The Canadian Association for Legal Ethics

Legal Ethics in Canada An Instructor's Guide

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Introduction

In 2006, a small group of law professors from across Canada and one judge convened at Dalhousie Law School (as it then was) to share insights on how to best teach legal ethics and professionalism. Over the years this group has grown significantly: it has established the Canadian Association for Legal Ethics / Association canadien d'ethique juridique; it has hosted annual meetings across Canada and one international conference; it has established a vibrant listserv; and its participants have produced a large amount of scholarship that has been published in Canada and abroad. Central to its mission, however, has been the goal to enhance the quality of, and resources for, teaching legal ethics and professionalism in Canada. To this end, several members of CALE/ACEJ edited a set of teaching materials that is now in its second edition: A. Woolley, R. Devlin, B. Cotter and J. Law, *Lawyers' Ethics and Professional Regulation* (Toronto: Lexis-Nexis, 2012).

This initiative accompanies, and builds upon *Lawyers' Ethics and Professional Regulation*. With the support of several key funders, members of CALE/ACEJ have produced several videos that, we hope, will be of value to both law students and lawyers who participate in continuing professional development programmes. It is hoped that new teaching videos will be added to the collection over time.

This Instructor's Guide is designed to provide some source materials for the videos, suggested pedagogical techniques, links to additional materials and some answer guides where appropriate. It is assumed that different instructors will utilize these videos in different ways. It has been a pleasure working on this project and we hope that both teachers and learners will find the videos engaging and enlightening.

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Legal Ethics in Canada

Competency

Competency

Accompanies Chapter 3C of

Woolley, Devlin, Cotter & Law, *Lawyer's Ethics And Professional Regulation*, 2d ed,
(Markham: LexisNexis Canada Inc, 2012)

Suggested Approach

i) Watch the video in class (11 minutes).

ii) Have students answer the 7 attached questions as they watch video. Give out script at the end.

iii) Lead students through the questions sequentially.

Issues to be addressed

Cultural competency of a defence lawyer

Prosecutor's responsibilities

Judicial responsibility, impartiality and equality for judges (*Ethical Principles for Judges*)

Aboriginal identifiers

Links

Ethical Principles for Judges

http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf

Cases

R. v. Gladue, [1999] 1 SCR 688, 1999 CanLII 679 (SCC), http://canlii.ca/t/1fqp2

R v. Ipeelee, [2012] 1 SCR 433, 2012 SCC 13 (CanLII), http://canlii.ca/t/fqq00

R. v. Park, [1995] 2 SCR 836, 1995 CanLII 104 (SCC), http://canlii.ca/t/1frj1

CULTURAL COMPETENCY

1) Is there anything in scene one that raises concerns about Mr. Woodson's knowledge, skills and attitudes?

2) a) Is there anything in scene two that raises concerns about Mr. Woodson's knowledge, skills and attitudes?

b) Are Ms. Claiborne's suggestions helpful in enhancing cultural competence or do they reinforce stereotypes?

3) Is there anything in scene three that raises concerns about Mr. Woodson's knowledge, skills and attitudes?

4) a) Is there anything in scene four that raises concerns about Mr. Woodson's knowledge, skills and attitudes?

b) Are Mr. Woodson's reasons for not pursuing a *Gladue* report defensible?

5) a) Is there anything in scene five that raises concerns about Justice O'Neill's knowledge, skills and attitudes?

6) As a result of Judge O'Neill's decision, what options are available to Mr. Woodson?

7) Can you suggest some of the possible variables, influences or factors that might explain Mr. Woodson's behaviour? What might have contributed to Woodson having the attitudes he has in this case?

Competency Script

Scene I

INTERIOR WOODSON'S OFFICE

We begin with the accused, MARSHALL, and his lawyer WOODSON seated and talking in in Woodson's office. Throughout the conversation, MARSHALL will avoid eye contact with both lawyers. CATHERINE CLAIBORNE knocks before poking her head in.

WOODSON
Katie, come on in. Thanks for joining us. Mr. Marshall, this is Katie Claiborne, the bright young lawyer I was telling you about.

MARSHALL and CLAIBORNE shake hands.

MARSHALL
Ms. Claiborne.

