

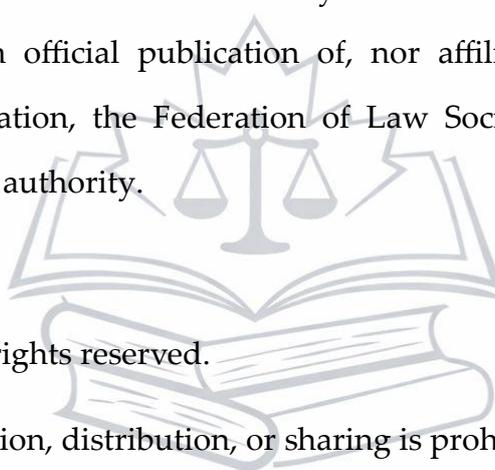
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THE LEGAL PROFESSION: LAWYERS IN SOCIETY AND A SOCIETY OF LAWYERS

Introduction:

The legal profession encompasses a set of practices and ethical standards that lawyers must adhere to in their professional lives. The foundation of professional responsibility lies in the understanding of what it means to be a lawyer and the ethical obligations that come with this role.

Professions and Professionalism: The Profession of Law and Law as a Profession

Sustainable Professionalism (Trevor C.W. Farrow)

Trevor C.W. Farrow's article on "Sustainable Professionalism" is pivotal to understanding the evolving concept of professionalism within the legal field. Farrow examines how traditional and alternate models of professionalism impact the long-term viability of the legal profession. The traditional, or dominant, model emphasizes the lawyer's role as an expert and advocate, focusing on individual competence and client-centered service. While this model underscores the importance of legal expertise and advocacy, it can sometimes lead to isolation and a narrow focus on client interests to the detriment of broader societal considerations.

Farrow contrasts this with alternate models of professionalism, which advocate for a more collaborative, socially responsible, and adaptable approach. These models suggest that lawyers should not only serve their clients but also contribute positively to society and the justice system as a whole. Emphasizing ethical practice, social justice, and adaptability, these models promote a more holistic view of the legal profession.

Farrow's advocacy for sustainable professionalism is crucial to this chapter as it integrates the need for balancing traditional professional roles with the demands of modern society. He argues that a sustainable approach, which incorporates elements from both dominant and alternate models, is essential for the long-term viability of the legal profession. By promoting ethical integrity, social responsibility, and adaptability, sustainable professionalism ensures that lawyers can meet contemporary challenges while maintaining public trust and fulfilling their broader duties to the legal system.

In the context of legal ethics and professional responsibility, Farrow's insights highlight the importance of evolving professional standards to meet changing societal expectations. This perspective is essential for law students and practitioners to

understand the dynamic nature of their profession and the need to integrate ethical, societal, and professional considerations into their practice.

Legal Ethics and Professionalism:

- **Dominant Model of Professionalism:** Traditional view focusing on the lawyer's role as an expert and advocate.
- **Alternate Models of Professionalism:** Emphasize collaboration, social responsibility, and adaptability in the profession.

Key Cases and Concepts:

1. *Law Society of BC v Jabour* [1980] 2 SCR 307

Brief Facts: A lawyer, Jabour, was disciplined by the Law Society of British Columbia for advertising his services, which was prohibited by the society's rules at the time.

Ratio: The Supreme Court of Canada upheld the Law Society's decision, emphasizing the importance of self-regulation in the legal profession. The court held that the Law Society's rules, including those prohibiting advertising, were reasonable to maintain the profession's integrity and public trust.

2. *R v Neil* [2002] 3 SCR 631

Brief Facts: A lawyer represented a client in a matter while simultaneously representing another client whose interests were adverse to the first client. This situation was not disclosed to the first client.

Ratio: The Supreme Court of Canada established the "bright line" rule, stating that a lawyer cannot act for a client whose interests are directly adverse to another current client unless both clients consent after receiving full disclosure. The duty of loyalty and avoidance of conflicts of interest are paramount in legal practice.

