleged”, so the source of the allegation does not matter so long as the lawyer’s conduct is called into question
      * It also does not matter whether the lawyer is a party to the proceedings to which that allegation is made, for example if you are a criminal defense lawyer and your client is convicted as part of an appeal where other counsel has been engaged and your former client pleads incompetent counsel. You can break confidentiality in this situation to clear your own name
      * Third Party: Some provinces say you can only dispute from clients but in Ontario, it does not matter who makes the allegations 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 for the Client through a waiver (will also help from the client suing you later)
      * Only can disclose as much information as is required to defend against the claim

#### Fee Collection

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

#### Ethical Advice

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

#### Conflict Checks

* **3.3-7:** A lawyer may disclose confidential information to the extent reasonable 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 the lawyer will cause the destination firm to have conflict – a firm does not want to lose 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

#### Jurisprudence on Self-Interest

* Case law demonstrates the circumstances in which a lawyer can defend against allegations of impropriety

### R v Dunar (1982) 68 CCC (2d) 13 (Ont. C.A.)

* **Overview:** Case law demonstrates the circumstances in which a lawyer can defend against allegations of impropriety through disclosure of confidential information
* **Facts:** Three guys tried together on 3 counts of first degree murder. All part of a bike gang and accused of killing a drug dealer, his son and a woman living with them. Drug dealer and son had been shot in the head and stabbed and she was stabbed and then beaten to death. Three accused each had their own lawyers. On the strength of testimony of Bray to the extent that he was not involved in the crimes but that Logan and Dunbar had admitted the crimes. Bray took the stand and he recanted his whole story about having been picked up by the men and said he had no knowledge of any confession or whether they had been involved and he said that his first lawyer suggested that he make up the story in order to help get an acquittal. Crown wanted to prove that his new “blame the lawyer plan” was made up to avoid convicting his friends and they wanted to produce documents that were passed between Bray and his lawyers. But Bray claimed privilege and said that they could not be admitted.
* **Issues:** In what circumstances can a lawyer defend against allegations of impropriety? Must the lawyer be facing negative consequences that flow from those allegations?
* **Ratio:** When a client impugns a lawyer including charges of incompetence, perjury, or conduct that waives privilege, privilege may be waived.
* Quoting Wigmore
  + “As to what is a controversy between lawyer and client the decisions do not limit their holdings to litigation between them, but have said that whenever the client, even in litigation between third persons, makes an imputation against the good faith of his attorney in respect to his professional services, the curtain of privilege drops so far as necessary to enable the lawyer to defend his conduct. Perhaps the whole doctrine that in controversies between attorney and client the privilege is relaxed, may best be based upon the ground of practical necessity that if effective legal service is to be encouraged the privilege must not stand in the way of the lawyer's just enforcement of his rights to be paid a fee and to protect his reputation.”
  + saying no-one will want to be a lawyer if clients can impugn their character or not pay fees if they cannot defend against those claims or collect fees
* “It appears to be clear that where the client on direct examination testifies to a privileged communication in part, this is a waiver as to the remainder of the privileged consultation or consultations on the same subject. Dean McCormick suggests that unless the client was surprised or misled the same rule should apply where part of the communication is revealed on cross-examination and that the decisions to the contrary are hardly supportable.”
  + - We are treating this exception as a modified form of waiver of privilege when a Client on the stand discusses or partially discusses a solicitor-client communication; client has already exposed himself
* “I see no valid reason why Bray's imputations against his former lawyers on cross-examination should not constitute a waiver of the privilege so far as it is necessary to enable them to defend themselves against the imputations, on the same basis that a partial disclosure of a communication on cross-examination constitutes a waiver of the privilege as to the balance of the communication.”
  + - language is misleading because we are talking about disclosure as is necessary to defend against imputations but the lawyer doesn't really need to defend himself because no-one believes Bray’s story
* **Held:** Allowed admission of the documents detailing the conversation between Bray and his former lawyers. Disclosure of confidential information allowed.
  + - You cannot claim the lawyer did something wrong and not let people see the file
    - If you are going to claim that your lawyer did something bad, then the client because open for the court

#### Questions on Self Interest:

* 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?
  + - Seems like the answer is that confidentiality and privilege disappear when the client impugned the lawyer to the extent that the lawyer could defend against those claims
    - The lawyer can protect himself if his reputation and character is put on the line
    - **The rationale:** making the practice of law palatable such that you don't have to fear negative allegations from your clients that you are unable to defend.
    - Policy arguments for self – interest:
      * + (a) makes profession of law more appealing: more lawyers means more counsel to help people
        + (b) lawyers may not want 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 because lawyer told them to perjure themselves, and sue this to get their friends off

## 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 go to jail
* Example:
  + Scott Trbovich is on trial for murder. Although there were no witnesses to the crime with which he is charged, Scott has no alibi and circumstantial evidence makes it appear that he is guilty.4
  + In reality, Larry Sizzler committed the crime with which Scott has been charged. Unfortunately, there is no evidence linking Larry to this crime. Police never suspected Larry's involvement. Larry's former lawyer, Amy Hamilton, is aware of Larry's guilt, because Larry confessed to Amy soon after he murdered the victim.
  + Before the conclusion of Scott's trial, Larry Sizzler dies of a heart attack. Larry's confession to Amy is confidential, and this confidentiality survives Larry's death. Amy, who has been monitoring the progress of Scott's trial, believes that Scott will be convicted, despite the fact that he is innocent.
  + Should Amy be permitted to disclose Larry's confession?
    - * Competing tests and views for this in different jurisdictions

#### Competing Tests:

* *Dunbar v Logan* (no continuing interest & would prevent wrongful conviction)
  + - The court in obiter through that there should be a general exception to innocence (i.e. allowed to tell) when the following 2 conditions are met:
      * + (1) the client whose privilege is at stake has no continuing interest in the privilege information being privilege (usually if they are dead)
        + (2) innocent person is likely to be convicted of a serious crime – will prevent wrongful conviction
* *Smith v Jones* (obiter)
  + SCC said that they like what was said in *Dunbar v Logan* but remember that it was said in Obiter and sometimes 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
* UK position: *Derby Magistrates’ Court*
  + - Traditional position that prevails in the UK
    - No innocence at stake exception to privilege and confidentiality
* New Canadian Position: *R v McClure*
  + - Says that 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’ Court [1995] 4 All ER 526

* **Facts:** teenage boy who was acquitted of stabbing a girl, but the stabbing was not fatal the strangulation was, and the boy said that it was his stepfather who strangled her. Stepfather was then on trial for the same murder and he wanted disclosure of anything stepson said to his lawyer which is based on the assumption that the son implicated himself to his lawyer which could lead to reasonable doubt. Son is opposing disclosure.
* settles the UK position on “Innocence at Stake”
* **Issue:** Should the privileged evidence between lawyer and son be admitted to prove the father’s innocence?
  + - Son would not be retried, but he might still have an interest since public would know he killed the girl
* “the privilege is that of the client, which he alone can waive, and that the court will not permit, let alone order, the attorney to reveal the confidential communications which have passed between him and his former client. His mouth is shut forever.”
* “One can have much sympathy with McCowan LJ's approach [permitting disclosure], especially in relation to the unusual facts of this case. But it is not for the sake of the appellant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors. For this reason I am of the opinion that no exception should be allowed to the absolute nature of legal professional privilege, once established.”
  + - if we want people to tell the truth, clients have to know in advance that their information will be kept confidential and that the only way it will come out is through client permission.
* “the courts have for very many years regarded legal professional privilege as the predominant public interest. A balancing exercise is not required in individual cases, because the balance must always come down in favor of upholding the privilege, unless, of course, the privilege is waived.”
  + privilege always wins
  + highest court in England saying we never need to balance privilege with other societal interests because no other interest can ever be as important
* “If the client had to be told that his communications were only confidential so long as he had "a recognizable interest" in preserving the confidentiality, and that some court on some future occasion might decide that he no longer had any such recognizable interest, the basis of the confidence would be destroyed or at least undermined. There may be cases where the principle will work hardship on a third party seeking to assert his innocence. But in the overall interests of the administration of justice it is better that the principle should be preserved intact.”
* **Held:** Lawyer could not break privilege. Court refused to order disclosure as privilege is of the upmost importance
* **Ratio:** UK does not have a privilege exception. Reason for this is that it will impair the neutral conduit model because people will not tell lawyer important information that is required for appropriate representation

### R v McClure [2001] 1 SCR 445

* **Overview:** Leading Canadian case on innocence at stake exception (endorsed and clarified)
* This case arises in the context of the Indian Residential Schools
* **Facts:** Teacher accused of sexual acts against multiple students. Someone read about McClure in the newspaper and came forward and said that he had also touched her inappropriately. The alleged crime against JC was added to the indictment and then he brought a civil action against McClure. JC retained her own lawyer. At criminal trial, McClure sought disclosure of confidential information that the victims told their lawyer in the civil trial.
* **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 requires to give the information?
* **Held:** Disclosure should not be permitted. Clarified how the innocent at stake exception would operate in Canada. Two step test created was not met so no access given to civil files. McClure failed at step 1- there is no evidence that would make the judge believe that there is information that could give rise to a reasonable doubt
* **Ratio:** Created the innocence at stake exception, two stage test
* Two-stage test for disclosure:
  + **Stage 1: “Could Cause Reasonable Doubt”**
    - * Requires production of “some material to the trial judge for review.”
      * Must point to some evidence that if believed would give risk to reasonable doubt (must give this information to judge sitting along without a jury) that there is information in the material that should be disclosed
      * When an accused person seeks disclosure that is projected by privilege, they must provide the court with some evidence that there is material that could give rise to reasonable doubt. There must be some evidence that the judge can review. Judge is looking at whether there is some evidentiary basis to the claim that a solicitor client relationship existed that could lead to reasonable doubt
      * Judge is looking for whether there is “some evidentiary basis for the claim that a solicitor-client communication exists that could raise a reasonable doubt”?
      * If you prove this, then judge gets the file and examines the evidence
      * Have to pass this stage first in order to move on to stage 2
  + **Stage 2: “Likely to Cause Reasonable Doubt”**
    - * Judge examines the confidential material to determine whether or not it is “likely to cause reasonable doubt”.
      * If it is, the material is ordered to be disclosed.
      * Judge makes the determination of if there is material evidence or information in the file that is likely to give risk to reasonable doubt, if looked at by the jury, they may doubt the charge. If this is determined, it is given to the jury
      * It does not matter that the owner of privilege still has a continuing interest in privilege. They do not have to be a dead client anymore, it is irrelevant

## Authorized Disclosure

* Recall that section **3.3-1(a) of the FLSC’s Model Code** provides as follows:
  + **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***;
* Subsection (a) refers to both “express” and “implied” authorization.
* “Express” waiver of confidentiality is fairly straightforward that is where the client tells you they want to plead guilty
  + - The waiver should be clear and unambiguous. The lawyer should ensure that 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 - known as the rule of candour, you must tell your client anything that may have an impact upon the client’s interests or is relevant to their case).
* Implied authorization (or “implied waiver”) is more complicated.
  + - Implied – whenever your client gives you a direction that requires disclosure of information (i.e. to do the instruction you are given, you have to waive privilege/disclosure)
    - Automatic implied waiver as is necessary to fulfill the retainer including disclosure to secretary, other lawyer at firm etc, also during plea bargaining. Disclosure must go no further than is required to pursue the 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 the 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.
    - **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.
      * + Inferred authority to seek necessary protection for your client when your client does not have the ability to give consent; in these cases, the lawyer has some leeway

## Public Knowledge

* **Rule 3.3-1, Commentary 8, provides** “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 by the lawyer. Apart from ethical considerations or questions of good taste, indiscreet shoptalk among lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the client. Moreover ,the respect of the listener for lawyers and the legal profession will probably be lessened. 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.”
* What constitutes “public knowledge”?
  + It is generally insufficient for the information to be “available” to the public. Instead, it should be “widely known” by the public before you rely on this exception.
* If information is already in the public eye, do you need to follow privilege?
  + - How public is the information? Extraordinary effort to find/access versus notoriously public knowledge
      * Not enough that the information is available, it has to be widely and generally known by the public before relying on this exception

### Ott v Fleishman (1983) 46 BCLR 321 (SC)

* **Overview:** What constitutes public knowledge? Good case to cite for scope of lawyer’s duty
* **Facts:** Fleishman was a family law lawyer and Ott wanted to divorce her husband, but she had no grounds which you needed at the time. She therefore wanted to find proof that he had cheated so she could get a divorce. He hired Mr. Britton a PI to try to find evidence of adultery, but he did not find any. Fleishman was successful in negotiating a matrimonial settlement whereby she would receive substantial amount of money from her husband. There was a party at the office. Fleishman did not go to the party, but Ott went, and Mr. Britton were both there and they started an affair with each other. Britton was married at the time so Miss Ott is separated from her husband but Britton is still married. Ott and Britton started seeing each other openly but discreetly. Britton’s marriage was on the rocks. Ott would openly discuss that she was not dating Britton, Fleishman did not know. She still wanted to get a final divorce, so she had the PI to continue to try to find evidence of adultery and he did eventually find evidence and her husband admitted to the affair and so divorce proceedings commenced. Fleishman’s secretary mentioned to Fleishman that Ott was dating Britton. On learning this, Fleishman got mad and fired Ott as his client. He handed her back her file. Fleishman sends a letter to RCMP, Deputy AG and LSO complaining about Britton’s behaviour. Britton was shortly suspended but then reinstated. The relationship became very public, so Ott said she was going to sue Fleishman for breach of fiduciary duty.
* **Issue:** Should Fleishman be held liable? Should he owe damages?
* **Fleishman’s Argument:** disclosure permitted on 3 grounds: (1) public knowledge, (2) there was a lack of confidentiality because Ott had talked about affair at office (shot down quickly) and (3) that there was a danger of fraud upon the courts
* **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
* **Held:** Disclosure not justified. Held for plaintiff, damages awarded for breach of contract
  + - * Ott and PI were “discrete but open” about relationship; Ott’s children knew
      * Details were not known and Fleishman made the public aware of them
* “Counsel for the defendant sought to justify the disclosure of the information on a number of grounds. First, he said the information was not confidential because the plaintiff had openly but discreetly kept company with Mr. Britton. The defendant's communication to the RCMP and others went far beyond that. In any event, her admission of adultery to the defendant was expressly given in confidence and ought not to have been breached.”
* “Thirdly, Mr. Nuttall argued that defendant had a duty to disclose this information to prevent possible fraud upon the court by the use of tainted evidence in the pending divorce trial and to prevent Mr. Britton from taking advantage of other women in the position of the plaintiff. These arguments cannot prevail in view of the fact that the defendant sent a copy of his letter to the Law Society, and because he furnished the same information to others. … Apart from that, I do not agree that the defendant, if he was under any such duty, was entitled to breach his primary duty of confidentiality to his former client. Many lawyers come into possession of information that could usefully be disclosed to police and other authorities and serious ethical questions sometimes arise in such cases. But the public interest has been declared to be that such information should be kept confidential, and lawyer has no real discretion in these matters and his lips are sealed.”
* “Those of us who have practiced with the defendant are aware of his self-assumed responsibility for the protection of the courts. This is not the first case where he has conceived it to be his duty either to carry a case forward or to withdraw from it in defense of what he regards as the absolute necessity for the protection and preservation of the integrity of the court's processes. If I may rely for a moment upon some personal observations made over many years of association with the defendant at the Bar I can say that I am satisfied that the defendant truly believes he has a continuing duty to expose any real or possible assault upon the purity of justice. This is commendable in one sense, but I regret to say in this case I believe the defendant overreacted under a misconception about the nature of his duty. … I find the defendant did breach his duty of confidentiality to the plaintiff.” (p. 309 of Text)
* **Damages:** $500 (nominal damages only – no real harm suffered).
  + - Just because someone COULD find out was not enough, most people did not know. It was not general knowledge, you have to be close to the parties to know about their relationship

## Disclosure Required by Law

* **Rule 3.3-1(a)** provides that “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: (b) required by law or a court to do so”
* lawyer may not disclose confidential information “unless … (b) required by law or a court to do so.”
* What counts as disclosure “required by law or a court”?
  + - generally speaking, a law specifically in statutory form dictates an instance where disclosure is required.
    - example: *R v Fink* which authorized certain searches of lawyer’s offices
    - a court order
* What should you do if you doubt the authority of the law or the court (e.g., the law may be unconstitutional, or the court may have over-stepped its authority)?
  + - Rule 3.3-1 includes a caveat: Court can tell you to disclose information but lawyer still has a positive duty to defence right to keep secret and question the court order
      * + 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: It is unfair to face difficult choice of violating rules of professional conduct or violating a court order by refusing to disclose information
    - Normally, it is safe to go along with a court order, so long as you bring up any non-frivolous reasons against the court order

### R v Fink [2002] SCC

* **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**
* **Decision:** 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

# Integrity and Good Character

* Unusual nature of these regulations
  + The rules surrounding integrity and good character are some of the weirdest
  + Other rules regulate lawyers’ behaviour or what a lawyer does, but the rules of integrity and good character govern the kind of person the lawyer is, traits the lawyer must exhibit rather than prohibiting forms of conduct
  + Breach of this rule could give rise to a charge of professional misconduct or conduct unbecoming under **s. 33 of the *Law Society Act*** leading to any of the penalties in **s. 35**
  + This seems to give the Law Society the ability to infuse it’s own values into what it means to have integrity
* Recall relationship to **s. 33 of the *Law Society Act* (Ontario)**
* If you are shown to lack integrity or good character, you could be reprimanded under professional misconduct

## Sources: The Rule of Integrity

* **Chapter 2 of the FLSC Code** is entitled “Standards of the Legal Profession”
  + **Part 2.1 of the Code** is entitled “Integrity”
    - **Rule 2.1-1:** A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity
      * Doesn’t really tell us what integrity means so we need to look to commentaries

## Commentaries to Rule 2.1-1

* [1] Integrity is the fundamental quality of any person who seeks to practise as a member of the legal profession. If a client has any doubt about his or her lawyer’s trustworthiness, the essential element in the true lawyer-client relationship will be missing. If integrity is lacking, the lawyer’s usefulness to the client and reputation within the profession will be destroyed, regardless of how competent the lawyer may be.
  + The word integrity says something about being trustworthy or being honest
  + Integrity translates to believability/honesty
  + This seems to state that it is not necessarily about competence, it is about honesty
* [2] Public confidence in the administration of justice and in the legal profession may be eroded by a lawyer’s irresponsible conduct. Accordingly, a lawyer’s conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.
  + This seems to suggest that the word integrity suggests some level of responsibility
  + Conduct should reflect favourable on the legal profession
  + We should not be irresponsible, and our behaviour should not give rise to the appearance of impropriety
* [3] Dishonourable or questionable conduct on the part of a lawyer in either private life or professional practice will reflect adversely upon the integrity of the profession and the administration of justice. Whether within or outside the professional sphere, if the conduct is such that knowledge of it would be likely to impair a client’s trust in the lawyer, the Society may be justified in taking disciplinary action.
  + Professional misconduct relates usually exclusively to behaviour that takes place within the lawyer’s professional practice. But, this commentary seems to suggest that you can violate integrity by doing activities in your private life, outside of your professional activities but it is restricted in how far it goes
  + This rule of integrity is somewhat unique in the Rules of Professional Conduct in that this one expands to catch activities in an individuals private life
* [4] Generally, however, the Society will not be concerned with the purely private or extra-professional activities of a lawyer that do not bring into question the lawyer’s professional integrity
  + This clarifies that they are worried only about your personal activities that give a sense that you may not be a trustworthy person but generally speaking, they will not be worried about any purely private activities that do not call your integrity into question
* Integrity seems to relate to honesty, trustworthiness, some sort of professional responsibility, we can deviate from integrity both when acting professionally and privately, but the focus is on dishonesty or other activities that might cause our clients not to trust us or may cause society at large to have doubts about the integrity of the legal system

## Case law on “Integrity”

### Adams v Law Society of Alberta (2000) 266 AR 157

* **Overview:** What do the Law Societies mean by the word “Integrity”? What’s the appropriate punishment for an integrity violation?
* Case helps to address 2 specific questions:
  + 1) What do the Law Societies mean by the word “Integrity”?
  + 2) What’s the appropriate punishment for an “integrity” violation? What do you do when you find that a lawyer has lost the trust of their clients or has engaged in behaviour that would cause people in general not to trust in the legal system or in the administration of justice?
* **Facts:** There was a 32 year old lawyer from Alberta who was working in criminal defence. He had 2 clients relevant to this case, a 16 year old young woman who had been in youth detention and her boyfriend who was currently in prison. Young woman had been incarcerated for prostitution. Adams succeeded in getting her out on bail, where she immediately resumed her activities as a sex worker. One day, Adams ran into his client. When he met up with her, he briefly discussed her boyfriend’s pending case. He then asked her what kind of services she provided to her clients, which she told him. Adams met with her again at least one additional time and suggested that they should have sex. She agreed and planned to meet him later at a hotel. While this was happening, police had his client under observation investigating her work as a prostitute. The police decided to interview her about her activities as a sex worker and during that interview, she told the police about her discussions with Adams. She also agreed to wear a listening device whenever she met with him next. When the time came to meet Adams, in the hotel, the young woman showed up wearing the wire. She asked Adams if he had ever had sex with a client before, which is important because it serves to remind Adams that that is his client to whom he owes fiduciary duties and to whom he has a professional relationship with. Adams said no but that he had had sex with a prostitute in Europe years earlier. Shortly after, the woman stepped out of the hotel room for a moment, which is when the police stormed in when Adams was partially undressed. They arrested Adams, he admitted that he was there to have sex with her.
* **Issue:** Did Adams act with integrity? If not, what is the appropriate punishment? Should disbarment be overturned?
* **Ratio:** Insight onto how LSUC punishes people – here, the entire violation of rules of professional misconduct is rooted in integrity (how he used his position as the lawyer, abused his power, and strong-armed client into situation) Relevant consideration was the vulnerability and power imbalance between him and the young woman
* These were all actions being taken with a client, they implicate his professional conduct, not purely private activities. Therefore, if he violates the rule of integrity then he has committed professional misconduct.
* There was also a power balance between the two given his profession and age. She even reminded him that she was his client and he is still representing her boyfriend
* Adams admitted at the hearing that arranging to have sex with his client was inappropriate, he admitted that he was in a trust position with this woman, and he said that he dishonoured the profession as a result of his conduct
* **Law Society decision:**
  + “…. Lawyers are perceived by their clients to be very special people with very special powers, and this means that the client then is in a very vulnerable position…. In his or her relationship with the lawyer, and it’s incumbent upon the lawyer to recognize that nature of this very special trust relationship…. Mr. Adams set that aside, the almost sanctity of this relationship, and minimized it and discounted it and took advantage of this young woman.”
    - Tribunal will clearly find that he violated integrity and therefore committed professional misconduct.
    - This case doesn’t seem to make him dishonest, he didn’t lie to anybody BUT this sets off sensors as to what could consider a lack of integrity such as being dishonourable or irresponsible. Behaviour did not implicate honesty, but is found by Law Society to have violated integrity
  + “The majority contended that perhaps the breach of trust involved in a proposed sexual relationship was even more serious that converting trust funds, for money can be restored but honour cannot. The minority expressly contended that Adams’ misconduct was less serious than a case of misappropriation of trust funds, which ‘in virtually every case… calls for disbarment.’ This suggestion is troubling, as it implies that the integrity of the person is somehow less important than the integrity of the dollar. We do not diminish the seriousness of the offence of absconding with a client’s trust funds. However, we have surely come to a point in our understanding of individual respect where the violation of a person’s dignity is at least as important as the value of a bank account.”
    - Fighting about here is whether or not this behaviour was worse behaviour or not as bad as stealing trust money from clients which always leads to disbarment
    - What integrity would mean: actions that violate a persons dignity
* **Relevant consideration:** Vulnerability
* **Penalty:** Disbarment. He was no longer allowed to practice law as a result of this behaviour.
  + Law Society focuses a lot, in determining the correct penalty, on the age difference between Adams and the young woman. They also spoke about the breach of trust and vulnerability of the client. Taking advantage of a vulnerable person for your own pleasure in a way that could be seen as harmful to that young person, seems to be a violation of integrity which is what gave rise to the disbarment.