CLAIBORNE
Please, call me Catherine.

WOODSON
I've just agreed to represent Mr. Marshall. He's been charged with robbery and aggravated assault, and he intends to plead not guilty. Mr. Marshall, I'd like to flesh out my notes a little bit, and I'll apologize if I'm asking you to go over things you've already told me, but I'd like Katie to hear it directly from you.

MARSHALL
OK.

WOODSON
So, the police say that the attack occurred at about 6:30 pm on Friday the 13th. Where were you at that time?

MARSHALL
I was driving back to Millbrook to visit my mom.

WOODSON
And do you have anything we can use to corroborate that? Anyone with you in the car? Any gas receipts from that trip?

MARSHALL
No, I was alone. I didn't have to stop -- it's only about an hour and a half away.

WOODSON
And when did you arrive?

MARSHALL
At about 7 pm.

WOODSON
Did anyone see you when you got there?

MARSHALL
No, I went straight to my mom's place, but she didn't get home until 9.

WOODSON
OK, so that explains why the police can't verify your alibi. They say you could have left after the assault and still made it to your mom's house before she got home at nine.

MARSHALL
Yeah, I guess that's true, but I didn't do it.

WOODSON
Oh, I know, I know. But it is something we'll have to deal with. Next, let's talk about the victim. How do you know her?

MARSHALL
We met when I was in the transition year programme at the university here. We've dated off and on since then. I can't believe anybody thinks I would hurt her.

WOODSON
Well, someone snuck into her house, apparently with a key, hit from behind and knocked her unconscious. She didn't see her attacker, so she hasn't identified you. But, boyfriends and ex-boyfriends are often the first suspects that the police consider. And they're saying you two had a history of domestic disputes?

MARSHALL
No, no --

WOODSON
(interrupting)
It says here that the police were called to your place?

MARSHALL
One time -- we had a fight a few years back when we lived together. We raised our voices and broke a couple of glasses. A neighbour called the police to complain about the noise. But there was nothing violent about it.

WOODSON
OK, I think I've got enough to get started, I just wanted Katie to hear that much. We'll get to work right away.

MARSHALL
(getting up to leave)
Thank you.

WOODSON
We'll be in touch soon.

MARSHALL leaves.

Scene II

WOODSON turns to impart some wisdom on his young associate.

WOODSON
Katie, thanks for sitting in. That's a great illustration of a really important lesson for you to learn at an early stage, which I why I wanted you to be here and see how I handle that kind of meeting.

CLAIBORNE nods.

WOODSON
Here's the lesson: even the guilty deserve a defence. Even the people you'd be scared of in any other context. They still deserve the best defence you can put on without breaking the law.

CLAIBORNE
What makes you so sure he's guilty?

WOODSON
That guy's guilt is eating him alive -- he could barely look me in the eye.

CLAIBORNE
(earnestly)
I believed him. And in some Aboriginal cultures, maintaining eye contact with a person of authority is a sign of disrespect.

WOODSON
Aboriginal?

CLAIBORNE
Yeah, he said he was going home to Millbrook -- that's a First Nations' community. He also mentioned being in the transition year program for aboriginal students at the university. And his name --

WOODSON
(cutting her off)
Yeah, I hadn't realized that. <beat> Still, it doesn't matter. His alibi is paper thin and he has a history with the complainant. In any case, guilt or innocence doesn't change our role: Mr. Marshall needs a champion to fight for him in the courtroom, and that's what we're going to do.

Claiborne jots down a few notes and nods.

Scene III

INTERIOR COURTROOM

MARSHALL and WOODSON sit at the accused's table. An all-white jury is led into the courtroom, and we see a look of concern on MARSHALL's face. MARSHALL, clearly concerned, whispers to WOODSON and shakes his head.

WOODSON
(quietly)
No, trust me, we made the right call. Better to trust the twelve in the box than the one on the bench. The jury selection process is

(MORE)

WOODSON (Cont'd)
random, so there's nothing we can do about drawing twelve white faces. And, yes, in this town you may get a racist in the mix. But don't worry, they only convict you if its unanimous, which means we only need to convince one. I've gotten lots of natives off with all-white juries before.