3. *Canada (AG) v Federation of Law Societies of Canada* [2015] 1 SCR 401

Brief Facts: The Federation of Law Societies of Canada challenged federal legislation that required lawyers to collect and report certain client information under anti-money laundering laws, arguing it infringed on solicitor-client privilege.

Ratio: The Supreme Court of Canada held that the legislation was unconstitutional to the extent that it infringed on solicitor-client privilege. The decision underscored the

fundamental importance of this privilege to the legal profession and the administration of justice.

4. *Strother v 3464920 Canada Inc.* [2007] 2 SCR 177

Brief Facts: A lawyer, Strother, was found to have a conflict of interest when he took on a personal business venture that was in competition with the interests of a client he was advising.

Ratio: The Supreme Court of Canada ruled that Strother breached his fiduciary duty to his client by failing to disclose his personal interest and the conflict it created. Lawyers must avoid conflicts of interest and maintain the highest standards of loyalty and good faith.

Ethical Obligations and Regulation:

What Does It Mean to be an Ethical Lawyer?

Ethical lawyering involves adhering to a set of principles that govern professional conduct, including honesty, integrity, and loyalty to clients.

Sources of Legal Ethics:

Case law, legislation, and the Model Code of Professional Conduct are primary sources. Legal ethics also draw from philosophical perspectives on morality and justice.

Scholarly Contributions:

1. Tim Dare "Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers"

Tim Dare's work, "Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers," examines the different levels of zeal lawyers may exhibit in their practice and the accompanying ethical considerations. Dare differentiates between mere-zeal, where a lawyer performs competently and diligently within ethical boundaries, and hyper-zeal, where a lawyer aggressively pursues a client's interests to the extent of bending or breaking ethical rules. The discussion emphasizes that while lawyers must advocate vigorously for their clients, they must also adhere to ethical standards and maintain the integrity of the legal system. The balance between zealous representation and ethical constraints is crucial to uphold the profession's reputation and the administration of justice.

2. David Luban “The Adversary System Excuse”

David Luban's essay, "The Adversary System Excuse," provides a critical analysis of the adversarial legal system and its implications for legal ethics. Luban argues that the adversarial system, which pits opposing parties against each other, often excuses unethical behaviour by framing it as zealous advocacy. He critiques the notion that the adversarial system justifies lawyers' actions that might be morally questionable outside the courtroom. Luban calls for a re-evaluation of this excuse, suggesting that lawyers should not be permitted to hide behind the adversarial nature

of the system to justify unethical conduct. He advocates for a more principled approach where lawyers balance their duty to their clients with broader ethical responsibilities to society and justice.

3. Alice Woolley “Michelle’s Story: Creativity and Meaning in Legal Practice”

Alice Woolley's "Michelle's Story: Creativity and Meaning in Legal Practice" explores how lawyers can find personal fulfilment and ethical meaning in their professional roles through creativity. Woolley narrates the story of Michelle, a lawyer who integrates creativity into her practice to enhance her professional satisfaction and ethical engagement. This narrative underscores that legal practice need not be a mere mechanical application of rules but can involve innovative and meaningful problem-solving. Woolley suggests that by fostering creativity, lawyers can navigate ethical dilemmas more effectively and find deeper personal and professional satisfaction. The story highlights the potential for creativity to enrich legal practice and enhance the ethical dimensions of a lawyer's work.

On Being an Ethical Lawyer:

Case Studies and Examples

1. *Szarfer v Chodos* [1986] OJ No. 256 54 OR (2d) 663

Brief Facts: In this case, Szarfer sued his lawyer, Chodos, for professional negligence. Chodos had been retained to handle Szarfer's legal matters, but Szarfer alleged that Chodos failed to competently manage his case. Specifically, Chodos was accused of neglecting important aspects of Szarfer's legal affairs, missing deadlines, and failing to communicate critical information. This negligence purportedly resulted in significant financial losses and adverse legal outcomes for Szarfer. The case brought to light the expectations clients have regarding the competence and diligence of their legal representatives.