### Law Society of British Columbia v A Lawyer [2000] LSDD No 19

* Good case for exam, appropriate test outlined for dealing with punishment!
* **Overview:** It helps us in our continuing quest to figure out how Law Societies define and regulate integrity and ithas a lot of interesting material on punishment. When you are preparing for the exam, look at these factors for determining appropriate penalty for professional misconduct (page 30 to 34)
* **Facts:** The lawyer was practicing law in BC at the time. He was also married to another lawyer, a woman named EVL in the decision. They were out walking one night and EVL fell into a hole and was injured. EVL decided to sue the owner of the hole. The lawsuit between EVL and the property owner was still ongoing 5 years later in 1994 when EVL and A Lawyer decided to separate. He was still supposed to appear as a witness to EVL in the personal injury matter. In 1995, EVL and A Lawyer entered into matrimonial litigation in an attempt to come up with some kind of separation agreement and this litigation was rather acrimonious. A Lawyer was involved in both of these, in one he was one of the two disgruntled spouses and in the other he was a witness. A Lawyer met with EVL’s lawyers in the personal injury matter, Mr. Cornfeld and Mr. Richardson. A Lawyer said that he could either be a very good witness for EVL but only if she gave him a satisfactory settlement in their matrimonial proceeding. A Lawyer stated that if he did not get a good separation agreement, he would tell the court that EVL had misappropriated $32, 000 from him and that he would attempt to ger her disbarred and said that he would bring forward claims of misappropriation of funds, breach of trust etc. The Law Society of BC took a very dim view of this behaviour.
* **Issue:** Does this constitute a lack of integrity?
* **Ratio:** Integrity appears to be about intent – purpose of the violation. Outlines the factors to consider when punishing a lawyer.
  + “The primary focus [when sentencing a lawyer] is the protection of the public interest. It follows that the sentencing process must ensure that the public is protected from acts of professional misconduct” […] “An appropriate penalty must ensure that the public is protected and must also take into account the risk of allowing the respondent to continue in practice”
* **Hearing Panel:**
  + Quoting from Professional Conduct Handbook: “A lawyer is a minister of justice, an officer of the Courts, a client’s advocate, and a member of an ancient, honourable and learned profession. In these several capacities, it is a lawyer’s duty to promote the interests of the state, serve the cause of justice, maintain the authority and dignity of the Courts, be faithful to clients, be candid and courteous in relations with other lawyers and demonstrate personal integrity.”
  + “The practice of law requires so much more of a member than the ability to manage his or her business affairs. It requires an awareness and appreciation of the role played by the member in the confluence of contributions which make up our system of justice which, in turn, is at the root of our free and democratic society. [The respondent’s] conduct suggests, at least, ignorance of his role in this process and, at worst, a cynical disregard for it… I find that [the Respondent] professionally misconducted himself… The several duties to uphold the integrity of the state, the law and our system of justice remain the responsibility of the lawyer at the end of the working day and a failure to perform these duties will result in a finding of professional misconduct even where the misconduct does not occur in the pursuit of the profession, in the strictest sense.”
    - When A Lawyer was making these threats, he was not there as a lawyer, he was a witness. It was his knowledge of the legal system that allowed him to make some of these claims but he was not there being a lawyer and so in some sense this was personal and not professional action. Even where misconduct does not occur in the pursuit of the profession, behaviour that shows disregard for the factors outlined below can constitute a lack of integrity and misconduct
* **Held:** Regardless that this did not happen within his professional duties, it still violated integrity
* What’s the appropriate punishment in this case?
  + Adams was disbarred
  + This case sets out the factors to be considered when determining a penalty for professional misconduct
  + Some of the factors are:
    - The age and experience of the lawyer under review
      * Significant experience, 11 years
    - The nature and gravity of the conduct proven
    - His previous character including details of prior discipline
    - The impact on the victim
    - The advantage that he sought or gained
    - Number of times offender conduct occurred
    - Whether respondent has acknowledged misconduct and taken steps to disclose/address the wrong and the presence or absence of other mitigating circumstances
    - Possibility of rehabilitation
    - Impact of proposed penalty
    - Need for specific and general deterrence
    - Need to ensure the public’s confidence in the integrity of the profession
    - Range of penalties imposed in similar cases
      * ***Charles Michael Jeffrey* (1997 LSBC)**: lawyer found out his trial was delayed, said he would tell opposing counsel, instead he sent them latest settlement offer (gained tactical advantage). Exemplary record of service as a lawyer. Penalty: 1-2 month suspension – but he had retired, so $8000 fine and $3000 to pay for costs of disciplinary committee.
      * ***Bolton v Law Society* (1994 ER):** Law Society orders are not *primarily* punitive; therefore considerations such as punishment have less importance than they would in a criminal case. The essential issue is the need to maintain among the members of the public a well-founded confidence that any lawyer whom they use will be a person of unquestionable integrity, probity, and trustworthiness. The reputation of the profession is more important than the fortunes of any individual member.
  + After reviewing the factors set out at pages 30-34 of the Legal Ethics text, the hearing Panel found that a 3 month suspension was appropriate

### Law Society of New Brunswick v Ryan [2003] 1 SCR 247

* Judicial Review Case, reviewing a Law Society Decision
  + The decision of any statutory body that is empowered with decision making authority is a decision that is governed by legislative authority. While the legislation may say that there is not appeal, it is important that that statutory body only has the power to exercise those powers that are spelled out in the statute.
  + **Judicial Review:** the process whereby anyone who has been the subject of the exercise of a statutory power of decision or an administrative body, if you can prove that they exceeded their jurisdiction under the statute, even if the statute says no appeal allowed, you can still have resort to courts for judicial review.
  + Generally speaking, this allows the courts to determine whether or not the statutory decision-making body has gone beyond the jurisdiction beyond which it was given
  + However, the review will give a lot of deference to the statutory decision-making body and will usually just determine whether or not their interpretation of their power was reasonable. If so, they can exercise it how they did, if not it will be overridden by the court and sent back for another round of decision making.
* Subjective Nature of “Integrity”
* What’s the appropriate penalty?
* **Facts:** Michael Ryan was a lawyer in New Brunswick. In 1993 he was retained by Grant Tryder and Ronald Stewart in connection with a wrongful dismissal claim. They meet with Ryan, and he informs them that they have a strong civil case. Unfortunately, for 5 and a half years, Ryan did absolutely nothing to advance his client’s cause, he took no action on their behalf, drafted no documents and did not make any calls. BUT, he pretended to. Ryan falsely told his clients that he was taking vigorous action on their behalf, he said that all the delays in their case were caused by lawyers on the opposition, he purported to hold a fake discovery in a hotel in which he invited his clients to meet with him but when they showed up he told them that the other side failed to attend. Ryan indicated he would bring contempt of court proceedings against them for failing to attend but this was all staged. Then, a limitation period passed without Ryan taking any action which means that you lose the right to bring the case in court. This eliminated the ability of the clients to sue their employer. Ryan does not tell his clients that the limitation period has passed, they think he is proceeding. He calls his clients one day and says he has some bad news which is that there is a recent decision at the New Brunswick CA that would force them to go back to square one and start the process all over again. He met with them and produced a copy of this decision which was on the correct letterhead etc. but it was completely forged. Some time passes and he informs his clients that they were successful and that they would be receiving $37, 000 in damages as a result of the contempt proceedings relating to the discovery. Then Ryan started making up reasons for the delay in the receipt of the payment. Now, almost 6 years have passed. He finally called them and told them that everything had been a lie, he owned up to it and explained his failures to his clients, bar officials and the Law Society. He claimed this behaviour was the result of alcoholism and depression. He was on medication and seeking treatment for depression and he was an alcoholic. The combined effect was that he was driven to commit these misdeeds. His wife had left him several years earlier, he sought sporadic treatment for alcoholism, but he could not control his behaviour.
* **Prior Proceedings:** Ryan appeared before Law Society and was quickly disbarred. The Law Society held that his long-term deceit was dishonest, disreputable and would undermine respect of the public for the administration of justice. Ryan appeals this all the way through all of the appeals that are allowed at the Law Society level, but the disbarment stands. He seeks Judicial Review to the New Brunswick Court of Appeal, but the judicial review is just making sure that the Law Society was acting within the powers granted to it. CA looked at the case and liked him, they thought all of this was brought on by alcoholism and they felt he was a troubled soul who needed rehabilitation. CA said that he was deserving of punishment but that should not be disbarment. Instead they suspended his licence pending treatment. They held that Ryan was at core a man of integrity and that he ought to be readmitted once treatment was successful. Law Society was not happy with this and so they appealed this Judicial Review to SCC.
* **Issue:** What should the penalty be for Ryan’s professional misconduct? Was LS finding unreasonable?
* **Ratio:** There is nothing unreasonable about the Discipline Committee choosing to ban a member from practicing law when his conduct involved an egregious departure from the rules of professional ethics and had the effect of undermining public confidence in public legal institutions
  + The LS disciplinary committee ahs broad discretion to determine what sanctions to apply in order to meet the objectives of Law Society Act
* Factors to consider:
  + What impact should alcoholism and depression have on integrity?
  + How strictly should the duty of integrity be enforced?
  + How do these issues have an impact on how you assess a person?
  + Should the duty of integrity take impairment into account?
* **Penalty:** Disbarment
  + SCC exercised deference to Law Societies decision. They said that Law Society was right to disbar him, they acted within their powers and that it was not unreasonable for them to disbar this man given the depths of his behaviour. They said that this was certainly something that fell within the Law Societies boundaries.
  + Held that there was a fundamental lack of integrity on Ryan’s part, the LSNB could disbar if they saw fit
* **Rule of integrity is almost always applicable !! – For EXAM**

## Conclusions on “Integrity”

* Do we need the rule?
  + Not a lot of cases where integrity is being invoked, however the Law Society will never repeal this rule
* Should it serve a “supplementary role” when other, more specific forms of “professional misconduct” arise?
  + This would mean that it would be a rule that applies when some other, more specific form of professional misconduct is alleged, and the lawyer undertakes that specific form of misconduct with a level of intention. In essence, the rule of integrity could serve as an aggravating factor
* Should it be the “mens rea” of professional misconduct?
  + Could serve as aggravating factor

# Part II: Good Character

* Relationship to “Integrity”
  + Under the Law Society Act, integrity is a trait that you must show while practicing law because integrity is one of the Rules of Professional Conduct
    - If you fail you can be suspended or disbarred
  + Rather, good character is a trait that you must possess at the time that you are called to the bar. Therefore, this only arises at the moment that the candidate is being called to the bar
* Not found in the Rules of Professional Conduct
  + This is because they apply to people who are not yet licensees
  + Instead of a rule that you have to follow while being a lawyer, it is rather a rule you have to have been found to have satisfied when you are a candidate for the call to the bar
* Pre-condition for Call to the Bar
* Found in the Law Society Act (Ontario) (similar versions in other jurisdictions)

## Source: S. 27(2) of the LSA

* **27(2)** It is a requirement for the issuance of every license under this Act that the applicant be of good character
  + Note that this applies to all classes of license under the Act: both lawyers and paralegals because the Law Society Act governs the receipt of licenses of both
  + If you are found to have lacked good character, you can be denied your license to practice law
* The burden of proof in a good character hearing is on the applicant (the candidate who wants to be a member of the profession). This burden is on the balance of probabilities.
* Does this mean that a hearing is held for every person that wants to be called to the bar?
  + No, instead when you are applying to be a candidate, you will receive a form when you have to disclose certain things to them including questions related to good character

## Good Character Questions

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

* If individuals answer yes, at that point they will call you for more particulars and they may call a hearing
* Some forms of criminality and fraud seems to suggest that people lack good character
* One thing that is settled is the issue of timing. **When do you have to be a person of good character?**
  + It is a requirement for the issuance of the license. Therefore, it does not require that the applicant must always have been of good character, but rather that they are when the license is being issued. The timing is the time of your application to the bar. Then, once you get that license, you have to be a person with integrity and live up to the Law Society’s rule regarding integrity

## Case law on “Good Character”

### Re P(DM) [1989] OJ No 1574

* Sexual assault of children
* **Facts:** DMP was a graduate of U of T law school. He successfully completed his articles and applied to be called to the bar. The primary difficulty facing him was that he was a convicted pedophile. Long before going to law school he had committed sexual assaults on two very young girls, one 8 year old deaf child (he wa her bus driver) and his own 4 year old daughter. DMP was caught and charged with these crimes and convicted of these sexual assaults. He spent 8 months in a reformatory. Upon his release, he claimed to understand that his actions were socially unacceptable. However, he seemed not to believe that he had harmed the children in any way or had done anything morally wrong. He was admitted to U of T law school. Law schools don’t have good character forms and so you do not have to disclose that information. Upon admission to U of T, he phoned the Law Society and told them about his past. He said he was a convicted pedophile. Law Society informed him in advance that he would not be admitted to the bar because he was not a person of good character and therefore not eligible for admission to the bar. Nevertheless, DMP forged on and completed law school, articled and applied for admission. DMP told his articling principals in advance about his behaviour before they hired him, and they hired him anyway.
* **Issue:** Should he be admitted to the law society/bar?
* **Ratio:** One can always how that they are of good character despite past actions. However, in this case, the individual did not show genuine remorse or healing. This is the most important theme- did you show genuine remorse? There is strong line of case law supporting the fact that remorse is the most important factor. The burden of proving good character rests with the applicant; there is no presumption of good character once hearing starts
  + *“The committee is not satisfied on the balance of probabilities that this applicant has truly reflected upon and altered the moral code and structure of beliefs which led or allowed him to act out his predatory assaults upon the children.”* The committee believes, in spite of his evidence, that he continues to rationalize his actions
* Character evidence from his employer:
  + “Mr. P was an exceptional articling student and he will not doubt be a superb lawyer and a credit to our profession. He is possessed of superior intellectual skills, he is dedicated and hard working. Perhaps more important, Mr. P is sympathetic, insightful and wise. His quick wit is consistently uplifting. At the risk of overstating the case for Mr. P, I am of the opinion that it would be a tragedy for him and the legal professional if such a talented person were to be shut out”
  + “In our many lively discussions, Mr. P showed a firm grasp of the ethics of our profession and he showed that his ethical standards are high. At our firm, he had complete trust. Mr. P had and still has a key to our offices. He knows how to operate computers and he knows how to access substantial information. He had day to day carriage of many files over the year and the feedback from clients to the lawyer in charge was always very positive. He is a good administrator and he always seemed to get more done in a day than one expected to be done in a week.”
  + “When Mr. P applied to our legal firm, he was interviewed by Paul B and myself. Both of us were impressed by his academic record and he seemed to have interests and skills suited to our practice. When we offered him the position but before he accepted Mr. P, without hesitation, informed us about his criminal record and he invited us to make as many inquiries as were necessary before confirming whether we wanted him to article with us. Quite frankly both Paul and I shared some anxious moments before deciding to trust our instincts and confirm his offer. Our anxiety was dispelled once Mr. P’s articles with our firm began…. I am of the opinion that given the difficulties five years ago, Mr. P is completely rehabilitated.”
    - He also received good character endorsements from a woman he lived with while he was on parole and from his treating psychiatrist who declared that he was cured of pedophilia, but other psychologists came and testified that you cannot cure pedophilia
  + DMP also had to testify in front of the hearing that he would not reoffend
* Assessment of Mr. P’s evidence
  + “As Dr. Marshall observed, a pedophile realizes that it is to his advantage to say ‘I feel remorse and I’m disturbed. I know now that this is harmful behaviour.’ For Mr. P the motivation to express remorse is very great, indeed: His admission to the Society turns on whether or not the Committee accepts his statement as true. In all the circumstances, the Committee is not satisfied on the balance of probabilities that the applicant’s expressions of remorse arise from a genuine regret for the manifest harm he has done to the infant victims. Nor in all the circumstances does the Committee believe that he understands his pedophilic activities to be morally reprehensible.”
    - There is a huge focus on remorse, generally speaking, the reason you are having a good character hearing is that you did something awful in the past, and if you appear as completely reformed and have genuine remorse, and the Committee finds that they believe you that will go a long way
    - BUT here, they are questioning whether he is actually remorseful by saying he had a huge motivation to express remorse in order to be called to the bar
  + “Mr. P’s overall deportment throughout these proceedings is relevant to the Committee’s assessment of his credibility. When pressed about whether or not he believed his actions had caused harm to his young victims, he was defensive and evasive. He gave his evidence listlessly, in monotone, except when he spoke about his desire to practice law. Then he spoke with emotion, no conviction. By contrast, he seemed somewhat indifferent to whether or not he had done harm to the children. It had not occurred to him, he said, to compensate or to suggest compensation for either of his victims.”
    - He seemed indifferent as to whether or not he harmed these children
  + “Overall, the Committee is left with the unsettling perception of a man at once intelligent, articulate, manipulative, and prone to intellectual rationalization of his past misconduct. The Committee is not satisfied on the balance of probabilities that this applicant has truly reflected upon and altered the moral code and structure of beliefs which led or allowed him to act out his predatory assaults upon the children. His personal non-conforming views on the significance of sexual relations with children, ironically reinforced by his educational background in the teachings of ethics and philosophy, do not, to the Committee, seem to have truly changed in the aftermath of his arrest and conviction. The Committee believes, in spite of his evidence, that he continues to rationalize his actions.”
    - He does not presently have remorse to his behaviour, he did not own his behaviour or have any remorse for the children. He bears the burden of proving good character and has not done this
* **Held:** Committee did not find that he was a person of good character. Therefore, ineligible to practice law. Even though he was not at a risk of reoffending, they want to (a) protect the public and (b) reputation of the administration of justice. Given the nature of the offences they could not declare him to be a person of good character
* **Note:** He took his own life after but self-harm is not something the law society should consider in their decisions

## Goals of the Good Character Requirement

1. Protect lawyer’s future clients
   1. Imagine DMP working with children as their lawyer. When you are called to the bar there are no restrictions as to the work you can do or the clients you can have therefore it is important, when calling someone to the bar, that the Law Society takes into account everyone they could possibly work with
2. Maintain (or increase) respect for the administration of justice

## Case law on “Good Character”

### Re D’Souza [2002] LSDD No 62

* Falsification of academic transcripts
* **Facts:** Cheryl D’Souza is now practicing law in Ontario. She was a lawyer in India, had a Masters degree in Law and she was already authorized to practice in another jurisdiction. She came to Canada, and sought accreditation through the National Committee of Accreditation. In order to be accredited, she had to take three courses in a Canadian law school. She enrolled at U of T. In those three courses she received a B, C+ and a D. Upon receipt of her grades, she applied to Tory’s. However, her grades were not competitive for the pool of applicants that applied to Tory’s so they denied her. About a year later, she was hired by Mitchell Corman who agreed to serve as her articling principal. She continued to work on assigned business as a document management consultant on the side. While she was articling with him, she decided to apply again to Tory’s for a non-lawyer position with the firm to run their document managing system. She got an interview, and they liked her and asked her about her future as a lawyer and she mentioned she was articling at another firm. These lawyers raised the possibility of her completing her articles with Tory’s in addition to the position she was applying for and she said yes. They got in touch with the student co-ordinator at Tory’s who said that she would have to provide Tory’s with her transcripts from U of T. She sent her transcripts in, but they could tell immediately that it had been altered and the D that she had received in evidence had been turned into a B. They told the student co-ordinator who recognized the transcript and the name and found her old application file. The lawyers called D’Souza and informed her that she would not be hired and that they would be reporting her to the Law Society. She completed her articles and the Law Society contacted her and informed her that she would need to have a good character hearing. She explained that the transcript alteration as simple negligence, she was distraught when she received the D on the transcript and in a fit of rage, she changed the D to a B. She meant to have a meeting with the Professor to appeal the grade but never got around to it. She accidently sent the altered transcript to Tory’s rather than the original. The Committee found that she was lying throughout her hearing. Her articling principle came to testify on her behalf as to her good character and that she was a highly skilled articling student and someone that he trusted.
* **Issue:** Should D’Souza be admitted to the bar? At the time of the hearing if she a person of good character?
* **Ratio:** Concepts or remorse + time can aid in good character hearing.
* Timing element- Dishonesty at the time of good character hearing
  + On the stand at the time of her hearing the Law Society believed that she lied, and they said that this was clear evidence of a lack of remorse for her behaviour.
* **Held:** They did not call her to the bar originally as time was a factor however she is now practicing law in Ontario.
* **Note:** that candidates denied admission based on the Good Character Requirement can apply again in the future
* “As much as individuals we can forgive and understand, our unhappy task is to assess good character at the present time. We are not satisfied that this applicant currently has the character requisite for admission to the bar. At a later time she may well be able to bring evidence that would satisfy a panel.”
  + Failed at first hearing; succeeded after. 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 had passed

### LSUC v Aidan Christine Burgess [2006] LSDD No 81

* Undergraduate plagiarism
* **Facts:** Students from Queens law who did very well and articled at Osler’s. At the end of her articling period, when she was being called to the bar, she filled out the application form. She correctly responded that she was the subject of undergraduate misconduct where she was punished for plagiarism at U of T. Law Society asked her to explain. She responded that she had handed in the paper in two separate courses, she technically plagiarized her own work. She said this was a technical error that she did not realize was wrong at the time, but she admits she should not have done that. She was very remorseful. However, this story was a lie. What had really happened was that she had plagiarized a paper written but someone else entirely and then submitted it as her own. Because of her own initial admission, the Law Society launched their own investigation and through that, she continued to put forward her false account of the plagiarism. Several friends and coworkers wrote letters of support, but she had told them all the false explanation of what happened. At the good character hearing, they put this evidence to her and told her that they had found out what she really had done and asked her why she made up a fake version. At this point, she became truthful and she said she was afraid she would not be called to the bar if she told the truth. She said she consulted the U of T rule book regarding academic misconduct and found what the least egregious form of plagiarism was and took that story. Hearing panel concluded that from the time that she committed plagiarism, through the time of her false explanation, that she could not have been found during that time to be a person of good character. However, at the time of her hearing, she admitted all wrongdoing and expressed significant remorse for what she did. People who supported her said that they were disappointed but maintained that at the time of the hearing she was a person of good character and that they trusted her.
* **Issue:** Does her conduct demonstrate that she is of good character?
* **Ratio:** Passage of time is critical indicator of good character. The relevant test is not whether there is too great a risk of future abuse by the applicant of the public trust, but whether the applicant has established her good character at the hearing.
* **Held:** Not admitted to the bar. Even though these people trust her and believe that she is a person of good character, not enough time has passed at the time of her hearing since she had been lying to the investigators. That is too quick of a turn around. Not enough time has passed and she is not a person of good character at the time of the Committee’s decision and so could not be called to the bar at that time.
* Some character reformation has to have happened from the time when you were a person of bad character and the time when you are found to be of good character.
* Remorse + Passage of Time= Good Character and called to the bar
  + Most recent evidence they had was that she recently lied so not enough time passes
  + Need to be a person of good character, showing remorse 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 No 63

* Destruction of Evidence
* **Facts:** Sharon Shore was a 50 year old applicant who had articled at a firm called McCague after graduating from Osgoode Hall. In 1998, shortly before she went to law school, her 10 year old daughter died in hospital. Two nurses were charged with homicide on the basis that they had given her daughter an improper dose of morphine. There is an ongoing homicide investigation while she was in law school. During the investigation, Sharon was asked to hand over any medical reports that might cast light on the issues related to that case. She did so, but she also destroyed some of the evidence, namely potentially relevant reports made by a neurologist which recorded his belief that her daughter’s problems, what had her in the hospital in the first place, were more psychological than anatomical. He said that she was not physically ill but that she had psychological issues and recommended counselling rather than other forms of medical treatment. Sharon felt that these reports would be damaging to the memory of her daughter. She destroyed this knowing that it would be considered relevant evidence in the ongoing investigation. According to the Law Society, the destruction of this report could potentially have hampered the ability of criminal charges to go forward. These charges had to be withdrawn, in part due to the destruction of evidence. She destroyed these reports in 2003, three years before her good character hearing. She did not try to justify her behaviour, explain it away or claim that it was anything other than terrible, she owned it. She had deep remorse and the Law Society did not think that she would commit something similar in the future.
* **Issue:** Can a person who destroys evidence relevant to a criminal proceeding, just three years before her hearing date be considered a person of good character?
* **Ratio:** Serious remorse and passage of time can result in good character.
* She did have a huge amount of good character evidence provided by friends and colleagues.
* LSUC Decision
  + “We do not condone what the applicant did. It was a wrong of the most serious kind. The suppression of evidence in a serious criminal proceeding with the knowledge that it should have been disclosed and with the knowledge that the defence, however mistakenly, thought the document was relevant to their case, is grave conduct. The suppression of evidence is a perversion of the administration of justice and the rule of law. The consequences of such misconduct can be catastrophic, resulting in the wrongful conviction of an innocent person, and in this case, the consequences were severe in that serious criminal charges were lost, in part, because of the applicant’s failure to disclose the evidence.”
  + “She has without reservation showed great remorse and shame for her actions. That remorse was genuine and heartfelt. In her evidence, she clearly, eloquently, and without qualification stated that her actions were wrong. Even when some of her character witnesses offered excuses for her wrong, she made none. We accept her evidence that she came forward to admit her wrongdoing and set the matter right for one reason- because it was wrong. The applicant clearly appreciated the effects of her wrongdoing, its negative impact on the administration of justice, and the destruction of her own credibility at the time. That she came forward in the circumstances that she did, despite the great costs of doing so, is evidence of her good character.”
    - She didn’t try to justify what she did but rather owned her behaviour
* **Held:** She was a person of good character and ought to be admitted to the practice of law and she was admitted.
  + DMP did not seem to appreciate the gravity of his conduct at the time of his hearing, while Shore did. DMP did not appreciate the harm he inflicted while she did.
  + (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 [2013] LSDD No 210