Scene IV

INTERIOR COURTHOUSE

WOODSON stands alone, gowned but missing his tabs, waiting nonchalantly. CLAIBORNE runs up and hands him the tabs.

WOODSON
Thanks, Katie, you're a life saver.
CLAIBORNE
No problem. I was going to come to see Mr. Marshall's sentencing hearing anyway.

WOODSON continues talking as he buttons his top button and puts on his tabs.

WOODSON
Still upset that we lost his case?
CLAIBORNE nods.
WOODSON
Thin alibi, like I said when we first met. We did the best we could.
CLAIBORNE
I still think you should ask for a continuance so we can have a Gladue report prepared.
WOODSON
Gladue?
CLAIBORNE
Gladue, yeah, I wrote you a memo about it just after the jury came back with the verdict.
WOODSON
Oh, Gladue, is that how you pronounce it? Yes, I took a look at your memo, but the kind of work
(MORE)

WOODSON (Cont'd)
you're talking about -- our client doesn't have the money, and we don't have the time. Besides, I've known Judge O'Neill for 30 years, and there is no way that she's going to buy it.

CLAIBORNE looks worried and a little skeptical.

WOODSON
Don't worry, I've been doing this for a long long time. I know what'll work. I'll see you afterwards.

Scene V

INTERIOR COURTROOM

We pick up the action as the PROSECUTOR is concluding her submissions regarding MARSHALL'S sentencing.

PROSECUTOR
To conclude, my lady, the Crown's position is that the goals of deterrence and denunciation are paramount in this case. We submit that those goals, together with the aggravating factor of domestic violence in this case, require the maximum sentence of fourteen years for the aggravated assault and an additional four years for the robbery.

PROSECUTOR sits down.

JUDGE
Thank you, counsel. Mr. Woodson?

WOODSON stands.

WOODSON
Thank you, my lady. My friend is wrong to characterize this situation as domestic violence and wrong to ask for the maximum sentence in this case. Mr. Marshall is a promising young native man with some post-secondary education
(MORE)

WOODSON (Cont'd)
and a steady job. Such an extreme sentence would almost surely destroy Mr. Marshall's life as he now knows it and ruin any future contribution that he might make to Canadian society. Rehabilitation, reparation, and the promotion of responsibility are also goals set out in the Criminal Code for the sentencing of offenders, and they all argue for a shorter sentence that would give Mr. Marshall some hope of rebuilding a productive life following his incarceration. My lady, I respectfully submit that a sentence of four years in an institution that would provide Mr. Marshall with the opportunity to complete his post-secondary education would best serve society's goals in this case.

WOODSON sits down.

JUDGE
Thank you Mr. Woodson. Having heard and given due consideration to the representations of both sides in this case, I'm prepared to make a ruling regarding Mr. Marshall's sentence. Mr. Marshall, you have been found guilty of aggravated assault and are therefore liable to a maximum sentence of fourteen years. Having been found guilty of robbery, you are also liable to a maximum sentence of life imprisonment. You have appeared at all points during these proceedings to be stoic and unrepentant. In my view, the aggravating factors raised by the Crown carry significant weight. Mr. Marshall, you are hereby sentenced to imprisonment for a term not exceeding fourteen years.

FADE OUT

Legal Ethics in Canada

Confidentiality

Confidentiality

Accompanies Chapter 4 of

Woolley, Devlin, Cotter & Law, *Lawyer's Ethics And Professional Regulation*, 2d ed,
(Markham: LexisNexis Canada Inc, 2012)

Suggested Approach

i) Break class into small groups of 5 or 6 students.

ii) Distribute script.

iii) Watch the video (4 minutes).

iv) Give students 10 minutes to individually identify salient issues and jot down relevant code provisions and case law on attached sheet.

v) Have students discuss in small groups for 20 minutes.

vi) Lead a large group debrief.

Confidentiality

ISSUES	RELEVANT CODE PROVISIONS AND CASE LAW

ISSUES	RELEVANT CODE PROVISIONS AND CASE LAW

Confidentiality Script

INTERIOR SWANKY LOUNGE - EARLY EVENING

Fade in on a cocktail reception that is part of a charitable fundraising event. EXTRAS in business attire mill about and socialize and the buzz of indistinct conversation fills the room.