Ratio: The court held that lawyers owe a duty of care to their clients, which includes providing competent representation and exercising due diligence in managing their clients' legal affairs. The ruling emphasized that lawyers must meet the standard of care expected of reasonably competent practitioners in similar circumstances. Failure to do so can result in liability for professional negligence. The decision reinforced the principle that clients are entitled to expect a certain level of proficiency and attentiveness from their legal counsel, and that deviations from this standard could lead to legal repercussions for the lawyer involved.

2. *R v Murray* [2000] 48 OR (3d) 544

Brief Facts: This case involved lawyer Patrick Murray, who was charged with obstructing justice in connection with his defense of Paul Bernardo, a high-profile criminal case in Canada. Murray had videotapes that were crucial evidence in the case against Bernardo but chose not to disclose them to the authorities for several months. The tapes contained footage of the criminal acts for which Bernardo was being prosecuted. Murray argued that he was protecting his client's rights and adhering to solicitor-client privilege. However, the prosecution contended that Murray's actions obstructed the course of justice by withholding critical evidence that could have been used in the investigation and prosecution of Bernardo.

Ratio: The court held that while lawyers have a duty to advocate zealously for their clients, this duty does not extend to actions that hinder the administration of justice. Lawyers must balance their responsibilities to their clients with their broader obligations to the court and the legal system. The decision underscored that ethical lawyering involves maintaining the integrity of the judicial process and ensuring that justice is not obstructed. The ruling clarified that solicitor-client privilege and the duty of confidentiality have limits, particularly when withholding information would pervert the course of justice. This case highlighted the critical need for lawyers to navigate the delicate balance between client advocacy and their duty to the legal system.

Conclusion:

Professional responsibility in law requires a balance between advocacy, client loyalty, and ethical conduct. Lawyers must navigate complex scenarios where ethical principles and professional duties intersect. Ongoing reflection and adherence to the Model Code of Professional Conduct are essential for maintaining the integrity of the legal profession.

NCA SAMPLE EXAM – PROFESSIONAL RESPONSIBILITY

QUESTION 1: (30% OF EXAM GRADE; 54 MINUTES)

Suzanne Smith, a long-time friend of yours, is the executive director of a not-for-profit agency, Youth at Risk [YAR], that supports young people who are at risk of getting in trouble with the law. During the course of this friendship, Suzanne has occasionally asked for pro bono legal advice on matters related to YAR's lease of its office, and recently you have undertaken to negotiate the terms of a termination of an employee, YAR's financial assistant, who Suzanne recently fired. This negotiation has just commenced. You are asked to attend a meeting of the Board of Directors of YAR to report on these negotiations. At the Board meeting Frederika Flint, the assistant director of YAR asks to speak with you in private. You and Flint leave the Board meeting and she draws you into the hallway just outside the women's washroom. She tells you that she has information that Suzanne has been skimming money from YAR for her own benefit. She hands over to you copies of bank records that show a pattern of \$1,000 withdrawals each month from YAR's bank account, payable to Suzanne. She advises that the real reason that Suzanne fired the financial assistant is that she had discovered that Suzanne had been stealing from the YAR bank account. You advise Frederika that you will think about it and get back to her. Just as you end this conversation, Suzanne exits the women's washroom.

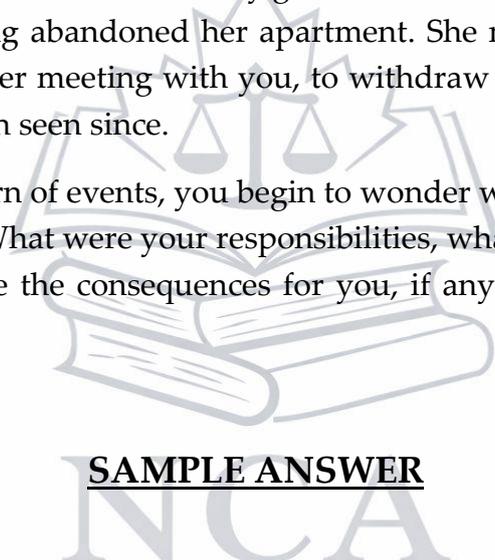
You arrange a meeting with Suzanne the following day. You confront her with the allegation. She responds by saying i) that Frederika Flint is after her job and that Flint has had a vendetta against her since she began work at YAR - 'it was Flint who told you about this?', she asks, and you confirm it - and ii) that there is absolutely no relationship between the firing of the assistant and the allegations being made by Flint. She continues, 'Look, you've been my lawyer here ever since I started work, and nothing untoward has ever occurred here'. This has been your experience and, upon being pressed by Suzanne, you have to agree.