* Sexual Exploitation and Luring of a Child
* **Facts:** In 2001, James Melnick became a teacher, teaching grade 7 and 8 and served as a guidance counsellor. From 2002 – 2004, he taught a young student named AS in grade 7 and 8. They began a friendly relationship that extended beyond the classroom and included emails. In the summer following grade 8, AS started seeing Melnick socially. She would have been 13 or 14 at the time, they met when she was 12. They went fishing together and together with Melnick’s wife, they took a trip to Canada’s Wonderland. She is no longer at the school where he teaches. Over the summer following grade 8, the emails began to display increasing intimacy between AS and Melnick. By September, the emails contained discussions of sexual fantasies. During September and October of grade 9, Melnick took AS to a variety of secluded places where he told her that he loved her and initiated sexual contact such as kissing, oral sex and mutual sexual touching including to ejaculation. Towards the end of October 2004, Melnick arranged to spend the night with AS in a hotel room when her parents would be away. On October 27th AS was reported missing, while her disappearance was being investigated, Melnick brought her home. Police contacted him and charged him with having abducted AS but that charge was ultimately dropped once police became aware of the sexual contact between the two, they replaced the abduction charges with charges of luring of a child and sexual exploitation. In 2005, he plead guilty and he was fired from his job and lost his license as a teacher as the teaching profession found him to be unfit to be a teacher as of 2005. In 2006, he was tried and plead guilty and convicted. He was sentenced to 6 months in prison and put on the Sex Offender Registry. Leading up to his trial, Melnick applied to Western Law, without revealing his misconduct. He was accepted in 2006. Following his conviction, he phoned Western’s former dean, revealed the facts of his conviction and asked if he could defer his admission while he served his jail sentence. The dean agreed. Apparently only the dean knew about his conviction until 2nd or 3rd year. Melnick was a solid student and well liked. He worked as an RA. When time came to secure an articling job, Melnick went around to professors asking for letters of reference and at this time he did disclose his prior criminal conduct. Professors agreed to write him letters. He ended up being hired by Western’s Community Legal Services. He disclosed his prior conduct to the Law Society, and they held a good character hearing. Good character evidence was presented by Melnick’s wife, the former dean, his articling principle at CLS and a few professors who all supported his call to the bar or at least said that he displayed good character. Good character hearing happened in 2009, 5 years after he was involved with that young girl.
* Hearing panel held thathe is not a person of good character and should not be called to the bar. The Hearing panel did not like how he characterized his relationship with the young person, he referred to himself as having a saviour complex when he was actually sexually exploiting them.
* Melnick appealed this decision to Convocation which is the overall body of the Law Society that has appellate jurisdiction. Convocation overturned the hearing panel’s decision stating that they had been unreasonable in finding that he was a person of bad character. They said that he was a person of good character.
* **Issue:** Should he be called to the bar?
* **Ratio:** Serious remorse and passage of time are the leading requirements for good character
  + “Despite the obvious attention that the hearing panel gave to this matter, it made findings that were unsupportable by the evidence. If one sets aside the unreasonable findings, the evidence overwhelmingly supports a finding that the appellant is now of good character.”
* **Held:** Convocation overturned the Hearing Panel and declared Melnick eligible to be called to the bar. He is now practicing law just outside of London, ON.
  + **Doctor said he had no chance of reoffending**
* There was massive outrage. Law Society said the good character requirement needs some reworking.
* Leading cases right now, ***Shore*** and ***Melnick*** 🡪 **expression of remorse and passage of time are still requirements**

## Reforming the Rule

* Establishing National Good Character Standards
  + The Federation of Law Societies of Canada is undertaking a major initiative on behalf of law societies to develop national standards for admission to the legal profession. The development and implementation of a common standard for ensuring that applicants meet the requirements to be of good character, including the identification of appropriate methods for assessing whether applicants meet the standards, is a major part of that work
  + A working group of policy and credentialing staff from law societies across Canada has been tasked with developing a standard for approval by the Federation Council and consideration and adoption by the law societies
  + The working group has prepared a consultation report to solicit input on the issues it has considered and its preliminary views on the content of the good character/suitability to practice standard
* Do we need a “good Character” rule?
  + Yes of course we do, it will never be removed
* How should it work?
* Is the emphasis on “Remorse” appropriate?
* Should it be more specific?
  + Should there be a list of specific offences that foreclose your ability to practice law?

# Civility Regulation

## Introduction

* Civility is important, the regulation of it is complicated
* How do we regulate civility?
* Why do we bother?
* Issue: Civility regulation is a limit on a constitutionally protected right. The default state is that all expression, without regard to its content, is protected under the *Constitution*.
* **The Crisis Incivility:** The notion that right now, in Canada and the US, people have forgotten how to behave. People are a lot less civil than we are used to them being.

## The Golden Age of Civility?

* Today’s lawyers are said to be less civil than those of the past
* Civility in general seems to relate to how we treat each other, clients and the courts
* **FLSC 6.3-3:** A lawyer must not sexually harass any person
* **FLSC 6.3-4:** A lawyer must not engage in any other form of harassment of any person
* **FLSC 6.3-5**: A lawyer must not discriminate against any person
* **Commentary [1]:** A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.

## Sources: Contempt of Court

* Criminal Code of Canada, s. 9: Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 730:
  + (a) of an offence at common law,
  + (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or
  + (c) of an offence under an Act or ordinance in force in any province territory or place before that province, territory or place became a province of Canada,

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

* This section essentially eliminates common law crime and crimes that have not been incorporated into Criminal Code but it does carve out this exception of contempt of court
* Contempt of court remains the only common law crime in Canada. It is the power of a court to control its own process and to control advocates who appear before it. If a judge finds that anyone in court, including the lawyers, through their behaviour disrupts the process of the court, the court has broad contempt-based powers. The court can give out a wide range of punishments including fines, jail etc.
* Contempt of court usually applies in the face of the court before the judge.

## Sources: The Rules of Civility

* **FLSC Code, Rule 5.1-5:**
  + A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings
  + **Commentary [1]:** Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by a lawyer, even though unpunished as contempt, may constitute professional misconduct
    - Even if your conduct has not risen to a level that it has upset a judge enough that they will punish you for contempt of court, Law Society could still punish them. This is the case where the Law Society has investigated this individual and discovered that over the course of a number of proceedings, they have come very close to the line with a number of judges. No individual judge has punished them, but when Law Society looks at the totality of behaviour, they see the consistent pattern of disruptive conduct. The Law Society can still find you guilty of professional misconduct.
    - Violation can constitute professional misconduct, giving rise to sanctions in s. 35
* **FLSC Code, Rule 7.2-1:**
  + A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of his or her practice
  + **Commentary [1]** The public interest demands that matters entrusted to a lawyer be dealt with effectively and expeditiously, and fair and courteous dealing on the part of each lawyer engaged in a matter will contribute materially to this end. The lawyer who behaves otherwise does a disservice to the client, and neglect of the rule will impair the ability of lawyers to perform their functions properly
    - Provides justification for the rule of civility suggesting that it is tied to efficient and effective client service. Civility is required because its absence will impair a lawyers ability to serve their clients.
  + **Commentary [2]** Any ill feeling that may exist or be engendered between clients, particularly during litigation, should never be allowed to influence lawyers in their conduct and demeanour toward each other or the parties. The presence of personal animosity between lawyers involved in a matter may cause their judgement 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
    - Personal remarks and abusive tactics interfere with the administration of justice
  + **Commentary [3]** A lawyer should avoid ill-considered or uninformed criticism of the competence, conduct, advice or charges of other lawyers, but should be prepared, when requested, to advise and represent a client in a complaint involving another lawyer
  + **Commentary [4]** A lawyer should agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities and similar matters that do not prejudice the rights of the client
* **FLSC Code, Rule 7.2-4**
  + A lawyer must not, in the court 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 the communication between the lawyer and other people
* **FLSC Code, Rule 3.2-1** (under the heading “Quality of Service”)
  + A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.
* These rules present a challenge from statutory interpretation perspective. **Rules 5.1-5** and **7.2-1** differentiate the word courteous from civil. This suggests that these words mean something different. Based on the case law this is not the case, it appears as though when we say be courteous and civil we are talking about the lawyer’s manners.

#### Overview

* These rules compromise the overarching duty of civility
* Provide challenge from statutory interpretation standard
* Courteous and civil are differentiated suggesting that they mean something different from one another

## Tensions with Other Rules

* **Commentary 1 to Rule 5.1-1**
  + Role in Adversarial Proceedings: In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer’s duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties’ right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.
    - Bold assertion: order is maintained
    - Tension between asking distasteful questions on the one hand and conducting yourself with candour, fairness, courtesy and respect

## The “Indeterminacy Objection”

* Tribunals can infuse their own views into the decisions thereby making them subjective
* If the word civility is infused with so much indeterminacy that it provides little or no guidance to the profession, it might be time to get rid of the rule
* Civility can carry with it whatever meaning the Tribunal wants

## The Regulatory Model of Legal Ethics

* The rules regarding civility, more than any other rules call upon us to look at the regulatory model
* One important element of the regulatory model relates to costs of enforcement – there is a social cost for everything
* The regulatory model states that we should only take cost justified precautions or cost justified regulatory measures. We should not spend $100 to prevent the theft of a dime. We only regulate activities that impose costs on the world. But, we should not regulate those at all if the costs of our regulating exceed the costs that we are trying to prevent.

## The Costs of Incivility

* Court efficiency
  + The suggestion is that if lawyers are rude or wasting the courts times by arguing with each other, then justice will be less efficient and it will take a lot longer for the wheels of justice to turn
* Reputation of the administration of justice
  + If the public observes lawyers being rude to each other, the public might have less respect for the justice system or respect it so little that they turn to extra-legal means to enforce their rights
* Hurt feelings
  + People might feel bad if someone calls them bad names. If people routinely treat each other horribly and are unkind, that makes the profession less attractive and might drive people away from the 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
  + For example, in sexual assault cases, if victims are worried about how the lawyer will treat them, they might be less willing to bring forward their complaint

## The Costs of Enforcement

* Law Society and Court resources that could be spent on their matters (ie, pursuing people who defraud their clients)
  + Less money is therefore available to pursue other matters
* 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 is the only way to achieve justice for your client is to rattle the opposition?
  + Sometimes referred to as the **chilling effect of civility regulation**
  + If counsel are unsure about the consequences of civility regulation, and fear prosecution for professional misconduct then they might not press witnesses or claimants as far as they should in cross examination. This good lead to less accurate verdicts.
* Expensive proceedings (paid for by tax dollars or lawyers’ annual law society fees – money which could be deployed in other ways)

## What Counts as Incivility

* Calling another lawyer an idiot
  + Context obviously will matter
* 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 strident at your firm”
  + Here you are calling into question your opponents’ competence in front of your opponents clients
* During discussions with opposing counsel (at which your clients are present), suggesting that opposing counsel has a history of incompetence or unethical behaviour
  + Will require some context
* Sexual harassment
  + Should this count as incivility or is this so bad that we carve it out of incivility and have it’s own rule?
  + Law Society has carved this out of incivility and dealt with it via it’s own rule of professional misconduct
* During a trial, accusing the judge of participating in some form of criminal behaviours (such as fraud, treason or illegal exercise of jurisdiction)

### LSUC v Clark [1995] LSDD No 199

* **Facts:** Bruce Clark was a lawyer who appeared frequently before the SCC, he was a rather successful advocate. Bruce Clark was a lawyer in Ontario up until 1999 when he was disbarred for a variety of actions he took while representing Aboriginal interests in the courts. The Law Society declared him to be ungovernable, meaning that he just would not abide by their rules and regulations and so they revoked his license. When he was disbarred in 1999, that was the Law Society’s second attempt to disbar him. The first attempt in 1995 is the one we are studying here. Clark was a lawyer in Ontario who was devoted to Aboriginal rights, though he was not an Aboriginal person. He held an MA in history with a focus on Aboriginal history and a PhD in jurisprudence in the field of Aboriginal rights. His underlying opinion about Aboriginal persons and their rights is odd: He believed that a great deal of Aboriginal territory was never properly surrendered to the Crown in accordance with the procedures set out in the relevant Treaties. He contends that these are still Aboriginal territory and that Aboriginal persons living on them are not subject to Canadian law or to the jurisdiction of Canadian courts. He argues that the assertion of jurisdiction over Aboriginal people has contributed to the current plight of Aboriginal people and amounted to complicity in genocide. His argument is that the basic way that the Canadian legal system has contributed to this cultural genocide is through the assertion of jurisdiction over people concerning whom the courts have no jurisdiction as a result of the fact that their territories were never properly surrendered. He made this argument very vocally and in Canadian courts he tended to shout a lot and one time even threw a Book of Authorities at a court clerk and yelled “File this!”. During oral arguments, he would regularly accuse the judge of genocide by saying “you are complicit in genocide by your decision against my client”. He also accused the BCCA of genocide and claimed that he was going to attempt a citizens’ arrest on at least 4 of the judges.
* Complaints against Clark:
  + (i) an affidavit which he swore, dated February 2, 1993, he alleged that:
    - A) The AG of Ontario was a part to a fraud with respect to concealing relevant evidence from appellate courts, and alleged that the AG of Canada was probably also a party to this fraud;
    - (b) Chief Gary Potts fraudulently, treasonably and genocidally induced the SCC to render a decision pursuant to a treat that is demonstrably void; and
    - (c) The leaders of the Aboriginal entities who caused a Note of Change of Solicitors to be delivered by Blake, Cassels and Graydon on February 24, 1993, did so in an attempt to further their fraud, treason and complicity in genocide
      * These particular Aboriginal leaders are changing solicitors, leaving Clark and hiring someone else, and he is claiming that that change in solicitors in complicity in genocide
  + (ii) In an affidavit which he swore, dated March 15, 1993, he:
    - (a) implicitly suggested that a decision made by the Honourable Mr. Justice Bolan of Ontario earlier in said litigation might constitute complicity in the crimes of fraud, treason and genocide;
    - (b) alleged that The Honourable Mr. Justice Bolan wilfully blinded himself to precedents, statutes and facts; and
    - (c) further alleged that The Honorable Mr. Justice Bolan’s refusal to address the precedents, statutes and facts… proved his own criminal liability
  + (iii) In an affidavit which he swore, dated April 20, 1993, he:
    - (a) alleged that the AG of Canada and the provinces and the judges of the courts of Canada wish to evade the questions as to whether Aboriginal courts have jurisdiction over land;
    - (b) accused the AG of Ontario of abuse of process and of invoking a criminally illegitimate aspect of non-native court jurisdiction;
    - (c) alleged that the AG has resorted to chicanery and is guilty of complicity in fraud, treason and genocide and of aiding and abetting the continuation of crimes;
    - (d) accused The Honourable Mr. Justice Huneault of escaping with his genocidal usurped jurisdiction intact in dealing with a previous motion in the litigation;
    - (e) alleged that the AG had fraudulently breached an agreement with counsel for the Aboriginal entities;
    - (f) accused Chief Potts and Rita O’Sullivan (the solicitor’s former clients) of participating in a system of patronage and bribery;
    - (g) accused the AG of Ontario and Canada, as well as unspecified judges, of being guilty of fraud, treason and genocide;
    - (h) accused The Honourable Mr. Justice Steele of Ontario and the Honourable Chief Justice McEachern of BC of racist attitudes which are fraudulent and treasonable and amount to genocide;
    - (i) accused the AG of sharp practice and chicanery and of being engaged in a criminal conspiracy on a national scale to pre-empt the law in furtherance of the crimes of fraud, treason and genocide;
    - (j) Accused the AG of cunning chicanery;
    - (k) accused the AG of sharp practice and chicanery and accused the Canadian domestic court of racism;
    - (i) accused the AG of concealing relevant evidence from appeal courts; and
    - (m) accused The Honourable Mr. Justice Loukidelis of Ontario of judicial complicity in the AG’s chicanery
  + (iv) He made allegations similar to… above, while making oral arguments before The Honourable Mr. Justice Hineault on March 19, 1993
  + (v) When appearing before The Honourable Mr. Justice Roberts of Ontario on June 1, 1993, he… refused a direct order from The Honouorable Mr. Justice Roberts to cease argument on this point and to sit down; accused The Honourable Mr. Justice Roberts of perpetuating fraud, treason and genocide; accused The Honourable Mr. Justice Roberts of wilful blindness; stated that he intended to lay an information against Mr. Justice Roberts forthwith; alleged that The Honourable Mr. Justice Roberts was afraid to charge the solicitor with contempt; and stated that he was going to attempt to lay an information against The Honourable Mr. Justice Roberts for complicity in fraud, treason and genocide
    - (h) By engaging in the course of conduct referred to above, he demonstrated his unwillingness to be governed by the Law Society or its Rules and Regulations
    - (i) on or about June 6, 1993 in Haileybury, Ontario, the solicitor unlawfully assaulted a member of the OPP
      * He removed the officer’s hand from his wrist. Clark was committing a trespass in trying to pursue a particular case. A police officer came up and asked him to leave the property, grabbed Clark by the wrist and Clark removed his hand.
    - (j) On or about June 6, 1993, the solicitor unlawfully trespassed upon certain property in Haileybury, Ontario, in an unjustified and illegal attempt to carry out a citizens arrest of one James Morrison….
    - The discipline hearing panel found all of the 21 allegations quoted above to have been established
  + **Result:** Hearing Panel recommends Disbarment. They found that he was ungovernable. This recommendation is carried forward to Convocation which is all the benchers sitting together as an Appellate body to consider the recommendation of the Hearing Panel
  + **Issue:** did Bruce Clark act with Civility/Integrity? Is he deserving of the punishment recommended by the Hearing Panel?
  + **Ratio:** The substance of your argument will affect how “uncivil” you are allowed to act. They place a high value on whether you sincerely hold belief in your argument. Law Society must strike balance between regulating civility and oppressing lawyer advocacy.
  + **Recall rule 5.1-5:** A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings
  + Convocation’s Decision
    - “We approach the merits of these complaints by placing great importance on the context in which these arguments are made… As mentioned above, the discipline hearing panel acknowledged that Mr. Clark’s argument (as summarized above) is at the root of the complaint of professional misconduct that the discipline hearing panel and Convocation have been called upon to adjudicate. Mr. Clark’s argument is anything but frivolous. It is the product of intensive study, and reflects a belief that Mr. Clark sincerely holds.”
      * In the context of a civility regulation, we do care about whether counsel actually believes the argument that they are making because if you are engaging in rambunctious uncivil behaviour in the context of an argument you are making just to win a case, it seems that the Law Society might treat you differently than if your making that same argument in a case where you genuinely believe the argument you are making.
    - “It would be difficult to disagree with Mr. Clark’s assertion that the issue that his argument raises is ‘constitutionally critical’. Again, the discipline hearing panel found that Mr. Clark honestly believes that the comments and conduct particularized in the complaint – which are an outgrowth of his argument – were intended to advance the cause of justice and the rule of law. The ‘genocide’ of which Mr. Clark speaks is real, and has very nearly succeeded in destroying the Native Canadian community that flourished here when European settlers arrived. No one who has seen many of our modern First National communities can remain untouched by this reality.”
    - “Had this activity been engendered in a context less fraught with significant and emotion, we would take a very different view of Mr. Clark’s conduct. The nature of Mr. Clark’s argument is such that the persistent refusal of the Courts – he states, without contradiction, that he has attempted to raise this argument some forty or forty-one times- itself in part engenders his fixed and firm conclusion this his argument is correct. The issue has not been determined by any Court. It is clear to us that the solicitor has been captured by this argument.”
      * Law Society was saying that if a lawyer acted this way in the case of say a parking ticket where there were no issues of civil liberty, your behaviour will be treated very differently. Therefore, the topic/context is relevant
      * He would try to make the arguments about genocide etc. and courts got sick of hearing it. Is that really appropriate? He was not given the ability to advance his arguments
    - “It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized…” (quoting Justice Cory in *Edmonton Journal v Alberta (AG)* [1989] 2 SCR 1326)
    - “The Law Society should be loath, in professional discipline proceedings, to become the arbiter of lawyers’ advocacy techniques. Style of advocacy vary greatly, and the effectiveness of any particular style is not a matter for Conviction to pronounce on in the context of an allegation of professional misconduct…. There is no necessary conflict between [the rules of civility] and lawyers’ duties to represent their clients “resolutely”…. ‘to raise fearlessly every issue, advance every argument and ask every question, however distasteful, which the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defense authorized by law’ … and ‘ to protect the client as far as possible from being convicted except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged.”
      * They don’t want Law Society to use professional discipline proceedings to become arbiters of advocacy techniques. They are characterizing Clark’s conduct as a style of advocacy.
      * Characterizing what he was doing as “style of advocacy”
    - “The Law Society must always be acutely sensitive to the danger that its disciplinary process may be sued to punish vigorous advocacy. The Law Society should act aggressively to protect counsel from attempts to inhibit zealous advocacy on behalf of clients. This duty flows from the Society’s responsibility- confirmed in the role statement approved by Convocation- to protect the independence of the bar. It is important to our decision that the use of what would in most other circumstances rightly be regarded as extravagant, disrespectful and discourteous language, in Mr. Clark’s case emanated directly from the legal argument that he was vigorously advancing on behalf of all his client. In attempting to resolve the tension between vigorous advocacy in the face of judicial resistance and the duty to treat the tribunal with courtesy and respect, much will depend on the context”
    - “We are sympathetic, moreover, to Mr. Clark’s assertion that the courts have been unwilling to listen to his argument. Though he must accept part of the responsibility for this, it is apparent on the record that he has been prevented by the courts on a number of the occasions in issue from effectively presenting the argument summarized above.”
    - “The lawyer’s duty to resolutely advance every argument the lawyer thinks will help the client’s case is of fundamental importance to the proper functioning of our judicial system. Failures to carry out that duty [to advance every argument] are more prevalent within the system of justice and more harmful to that system than are overzealousness and failures to treat the courts with courtesy and respect. Where the duties do come into conflict, Convocation should be reluctant to find that overzealousness constitutes professional misconduct.”
      * They are endorsing a hierarchy of duties for lawyers; the duty to zealously press all considerations that help your client outweighs the duty to be courteous
  + **Held:** Disbarment overturned
    - Recall Rule 5.1-5: A lawyer must be courteous and civil and act in good faith to the tribunal and all persons with whom the lawyer has dealings.
    - Not “ungovernable”
    - His attempted Citizen’s arrest of the BCCA “caused only a minor disruption”
    - Assault and trespass were “technical” and “momentary”, “no harm was done”
    - License reinstated
    - The actions above still qualify as professional misconduct
    - **Appropriate penalty:** reprimand
      * He had to go before Convocation and be told that his conduct was inappropriate. Mr. Clark refused to attend Convocation to be reprimanded and so they just left him a mean voicemail
    - Clark continued to engage in this behaviour despite being warned and it rose to a level that led to his disbarment in 1999. He promised that if they would give him his license back, he would stop bringing up this issue.

### LSUC v Joseph Peter Paul Groia [2013] LSDD No 186

* **Overview:** Leading case on civility
* **Facts:** Joe Groia is a well-known litigator in Toronto with a reputation for being belligerent. He was the lawyer for the people accused in *R v Felderhoff*, a case arising out of the Breex scandal. Breex was a gold mining company that had been trading as a penny stock and then claimed to have struck a major gold vein. Their stocks went crazy which was very profitable for investors. As it turns out, that major gold vein was not real and Breex had not actually struck gold at all and the mis-discovery of gold was fraud, not an accident. John Felderhoff was the VP of this company and he had made several false claims about the possible value of the gold mine. Once it came out that it was false, the stocks lost almost all their value in seconds. Ontario Securities Commission admitted that there was no evidence Felderhoff was aware of the fraud, but he was still charged with the offence of insider trading which is when you trade securities based on insider information that is not yet public. At this trial by the OSC, Felderhoff was represented by Joe Groia. The trial was crazy but Felderhoff was acquitted and Groia won. Throughout the trial, Groia kept accusing the prosecution, Mr. Naster, of prosecutorial misconduct. He said that he prosecutor and the OSC were engaging in a witch hunt and that the prosecution just wanted to put the blame on someone. The core of Groia’s argument is that the prosecution had failed in its disclosure obligations in its duty to disclose prosecutorial materials. On March 1 2011, Day 54 of the trial, Mr. Groia submitted that he had concluded that the prosecution’s position offended the principle that the duty of the prosecutor is not to seek a conviction. Mr. Groia submitted that the examination in chief of Mr. Francisco had been “conducted in a manner intended to secure a conviction, not to tell the whole story.” He repeatedly suggested that the prosecution was using ‘a conviction filter’ in the presentation of it’s evidence and that the prosecution, by failing to adduce defence evidence, was laying “an unfair trap” for the defence consistent only with a ‘convict at all costs’ approach to the case
  + Mr. Groia then submitted that the OSC “demonstrated an actual disregard for the dignity of these proceedings…” …. He suggested that Mr. Naster’s conduct might form the basis for a finding of contempt of court”
  + He continually impugned the integrity of the prosecution and kept calling Mr. Naster “the government” and calling him a liar and saying he did not care about the truth. He said that they did not care whether his client was innocent or guilty they just wanted to convict him. Mr. Naster responded by demanding he substantiate these claims or asked the judge to rule he committed professional misconduct.
  + Judge refused to do this and Groia continued to insult the prosecution. The prosecution sought to have the judge removed from the case which resulted in Judicial Review proceedings which went to the ONCA. ONCA was not dealing with the securities claim, they were just dealing with whether the TJ had lost jurisdiction due to his handling of the proceedings.
  + During Judicial Review, both the Reviewing Court and the CA made a series of claims about Groia’s conduct. Original reviewing court said his behaviour was unacceptable and ONCA said that his claims of prosecutorial misconduct without evidence amounted to potential violations of the Rules regarding Civility. While usually it is the Law Society interpreting their rules, here, before Groia has ever been charged with any misconduct, the ONCA is saying that his actions could constitute professional misconduct.
* Judicial Descriptions of Groia’s behaviour
  + “In his reasons, the application judge has set out many examples of Mr. Groia’s conduct in the trial. The application judge described this conduct in some of the following ways:
    - Unrestrained invective, excessive rhetoric, descended from legal argument to irony to sarcasm to petulant incentive, theatrical excess reaching new heights, resembling guerilla theatre rather than advocacy in court, unrestrained repetition of sarcastic attacks, defence consisting largely of attacks on the prosecution, including attacks on the prosecutor’s integrity
* **Issue:** Did Joe Groia violate the rules of civility? If so, when did his conduct cross the line? Does it matter that his conduct was “successful”, in the sense that he won the case? To what extent can defense counsel impugn integrity of opposing counsel and to what extent did that occur? Should there be a penalty? If so, what? When addressing this issue, consider the fact that costs in this case have already amounted to over $200, 000 and Groia will be forced to bear these if he loses
* **Ratio:** Allegations of professional misconduct that impugn integrity of opposing counsel are uncivil, unless they are both made in good faith and have a reasonable basis. Look at whether is an isolated event of pattern of behaviour. Looks to whether the accused was provoked. Looks at remorse during sentencing. Looks at prior discipline record during sentencing as well as public nature of misconduct having an impact on Groia’s career.
* Law Society’s Decision:
  + “Taken as a whole, the submissions we have excerpted can best be described as a relentless personal attack on the integrity and the *bona fides* of the prosecutors. It is important to emphasize that the examples we have selected provide some flavour, but it is difficult to convey the cumulative effect of the unabated repetition over the course of 10 hearing days of Mr. Groia's vehement and very lengthy attacks on the prosecutors. These attacks were personal in nature. In Mr. Groia's testimony before the hearing panel, he suggested that he never attacked the prosecutors, but merely the way in which the prosecution was being handled by the OSC. We disagree. Some of these comments taken in isolation could arguably be seen as directed at the OSC or the Crown, not the individuals who were representing it in court. Taken together, in context, over the course of this lengthy trial, it is very clear that they were decidedly personal.”
  + “These attacks were aimed at the integrity of the prosecutors, by repeatedly asserting that they had broken their 'promises' and could not be relied on to do what they represented to the court and were, in a word, untrustworthy. These attacks also included numerous allegations of deliberate prosecutorial misconduct: that the prosecutors intended to 'win at all costs', that their conduct offended the ethical principle that the duty of the Crown is not to seek a conviction, that they were deliberately putting the evidence through a 'conviction filter', and, most troubling, that they were intentionally acting so as to ensure that Mr. Felderhof did not obtain a fair trial. Nothing the prosecutors did justified this onslaught. These attacks on their integrity and *bona fides* did not have a reasonable basis.”
  + “We have little sympathy for Mr. Groia’s arguments regarding the ‘civility movement’ and the supposed retroactive application of a higher standard to his conduct. As outlined earlier, the rules of professional conduct at the time leading up to the trial, contained clear rules regarding a lawyer’s obligation to avoid ‘ill-considered or uninformed criticism of the competence, conduct, advice or charges of other legal practitioners’”
    - Groia had brought in various people to testify to the alleged fact that we are getting unduly interested in civility. He brought in Alice Wooley who was a massive civility skeptic. Groia argued that this rise in the standard of civility is retroactive application of the civility rules.
    - Law Society is saying that it is not the retroactive application.
* **Held:** He engaged in professional misconduct, violating rules of civility subject to penalties – 1 month suspension
  + “Finally, Mr. Groia's position that any obligation of civility had to yield to his primary duty of zealous advocacy towards his client is misplaced. In the context of this trial, zealous advocacy did not require Mr. Groia to make unfounded allegations of prosecutorial misconduct. Zealous advocacy did not dictate that Mr. Groia improperly impugn the integrity of his opponents. Zealous advocacy did not require Mr. Groia to frequently resort to invective in describing opponents who were trying to do their jobs. In conclusion, on the basis of the record, which we were invited by both parties to independently examine, we are satisfied that Mr. Groia engaged in professional misconduct as alleged.”
    - Not being civil is enough to violate the rules of professional misconduct
  + “In our view, taking into account all the relevant factors, this is not a reprimand case. Rather, we conclude that a one-month suspension is justified and appropriate in light of the relevant factors. This suspension shall commence 30 days after the release of the appeal panel’s order with respect to costs”
* This was appealed to the ONCA which released it’s decision in 2016 but the ONCA just endorsed the Law Society’s decision with one judge dissenting. This case is going to the SCC soon.
  + “Mr. Groia relies on *Re Clark,* 1995 CanLII 1628 (Ont. L.S.T.), a decision of the Benchers of the Law Society, sitting in Convocation, for its comments about the importance of protecting the independence of the bar and its statement that, to the extent that the duty of zealous advocacy comes into conflict with the duty to treat the court with courtesy and respect, the Law Society should be reluctant to find that overzealousness constitutes professional misconduct.  In my view, *Clark* does not assist Mr. Groia in the circumstances of this case.”
  + “Convocation’s decision in *Clark*, like the Appeal Panel’s fashioning of its test for incivility, was highly contextual and fact-specific.  As in *Clark*, the Appeal Panel balanced the duty of zealous advocacy with the duty of courtesy and civility in light of the facts established on the record.  I have already concluded that the Appeal Panel carefully considered the importance of the duty of zealous advocacy in crafting its test to ensure that the ability of an advocate to resolutely advance his or her client’s cause would not be undermined.  Its formulation of that test is entitled to deference.  Nothing in *Clark* compels me to a different conclusion.”
  + “It is also important to note that *Clark* was decided more than 20 years ago.  Since *Clark*, the legal discourse on professional misconduct arising from incivility has evolved. This court's discussion in *Marchand* exemplifies that evolution. In my view, the particular context of *Clark* makes it unsuitable as a benchmark for incivility.  It does not reflect contemporary appreciation of the advocate’s duty of professionalism
  + They are saying that the context in which *Clark* was decided calls for a different assessment of the balancing act between zealous advocacy and civility. *Clark* is old and civility, and our view of what is civil, has evolved.
  + **Also note:** In the wake of all of this, Joe Groia was elected to be a bencher of the Law Society of Upper Canada which means that lawyers a few years ago had the opportunity to select who they wanted to be Convocation (who would represent them at the Law Society level). They elected Groia and he is now a member of governing body. Consider what this says about the profession’s overall view of Groia’s conduct.

### LSUC v Groia, SCC 2019

* First thing the SCC does is assess the standard of review: how much do we have to disagree with the Law Society before they can overturn it?
  + Agree with the court below that the standard is reasonableness. They can only overturn it if they find the Law Society to be unreasonable
* Why do we regulate civility? Has person implicated any of these reasons:
  + 1) When lawyers are uncivil, that may prejudice the court or jury against their client. If you are a jury, you may take it out on the client if you think their lawyer is an idiot. People might just the substance of a case by reference to lawyer’s behaviour rather than on merits of the case
  + 2) Incivility might be so distracting that a trial court could fail on its fact finding duties if it had difficult assessing the evidence as a result of the incivility
  + 3) If you are a witness appearing in trial and the lawyer is behaving this way, this can be unduly stressful for witnesses and prohibit them from giving their testimony
  + 4) Incivility makes us all look back. It might hurt the reputation of the administration of justice.
* Test for incivility:
  + Groia said that for court incivility should only be potentially chargeable where the incivility rises to the level where it implicated trial fairness or administration of justice
  + SCC says that lower courts were right to punt this test. You can be charged even if the trial fairness is not affected or if the administration of justice is not brought into disrepute
* Appropriate weight between civility and resolute advocacy
  + Sometimes they are at odds
  + SCC said Law Society was right. A robust definition of civility that chills zealous advocacy should not be given. They want people to be brave enough to make their arguments without fearing they might be come after for incivility
  + Want to be reluctant to find that someone has engaged in incivility
* **Test for incivility:** What it should be – 3 stage test
  + 1) Have to assess what the lawyer said: This splits into a sub test
    - Dealing with a lawyer making claims of prosecutorial misconduct or making legal claims: in order to assess what they said you need to determine whether the lawyer had a good faith basis for what they said (subjective) and was there a reasonable test for what they said (objective)
  + 2) Manner and frequency of what the lawyer said. Did they say the same think a lot? Were they calm and dispassionate when saying it or did they yell a lot and swear? Did they interrupt proceedings?
  + 3) Trial judge’s response. Did TJ say stop and the lawyer kept going? Was it enough to bug the TJ such that they intervened? If TJ intervened, did lawyer respond appropriately?
* Incivility in relation to 2(b):
  + Advocacy in courts might be considered core values of expression where we want to be skeptical of regulating what courts can regulate
  + They only have to think about the values and freedom of expression and balance those with the need tor regulate lawyers. They said Law Society did this.
* **Held:** SCC held that Law Society was unreasonable in holding that Groia was being unreasonable. They got the test right but applied it badly.
  + **Principle area of bad application was in part 1.** There has to be a good faith basis AND a reasonable basis for making it. Law Society agreed that Groia had a good faith basis, he genuinely believed that Naster was engaged in prosecutorial misconduct even though he was not. Groia was wrong in his belief because he completely misunderstood the evidentiary rules relating to disclosure of the prosecutions evidence. This led Law Society to say that he had a good faith basis but not a reasonable basis because he misunderstood evidence rules. SCC said that his understanding of the rules of evidence was SO BAD that it was reasonable for him to conclude that there had been prosecutorial misconduct (problem here is that this removes the objective element of it). SCC said they think Law Society also screwed up at stage 3. When the TH finally said stop it, Groia did modify his behaviour at least a little.

## Should We Regulate Civility?

* What are the benefits of regulating civility?
* What are the costs?
* Do courts have adequate tools, through the contempt power, to deal with incivility?
  + Do we need to be supplementing these tools with civility regulation?
* What about incivility outside of the courtroom?
* Are “reputational costs” enough?
  + Notion that people who deal with Groia say nasty things about him and treat him less well because of it.
* What should Law Societies do when faced with repeated incivility?

# Conflicts of Interest

## Overview

* Most complicated and technical part of the court
  + Inherent complexity in rules and regulations and have given rise to litigation in recent years
* Come from two primary sources:
  + **Regulated by Courts** (via private law disputes when client sues their lawyer and the courts’ inherent jurisdiction to control their own process and the sorts of people who will be allowed to appear in court)
    - Part of courts job is to ensure any counsel that appears before it does not have conflicts of interest
    - Courts reserve the right to exclude any counsel from any proceedings where they are operating under a conflict of interest
  + **Regulated by Law Societies** which is represented by Federal Law Societies of Canada (FLSC) (through professional conduct rules)
    - Recall relationship to s.33 of the Law Society Act
    - The Law Societies have largely adopted judicial definitions of conflicts of interest
* Rules of Professional Misconduct have been amended to SCC language (significant overlap)

## Duty of Loyalty

* The **Duty of Loyalty** which is the lawyer’s obligation to remain loyal to the client. One aspect of this duty of loyalty is to avoid conflicts of interest.
  + Root of conflict of interest is often rooted in duty of loyalty
  + Lawyer has a fiduciary duty to put their clients interest first
  + Lawyers owe clients loyalty and part of this is for the lawyer to avoid conflicts of interest
* The lawyer may have competing loyalties
  + (a) between two different clients,
  + (b) between a client and some third party, (i.e. when the lawyer is representing a young client accused of a crime, but the lawyer’s fees are being paid by the client’s parents) or
  + (c) between lawyer’s personal interests and interests of the client (i.e. lawyer is asked to argue in favour of government policy that they detests, or where lawyer acts for a corporation in which they have significant investments and the client wants lawyer to take actions which might affect the lawyers financial interests)
* Conflict exists when there is a material impact or conflict – not simply trivial
* Competing loyalties – **6.2-6.4**

## Sources: Conflicts of Interest

* **Rules 1.1-1 of the FLSC Model Code** defined “Conflict of Interest” as follows:
  + A “conflict of interest” means the existence of a substantial risk that a lawyer’s loyalty to or representation of a client would be materially and adversely affected by the lawyer’s own interest or the lawyer’s duties to another client, a former client, or a third person.
    - Note: substantial risk, must be materially and adversely affected for a conflict of interest to exist
    - Does not need to be that your loyalty to a client was in fact materially and adversely affected before we find a conflict of interest. As soon as you are in a position where there is a significant chance that your loyalty is affected in a material, adverse way then you fit the definition of conflict of interest
    - To find a conflict of interest, there must be a negative affect to your duty of loyalty to the client
    - **Material:** something that has a trivial impact on your loyalty to a client will not be a problem
    - **Adverse:** a negative impact on loyalty or representation to the client
    - This role does not purport to regulate conflicts of interest at all, it simply is a definition
* **Rules 3.4-1 and 3.4-2 of the FLSC Model Code** set out the basic rules:
  + **3.4-1** A lawyer must not act or contribute to act for a client where there is a conflict of interest, except as permitted under this Code (general prohibition relating to conflicts of interest)
    - This rule acknowledges that practicing in the face of a conflict of interest is allowed sometimes.
    - Cannot act for a client where this is a conflict of interest explained in **rule 1.1-1**
      * Allowed in some situations which are outlined by the Code
  + **3.4-2** A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all 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
    - This was recently amended. Old law used to say “all clients” rather than “all affected clients”. But this made the lawyer faced with a conflict of interest have to go to every single client to gain permission which is crazy because then the lawyer would have to give up confidential information that they are representing the two parties to all of their clients
  + Result of the interaction between these two rules is that if you disclose your conflict of interest to all concerned parties and everyone consents, you cannot be found guilty of having violated the rule.

## The Neutral Conduit Model

* Access to Legally Authorized Rights and Remedies despite the complexity of the Law
* How the Neutral Conduit Model Works: the world of law creates for us a set of legal rights agreed upon by us as a society and they are out there for anyone to access. In a perfect world, everyone would be able to access those rights and remedies. But accomplishing any of these things is complicated because the legal system is complicated and individuals who are not trained in law are separated from the rights and remedies as a result of this complexity.
* Lawyers are the neutral conduit through which clients are able to access the rights and remedies authorized by law. The lawyers only reason to exist is to navigate this complexity and get through the barrier.
* Difficulty in this scenario is that it creates agency conflict. The lawyer carries all the usual baggage that humans have including their own wishes and aspirations and sometimes the thing the client wants might come into conflict with the thing that the lawyer wants.

## Basics: The Duty of Loyalty

* Fiduciary obligations
  + The lawyer owes fiduciary duties to clients- the duty to be loyal, duty to act in the clients interests even in the situation where the lawyer may be tempted to subordinate those interests to something else
* Recall *Szarfer v Chodos*
  + This was the case about the lawyer’s use of confidential information to the client’s detriment
  + In this case, the court held that the use of the information was a breach of the lawyer’s fiduciary duty to the client so the lawyer had to pay the client money damages to make up for subordinating the clients interests for his own interest of pursuing a relationship with the client’s wife
  + 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
    - Lawyers in some situations only feel a duty towards their position as a “neutral conduit” rather than towards the client
    - We are opposing parties to a retainer agreement (we want money, they want to pay as little as possible)
* **FLSC Code: Rule 3.4-1, Commentary 5**
  + “The rule governing conflicts of interest is founded in the duty of loyalty which is grounded in the law governing fiduciaries. The lawyer-client relationship is based on trust. It is a fiduciary relationship and as such, the lawyer has a duty of loyalty to the client. To maintain public confidence in the integrity of the legal profession and the administration of justice, in which lawyers play a key role, it is essential that lawyers respect the duty of loyalty. Arising from the duty of loyalty are other duties, such as a duty to commit to the client’s cause, the duty of confidentiality, the duty of candour and the duty to avoid conflicting interests.”
* Failure to discharge this duty:
  + Sanctions at common law (breach of fiduciary duty, removal as counsel of record)
    - Being found guilty at common law does not necessarily mean that the lawyer will also be found guilty under the Rules of Professional Conduct regulated by the Law Society and vice versa
  + Sanctions by Law Society (professional misconduct under **s. 33 of the LSA**)
    - Common law and Law Society= different, therefore different sanctions
    - Compliance with one does not mean compliance with the other

## Basic Principles & Common Law Governance

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

* **Facts:** This case involved a lawsuit between two parties, A and B. Party A retained Twaddle who was a lawyer with a number of assisting associates and articling students including a woman named Kristin Dangerfield. Kristin Dangerfield is the key actor in this case. A lawyer who carries a conflict of interest from one firm to another is called a Plague Mary or a Tyfoid Mary. Party B retains Thomson, Dorfman, Sweatman (TDS). At some point in the proceedings, Kristin Dangerfield leaves the employment of Twaddle to work for another firm, named Scarth Dooley. She continued to carry on her work there for some time while the dispute continued. At some point during these proceedings, TDS absorbed much of Scarth Dooley. One of the lawyers who came along during this absorption was Kristin Dangerfield. Dispute between A and B is still going on. Twaddle gets called to the bench and so Party A has to find another lawyer. TDS continued to represent Party B throughout and Party A was annoyed by this claiming that one of their lawyers, Kristin Dangerfield has now moved over and joined the other team and so Party A sought to have TDS removed as counsel of record. Party A is alleging that Party B would now have unfair access to confidential information about A’s position in the litigation because a lawyer formerly representing Party A is now on B’s team. Kristin Dangerfield and TDS all signed affidavits indicating no confidential information had been or would be discussed since Dangerfield joined the firm. This strategy used to be referred to as a “Chinese Wall”.
* **Issue:** Should TDS be allowed to continue acting for Party B in this case or should the whole firm be excluded from acting for Party B because they now hired Dangerfield?
* Generally speaking, if you are a client of a firm of lawyers that means that you are a client of every lawyer in that firm so Party A could say that Kristin Dangerfield was my lawyer and now, she is my opponents’ lawyer.
* Ratio:
  + 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”*
  + 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.”*
  + The FLSC is NOT binding on the courts but it 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*”
  + Appropriate test for conflict of interest (below)
* “In resolving this issue, the Court is concerned with at **least three competing values**. There is **first** of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. **Furthermore**, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. **Finally**, there is the desirability of permitting reasonable mobility in the legal profession.”
  + **Second value:** Party B wanted to hire TDS and have been working with them for years and so if we are to deprive them of the ability to stay with TDS, that means that they do not get their first choice lawyer, that all the preparation they did is likely to be wasted and they will have to hire a new lawyer that they would not have chosen in the first place and get them up to speed and therefore putting them at a significant disadvantage and costing them a lot of money
    - By conflicting TDS out they are also imposing a cost on Party B
  + **Third Value:** Firms should not be scared of doing lateral hires for the fear of conflicts of interest
* “Merger, partial merger and the movement of lawyers from one firm to another are familiar features of the modern practice of law. They bring with them the thorny problem of conflicts of interest. When one of these events is planned, consideration must be given to the consequences which will flow from loss of clients through conflicts of interest. To facilitate this process some would urge a slackening of the standard with respect to what constitutes a conflict of interest. In my view, to do so at the present time would serve the interest of neither the public nor the profession.”
  + SCC knows it becomes harder to move from firm to firm as a lawyer if your movement might result in the destination law firm being conflicted out of a bunch of clients but they are not going to lower the standards or make it easier because it poses too high a risk of confidential information moving from one firm to another
* “Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client. The legal profession has distinguished itself from other professions by the sanctity with which these communications are treated. The law, too, perhaps unduly, has protected solicitor and client exchanges while denying the same protection to others. This tradition assumes particular importance when a client bares his or her soul in civil or criminal litigation. Clients do this in the justifiable belief that nothing they say will be used against them and to the advantage of the adversary. Loss of this confidence would deliver a serious blow to the integrity of the profession and to the public’s confidence in the administration of justice”
  + Dealing with the first value from above relating to the public’s confidence in the administration of justice
  + If people are afraid that their lawyer will move to another firm or will in some way start using confidential information against them, that is the loss of loyalty that we worry about
* “A Code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. See, for example, *Law Society of Manitoba v Giesbrecht* (1983), 24 Man R (2d) 228 (CA). The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy.”
  + When the court is trying to determine whether a lawyer has a conflict of interest, the court might refer to the definition of conflict of interest but they might not. They might have their own definition which may be more robust and capture more behaviour.
  + Court is telling us that they are not bound by Law Society definitions and they can create their own.
* The Court creates what it calls “The Appropriate Test” for conflicts of interest:
  + “… the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest?”
    - Court is saying that the main thing they are worried about when defining conflicts of interest is whether there is a risk that confidential information will spill and be sued against the client?
  + “Typically, these cases require two questions to be answered: **(1) Did the lawyer (the one travelling from one firm to another) receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?”**
  + “In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court’s degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.”
    - All that Party A must show is that it had a relationship with Kristin early on that was related to the matter. Once they show that she was related in some way to the matter at hand, court will infer that she received confidential information pertinent to the matter.
    - There might be some way that you can show that you were a lawyer at a firm when they were representing a client but you can show that you were on secondment during that time period. They leave the door open for lawyers to be able to prove that they did not have confidential information.
  + “The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client.”
    - Since Dangerfield has confidential information against Party A, she cannot act against that client in the matter concerning which they have relevant confidential information. Since she has it and it is relevant she absolutely cannot act. Therefore, that means she is automatically disqualified from acting in this matter. The question now turns to whether the whole firm is disqualified as a result.
    - Kristin can’t say that she is going to continue acting in the matter but that she will not use any of the confidential information she has against Party A in her representation of Party B
    - Court comes down hard here and says that if you have confidential information pertinent to a matter against a former client you cannot act in that matter against that client
  + “The answer is less clear with respect to the partners or associates in the firm. Some courts have applied the concept of imputed knowledge. This assumes that the knowledge of one member of the firm is the knowledge of all. If one lawyer cannot act, no member of the firm can act. This is a rule that has been applied by some law firms as their particular brand of ethics. While this is commendable and is to be encouraged, it is, in my opinion, an assumption which is unrealistic in the era of the mega-firm. Furthermore, if the presumption that the knowledge of one is the knowledge of all is to be applied, it must be applied with respect to both the former firm and the firm which the moving lawyer joins. Thus, there is a conflict with respect to every matter handled by the old firm that has a substantial relationship with any matter handled by the new firm irrespective of whether the moving lawyer had any involvement with it. This is the “overkill” which has drawn so much criticism in the United States to which I have referred above.”
    - Notion of imputed knowledge was too strict. A lawyer is not going to infect everyone in a new firm from knowledge from the previous firm. That lawyer cannot possible know ALL knowledge from one firm and then pass on to the next firm.
  + “Moreover, I am not convinced that a reasonable member of the public would necessarily conclude that confidences are likely to be disclosed in every case despite institutional efforts to prevent it. There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the “tainted” lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence. These concepts are not familiar to Canadian courts and indeed do not seem to have been adopted by the governing bodies of the legal profession.”
    - When a lawyer moves from one firm to another, that will not automatically infect the destination firm or all the lawyer’s in the destination firm with all of the knowledge that the lawyer might have. Instead, when that lawyer moves, the courts will have a strong inference that that lawyer might have information but they will leave open the possibility that the lawyer and firm can bring forward evidence that no confidences of the former client have been shared with the destination firm
    - The moving lawyer is tainted but the new firm is not
    - **Cone of silence:** used to mean physical separation but not anymore.
  + “A fortiori undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying “trust me”. This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used”.
    - Court said that they will assume that the tainted lawyer has confidential information when they move to a new firm, they will also assume that they will taint every lawyer in the firm with the information unless the firm gives clear evidence that all reasonable measures were taken to prevent the spreading of the information
    - An affidavit is not enough
    - Look at s.17-3.26 to highlight how firms analyze a “tainted lawyer”. Rules arose out of this case
* **Result:** Both Kristen Dangerfield and TDS are disqualified. Court is exercising it’s inherent jurisdiction to control counsel of record. The appropriate remedy in these cases is generally disqualification.
  + Party B has to find a new lawyer and get them up to speed on the matter
* Recall that the Court is exercising its inherent jurisdiction to control counsel of record. The appropriate remedy in these cases (where an impermissible conflict is found) is generally disqualification.