She asks to see the bank records that Flint gave you, and you show them to her. She responds by saying that the withdrawals have nothing to do with anything improper, but are 'ex gratia payments' that YAR agreed to make to her in lieu of taking holidays over the previous number of years. In fact, she says, she has a copy of that agreement with her and shows it to you. The agreement is signed by Suzanne and the chair of the Board of Directors, and entitles her to pay herself \$1,000 per month for three years to

compensate her for having foregone vacations. She asks you for the bank statement, and shows you that the amounts to which she is entitled in the agreement exactly correspond with the amounts that have been withdrawn from the YAR bank account. You are relieved. She takes the copy of the bank statement with her when she leaves.

A few days later you call Frederika Flint to tell her about the special agreement regarding vacation pay, and that there was an innocent explanation for the withdrawals. Within minutes you receive a phone call from the Chair of the Board of Directors. He informs you in no uncertain terms that there was never an agreement to pay Suzanne in lieu of vacation, and that Suzanne has taken the full amount of her vacation each year that she has been employed with YAR. And he asks you why you were talking about all of this with 'your friend Suzanne'. You don't answer, promise to get back to him shortly, and immediately go in search of Suzanne, only to learn that she has left town, having abandoned her apartment. She made one last visit to the bank, the afternoon of her meeting with you, to withdraw \$30,000 from YAR's bank account and has not been seen since.

As you reflect on this turn of events, you begin to wonder whether you may not have handled this properly. What were your responsibilities, what mistakes may you have made, and what may be the consequences for you, if any? Give your reasoning in detail.



SAMPLE ANSWER

Issues:

- Whether there is a **Solicitor-client relationship** between me and Suzanne or between me and YAR?
- Whether there is a breach of **Confidentiality** towards YAR?
- Whether there exists a **Conflict of Interest** between Suzanne and YAR?
- What are the **ethical and legal obligations** I have breached as a lawyer towards YAR?
- Do I have a **right to withdrawal**?
- What will be the **consequences** for me?

RULES:

- Commentary [1] of the Model Code of Professional Conduct (MC) - Client;
- 3.2-3 of MC - When the client is an organization;
- 3.3-1 of MC – Confidential Information;

- 3.2-7 (b), Commentary [2] [3] of MC – Dishonesty, Fraud by Client or **Others**;
- 3.4-1 of MC – Duty to avoid conflict of interest;
- Case Law: *R v. Neil (2002)* (Brightline Rule) & Commentary [1] of Rule 3.4-1 of Model Code;
- 3.4-1 Commentary [5] of MC - The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests;
- Case Law: *McDonald Estate v. Martin SC (1990)*; *Ontario v. Chartis Insurance Co. of Canada (2017)*
- 2.1-1, Commentary [1] of MC – Integrity;
- 3.2-2, Commentary [1] of MC – Honesty and Candour;
- 3.7-1 of MC – Withdrawal from Representation – for good cause;
- Potential Sanctions: Reprimand, Fine, Suspension, Disbarment, Probation;

Analysis:

Under *Rule 1.1-1, Commentary [1]* and *Rule 3.2-3*, my client in this scenario is YAR, not Suzanne. Suzanne's role as the executive director does not change the fact that my obligations are directed toward YAR as the organization.

The *Bright Line Rule* from *R v. Neil (2002)* further emphasizes that a conflict of interest arises when a lawyer's duty to one client (YAR) is compromised by their relationship with another client (or individual), and this conflict must be disclosed. In this case, my long-standing friendship with Suzanne created a conflict of interest because Suzanne's personal interests were potentially adverse to YAR's.