## Impact of Common Law Regulation

* Motion for disqualification
  + A party who fears that one of their lawyers has now gone off and infected someone will typically bring a motion for disqualification and say that the other party’s lawyer is conflicted out because they carry confidential information about us
* Action for Breach of Fiduciary Duty
  + In the event that the lawyer actually did use this confidential information against the former client then that would be an easy case of breach of fiduciary duty
* 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 sometimes use this to their benefit by removing counsel from other side as a result of the conflict of interest
* “Motions for disqualification orders may not always be sought for the purest of motives. Many such motions are undoubtedly brought by reason of genuine concerns about lawyers’ loyalty or breaches of confidence. Others may be brought, however, to gain a tactical advantage by burdening a less well-financed adversary with additional costs, or by depriving the adversary of the services of a lawyer who is known to be effective in a particular type of case.” (Gavin MacKenzie, “Lawyers and Ethics”)
  + Corporations use this rule to block people from using highly effective counsel by first hiring those counsel

## Acting Against Clients

* Two forms:
  + Successive Representation (acting against a former client)
  + 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.
  + Counsel acted for party X in the past and now acts for party Y where party Y is suing party X
* Two most common examples in the criminal context:
  + A “***jailhouse informant***” comes to testify ***against your client***, and you acted on behalf of that informant on a previous occasion (clothing you with information that could undermine his credibility in the current matter such as their criminal past or propensity to life);
  + Former defence counsel moves to a Crown law office, and must now prosecute a former client
    - That former client might have developed a trusting relationship with the lawyer
    - What we saw from *MacDonald State v Martin* is that a lawyer who acts against a former client may have been clothed with confidential information when acting as the former clients’ lawyer

## Rules: Successive Representation

* **FLSC Code, Rule 3.4-10**: Unless the former client consents, a lawyer must not act against a former client in:
  + (a) the same matter,
    - This applied to Kristin Dangerfield
  + (b) any related matter, or
    - No caveat for if you have confidential information
  + (c) any other matter if the lawyer has relevant confidential information arising from the representation of the former client that may prejudice the client.
    - This acts as a catch all
    - A former client can waive the issue of successive representation (usually you want to express consent from client) and can authorize the lawyer to act against you
* A case of successive representation where the lawyer might be conflicted out can be cured if the client gives informed consent as long as they understand the risk
* Sometimes this consent can be inferred, but usually we want explicit consent
* **Rule 3.4-10, Commentary:**
  + [1] This rule guards against the misuse of confidential information from a previous retainer and ensures that a lawyer does not attack the legal work done during a previous retainer, or undermine the client’s position on a matter that was central to a previous retainer. It is not improper for a lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that client if previously obtained confidential information is irrelevant to that matter
* **FLSC Code, Rule 3.4-11**: When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer 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 there will be no disclosure of 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
* This is like the *MacDonald Estate v* *Martin* case
  + They could have gotten consent from Thompson to have Kristin acting on the other side now
  + Or they can follow the two steps above. Must show all reasonable measures were taken to ensure there will be no disclosure of confidential information AND must advise tainted lawyers former client of any measures taken
* **Rule 3.4-11, Commentary:**
  + [1] The Commentary to rule 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.
    - This reminds us that we have tonnes of rules about tainted lawyers.
    - If you look at all these rules and commentaries, they are the conflict of interest rules, but they keep referencing confidential information. The soul of the conflict of interest rules is protecting confidential information.

### R v Zwicker (1995) 169 NBR (3d) 350

* **Facts:** The accused was Bucky Dean Zwicker. He got very drunk and stole a fishing boat and rode the boat around the harbour causing damage to docks and property. Zwicker was apprehended and charged with theft. He hired a lawyer named Randal Wilson who advised Zwicker to plead guilty. Court accepted the guilty plea and so the only matter outstanding was sentencing. At the sentencing hearing, Wilson argued that his client should serve a non-custodial sentence. He said, “Mr. Zwicker realizes that the owner has had substantial losses, had substantial downtime. He knows that the people of Grand Manan are outraged by his behaviour and he thinks that this is an opportunity to go back to Grand Manan and get to work and pay this individual back which he fully intends to do. He wishes that in lieu of incarceration.” At the conclusion of Wilson’s submissions, TJ adjourned the matter to make a pre-sentencing report. Two weeks past before the court reconvened to hear the Crown’s submissions on sentencing. When they reconvened, the Crown said “It is the Crown’s position that Mr. Zwicker should go to jail. We base this on the magnitude of the crime he committed and also upon the impact that it had on the victim.” Crown cited 2 cases where imprisonment for 1 year was given to an individual who stole a car. He said Zwicker had a poor work record and bad reputation. It turns out that the defence counsel (Wilson) and the Crown were actually the same lawyer. When the court had adjourned, Wilson stopped his work as defence counsel, and got hired by the Crown and then came back prosecuting his client in the same matter. This is not allowed, and Wilson violated the rules of professional conduct. TJ sentenced Zwicker to 12 months in prison and 2 years probation as well as a compensation order of $22, 000 dollars which was the amount of damage he did. In realizing how weird it was that it was the same lawyer, Zwicker appealed his conviction and sentence up to New Brunswick CA. Crown conceded that this form of conflict of interest was not allowed. The Crown also conceded, and the court accepted, that the conflict of interest in this case was actually a breach of s.7 of the *Charter*. Zwicker, by being represented by the lawyer then acting for the Crown in the same case was denied his right to independent legal representation.
* **Issue:** Is RW allowed to do this?
* **Held:** successive representation in a criminal matter= breach of section 7 of the Charter. You cannot act against client in the same latter.
* **Ratio:** Everyone charged with an offence has a Charter right not just to counsel but to unconflicted counsel. Having counsel with a conflict of interest violates our notions of fundamental justice and would violate s. 7 of the Charter. If the court is taking away the liberty of a person, they must do it in accordance with principles of fundamental justice
* Bucky pled guilty before the conflict arose and so they had to accept his guilty plea.
* **Results:** Sentence reduced to time served plus the compensation order (common law)
  + Lawyer penalized (Law Society). Wilson was found to have engaged in prosecutorial misconduct.

### R v J(GP) 2001 MBCA 18

* Deals with “lateral” moves, which instead of a successive representation case, it is a case instead of acting for the opposite side there is a case with 2 plaintiffs for example and a lawyer moves from representing one plaintiff to representing another still against the defendant. There is no separate definition for moves of this nature. If the move is such that it would adversely affect the representation of your client or former client, you are in a conflict of interest. Even if the two parties you move between are on the same side of the V they might still try to throw each other under the bus for example, in the extent that they are liable for damages
* **Facts:** J was charged with sexual assault, sexual intercourse with a person under 14, indecent assault, buggery and gross indecency. These charges involved the accused’s wife’s youngest sister who was the complainant. J admitted to consensual intercourse with his wife’s sister when she was 17 or 18 years old but denied any other involvement. The complainant claimed that sexual exploitation had occurred from the ages of 11 through 21 and that intercourse took place weekly. The complainant’s evidence was challenged by the accused on the basis that she had said that the accused ejaculated in her each time they engaged in intercourse weekly over the course of 10 years but never resulted in conception despite the fact that no contraception was used so the accused is going to argue that her account of the facts is simply not credible based on other evidence. Complainant brought the complaint 17 years after the alleged abuse had taken place. Shortly before bringing the complaint, the complainant had spoken to a counsellor who informed her that she had been sexually abused by her brother in law. This allegedly caused memories of the abuse to resurface and then made a complaint against the accused and charges were brought forward. J, in order to make a defence, wanted to seek production of the complainant’s counselling records. He wanted to examine them to demonstrate that this notion of alleged abuse was planted by the counsellor and was not real abuse. His suggestion was that the counsellor’s records would reveal evidence of this “planting”. Normally this disclosure was not allowed but the TJ ordered the production of the therapy records because of the bizarre nature of the complaints. The order of production was sought by the accused and was opposed by both counsel for the Crown and counsel for the victim. Based in part on revelations within those records, the accused was acquitted. Crown appealed. During the appeal, the Crown ordered that the disclosure order had been improperly made and that the order was based not on evidence but on discriminatory beliefs about the sexual practices of women. Crown’s argument was that the argument was based on “rape myths” and that by acting on these beliefs, the court erred in ordering the disclosure. CA denied the appeal and held that there was a proper evidentiary foundation for the trial court’s ruling. TJ order to produce the records was upheld. However, the lawyer for the complainant at trial had taken a new job by the time of the appeal and she was not working for the Crown and was now the lawyer for the Crown on this appeal, seeking suppression of the records.
* **Issue:** Is this a problem of successive representation? Should the lawyer who represented the complainant at trial be allowed to represent the Crown on appeal? Even though she is still on the same side of the V?
* The court noted that this particular lawyer at trial representing the complaint was completely appropriate but that changed when she switched to become Crown counsel on appeal
* Quoting from *Boucher v The Queen* [1955] SCR 16
  + “The position held by counsel for the Crown is not that of a lawyer in civil litigation. His functions are quasi-judicial. His duty is not so much to obtain a conviction as to assist the judge and jury in ensuring that the fullest possible justice is done. His conduct before the Court must always be characterized by moderation and impartiality. He will properly perform his duty and will be beyond all reproach if, eschewing any appeal to passion, and employing a dignified manner suited to his function, he presents the evidence to the jury without going beyond what is discloses.”
    - the Crown never seeks to convict, never loses. The Crown seeks to assist the judge in determining what happens. If the Crown believed there was exculpatory evidence, they should stop prosecution
    - The complainant by contract might seek to suppress those counselling records regardless of the guilt or innocence of the accused. Counsel for the complainant might seek a conviction while Crown simply sought to determine the truth and not go ahead with conviction if they had reasonable doubt
    - Crown has a duty to present all relevant information, favourable and unfavourable while counsel for the complainant was simply seeking to assert the complainant’s rights without regard how those would impact upon the interests of the accused
    - Because counsel for the Crown and counsel or the complaint are serving very different interests the court found that this did present a conflict of interest as well as impropriety
* “There is, in my view, flowing from counsel’s latter role the likely perception both in the eyes of the accused and in those of the informed and reasonable person, that the Crown and the complainant share a common purpose in seeking the conviction of the accused. That may well be the purpose of the complainant, but it is no part of the public duty of a prosecutor exercising his quasi-judicial functions.”
  + The public and accused might perceive that this counsel acting for the Crown is seeking to convict because she used to represent the complainant. Suddenly, she is the Crown lawyer who is supposed to be looking at it in a dispassionate way, but she actually wants to convict because of the past relationship with the client
* **Held:** This was held to be an inappropriate conflict of interest.
  + Cannot represent Crown interest + complainant interest because in criminal cases, the Crown represents the public and has special ethical duties

## Problems with Successive Representation (why it is not allowed)

* Most of the problems relate to confidential information
  + A lawyer plagued with a problem of successive representation may have confidentially obligations to the former client that end up preventing them from cross examining a witness they have previously represented
  + If you did this, there would be a disincentive for clients to want to share their secrets out of fear counsel will use them against them in a later matter
* 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

* **Concurrent representation:** cases involving lawyers who are tempted to act against the interests of a current client
* Why would a lawyer ever act against the interests of a current client?
  + Imagine you are acting on behalf of a bank. You represent them in a transaction such as loan negotiations with a large business. In addition to solicitor work on loan transactions you also do some personal injury work. While the bank transaction is still an ongoing matter, a new potential client comes to your office in the hopes of hiring you in relation to a slip and fall. He fell on his way into a local branch of the bank that you are representing in an unrelated matter. Can you take this client on? If you do…. You will be acting against a current client. What if something you learn in Matter A will help you act against the bank in Matter B?
* 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?
* This may happen when lawyers have conflict business interests
  + Example #1:
    - Brent is a young articling student with the law firm of Drekken LLP. Brent is currently working on the files of 2 clients, LeVar and Candice. They have both recently entered the cat food business. Both employ Drekken LLP on a non-exclusive retainer to provide them with information and legal advice pertaining to the cat food industry which is highly competitive. LeVar recently approached the firm with a new business model that would allow cat food producers to avoid certain regulations governing the industry. He retained Brent to determine whether or not this new business model is legal. Brent assessed the applicable law, and discovered it was legal. Furthermore, the idea could allow whoever employed it to dominate the cat food industry.
    - What should Brent do? Should he discharge his duty of confidentiality to LeVar, and refrain from telling Candice about the new scheme? Should he discharge his duty of loyalty to Candice by telling her about the new business model, and thus compromise his duty of confidentiality to LeVar?
      * He may not be acting against them in the sense of helping someone sue them, but he is pursuing legal right or remedies for a particular client that will ultimately harm the other
* Lawyers who work in huge firms with multiple practice groups. A client at the firms’ corporate group might come into conflict with a client in the firm’s bankruptcy group
  + Example # 2:
    - BigLaw LLP is a 200-lawyer firm in Calgary, Alberta. BigLaw has dozens of clients, including A. Co and B.Co. Ian Brown and Sarah Choudhury are two of the BigLaw’s lawyers. Ian (a securities lawyer) is representing A. Co in the planned acquisition of another business. Sarah (an IP lawyer) is representing B.Co in a patent dispute. While Ian and Sarah know each other, they work in different departments of the firm (on different floors), and they rarely bump into each other. They have no idea who the other’s clients are.
    - A. Co and B.Co own plots of land beside each other somewhere in Northern Ontario. Neither Ian not Sarah knows about this. B.Co brings a nuisance against A. Co (stemming from a disturbance allegedly caused by A.Co’s noisy machinery). BigLaw isn’t involved in this nuisance action: both clients are using local counsel. While reading a newspaper, Ian learns about the nuisance action. He now realizes that his firm is representing two companies that are suing each other in tort.
    - Assuming that this nuisance action has absolutely no bearing on BigLaw’s representation of A.Co and B.Co in their securities and patent matters, is BigLaw now in a conflict position?
      * If yes, they are going to have to seek permission from the clients to continue acting
    - Must BigLaw disclose its representation of B.Co to A.Co (and vice versa)? Does BigLaw need B.Co’s consent to continue representing A.Co (and vice versa)?
      * Problem arises in part because each of a law firm’s client is considered a client of every partner in the firm. As a result, every partner in BigLaw is representing both A Co and B Co and in an unrelated matter they are suing each other

## The *Neil* Bright Line Test

* Competing Interpretations:
  + **Interpretation A:** Lawyer prohibited from acting in “bright line” cases even where no possibility of harm
    - Lawyer cannot act for two clients adverse in interest even where the lawyer’s representation of both clients cannot possible lead to harm
    - Some problems:
      * Assume that the parties really hate each other. Further assume that your work for one client is almost finished. Your work for the other client is on going and they would be severely prejudiced if you had to stop being their lawyer. One can withhold their consent to allow the firm to continue acting for the other unless the other gives them a favourable settlement in their nuisance claim.
      * If you are a major bank that has dozens of transactions and lawsuits on going, you could spread your major files among the major firms. Now if anyone wants to sue your bank, the broad interpretation of this test, could end up conflicting out every major Bay St firm therefore making the opposing parties hire other less experienced firms
  + **Interpretation B:** Lawyer prohibited from acting in “bright line” cases only where there is a substantial risk of a material, adverse impact on the lawyer’s representation of the client
    - Slightly more favourable to law firms
    - The lawyer can generally act for 2 clients adverse in interest unless doing so poses a substantial risk of harm to the client through your continued representation
  + **Question here is:** Do we need a substantial risk of harm for the Neil Bright Line test to be engaged or is it engaged the moment we have clients adverse in interests in some way
  + FLSC endorsed interpretation A from the beginning subject to one little exception. Therefore they say you cannot act for two clients adverse in interest even if there is no risk of harm
  + The Canadian Bar Association by contrast, endorsed interpretation B.
* SCC promogulated this test for determining when a concurrent representation problem arises. It has been interpreted very broadly and it might have implications dragging this problem into the realm of prohibited conflicts of interest even though that result doesn’t make any sense

### R v Neil [2002] 3 SCR 631

* In this case, SCC articulated the test for determining if conflicts of interests exist
* “… 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.”
  + Even if lawsuits are unrelated and cannot have impact on the two files for which the firm is acting, they are disqualified from acting and there is a conflict of interest
  + Even if there is no chance of harm, if you are serving 2 clients with diverse interests, you are disqualified
  + Application to Example 2 above: This example involved 2 clients whose legal interests are directly adverse. Even if the cases are unrelated, you CANNOT act for 2 clients adverse in interest.
* “I adopt, in this respect, the [following] notion of a ‘conflict’ … a ‘substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another client, a former client, or a third person”
  + This seems to adopt the substantial risk test that we have been using all along.
  + SCC is saying that in order for it to be a conflict of interest, there must be a substantial risk that the lawyer’s representation of a client would be materially and adversely affected by the lawyer’s own interest or duties to another client, former client or a third party. Absent this substantial risk, there is no conflict of interest.
  + If you are acting for 2 clients then you are disqualified BUT ONLY if there is a substantial risk that the conflict harms them in some way
  + But how do we reconcile these two paragraphs? Is it to be interpreted broadly such that it catches almost anything or narrowly such that there must be substantial risk?
* **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 the informed consent, express or implied”
    - If you are a big bank or company with your own in house lawyers and are a sophisticated party who litigates all the time, then you know that some of the counsel you use are going to be acting against you in some of the cases you are involved in. You have your own in-house counsel to protect you from these conflicts of interest. Courts have said they are not going to use the broad interpretation in these situations, but instead will infer that since they are aware that they have so many ongoing matters that are unrelated to each other, that you have given implied consent in advance to having your own counsel act against you in unrelated matters. They would still need to give consent to act in a related matter. This only applies to professional litigants who are capable of protecting their own interest in some way.
* Even with this exception, there is a lot of controversy concerning which interpretation of this test should be used.

### Strother v 3464920 Canada Inc 2007 SCC 24

* **Facts:** Mr. Strother was a great tax lawyer at David & Company. One of his clients, Monarch Entertainment Corporation, was a film financing company that devised and sold tax shelter investments. At this time, tax loopholes in Canada’s *Income Tax Act* made it tax advantageous to invest in certain forms of film production. Strother’s job was to design these tax shelters based on applicable tax laws. In 1996 and 1997, the retainer agreement between Monarch and Davis provided that Davis would work exclusively for Monarch on matters related to tax shelters in the film financing business. In 1997, while this exclusive retainer agreement was ongoing, the Government of Canada changed the *Income Tax Act* to eliminate the sort of tax shelters that Monarch sold. Becoming aware of these Amendments, Strother informed Monarch right away and advised them that given the changes in the law, there was no way for Monarch to continue on. Strother was wrong about this, there was still a clever loophole that could allow the tax shelter business to continue but Strother did not notice it. Monarch accepted his advice and shut down that aspect of their business. Monarch entered into a new retainer agreement with Davis which did not include the exclusivity clause from the old retainer. In 1998, a man named Paul Darc, former employer of Monarch, approached Strother with an idea. He claimed he spotted the loophole that Strother missed and he informed him that the tax shelter business may still be viable despite the changes. Darc was unsure if his scheme was legal and he wanted to retain Strother to apply to Revenue Canada for an advanced tax ruling stating that this loophole worked the way they predicted it would work. Strother says maybe and Darc offers him a retainer in which the terms were unusual. In exchange for obtaining a positive ruling, Strother was not going to be paid any money, instead he would become a partner with Darc in a new tax shelter business, called Sentinel. Strother accepted this retainer and did not disclose this special retainer to his firm or to Monarch who is still his client. They may not be involved in the tax shelter business anymore, but they still need tax advice. Strother went to Revenue Canada and was successful in getting a positive advance tax ruling saying that that was in fact a loophole and they would enjoy the advantages of it. Strother’s retainer was revealed to Davis. Davis instructed Strother to drop his personal interest in the matter because they thought it was going to be a conflict of interest. Instead, Strother left the practice of law and created that company with Darc. Selling these tax shelter arrangements is incredibly profitable and in the first 2 years, Sentinel made $60 million. If you are the first person to market these tax shelter arrangements, you get a massive advantage because everyone will come to you. This would be a detriment to Monarch if Monarch were to ever discover that this loophole existed and Strother did not inform them of it. Monarch discovered Sentinel’s business and Strother’s role. Lawyers generally speaking, do not owe a duty to go back to their client and correct bad advice unless the lawyer fell below the duty of care they owe clients. When approached by Monarch about why he gave them that advice and then went into the business himself, Strother said that he advised them based on the best knowledge he had at the time. Monarch is not worried about being given wrong advice, they are worried about him then discovering this and rather than correcting the wrong advice, he pursued the business himself. Monarch said that he undermined their interest by setting up this other business and that he breached his fiduciary duty to them. They sued Strother for the money he earned as a principal of Sentinel. The theory of the case is that while Monarch was still a client, Strother took steps to start competing with them in a business he knew they wanted to pursue. Strother claimed he breached no ongoing fiduciary duty because there was no longer an exclusivity clause in their retainer and that meant he could give advice in regard to that business to others. Strother said he was under no duty to advise Monarch of the remaining loophole unless they specifically asked about it which they did not.
* **Issue:** Does the change in retainer mean anything? Doesn’t this mean you can act for other people? Should Strother be found guilty of a breach of fiduciary duty on the basis of a conflict of interest? If so, what is the appropriate remedy?
* **Ratio:** Law firms may act concurrently for different clients in the same line of business when (a) 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 interests, not adverse BUSINESS interests (so *Neil* would not apply)
* “Monarch’s tax business was in a jam. Strother was still its tax lawyer. There was a continuing “relationship of trust and confidence.” Monarch was dealing with professional advisors, not used car salesman or pawnbrokers whom the public may expect to operation on the basis of “didn’t ask, didn’t tell”, and who collectively suffer a corresponding deficit in trust and confidence. Therein lies one of the differences between a profession and some businesses. In my view, subject to confidentiality considerations for other clients, if Strother knew there was still a way to continue to syndicate US studio film production expenses to Canadian investors on a tax-efficient basis, the 1998 retainer entitled Monarch to be told that Strother’s previous negative advice was now subject to reconsideration.”
  + Strother is still their tax lawyer, he knew that they wanted to be in that business and him telling them that they could not be was the only thing preventing them. Once he became aware that they could get back into that business, he, subject to the duties he owed future clients, owed them a duty to tell them that his prior advice had been incorrect
* “It is this contractual duty that came into conflict with Strother’s personal financial interest when he took a major stake in Sentinel which was, as Newbury JA pointed out, a competitor in a small market where experience shows that, even limited, competition could lead to a rapid erosion of market share.”
  + Strother had ongoing duty to Monarch to advise them whether or not they ought to be in this business.
  + SCC said that the ongoing duty to Monarch was subject to his duty of confidentiality to any future clients. Darc was his client.
* “Of course, it was not open to Strother to share with Monarch any confidential information received from Darc. He could nevertheless had advised Monarch that his earlier view was too emphatic, that there may yet be life in a modified form of syndicating film production services expenses for tax benefits, but that because his change of view was based at least in part on information confidential to another client on a transaction unrelated to Monarch, he could not advise further except to suggest that Monarch consult another law firm. Moreover, there is no excuse at all for Strother not advising Monarch of the successful tax ruling when it was made public in October 1998. As it turned out, Monarch did not find out about it until February or March 1999. I therefore conclude that David (and Strother) failed to provide candid and proper legal advice in breach of the 1998 retainer….”
  + Strother should have told Monarch that his prior advice was not correct. Strother could not tell them any more information because that information is based on a confidential retainer with another client.
  + Once it became public information, he should of called them and told them at that point. He still did not.
* “I agree with Strother’s counsel when he writes that ‘[t]he retainer by Sentinel Hill was … not ‘directly adverse’ to any ‘immediate interest’ of Monarch.’ On the contrary, as Strother argues, “Sentinel Hill created a business opportunity which Monarch could have sought to exploit”
  + Note: this means that, according to the Court in Strother, these facts do not trigger the “Bright Line Test”
  + Court here is saying that Sentinel Hill and Monarch are not two clients who have adverse direct interests. And so, the Bright Line Test is not triggered.
* “The clients’ respective “interests” that require the protection of the duty of loyalty have to do with the practice of law, not commercial prosperity… [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. Whether or not a real risk of impairment exists will be a question of fact. In my judgement, the risk did not exist here provided the necessary even-handed representation had not been skewed by Strother’s personal undisclosed financial interest. Condominium lawyers act with undiminished vigour for numerous entrepreneurs competing in the same housing market; oil and gas lawyers advise without hesitation exploration firms competing in the oil patch, provided, of course, that information confidential to a particular client is kept confidential. There is no reason in general why a tax practitioner such as Strother should not take on different clients syndicating tax schemes to the same investor community, notwithstanding the restricted market for these services in a business in which Sentinel and Monarch competed”
  + You will not be held to be two clients adverse in interest simply because you are competitors in the same market. If they are not suing each other they are not adverse in interest. They may be adverse in business interest, but we don’t care about that. When we said in *Neil* that they had to be two clients with direct adverse interests that meant adverse legal interests which means they must be suing each other.
* “The more sophisticated the client, the more readily the inference of implied consent may be drawn. The thing the lawyer must not do is keep the client in the dark about matters he or she knows to be relevant to the retainer” (*Neil*)
  + Here the court addresses the sophisticated litigant exception
  + Monarch is quite sophisticated and sues people all the time. That does not matter because you still cannot keep the client in the dark about matters that you know to be relevant to the retainer. Strother knew something that they wanted to know and kept it in the dark
* “In these circumstances, taking a direct and significant interest in the potential profits of Monarch’s “commercial competitor”…. created a substantial risk that his representation of Monarch would be materially and adversely affected by consideration of his own interests. Strother could not with equal loyalty serve Monarch and pursue his own financial interest which stood in obvious conflict with Monarch making a quick re-entry into the tax-assisted film financing business. As stated in Neil, ‘loyalty includes putting the client’s business ahead of the lawyer’s business.’ It is therefore my view that Strother’s failure to revisit his 1997 advice in 1998 at a time when he had a personal, undisclosed financial interest in Sentinel Hill breached his duty of loyalty to Monarch”
  + The bright line test would not apply because the clients do not have competing legal interests but court is now saying there is STILL a conflict in this case flowing from the substantial risk language
  + What really matters here is that Strother was not being paid in the ordinary way. Because he had a personal stake, that gave him a strong temptation to keep Monarch out of the business because the longer they were out the more profitable Sentinel would be. This created a substantial risk that his representation of Monarch would be materially and adversely affected because he would not be tempted to tell them that they should get back into the business because his own profits from Sentinel would be cut.
* “The duty was further breached when he did not advise Monarch of the successful tax ruling when it became public on October 6, 1998. Why would a rainmaker like Strother not make rain with as many clients (or potential clients) as possible when the opportunity presented itself (whether or not existing retainers required him to do so)? The unfortunate inference is that Strother did not tell Monarch because he did not think it was in his personal financial interest to do so….”
  + When Revenue Canada finally published it’s advanced tax ruling why did he then not say something to Monarch? – Because he didn’t want to undercut his profits. His financial interests caused him to not bother giving financial advice to clients which is a breach of fiduciary duty and a breach of conflict of interest rules.
* **Appropriate Remedy in Strother:** where your own financial interests have caused you to not give candid advice
  + “Where, as here, disgorgement is imposed to serve a prophylactic purpose, the relevant causation is the breach of a fiduciary duty and the defendant’s gain (not the plaintiff’s loss). Denying Strother profit generated by the financial interest that constitutes his conflict teaches faithless fiduciaries that conflicts of interest do not pay. The prophylactic purpose thereby advances the policy of equity, even at the expense of a windfall to the wronged beneficiary”
* **Held: (5-4)** Monarch gets Strother’s share of the profits that he had in Sentinel Hill over those 2 years.
  + The duty here was not just the retainer, it was the relationship of trust and confidence which obligations flow from. Since pre-retainer discussions are confidential, Strother could not tell Monarch about it
  + The measure is not the loss to the beneficiary, it is the gain to the fiduciary who breached fiduciary duties
  + The dissent would have found that there was no conflict of interest at all. They held that the extent of the lawyer’s obligation to the client is limited by the retainer. Since the retainer contained no exclusivity clause, Strother was entitled to act for other clients, even those with commercial interests opposing Monarch’s.

### Canadian National Railway Co v McKercher LLP [2013] 2 SCR 649

* This is the leading case for conflicts of interest in Canada. This case determined whether the Neil Bright Line Test applied regardless of whether there was a potential for the lawyer’s representation of the client to be compromised.
* **Facts:** McKercher LLP is a large law firm in Saskatchewan. One of their highest profile clients was CNR. In late 2008, they were acting for CNR on 3 matters; a real estate purchase, a personal injury matter defended by CNR and a claim in recievorship proceedings. McKercher was approached by a potential new client, Gord Wallace who wanted to sue CNR. The basis of his intended suit is relating to the over charging of grain farmers. He alleged CNR, in shipping grain, had been over charging grain farmers who used the railway for their shipments. The court and all parties involved accept that this grain suit is legal and factually unrelated to prior CNR retainers with McKercher. CNR regards McKercher as their go-to lawyers. But, when Mr. Wallace brought his claim to McKercher, the only actual on going matters that McKercher had for CNR were the three above. McKercher told Wallace that they sometimes act for CNR and he said he didn’t care. Wallace’s law suit was a $1.75 billion class action law suit. The lawyer would have been entitled to charge a contingency fee which is contingent on achieving some result (“we don’t get paid unless you win and if you do win, we will get paid by taking 1/3 of your winnings”). If successful, this class action would have been worth about $583 million in legal fees to McKercher- strong incentive for them to take it. Assume that none of the confidential information that McKercher has learned about CNR would provide McKercher or it’s new clients with any advantage in this litigation. Therefore, there is no substantial risk that the loyalty or representation to either client will be impacted by their representation of Wallace. McKercher agreed to take the class action but did not directly inform CNR of this. Instead, CNR didn’t learn about this at all until they received a statement of claim for $1.75 billion in January 2009 with solicitors for the plaintiff as McKercher. McKercher then quickly terminated 2 of it’s retainers with CNR retaining only the real estate file. CNR terminated the real estate retainer and so now all the retainers are gone. CNR brought a motion in the class action proceedings to have McKercher removed as counsel of record claiming McKercher breached the duty of loyalty by acting against CNR, they have improperly terminated their retainers with CNR and they might inappropriately use information about CNR in the class action dispute. CNR argued that at the time they were drafting the statement of claim, McKercher still had 3 active retainers with CNR and therefore CNR was still their client and therefore they were representing two clients adverse in legal interest implicating the Bright Line Test. CNR is pushing for interpretation A of the Bright Line Test (the broad version).
* **Prior Proceedings:** TJ held that McKercher was disqualified from acting in this case. TJ said that CNR had felt a justifiable sense of betrayal by McKercher and this substantially interfered with their ability to represent CNR in other matters. This got appealed to the CA. CA said that CNR was a large corporation that was not vulnerable to McKercher. It was such a large and sophisticated organization that we could infer that it would hire lawyers on some files who would act against it in others (Professional Litigant exception). The fact that McKercher knew some general litigation strengths of CNR did not count as relevant confidential information so long as the files were legally and factually unrelated. CA found McKercher breached it’s duty of loyalty when it terminated its retainers so abruptly but it said that disqualification was not an appropriate remedy. CA said that the termination of the ongoing retainers actually eliminated any chance of prejudice to CNR in the future. This was then appealed to the SCC.
* **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. Assuming that McKercher’s representation of CNR would not have been affected, should McKercher have been allowed to continue to represent CNR in some cases when acting against them in the class action?
* **Ratio:** **The Neil Bright Line test applies as a default, but there are 3 circumstances when the test will not apply, and we fall back on substantial risk test** (see below)
  + **Neil Bright line test and substantial risk test are 2 different tests**
  + **The potential for conflicts of interest aren’t the only breaches of fiduciary duty- two more:**
    - **The duty of commitment to the client’s cause (369)**
    - **The duty of Candor (397)**
* Limitation on the scope- the rule does not apply in three distinct instances (“In a concurrent relationship, the bright line test always applies UNLESS…):
  + - * **(1) Adverse in legal interests**
      * **(2) Constitutes tactical abuse rather than ‘ethically’**
        + Using it to get counsel excluded to gain an advantage
      * **(3) Where its application would be unreasonable** 
        + Cites professional litigant exception
* **Held:** The Bright Line Test did apply and McKercher was in fact offside the Bright Line Test because they had 2 clients adverse in legal interests. They cannot represent Wallace. The rule was not being used tactically and it was not unreasonable for CNR to expect the Bright Line Test to apply because they had a long-standing relationship with McKercher. It was reasonable for CNR to be surprised and dismayed that McKercher was acting against them. Court held that McKercher breached it’s duty of loyalty, particularly its duty of commitment to the clients cause by summarily dropping it’s retainers with CNR. McKercher also breached its duty of candour by failing to inform CNR that it would be suing them on behalf of Wallace. However, they held that disqualification might not be the appropriate remedy and they sent it back to the TJ for reconsideration of the appropriate remedy. Court said there was no likelihood of confidential information being used. General knowledge of litigation strategy was not enough. There was also no likelihood that the conflict of interest would put CNR at an actual disadvantage in this case and as a result the only reason to disqualify McKercher in this case would be if continued representation would undermine the administration of justice and the court sent it back to trial for re-hearing. They found that they were in a conflict of interest, breached their duty of loyalty and duty of commitment and candour but don’t think disqualification is the appropriate remedy.
* “As we held in *R v Neil*, the general “bright line” rule is that a lawyer, and by extension a law firm, may not concurrently represent clients adverse in interest without obtaining their consent – regardless of whether the client matters are related or unrelated. However, when the bright line rule is inapplicable, the question becomes whether the concurrent representation of clients creates a “substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interests or by the lawyer’s duties to another current client, a former client or a third person” (*Neil*). This appeal turns on the scope of the bright line rule: Did it apply to McKercher’s concurrent representation of CN and Wallace? Or is the applicable test instead whether the concurrent representation of CN and Wallace created a substantial risk of impaired representation?”
  + Court is saying that the substantial risk test and the Bright Line Test are two different tests. Sometimes one applies and sometimes the other does.
* “the law of conflicts is mainly concerned with two types of prejudice: prejudice as a result of the lawyer’s misuse of confidential information obtained from a client; and prejudice arising where the lawyer “soft peddles” his representation of a client in order to serve his own interests, those of another client, or those of a third person. As regards these concerns, the law distinguishes between former clients and current clients. The lawyer’s main duty to a former client is to refrain from misusing confidential information. With respect to a current client, for whom representation is ongoing, the lawyer must neither misuse confidential information, nor place himself in a situation that jeopardized effective representation.”
  + SCC says there are two things they are protecting with the law of conflict of interest: (1) a duty to maintain confidential information and (2) the duty to not soft peddle your representation of a client meaning don’t be tempted to not go as hard as you would otherwise go because of some competing interest (like how Strother did not tell Monarch in a timely manner to go back into the business)
* “The [bright line] rule expressly applies to both related and unrelated matters. It is possible to argue that a blanket prohibition against concurrent representation is not warranted with respect to unrelated matters, where the concrete duties owed by the lawyer to each client may not actually enter into conflict. However, the rule provides a number of advantages. It is clear. It recognizes that it is difficult – often impossible – for a lawyer or law firm to neatly compartmentalize the interests of different clients when those interests are fundamentally adverse. Finally, it reflects the fact that the lawyer-client relationship is a relationship based on trust. The reality is that ‘the client’s faith in the lawyer’s loyalty to the client’s interests will be severely tried whenever the lawyer must be loyal to another client whose interests are materially adverse’”
  + Court is acknowledging it may not make sense to have a blanket prohibition of concurrent representation but no, it exists!
* “The parties and interveners to this appeal disagreed over the substance of the bright line rule. It was variously suggested that the bright line rule is only a rebuttable presumption of conflict, that it does not apply to unrelated matters, and that it attracts a balancing of various circumstantial factors that may give rise to a conflict. These suggestions must be rejected. Where applicable, the bright line rule prohibits concurrent representation. It does not invite further considerations. As Binnie J stated in *Strother v 3464920 Canada Inc*, “the bright line rule is the product of balancing of interests not the gateway to further internal balancing”. To turn the rule into a rebuttable presumption or a balancing exercise would be tantamount to overruling *Neil* and *Strother*. I am not persuaded that it would be appropriate here to depart from the rule of precedent. … However, the bright line rule is not a rule of unlimited application. The real issue raised by this appeal is the scope of the rule. I now turn to this issue”
  + Seems to say that when the Bright Line Rule applies then boom they are done, no further considerations (such as substantial risk) are necessary. BUT the rule does not always apply
* “*Neil* and *Strother* make it clear that the scope of the rule is not unlimited. The rule applies where the immediate legal interests of clients are directly adverse. It does not apply to condone tactical abuses. And it does not apply in circumstances where it is unreasonable to expect that the lawyer will not concurrently represent adverse parties in unrelated legal matters.”
  + Limitation on the scope of the Bright Line Test is new
  + Court is saying that the rule does not apply in 3 distinct circumstances (1) if legal interests of the clients are not directly adversely impacted, (2) it does not apply where it is used tactically (important when dealing with large institutional clients – tactical abuses such using it to get their counsel excluded in order to gain an advantage in a third unrelated file) and finally (3) does not apply where its application would be unreasonable (i.e. professional litigant exception – it is unreasonable to expect that lawyers will not represent adverse parties where professional litigants are concerned)
* “Firstly, the bright line rule applies only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting. In *Neil*, a law firm was concurrently representing Mr. Neil in criminal proceedings and Ms. Lambert in divorce proceedings, when it was foreseeable that Lambert would eventually become Neil’s co-accused in the criminal proceedings. … This Court did not apply the bright line rule to the facts in Neil, because of the nature of the conflict. Neither Neil and Lambert, nor Neil and Doblanko, were directly adverse to one another in the legal matters on which the law firm represented them. Neil was not a party to Lambert’s divorce, nor to any action in which Doblanko was involved. The adversity of interests was indirect: it stemmed from the strategic linkage between the matters, rather than from Neil being directly pitted against Lambert or Doblanko in either of the matters”
  + E.g. A Co is not adverse to B Co and vice versa on the legal matters which BigLaw represents each of them
  + Seems from this that the court is saying that you can have clients that are suing each other so long as they are not suing each other on the matters on which you are advising them on. The adversity must be with respect to the files that you are already representing the clients on. Interests have to be directly adverse
  + Adversity has to be with respect to the files you are working with
  + Interests have to be directly adverse- both clients need to be involved
* “Second, the bright line rule applies only when clients are adverse in legal interest. The main area of application of the bright line rule is in civil and criminal proceedings. *Neil* and *Strother* illustrate this limitation. The interests in *Neil* were not legal, but rather strategic. In *Strother*, they were commercial”
  + Business competitors does not make them adverse in interest
  + Must be adverse in legal interest to invoke bright line test
* “Third, the bright line rule cannot be successful raised by a party who seeks to abuse it. In some circumstances, a party may seek to rely on the bright line rule in a manner that is ‘tactical rather than principled’ (*Neil*). The possibility of tactical abuse is especially high in the case of institutional clients dealing with large national law firms. Indeed, institutional clients have the resources to retain a significant number of firms, and the retention of a single partner in any Canadian city can disqualify all other lawyers within the firm nation-wide from acting against that client”
  + Court is restricting the application so that it does not have the consequence of allowing big organizations to employ a bunch of law firms so that their oppositions cannot use those firms
* “Finally, the bright line rule does not apply in circumstances where it is unreasonable for a client to expect that its law firm will not act against it in unrelated matters… In some cases, it is simply not reasonable for a client to claim that it expected a law firm to owe it exclusive loyalty and to refrain from acting against it in unrelated matters. As Binnie H stated in *Neil*, these cases are the exception, rather than the norm. Factors such as the nature of the relationship between the law firm and the client, the terms of the retainer, as well as the types of matters involved, may be relevant to consider when determining whether there was a reasonable expectation that the law firm would not act against the client in unrelated matters. Ultimately, courts must conduct a case-by-case assessment and set aside the bright line rule when it appears that a client could not reasonably expect its application.”
  + Court will analyze the relationship between the firm and the client and say it would have been crazy to expect the firm never to ask against you
* What do we do when the Bright Line test does not apply?
  + 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.”
      * Bright Line Test is the default conflict of interest rule in instances involving concurrent representation. Bright Line Test will always apply unless one of those above conditions.
* “The bright line rule is precisely what its name implies: a bright line rule. It cannot be rebutted or otherwise attenuated. It applies to concurrent representation in both related and unrelated matters. However, the rule is limited in scope. It applies only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting. It applies only to legal – as opposed to commercial or strategic – interests. It cannot be raised tactically. And it does not apply in circumstances where it is unreasonable for a client to expect that a law firm will not act against it in unrelated matters. If a situation falls outside the scope of the rule, the applicable test is whether there is a substantial risk that the lawyer’s representation of the client would be materially and adversely affected”
  + When Bright line does apply, then we turn to substantial risk
  + When applying the substantial risk test, we will only find a disqualifying conflict of interest where it is found that the lawyer’s continued representation of both clients generates a substantial risk that it’s loyalty to or representation of one of the clients would be materially and adversely affected
* “The duty of commitment is closely related to the duty to avoid conflicting interests. In fact, the lawyer must avoid conflicting interests precisely so that he can remain committed to the client. Together, these duties ensure ‘that a divided loyalty does not cause the lawyer to soft peddle his or her representation of a client out of concern for another client. (*Neil*). The duty of commitment prevents the lawyer from undermining the lawyer-client relationship. As a general rule, a lawyer or law firm should not summarily and unexpectedly drop a client simply in order to avoid conflicts of interest with existing or future clients. This is subject to law society rules, which may, for example, allow law firms to end their involvement in a case under the terms of a limited scope retainer.”
  + Duty of loyalty includes the duty to avoid conflicts of interest and the duty of commitment to client’s cause
  + E.g If you are acting for a small convenience store in a retainer for only a few thousand dollars and you’ve been acting for them for only a few weeks. But then comes a massive organization that wants to hire you for a massively profitable retainer and one of the aspects of this retainer might cause you to act against the interests of this little store. You have a duty to be committed to the clients cause, cannot just get rid of them.
  + Duty of Commitment prevents the lawyer from summarily and unexpectedly dropping a client simply to avoid conflicts of interest with existing or future clients
  + It is an aspect of duty of loyalty: Duty of Loyalty = avoid conflict of interest + commitment to client’s cause = duty of candour
* “A lawyer or law firm owes a duty of candour to the client. This requires the law firm to disclose any factors relevant to the lawyer’s ability to provide effective representation. As Binnie J stated in *Strother*, ‘The thing the lawyer must not do is keep the client in the dark about matters he or she know to be relevant to the retainer’… It follows that as a general rule a lawyer should advise an existing client before accepting a retainer that will require him to act against the client, even if he considers the situation to fall outside the scope of the bright line rule. At the very least, the existing client may feel that the personal relationship with the lawyer has been damaged and may wish to take its business elsewhere. … I add this. The lawyer’s duty of candour towards the existing client must be reconciled with the lawyer’s obligation of confidentiality towards his new client. In order to provide full disclosure to the existing client, the lawyer must first obtain the consent of the new client to disclose the existence, nature and scope of the new retainer. If the new client refuses to grant this consent, the lawyer will be unable to fulfill his duty of candour, and, consequently, must decline to act for the new client.”
  + Court said that even if they were to hold that this case falls off side the Bright Line Rule, the way in which McKercher notified CNR that it was not going to represent them was improper. The lawyer should advise an existing client before accepting a retainer that will require them to act against the client. You have to inform your current clients that you are acting against them even if it is a substantial risk case.
  + Lawyers duty of candour in this case would require them to disclose to CNR if they accept the Wallace retainer but you cannot disclose your acceptance of this retainer without Wallace’s consent due to confidentiality. If Wallace says no, you have to say that you cannot take his case.

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

* They adopted almost verbatim the SCC in *McKercher*
* **FLSC Code, Rule 3.4-1:** A lawyer must not act or continue to act for a client where there is a conflict of interest, except as permitted under this Code.
  + **Commentary [1]** Lawyers have an ethical duty to avoid conflicts of interest. Some cases involving conflicts of interest will fall within the scope of the bright line rule as articulated by the SCC. 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 the SCC would not
    - 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
    - Only when the courts would of found you guilty of breach of fiduciary duty will the Law Society find you guilty of professional misconduct
    - 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 judgement 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*

# Personal Conflicts

* 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 as lawyers do have a personal interest in being paid as much as possible for their services while a client will have an interest in paying as little as possible for these services
  + Lawyers are technically opposing parties with their clients in the sense that they are both parties to a retainer
* **Recall Rules 3.4-1 “Duty to Avoid Conflicts of Interest”**
  + “A lawyer must not act or continue to act for a client where there is a conflict of interest, excepts as permitted under the code”

## Third Party Fee Payments

* Some person or entity other than the client is paying the lawyer to represent that client’s interests
* The lawyer is representing X, but Y is paying the bills (Y has retained the lawyer to represent X)
  + There is a contract of retainer between Y, the bill payer, and the lawyer. Considerations flows from Y to the lawyer in the form of money and consideration flows from the lawyer to Y in the form of a promise to represent X’s interests as their lawyer
* The lawyer has a contract with Y to represent X. To whom does the lawyer owe his or her “duty of loyalty”?
  + While there is a contractual duty between Y and the lawyer, all ethical duties are between the lawyer and X. The lawyer’s contractual relationship with Y has no bearing on the duties that the lawyer owes to X. The lawyer’s duty to X will be the same as if Y was not in the picture at all
* “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” (Gavin MacKenzie)

## Third Party Fee Payments: Young Clients

* The issue of third party fee payments can be particularly problematic in the context of young clients because generally it will be their parents that are paying the bill and the interests of the parent and the interests of the child might conflict (child might disclose uncomfortable fact about the family that the parents do not want to get out)
  + BUT lawyers owes all their obligations to the client, not to the parent
* **Section 25(8) of *Canada’s Youth Criminal Justice Act:***
  + **(8)** If it appears to a youth justice court judge or a justice that the interests of a young person and the interests of a parent are in conflict or that it would be in the best interests of the young person to be represented by his or her own counsel, the judge or justice shall ensure that the young person is represented by counsel independent of the parent

## Payment Among Multiple Accused

* Troublesome where lawyer is representing multiple accused but only one is footing the entire legal bill

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

* **Facts:** A number of guys were charged with conspiracy to possess narcotics. Three of the accused, Stork, Toews and Stenson were represented by a lawyer named Mr. N. Stork and Toews, were getting a free ride as all of the bills were being paid by Stenson. At Stenson’s direction, Mr. N, influenced Stork and Toews to plead guilty and contacted the Crown and RCMP and convinced them to stay charges against Stenson in exchange for the pleas of Stork and Toews. Everyone agreed. Stork and Toews were convicted based om their pleas. On appeal to the BCCA, Mr. N admitted that he had influenced Stork and Toews to plead guilty with a view to assisting Stenson.
* Mr. N’s admission:
  + “in fairness to the accused, STORK and TOEWS, I believe that they accepted my estimation of the case and accepted my advice that they should plead guilty. I believe that I influenced them in this regard and that they relied upon my judgement and upon my advice in deciding to plead guilty.”
    - According to the BCCA, this situation created an impermissible conflict of interest. The fact that only one of the accused was paying the bills and the appearance that he was being given preferential treatment created more than a potential risk that N’s loyalty towards Stork and Toews had been compromised.
    - Pursuing the interests of the client paying the bill created a substantial risk that the lawyer would soft peddle for the clients not paying. Court is are saying that it looks like Stenson is getting better treatment because he was paying the bill
    - **Reminder:** To find a conflict of interest we don’t need to find that the lawyer’s loyalty to a client was compromised, you just that there was a substantial risk that the lawyer’s loyalty to the client was compromised
* **Issue:** What was 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 is needed, was there a substantial risk?
* **Held:** Court found that the pay situation, coupled with the appearance of impropriety that arose as a result of the different outcomes, generated such a substantial risk. Verdicts cannot stand. New trial.
  + It looked like Stenson was getting preferential treatment because he was paying the bills (whether or not he was)
  + The pay situation coupled with different outcomes generated a substantial risk
* “In my opinion, Mr. N was in a position of hopeless conflict of interest. Here, the man who was paying him goes free while the other two accused go to jail for five or eight years. While there is no attack on Mr. N’s good faith, or indeed, upon the soundness of his advice, it does not seem to me that the plea of guilty obtained under such circumstances can stand when the accused ask to withdraw it”
* **Remedy:** BCCA allowed accused to revoke their pleas, replace them with pleas of not guilty and get a new trial.