Suzanne's alleged misappropriation of funds directly impacted YAR, and my duty was to report this issue to YAR's board of directors rather than discussing it with Suzanne, as required by *Rule 3.4-1* and *Commentary [5]*. By confronting Suzanne instead of prioritizing YAR's interests, I breached my fiduciary duty of loyalty to YAR. This breach becomes even more apparent when Suzanne left town after withdrawing additional funds, demonstrating the serious consequences of the conflict between my loyalty to Suzanne and my duty to YAR.

The case *McDonald Estate v. Martin (1990)* reinforces the principle that a lawyer must not represent conflicting interests due to the risk of misusing confidential information obtained from a client. In this case, my actions put YAR at risk because I revealed sensitive information to Suzanne, who was under suspicion of misappropriating YAR's funds. This disclosure not only breached confidentiality but also represented a clear conflict of interest, as I was unable to separate my personal relationship with Suzanne from my professional duty to YAR.

Similarly, *Ontario v. Chartis Insurance Co. of Canada* (2017) emphasizes that a lawyer's loyalty to their client must remain undivided. In this case, my divided loyalties between YAR and Suzanne led to poor decision-making. By giving Suzanne access to the bank records, I further compromised YAR's position, allowing Suzanne to take additional actions (such as withdrawing \$30,000) that harmed the organization.

Under *Rule 3.3-1*, my obligation was to maintain strict confidentiality regarding YAR's internal affairs. When Frederika Flint shared confidential information regarding Suzanne's alleged embezzlement, I was required to protect that information for the benefit of YAR. However, by disclosing to Suzanne that Frederika was the source of the allegation, I breached YAR's confidentiality. Suzanne's role as executive director did not grant her the right to access information about internal allegations or investigations.

Furthermore, when I gave Suzanne access to the bank records, I violated the rule that prohibits sharing sensitive client information without authorization. This was a significant breach of my duty to YAR, as those documents were critical evidence of potential wrongdoing within the organization, and they should have been disclosed only to YAR's board of directors for further investigation.

Rule 3.2-7(b), Commentary [2] and [3] provides that when a lawyer suspects dishonesty or fraud within the organization, they must take steps to protect the client's interests and may need to disclose the information to the organization's governing body. When I received the information about Suzanne's withdrawals, I should have immediately raised the issue with YAR's board rather than showing Suzanne the bank records. My failure to escalate the matter contributed to YAR's financial loss when Suzanne withdrew an additional \$30,000.

My actions reflect poorly on my integrity under *Rule 2.1-1, Commentary [1]*, which emphasizes that lawyers must maintain the trust of their clients and uphold public confidence in the profession. By prioritizing Suzanne's interests over YAR's and failing to report the issue to the board, I acted dishonestly and breached my duty of candour under *Rule 3.2-2, Commentary [1]*. My failure to disclose the truth to YAR's board (regarding Suzanne's actions) ultimately led to further harm to the organization.

Once it became clear that I was unable to fulfil my duty to YAR due to my personal relationship with Suzanne, *Rule 3.7-1* would have required me to withdraw from the matter for good cause. My conflict of interest and the breach of confidentiality constituted valid reasons for withdrawal, and continuing to represent YAR under these circumstances further complicated the situation. Withdrawal should have been

initiated as soon as I recognized the conflict between my duties to YAR and my personal loyalty to Suzanne.

Given the multiple ethical breaches such as, confidentiality, conflict of interest, and failure to act with integrity I could face significant sanctions. These may include reprimand, fines, suspension, or even disbarment, depending on the severity of the violations and the harm caused to YAR. My breaches contributed to financial loss for YAR and damaged my standing as a trustworthy lawyer.

Conclusion:

In this case, I breached several key ethical obligations as outlined in the *Model Code of Professional Conduct*. My personal relationship with Suzanne created a conflict of interest, leading to a failure to prioritize YAR's interests, a breach of confidentiality, and violations of integrity, honesty, and candour. These actions compromised my role as YAR's lawyer and could result in significant professional sanctions, including reprimand, suspension, or disbarment. I should have withdrawn from representing YAR as soon as the conflict of interest became apparent and acted to protect YAR's interests by reporting Suzanne's actions to the board.