## Thoughts on Third Party Fee Payments

* Should we ban them?
  + Might be a bad idea to ban them because their availability provides access to justice because people who cannot pay for their own lawyer, might get access to a lawyer because a third party is willing to pay the bill.
  + Neutral conduit model is premised on the availability of counsel and the availability of third parties willing to pay for these counsel will give access to these neutral conduits
  + However, the lawyer must ensure that all parties know where the lawyer’s loyalties lie
* Should “third party” simply give the money to the client, who then pays the lawyer? (may not always be a solution)
  + Payor should be told their interests would be “ignored” and interests of the client would be paramount

## Contingency Fees

* Recall brief discussion of contingency fees in *CNR v McKercher*
  + Lawyers can get contingency fees when representing a class in a class action proceeding
* All or part of the lawyer’s fee is “contingent” on achieving a particular result for the client (i.e. only if they obtain a judgement for the client)
  + If they are unsuccessful they will not be paid at all, payment is contingent on the results of the client’s face
* Often pursued in connection with class action claims, in which lawyer receives some percentage of client’s final award (often 33.3%)
* Potential for enhancing access to justice
* Potential for conflicts – Consider a lawyer who is in immediate need of funds
  + This may force the lawyer to consider an early and perhaps inadequate settlement for the client
  + The clients’ interest might be better served by taking the matter to trial but the lawyer’s interest might be better served accepting an immediate offer to settle – this is a conflict
* Main reason we allow contingency fees is to promote access to justice
  + People who may not be able to afford a lawyer in other circumstances, obtain access to justice through a contingency fee arrangement
* Until recently, contingency fees were not allowed in Ontario at all because they gave a lawyer a stake in the outcome and that is a conflict of interest. Ontario was the last jurisdiction in NA to allow them.
  + E.g A lawyer has two clients, one who is paying him hourly and the other that will only pay him if he gets a win. Will he treat these two clients differently? This generates potential interests between clients as well.
* They are now allowed in Ontario but are closely regulated.
* Regulated by **rules 3.6-1 and 3.6-2 of the FLSC Code**:
  + Reasonable Fees and Disbursements
    - **3.6-1** A lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion
      * Rule starts by seeming like an absolute prohibition, but then states that lawyers are only allowed to charge clients fees that are fair and reasonable
    - **3.6-2** Subject to rule 3.6-1 (the requirement that the fee must be fair and reasonable), a lawyer may enter into a written agreement in accordance with governing legislation\* that provides that lawyer’s fee is contingent, in whole or part, on the outcome of the matter for which the lawyer’s services are to be provided
      * \*In Ontario, governing legislation is *The Solicitor’s Act* which regulates contingency fees
        + **S. 28.1(3)** lawyers cannot enter into contingency fee agreements in criminal law or family law matters
        + **S. 28.1(4)** Contingency agreements have to be in writing
      * Every jurisdiction that allows contingency fees has this legislation which regulates it.
      * Law Society Rules of Professional Conduct allow contingency agreements as long as (a) they are in accordance with this external governing legislation and (b) satisfy the requirement that the lawyers’ fees be fair and reasonable

## Non-Payment of Fees

* What do you do when your client fails to pay?
  + You can sue client for payment, and even release confidential info supporting your claim for payment (**rule 3.3-5**)
* What if you’re in the middle of representing a client and the client stops paying?
  + Duty of loyalty, which includes a duty of commitment to the client’s cause and as a result, lawyers do not have the ability to just stop representing clients when they want to (including for non-payment of fees)
  + **FLSC s. 3.7** outlines when lawyers can and cannot withdraw from representing a client as a result of the client not paying
    - **3.7-1:** A lawyer must not withdraw from representation except for good cause and on reasonable notice to the client
* Along with Law Society, courts can also prevent a lawyer from ending representation over non-payment of fees.
* Can you bail on the non-paying client? Does this give rise to conflicts of interest?

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

* **Facts:** Jenny Cunningham is a criminal defense lawyer working for Yukon Legal aid. In 2006, she was representing a man named Clinton Morgan charged with 3 sexual offences against a young child. On May 3 2006, Legal aid told Mr. Morgan that in order to continue to be eligible for legal aid, he had to update his financial information. They further told him that failure to do this would result in termination of legal aid. Mr. Morgan failed to respond to this request. Legal aid called Cunningham and told her that she was not longer authorized to represent Mr. Morgan. She brought an application to the court to withdraw from counsel of record. The sole reason that she stated for wanting to withdraw was Morgan’s inability to pay fees. Cunningham expressed that she was willing to keep working for Morgan if Legal aid were reinstated. Morgan expressed no views one way or the other, he was not going to pay her, nor was he going to update Legal aid. Court decided to examine the limits of its ability to regulate lawyers in this position and raised the question of whether they can force her to continue to represent her client for free.
* **Issue:** Should the court grant Cunningham’s request to withdraw? Can the court force a lawyer to act for free? What impact does this have in conflict of interest, if the court forces them to act for free will they soft peddle? What is the impact of confidentiality on representing a client for free, can the lawyer tell the court that they want to withdraw because the client is not paying but what if the clients’ financial circumstances is relevant to the case?
  + Could she be tempted to soft peddle?
* **Ratio:** Accused can discharge legal counsel and court cannot stop this. Courts do have jurisdiction to disallowed requests for withdraw. Test to allow withdrawal from this case is:
  + “The Supreme Court of the Yukon Territory correctly concluded that the territorial court had the jurisdiction to refuse to grant counsel’s request to withdraw. This jurisdiction, however, should be exercised **exceedingly sparingly.** It is not appropriate for the court to refuse withdrawal where an adjournment will not be necessary nor where counsel seeks withdrawal for **ethical reasons.”**
    - This is the way out—all the lawyers have to do is tell the court that they have ethical reasons and thus have to withdraw; Jenny Cunningham’s problem is that she was to honest and said it was about being paid not simply ethical reasons
    - \*Ability to withdraw is restrained by 3.7, court has jurisdiction to refuse, but no jurisdiction where ethical reasons lead to request for withdrawal. In some situations, non-payment leads to ethical reasons. \*
* “An accused has an unfettered right to discharge his or her legal counsel at any time and for any reason. A court may not interfere with this decision and cannot force counsel upon an unwilling accused… Counsel, on the other hand, does not have an unfettered right to withdraw. The fiduciary nature of the solicitor-client relationship means that counsel is constrained in his or her ability to withdraw from a case once he or she has chosen to represent an accused. These constraints are thoroughly outlined in the rules of professional conduct issued by the provincial or territorial law societies. This appeal raises the issue of whether a court’s jurisdiction to control its own process imposes a further constraint on counsel’s ability to withdraw…”
  + **3.7 of the FLSC code** create Law Society constraints on counsel’s ability to withdraw
  + Court asking whether there are judicial constraints on top of the statutory ones already outlined in the FLSC
* “…. It would seem to follow that just as the court, in the exercise of its inherent jurisdiction, may remove counsel from the record, it also may refuse to grant counsel’s application for withdrawal”
  + The court has not asserted the right to force a lawyer to work for free in the past
  + SCC says that they do have the jurisdiction and therefore they do
* “The reasons in favour of courts exercising this jurisdiction are numerous. An accused, who becomes unable to pay his lawyer, may be prejudiced if he is abandoned by counsel in the midst of criminal proceedings. Proceedings may need to be adjourned to allow the accused to obtain new counsel. This delay may prejudice the accused, who is stigmatized by the unresolved criminal charges and who may be in custody awaiting trial. It may also prejudice the Crown’s case. Additional delay also affects complainants, witnesses and jurors involved in the matter, and society’s interest in the expedient administration of justice. Where these types of interests are engaged, they may outweigh counsel’s interest in withdrawing from a matter in which he or she is not being paid”
  + Why do these problems lead to the conclusion that defense counsel who is not being paid must act for free? What about making the individual self-represent or ordering legal aid to pay? Why should defense counsel bear the burden?
* **Issue:** Should counsel have to explain the reason for withdrawal? If counsel has to explain that he or she isn’t being paid, does that disclose confidential or privileged information?
  + “The only information revealed by counsel seeking to withdrawal is the sliver of information that the accused has not paid or will not be paying fees. It has not been explained how, in this case, this sliver of information could be prejudicial to the accused. Indeed, it is hard to see how this simple fact alone could be used against the accused on the merits of the criminal proceeding: it is unrelated to the information given by the client to the lawyer, and unrelated to the advice given by the lawyer to the client. It would not be possible to infer from the bare fact of non-payment of fees any particular activities of the accused that pertain to the criminal charges against him.
* “… To be sure, this is the case where non-payment of fees is not linked to the merits of the matter and disclosure of non-payment will not cause prejudice to the accused. However, in other legal contexts, payment or non-payment of fees may be relevant to the merits of the case, for example, in a family law dispute where support payment of fees may cause prejudice to the client, for example, where the opposing party may be prompted to bring a motion for security for costs after finding out that the other party is unable to pay its legal fees. Where payment or non-payment of fees is relevant to the merits of the case, or disclosure of such information may cause prejudice to the client, solicitor- client privilege may attach”
  + In cases where disclosing the non-payment of fees might disclose something pertinent to the matter at hand, then counsel will be prevented from saying the reason they want to withdraw is non-payment of fees.
* “I am also unpersuaded… that forcing unwilling counsel to continue may create a conflict between the client’s and lawyer’s interests. It is argued that where counsel is compelled to work for free, he or she may be tempted to give legal advice which will expedite the process in order to cut counsel’s financial losses even though wrapping up a criminal matter as quickly as possible may not be in the best interests of the accused. This argument, however, is inconsistent with the Law Society’s position… that the court should presume that lawyers act ethically. There are many situations where counsel’s personal or professional interests may be in tension with an individual client’s interest, for example where counsel acquires an interesting new file that requires immediate attention, or has vacation plans that conflict with the timing of court proceedings affecting the client. Counsel is obligated to be diligent, thorough and to act in the client’s best interest. When the court requires counsel to continue to represent an accused, counsel must do so competently and diligently. Both the integrity of the profession and the administration of justice require nothing less.”
  + We should presume that lawyers act ethically BUT we know that the courts often do not presume this, sometimes they presume the office (*MacDonald Estate v Martin*)



* + If the court is responsible for creating the possibility of a conflict of interest, they can presume that the lawyer will nevertheless act ethically. Court is creating a substantial risk that the lawyer’s loyalty to or representation will be compromised.
* “… ordering counsel to work for free is not a decision that should be made lightly. Though criminal defense counsel may be in the best position to assess the financial risk in taking on a client, only in the most serious circumstances should counsel alone be required to bear this financial burden. In general, access to justice should not fall solely on the shoulders of the criminal defense bar and, in particular, legal aid lawyers. Refusing to allow counsel to withdraw should truly be a remedy of last resort and should only be relied upon where it is necessary to prevent serious harm to the administration of justice.”



* + Why don’t we require the prosecutor to pay the defense counsel fee? Why does the judge waive their salary for the duration of the proceedings? Why does the burden fall on defense counsel?
  + This is should be a last resort for sure, but should it be allowed at all?
* “If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation, there is no need for the court to enquire into counsel’s reasons for seeking to withdraw or require counsel to continue to act.”
  + If you have been retained and it is early in the proceedings and your client informs you that they are unable or unwilling to pay, as long as it will not require an adjournment and the proceedings are not underway, the court should allow them to withdraw
  + BUT that was not the case in this case as the proceeding was already under way
* “Assuming that timing is an issue, the court is entitled to enquire further. Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor- client relationship where it is now impossible for counsel to continue in good conscience to represent the accused. Counsel may cite “ethical reasons” as the reason for withdrawal, if, for example, the accused is requesting that counsel act in violation of his or her professional obligations… or if the accused refuses to accept counsel’s advice on an important trial issue… If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for “ethical reasons”. However, in either the case of ethical reasons or non-payment of fees, the court must accept counsel’s answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege”
  + When a lawyer says to the court that they have to withdraw for ethical reasons or non payment of fees, the court has to accept that as true
  + To the extent that privilege is not engaged, you can explain your reasoning (cannot break confidentiality/privilege during this process)
  + Court cannot ask further questions at the risk of violating privilege
* “If withdrawal is sought for an ethical reason, then the court must grant withdrawal… Where an ethical issue has arisen in the relationship, counsel may be required to withdraw in order to comply with his or her professional obligations. It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.”
  + If it is for ethical reasons, court must believe you and let you withdraw without asking any further questions
  + This leaves a loophole for lawyers to say ethical reasons instead of non-payment
* “If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel’s request. The court’s order refusing counsel’s request to withdraw may be enforced by the court’s contempt power”
  + This means that you could be put in jail for refusing to act for free. The court’s contempt of court charge means you can be thrown in jail until you agree to do whatever they want you to do
* 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 in custody
  + Conduct of counsel (i.e. if counsel gave reasonable notice to 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 defense counsel, including consideration of expected length and complexity of the proceedings
    - Are we going to be requiring this person to work for free for 2 years in complicated proceedings?
  + The history of the proceedings (e.g. if the accused has changed lawyers repeatedly)
* Unstated elements of the court’s decision in *Cunningham*:
  + Court seemed to realize they were doing a bad thing by forcing Ms. Cunningham to work for free.
  + The court was forcing her to work for free, but they were doing that knowing that this is probably the last time they were ever going to have to do this. The court said that if you say you are withdrawing for ethical reasons, they will believe you and they will not ask what those ethical reasons are. They also said that if they ask to withdraw for ethical reasons you will be allowed to withdraw.
* Questions
  + What if counsel in Cunningham’s position genuinely feels that acting in the fact of non-payment will create a conflict of interest (i.e soft peddle or settle quickly)? Can counsel cite ethical reasons?
    - Court says that if the real reason is non-payment of fees you cannot cite ethical reasons. But what if the original reason was nonpayment of fees but this has given rise to bona fide ethical concerns?
  + What about disbursements? Will Cunningham have an incentive not to bring in expert witnesses? Eyewitness who now live far away and have high travel expenses
    - Yes, she will because if you are forced to act for free, your strategic choices on behalf of a client might change. This is a bona fide ethical issue that arises.
  + Would Cunningham have requested withdrawal if her client had planned to please guilty? What if her client had a very simple defense, that would take little time to muster? Does a motion to withdraw (for non-payment) reveal something about the defense strategy (e.g. length and complexity)?
    - Yes. Asking to withdraw in event of nonpayment can be divulging too much information to the court.
    - If your motion to withdraw would require you to disclose privileged information if you were to say it was for non-payment of legal fees, then you cite ethical reasons.
* **Held:** Court does have jurisdiction to now allow Cunnigham’s request for withdrawal and forced her to act. A lawyers ability to withdraw from a client’s case remains constrained by **s. 3.7 of the Law Societies Rules of Professional Conduct**. After *Cunningham*, the court, in theory, does have jurisdiction to refuse your application to withdraw even when your client is not paying you, but they do not have jurisdiction to prevent you from withdrawing if it is for ethical reasons. In certain situations, nonpayment of fees may give rise to bona fide ethical reasons for withdrawal and then the court cannot stop you.

## Other Personal Conflicts

* Personal conflicts aren’t only caused by fees
* Rule **3.4-1, Commentary 11**, provides other examples of circumstances in which the lawyer’s personal interest may give rise to conflicts of interest (this is commentary 8 in our textbook)
* **3.4-1, Commentary 11 (8)**
  + Conflicts of interest can arise in many different circumstances. The following examples are intended to provide illustrations of circumstances may give rise to conflicts of interest. The examples are not exhaustive
    - (d) A lawyer has a sexual or close personal relationship with a client.
      * (i) Such a relationship may conflict with the lawyer’s duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the court 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 or close personal relationship with a client, that personal relationship can undermine the lawyer client relationship and your duty of confidentiality. The Law Society will not impute that conflict to other members of the firm, you can give them to another member of the firm.

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

* **Facts:** George Hunter was a respected lawyer. Called to the bar in 1974 in Ottawa and was the senior partner at a highly reputable law firm. His practice was devoted to family law. In January 2000, a new client retained him for the purpose of upholding a child custody and access regime. The client’s name is XY who had sole custody of the child of her former husband ZZ. ZZ had supervised access. ZZ was challenging this arrangement and XY was also concerned because ZZ was an alcoholic with a history of violence and XY worried about his continued contact with her children. Hunter was retained to assisg XY in all matters related to this arrangement. In 2003, ZZ declared bankruptcy and Hunter assisted XY in attaining funds that were owed to her under existing divorce arrangements. Between 2003 and 2005, Hunter continued to represent XY on a number of issues related to child custody and divorce arrangements. Hunter and XY got on well and occasionally engaged in personal conversations while talking about the case. Hunter eventually invited XY to a hockey game in April 2003. They had several lunches together. Later in April 2003, Hunter invited XY out to dinner. At the dinner, Hunter, who was married at the time, informed XY that his marriage was a sham. He said it was not a good marriage and had been over for a while and that he was staying with her only for his kids. Hunter and XY then went back to XY’s home where they had sex. Both agree that the sexual relationship was completely consensual and there was no coercion. They continued their sexual relationship for 2 and a half years while Hunter continued to represent XY. Hunter, at no point, disclosed to XY that his judgement may be impaired as a result of their relationship. XY was sometimes unhappy with the legal advice Hunter gave her and she felt that he was insufficiently aggressive in trying to halt ZZ’s access visits’ but she did not challenge him on this because she was worried about upsetting him and putting their intimate relationship in jeopardy. In June 2005, XY’s child was injured in a pool owing to the negligence of ZZ. XY had Hunter recommence proceedings to reopen child access and by the time 2006 came around this would resolve in XY’s favour with ZZ agreeing to give up all access rights to the kids. Before that resolution took place, in November 2005, Hunter and XY met at a restaurant. Hunter showed XY the conflict of interest rule. XY maintains she only glanced through it, but Hunter said she read it. Hunter made XY initial each page of the rule and commentaries and she did. Hunter told her it was important to him to have her acknowledge that she read the rule. He wrote out an acknowledgment and had her read it and signed it. As soon as she signed the documents, Hunter informed her that throughout their relationship he had been carrying on similar relationships with at least 2 other women and admitted that he had just revealed these affairs to his wife. He and his wife were going to try to work things out and he ended up breaking up with XY. XY stormed off. Hunter met with management at his firm and informed them of his conduct and provided them with the signed and initialed copies of the rules and acknowledgments. In November 2006, Hunter appeared before Convocation of the Law Society of Upper Canada. He informed Convocation of his conduct. He was not there because he was charged with anything but because he was the head of the Law Society. At the time of this case, Hunter was the Treasurer of the Law Society of Upper Canada. Now he has to tell them about all of his past conduct, so he did. He resigned and Convocation accepted. Hunter was subsequently charged with professional misconduct and conduct unbecoming. The primary allegations related to this conflict of interest; he allowed his personal interest of having a relationship with his client to interfere with his representation of the client. At his hearing, 27 good character letters were put into evidence. Hunter expressed deep remorse for his conduct. A psychological report of XY indicated that she had been terribly harmed by the affair, that she was experiencing anxiety, depression and weight loss. Law Society noted that this was not caused only by Hunter’s misconduct but also because of their personal relationship. XY was in love with Hunter and was hurt. Convocation said that breaking up with someone is not necessarily professional misconduct. Law Society counsel is going to be seeking suspension for 4 months plus a fine of $2,500.
* Some things to note:
  + No evidence before us that Hunter’s work for the client suffered in any way
  + No evidence XY would have gotten a better result if Hunter behaved differently or if she had another lawyer
  + Hunter accepted personal responsibility for what he did
  + Hunter’s request for XY to initial the rules was not really an attempt to get informed consent, but rather an attempt to cover his ass
* I**ssue:** Should there be punishment: Was there a conflict of interest?
* **Ratios:** 
  + 1) There is no absolute ban against sexual relationship with clients, but they are cautioned against
    - “the rules of professional conduct do not create an absolute prohibition against initiating or continuing a sexual/romantic relationship with a client. […] however it can be fairly said that any sexual/romantic relationship with a client, at the very least, raises serious questions about whether the lawyer is thereby placed in a conflict of interest or is otherwise jeopardising the solicitor-client relationship.”
  + 2) If you are in one, you must warn from the onset
    - “Given the conflict of interest, the member was obliged to discuss with his client at the outset of their sexual/romantic relationship whether he should continue to act on her behalf. The member should have referred at minimum, to the circumstances that created the conflict of interest, and the dangers associated with that conflict of interest. The factors articulated in the Commentary to 3.4-1 should have figured prominently in that discussion.”
  + 3) If the conflict is too profound, the lawyer must pass off the file
    - *“it should be noted that, in some circumstances, the conflict created by the existence of a sexual/romantic relationship will be so profound and irreconcilable with the lawyer’s ability to provide objective, disinterested professional advice that the lawyer simply cannot continue to act, and must recommend that the client retain a different lawyer.”* (431)
* Panel agreed Hunter was unlikely to do something like this again. They did not think he was at a risk of re-offending but they did say that specific deterrence is not the only goal of punishment, general deterrence matters as well.
* “There is no doubt… that the sexual/romantic relationship between the member and XY created a conflict of interest. The member had a duty to provide objective, disinterested professional advice to XY. The sexual/romantic relationship had the significant potential of jeopardizing the member’s ability to provide such advice. It also had the significant potential of inhibiting the client from challenging or even questioning the advice being given by someone who was not only her lawyer, but an intimate partner. The fact that XY viewed the relationship as serious and committed reinforced this potential danger. As well, the nature of the work being performed by the member on XY’s behalf – involving a dispute with XY’s former husband and access issues- further underscores that danger”
  + The rules don’t prohibit having sec with client or having relationships with them but the Law Society is saying that the presence of the relationship gives rise to obligations
  + Lawyer should point out potential conflicts of interest, get consent, make client aware fo the professional downside, recommend indepenadnt legal advice
* “The Rules of Professional Conduct do not create an absolute prohibition against initiating or continuing a sexual/romantic relationship with a client. This is not the case or the forum to debate whether the existing Rule is sufficiently broad or inclusive. However, it can fairly be said that any sexual/romantic relationship with a client, at the very least, raises serious questions about whether the lawyer is thereby placed in a conflict of interest or is otherwise jeopardizing the solicitor-client relationship. …. Given the conflict of interest, the member was obligated to discuss with his client at the outset of their sexual/romantic relationship whether he should continue to act on her behalf. The member should have referred, at a minimum, to the circumstances that created the conflict of interest, and the dangers associated with that conflict of interest.”
  + While the Rules don’t prohibit a sexual relationship with a client, those relationships give rise to additional obligations for the lawyer to advise their client of the impact their sexual relationship may make on their representation of the client, should get their express consent to act in the face of this conflict of interest. Independent legal advice here would be ideal.
* “[The applicable rule] does not compel a lawyer to advise the client to obtain independent legal advice about the conflicting interests in all cases. However, where the client is unsophisticated or is vulnerable, the lawyer should recommend such advice to ensure that the client’s consent is informed, genuine and uncoerced. Here, the client was emotionally vulnerable (whether as a result of the family law dispute, her new, intimate relationship with the member or both), and the member should have recommended independent legal advice. Any uncertainty on the member’s part as to whether the circumstance compelled him to recommend independent legal advice should have been resolved in favour of such a recommendation.”
  + If you have a sexual relationship with a client, you must tell them about the potential downsides and if there is any vulnerability you should recommend they seek independent legal advice before they retain you as their lawyer
* “It should be noted that, in some circumstances, the conflict of interest created by the existence of a sexual, romantic relationship will be so profound and irreconcilable with the lawyer’s ability to provide objective, disinterested professional advice that the lawyer simply cannot continue to act, and must recommend that the client retain a different lawyer.”
  + If the lawyer believes that the nature of the sexual relationship is such that it gives rise to a substantial risk that their loyalty to or representation of that client will be materially or adversely affected, then the lawyer should tell that client that they cannot continue to act because it has generated a conflict of interest
* **Held:** There had in fact been a conflict of interest, Hunter admitted it, and that this was professional misconduct. Hunter was suspended for 60 days. Hunter was ordered to pay costs to the Law Society in the amount of $2,500.
* Question: Should we prohibit sexual relationships between lawyers and clients? Why or why not?
  + - This rule could have some difficult incentives:
      * Consider lawyers in rural centers, who may act for most of the people in the area.

# The Ethics of Advocacy

* Apply only when lawyers act as advocates
* Professional Conduct Obligations that arise only where the lawyer acts “as an advocate”
* Acting “as an advocate” is not defined by the relevant rules
  + Rules apply whenever lawyers represent clients in proceedings before courts or administrative tribunals
* Relates to representation of clients before courts, administrative tribunals, mediators, etc.
* Advocacy rules are some of the most indeterminate and flexible rules we have

## The Advocacy Rules

* **Chapter 5.1 of the FLSC Model Code**:
  + The Lawyer as Advocate
    - **5.1-1** When acting as an advocate, a lawyer must represent the client resolutely and honorably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect
      * **[1] Role in Adversarial Proceedings**- In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client’s case and to endeavor to obtain for the client the benefit of every remedy and defense 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 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.
        + E.g just because bribing a judge would secure the desired remedy for the client, that would violate the fairness and honest means requirement.
      * **[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.
      * **[3]** The lawyer’s function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (expect 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 professional into disrepute
        + Must balance zealous advocacy with the boundaries created by our duty of candour and respect to the court

## Rule 5.1-2

* When acting as an advocate, a lawyer must not:
  + A) abuse the process of the tribunal by instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party;
    - Lawyers should only be bringing proceedings on behalf of people who are seeking to vindicate their legal rights, not people who simply want to harm others
  + B) knowingly assist or permit a client to do anything that the lawyer considered to be dishonest or dishonorable;
    - Seems like it would be a defense to say that while the court may think the actions were dishonorable, the lawyer did not and by this rule, lawyers are only prohibited from doing things that they believe are dishonorable
  + C) appear before a judicial officer when the lawyer, the lawyer’s associates or the client have business or personal relationships with the officer that give rise to or might reasonable 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;
  + D) endeavor or allow anyone else to endeavor, 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
    - I.e bribery, you cannot try to convince the tribunal by anything other than arguments
  + E) knowingly attempt to deceive a tribunal or influence the court of justice by offering false evidence, mistaking facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct;
  + F) knowingly misstate the contents of a document, the testimony of a witness, the substance of an argument or the provisions of a statute or like authority
  + G) knowingly assert as true a fact when its truth cannot reasonably be supported by the evidence or as a matter of which notice may be taken by the tribunal
  + H) make suggestions to a witness recklessly or knowing them to be false
    - E.g. if you know the witness before you is absolutely not responsible for the crime which your client is charged with, you cannot put it to them that they are guilty and try to get them to confess
  + I) deliberately refrain from informing a tribunal of any binding authority that the lawyers consider to be directly on point that has not been mentioned by another party
    - If you are arguing before the court, and you notice that your opponent has missed some key authority that would really hurt you, you have a positive duty to bring to the court’s attention any adverse authority that is against your position that is binding in the case
  + J) improperly dissuade a witness from giving evidence or advise a witness to be absent
  + K) knowingly permit a witness or party to be presented in a false or misleading way or to impersonate another
  + L) knowingly misrepresent the client’s position in the litigation or the issues to be determined in the litigation
  + M) needlessly abuse, hector or harass a witness
    - You can do it to prove a point, but it cannot be needless
  + N) 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
  + O) needlessly inconvenience a witness
    - You can inconvenience a witness but not where it doesn’t appear to prove a purpose
  + P) appear before a court or tribunal while under the influence of alcohol or a drug

## Examples of Specific Duties

1. Defending the Guilty
2. Client Perjury

## 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 crim with which he or she has been charged while also having the related mens rea)?
  + Some commentators say no, but this is not the position our legal profession has taken

## Barrister and Solicitor’s Oath

* 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 the diligently represent the best interests of my client. I shall not refuse causes of complaint reasonably founded; not shall I promote suits on frivolous pretenses. I shall not pervert the law to favour or prejudice anyone, 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
  + A number of these prove that you cannot refuse to represent people who have causes of complaint reasonably founded
  + Everyone has a right to a defense. Even a guilty person has the right not to be deprived of life, liberty and security of a person for example.

## The Neutral Conduit Model

* Access to Legally Authorized Rights and Remedies despite the complexity of the Law
* Most common argument in favour of the defense of guilty clients is the Neutral Conduit Model rationale for lawyer’s behavior.
* Neutral conduits should not impede an individual’s ability to access rights and remedies

## The Neutral Conduit Model: Criminal Law

* “The lawyer who vigorously defends the accused who is known to be guilty sends a message to police and prosecution alike that fair and complete evidence will be needed if they hope to secure a conviction, with an attendant benefit for all accused. Such a defense also recognizes an inherent dignity and autonomy in even the culpable accused, who is deserving of fair procedures as he or she goes through the criminal justice process. The result may be the acquittal of persons who have committed criminal offences – in a sense, the overprotection of the guilty – but society has deemed this to be an acceptable price to pay in exchange for the adequate protection of individual rights” (Proulx and Layton)
* “Resolute partisan advocacy on behalf of those accused of crimes is the greatest safeguard against encroachment by the state. The right to counsel is essential whether or not the accused person is guilty. To suggest that defense counsel represent only people who are innocent (or any other category of people) is to open the door to a system in which the government decides who is, and who is not, entitled to a defense” (Gavin MacKenzie)

## Commentaries to Rule 5.1-1

* **[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 defenses, 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 objective 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.
  + If you come away from meeting with your client knowing for sure based on the evidence they provided you that your client is guilty of the offence with which they have been charged. You cannot set up an affirmative defence, you cannot blame someone else for the crime, you cannot create an alibi or assert any evidence you know to be false and the accused should be made aware of these limitations
  + The accused should be made aware of these limitations
  + Cannot take any form of action suggesting to client that they should lie to you

### R v Li [1993] BCJ 2312 (BCCA) – What counts as “misleading” the tribunal?

* **Facts:** The accused, Li, had robbed a jewelry store. He had in fact robbed it and admitted that to his lawyer. The lawyer representing him was Mr. Brooks. During the trial, clerks that worked at the jewelry store gave evidence as to the appearance of the robber and the robber’s fluency in English as well how the robber wore his hair. Li’s counsel called evidence from other independent witnesses who knew Li and who testified Li had never worn his hair in that way and that Li’s English skills were incompatible with the way the witnesses described. These independent witnesses cast doubt on the identification evidence led by the Crown. Counsel knows that the clerks are giving evidence regarding their perceptions of the person who actually was his client robbing the store. Knowing that these were the clerks who saw his client rob the store, Mr. Brooks brought contradictory evidence to impeach the identification evidence which he knows to mostly true. Li wanted Brooks to call him to the stand so that he could testify that he did not commit the robbery but Brooks, knowing that he had, refused to call him as a witness.
* **Issue:** Did Mr. Brooks act properly by impeaching identification evidence that he knew to be true?
* **Ratio:** As long as you do not say something that is untrue (i.e. blame a 3rd party) you are allowed to challenge the prosecution by disproving elements of their case
* **Held:** No issues with the way in which the defence was forwarded.
* “Having received an admission from the accused that he robbed the store, Mr. Brooks was required to refrain from setting up any inconsistent defence. He was entitled, however, indeed under a duty, to test the proof of the case in every proper way. Thus, in my view, it was not improper for Mr. Brooks to call two independent witnesses who gave uncontroversial evidence about the hairstyle of the accused, about his fluency in English. Those matters might have raised a doubt about the reliability of the identification evidence given by the jewelry store clerks”
  + Judge does not talk about the accuracy of the evidence, he is talking about the reliability of it. If there is a flaw in their testimony, is this the evidence on which it is safe to base a conviction beyond reasonable doubt?
* “Thus, it does not appear that Mr. Brooks breached any ethical rule by continuing to act after the accused admitted he participated in the Burnaby robbery. He cross-examined the witnesses and sought to raise a doubt about identification (which was the only hope the accused had). He did not call the accused or put up any defence inconsistent with the facts believed by him to be true”
  + What Brooks did was not deceptive. He was not trying to deceive the Tribunal, but rather testing the quality of the witness’s evidence. Was not saying they never saw Li he was saying their memories were not reliable.

### United States v Wade (USSC)

* “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”
  + You cannot outright assert that a witness is lying unless you have a good faith basis for that assertion.
  + Despite permission to test evidence, it is accepted in the US and Canada that you cannot assert a witness is lying UNLESS you have a good faith basis

## Client Perjury

* Perjury is a crime punishable by up to 14 years in prison
* **Criminal Code of Canada**
  + **131(1)** …. Everyone 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** Everyone who commits perjury is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years

## Client Perjury: Possible Strategies

* **Proceed as usual** (leading to violations of **FLSC Code s. 5.1-2**). The lawyer would even rely on the client’s testimony when summing up to the jury
  + The lawyer could simply let the client offer the perjured testimony or elicit the perjured testimony
  + This would constitute participation by the lawyer in the deception of the Tribunal. This is prohibited by law
* **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)
  + Clients have a right to testify but do not have a 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 and denies the client the chance to have a last-minute change of heart on the stand
  + This could put your client at a significant disadvantage
* **Dissuade or withdraw**. Withdrawal might be prevented by **rule 3.7 of the FLSC Code** or its provincial equivalents
  + If the lawyer is precluded from withdrawing, they will have to choose another option on this list
* **Expose the client’s intentions** (excludes the possibility of a change of heart, and also violates confidentiality)
  + Problematic because client may have had a change of heart and disclosure violates rules of confidentiality
* With all of these options the lawyer must balance several important considerations including (1) loyalty to the client (2) the duty of confidentiality (3) the duty to render competent service (4) the client’s constitutional right to testify on her own behalf (5) the lawyer’s role as officer of the court (6) the lawyer’s potential liability for assisting in the commission of an offence (namely, perjury)

## Client Perjury: Rule 5.1-4

* Law Society has endorsed the dissuade and withdraw approach
* A lawyer who has unknowingly done or failed to do something that, if done or omitted knowingly, would have been in breach of this rule and who discovers it, must, subject to **section 3.3** (confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it
* **Commentary [1]** If a client desires that a course be taken that would involve a breach of this rule, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done, the lawyer should, subject to rule **3.7-1** (Withdrawal from Representation), withdraw or seek leave to do so
  + If a client wants you to take a course that would violate the rules of advocacy, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done, they should seek to withdraw.

## If Withdrawal is Impossible?

* “The duty of confidentiality, like the client-lawyer privilege does not extend to clients’ intentions to commit crimes [including the crime of perjury]. For policy reasons, moreover, lawyers should not have any duty to assist clients to carry out their expressed intentions to commit crimes. To require lawyers to do so is to corrupt the appropriate role of criminal defence lawyers in the administration of criminal justice” (Gavin MacKenzie)
  + Good point that perjury is a crime!!
  + However the court has asserted in *Cunningham* that if a lawyer asserts ethical reasons for needed to withdraw, the court must allow them and not ask any further questions
  + We cannot forget that perjury is a crime. And so, your duty to protect the client does not extend to a duty to help them commit criminal acts by putting them on the stand, eliciting that perjury and then treating that perjury as true testimony.
  + There are no circumstances in which you should knowingly allow your client to commit perjury. You must try to dissuade them and withdraw if that is not possible. The court will almost certainly allow you to withdraw. Even if the court does not allow you to withdraw, you never assist by allowing the client to put their perjury forward

## Surprise Perjury: Rule 5.1-4

* When you don’t know your client is going to commit perjury, but they get on the stand and perjure themselves
* 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, subjection to **section 3.3** (confidentiality), disclose the error or omission and do all that can reasonably be done in the circumstances to rectify it
  + If you have accidently allowed your client to lie, you are supposed to, it seems, disclose this error or omission, and do all that can reasonably be done to rectify it
  + Note the unclear relationship between this rule and rule of Confidentiality
    - If the client does decide to perjure themselves, the lawyer will only know this as a result of confidential information. One could argue that any disclosure of client injury would constitute a prohibited use of client information. Because this rule is subject to the rule of confidentiality, disclosure would be prohibited
    - Most commentators agree that lawyers must not allow the court to rely on perjured evidence. Lawyers must first attempt to get the client to correct their false evidence and if they cannot, the lawyer must disclose the client’s perjury

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

* **Facts:** This was a tort case stemming from the assault of a press photographer by Chief Inspector of the Metropolitan Police. The victim, a paparazzo, gave unsupported evidence that the chief inspector had arrested him improperly and beat him in the process. Chief Inspector claimed it did not happen this way and that the arrest was entirely proper based on disorderly misconduct by the photographer and that he only grew mildly violent when the victim first attempted to obstruct and assault the police. Chief Inspector’s account was supported by other police officers. Chief Inspector won at trial. But the trial court did not know that the Chief Inspector was no longer a chief inspector at the time of trial. Since the arrest, he had been demoted all the way down to a station Sargent by a disciplinary board because he had been involved in deceiving a court in an earlier case in connection with his duties as a police officer. This lie had concerned the arrest of a particular bookie. Chief Inspector lied and said another officer made the arrest when it was in fact him who did it. The lie was told because the Chief Inspector could not make it to the bookie’s trial and so another officer who could make it was made out to be the arresting officer. This was a lie and constituted perjury. The plaintiff in this case, the photographer, had no idea about this past but the former Chief Inspector’s lawyers did know. His counsel did some pretty deceptive things allowing the former Chief Inspector to portray himself as a continuing chief inspector.
* **Issue:** Did the lawyer do anything wrong? Was it perjury?
* **Ratio:** “In every case it must be a question of degree, weighing one principle against the other. In this case it is clear that the judge and jury were misled on an important matter. I appreciate that it is very hard at times for the advocate to see his path clearly between failure in his duty to the court, and failure in his duty to his client. I accept that in the present case the decision to conceal the facts was not made lightly, but after anxious consideration. But in my judgment the duty to the court was here unwarrantably subordinated to the duty to the client. It is no less surprising that this should be done when the defendant is a member of the Metropolitan Police Force on whose integrity the public are accustomed to rely”
* “It having been decided not to reveal these facts, the following things occurred at the trial. The defendant attended the trial not in uniform, but in plain clothes, whereas all the other police witnesses were in uniform. Thus, there was no visible sign of the defendant’s altered status. He was constantly addressed by his counsel as “Mr.” and not by his rank of sergeant. Counsel tells us that he would so address a sergeant in the normal case. When the defendant entered the witness box, he was not asked his name and rank in the usual manner. No suspicions were aroused since no one had any reason to suspect. The plaintiff’s counsel, however, and the judge frequently addressed the defendant, or referred to him, as “inspector” or “chief inspector,” and nothing was done to disabuse them.”
  + Counsel intentionally had his client come in in plain clothes rather than in his uniform which would have Sargent’s stripe and not Chief Inspector ones
* “The defendant started his evidence with a brief summary of his career up to the time when he was chief inspector at Cannon Row police station, but no reference was made to his reduction in rank. In cross-examination he was asked: “you are a chief inspector, and you have been in the force, you told us, since 1938? (A) Yes, that is true.” That answer was a lie. Later: “(q) You realize, as chief inspector, the importance of the note being accurate? (A) The importance of it conveying to me what I want to give in evidence.” He was asked further: “Let us understand this. You are a chief inspector. How old are you? (A) I am forty-six years of age”. And again: (Q) I am not asking you whether you took part in the inquiries, but whether you as a responsible and senior adult man- never mind about your being a chief inspector- had no anxiety about this case, no concern or interest? (A) No. I can only repeat I have nothing to fear.”
  + Multiple assertions that he was a Chief Inspector and no one corrected that view
* “The judge referred to the defendant as “inspector” or “chief inspector Fleming” many times in his summing-up to the jury. It is clear that he reasonably considered that the defendant’s rank and status were relevant on credibility in a case where there was oath against oath, and where there was a question of the defendant’s conduct in the course of his duty… Nor was the defendant’s counsel prepared to forgo the advantage to be derived from the status in the police force of his witnesses in general”
  + Credibility is the most important issue in this case and a reduction in rank carries a deficit in credibility
* “Where a party deliberately misleads the court in a material matter, and that deception has probably tipped the scale in his favour (or even, as I think, where it may reasonably have done so), it would be wrong to allow him to retain the judgement thus unfairly procured. Finis litium is a desirable object, but it must not be sought by so great a sacrifice of justice which is and must reaming the supreme objective. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behavior and do even greater harm than the multiplication of trials…. In every case it must be a question of degree, weighing one principle against the other. In this case it is clear that the judge and jury were misled on an important matter. I appreciate that it is very hard at time for the advocate to see his path clearly between failure in his duty to the court, and failure in his duty to his client. I accept that in the present case the decision to conceal the facts was not made lightly, but after anxious consideration. But in my judgment, the duty to the court was here unwarrantably subordinated to the duty of the client”
  + Talking about the balancing of interests between zealous advocacy and your duty of candour to the court. Court is saying the lawyer’s struck the wrong balance even though it was in their client’s interest
* “It was argued that the defendant was justified in that a party need not reveal something to his discredit; but that does not mean that he can by implication falsely pretend (where it is a material matter) to a rank and status that are not his, and, when he knows that the court is so deluded, foster and confirm that delusion by answers such as the defendant gave. Suggestio falsi went hand in hand with suppression very. It may well be that it was not so clear in prospect as it is in retrospect how wide the web of deceit would be woven before the verdict came to be given. But in the event it spread over all the evidence of the defendant. It affected the summing-up of the judge, and it must have affected the deliberations of the jury”
* “It would be an intolerable infraction of the principles of justice to allow the defendant to retain a verdict thus obtained. I would, accordingly, allow the appeal with costs, and order a new trial.”
* **Held:** No perjury but the court condemns the way the lawyer behaved. New trial ordered. Appeal allowed. New trial ordered where the former Chief Inspector would not be allowed to rely on the identity of Chief Inspector
* “In the discharge of his offer the advocate has a duty to his client, a duty to his opponent, a duty to the court, a duty to the State and a duty to himself. It seems to me that the decision which was taken involved insufficient regard being paid to the duty owed to the court and to the plaintiff and his advisers.”
  + Court here is saying that you have a duty to your opposing parties and that that duty and the duty to the court was unwarrantly subordinated to the duty to the client
* DURAND QC: “I indicated last week in the course of my argument before your Lordships that I took responsibility for the decision; I hope that the words I used then left the court under no misunderstanding as to my personal responsibility. It is right that I should say as emphatically and clearly as I can that the decision not to make disclosure of the defendants 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 to deceive the court.

### Re Jenkins and The Queen (2001) 152 CCC (3d) 426 – tells us the procedures we should follow when our continued participation in the representation of a client would result in the deception of the Tribunal

* **Facts:** Jenkins was on trial for 1st degree murder. This was his 3rd trial for the same charge. His first time, the court ended the trial by having Jenkins’ counsel booted for conflict of interest. The second trial, Jenkins fired his lawyer in the middle of the proceedings. At the third trial, he is now being represented by Mr. Powell. The trial had been going on for 8 weeks and cross-examination by the Crown had begun. The trial was going to be concluding in a couple weeks. Mr. Powell sought a brief adjournment and when trial resumed, Powell was represented by his own lawyer, Mr. Peel. Mr. Peel brought an application to have Powell removed on the grounds that Powell had received information cunning to the core of the case revealing that if Powell continued to represent the client, he would be forced into the position of deceiving the Tribunal. Peel took the position that Powell could not be put in the position to divulge that information to the court on the ground that it would violate confidentiality.
* **Held:** Counsel should withdraw for ethical reasons. Court granted the application to withdraw.
* “Mr. Peel, in his submissions to me, emphasized that the information which the accused had conveyed to Mr. Powell was such that it was fundamentally inconsistent with the very essence of the case which had been advanced to the jury on behalf of the accused. It was his view that, should Mr. Powell be required to continue his representation of the accused, any active participation whatsoever would raise the potential of Mr. Powell misleading the court.”
  + The Client seems to have given a certain set of facts to his lawyer upon which Mr. Powell has built his defense on the validity on, and then found out he has been basing the entire case on a lie. Neither of them is saying this but that is clear what is happening.
* “Mr. Peel was in the awkward position of being unable to set forward the precise factual underpinning for the application. He could go no further than to say to me that the information communicated by the accused was such that any involvement by Mr. Powell in the continuation of this trial would raise the hazard of a deception of the court.”
  + Judge was reluctant to allow Powell to withdraw because there was a certain amount of prejudice to the accused and a lot of delay. Jenkins did not care.
* **Issue:** Should counsel be allowed to withdraw? This was before *Cunningham*
* **Ratio:** Silence constitutes deception. The judicial view on what constitutes participation in the deception of the tribunal matches up with **rule 5.1.4**
* “It was the position of the Crown that, even should the accused, in the continuation of this trial, testify contrary to the disclosure made to Mr. Powell, the duty which Mr. Powell owes to the court would be fulfilled provided he did not, to use the Crown’s words, advance the lie. As I understood his position, it was that as long as Mr. Powell remained silent it would not matter that silence in the face of what had gone before would have the effect of deceiving the court nor would it matter that even further testimony would have that effect, so long as Mr. Powell did not actively do anything to advance the deception. Respectfully, I disagree. It is important to note that this was not a case where the application was made before trial so that deception might be avoided by counsel, to borrow the Crown’s words, not advancing the lie in the way in which the case was then presented. Rather, the deception in this case would arise from silence alone on the part of counsel in the fact of what had already been presented to the court.”
  + Simply remaining silent would allow the court to proceed on a misapprehension of the facts, on the face of a defense built on a lie and the final verdict will not be a reliable one
* “My view is that, quite apart from the obvious prejudicial inferences that might be taken by the jury as a result of Mr. Powell continuing as counsel while virtually tied to his chair, even silence on the part of Mr. Powell would have the potential of placing him in jeopardy in respect to his duty to the court, remembering that the communication made to Mr. Powell cuts to the very core and essence of the defence that had been presented in the trial. Silence on the part of counsel may not in all circumstances be deception, but in these circumstances, I believe that it would be. Limited representation on the part of Mr. Powell would not be an acceptable alternative. To borrow the words of Mr. Martin (as he then was) from 1969, the application has made in good faith, there is a serious problem and counsel has acted promptly. I am, therefore, reluctantly compelled to the conclusion that the application must be granted”
  + If you build your case on a set of factual circumstances that you believe to be true, and then you find out that they are not true such that your case is one that is inconsistent with the true state of affairs, the act of silently allowing the court to base its decision on that strategy is going to constitute deception of the Tribunal
* This case tells us that the judicial view on what constitutes participation in the deception of the tribunal matches up with rule **5.1-4** which is that counsel who has accidently participated in the deception of the Tribunal must disclose that error or omission and do all that can reasonably be done to rectify it and that must be made subject to the rule of confidentiality
  + That is exactly what this case is telling us