Focus on BECKY who is standing at the bar. The BARTENDER refills her wine glass, BECKY nods in thanks, turns around with her glass, and is pleasantly surprised to be greeted by JOAN. JOAN attempts to mask her anxiety, to which BECKY is oblivious.

JOAN
Hi.

BECKY
Joan! How are you?

BECKY hugs JOAN.

BECKY
What are you doing here?

JOAN
Paul told me about the reception, and, actually, I was hoping to bump into you, I know you do some work with these guys.

BECKY
Yeah, it's a great cause, and this is one of my favourite events. It's a ton of work to put together, but we do raise some money, and it's a lot of fun. <beat> But, no, I mean, what are you doing in town? I thought you were in London!

JOAN
Oh, yeah, I've been back for about six weeks now. Our firm just bought out LeBlanc & Associates and they sent me back here to manage the transition.

BECKY
(warmly)
Hey, that's great -- it's good to see you. Makes me feel old, though, you know, seeing my young juniors move up in the world like that.

JOAN
Well, you were a great mentor.
Listen --

BECKY
(oblivious to the fact that JOAN is there to see her, cutting her off to continue small talk)
Speaking of moving, did you hear that Joe got himself appointed to the bench?

JOAN
(surprised)
Joe McDeere? Really? That's quite a surprise.

BECKY
Well, he goes way back with the new Minister of Justice. I think he's the godfather of the Minister's oldest kid.

JOAN
So that's how the world works, eh?

BECKY nods, but JOAN doesn't wait for an answer.

JOAN
Listen, I know you sometimes do work for other lawyers, and I need your take on something.

JOAN glances around to make sure no one is listening and pulls BECKY slightly aside.

BECKY
(distracted)
Sure, of course.

JOAN
(nervous, rambling start to the story)
So, this guy comes into my office yesterday. I've never met him before, but he's on my schedule as a new client. And I don't know who thought I needed to be taking new clients here already, with everything else I've got going, but, anyway, this guy, Gordon Oates, comes into my office and drops a shoebox on my desk.

JOAN sees that BECKY is still distracted, and tries to regain her interest with a question.

JOAN
You know the kind of thing I'm talking about?

BECKY
Oh yeah, the "Nike Organizational Filing System".

JOAN
So, out of this box, he pulls a letter from his business partner --

The WAITER appears from behind JOAN with a plate of hors d'oeuvres.

WAITER
Ladies, would you like an hors d'oeuvre?

JOAN, masking surprise and impatience, declines by shaking her head. BECKY, still oblivious to JOAN's latent stress, takes a serviette and an hors d'oeuvre and thanks the WAITER. With the WAITER safely out of earshot, JOAN continues.

JOAN
So his business partner threatens to disclose -

JOAN glances around again to make sure no one is listening.

JOAN
- well, let's just say the letter threatens to out Gordon on some questionable behaviour.

BECKY
What, like an affair?

JOAN
What? No. I mean, I'm not clear on the whole story, but in the shoebox I found a hand-drawn diagram that has a lot of boxes and arrows. A lot of money is moving around. There's a Cayman Islands account. Our firm's trust account is on there. I haven't had time to completely figure it out, but I *think* the bottom line is that some investors in Florida get ripped off along the way.

BECKY
(suddenly uncomfortable with the conversation, and somewhat flustered to have been caught off guard)
Wait, do you still have this box? <shakes head> Actually, this might not be the place <shakes head again> I've got some time tomorr --

JOAN
(too wound up to stop her story at this point)
Yeah, I've still got it, and Gordon says he's going to have some of his *associates* pay a visit to this business partner and *help* him *change his mind*, and make sure he keeps his mouth shut.

BECKY
Are you serious? That sounds like a bad crime novel.

JOAN
His exact words, I swear. And when I asked what he meant, he says, "Don't worry about it" and tells me his partner is going to want out of the business next week, and he'd like me to structure the buy-out and talk to him about the tax implications.

JOAN takes a breath. BECKY starts to say something, but JOAN cuts her off to finish the story.

JOAN
Then it gets worse, because I find out that this business partner we've been talking about is Lance Fredericks.

BECKY
Whoa - do you know who Fredericks is? He's a big deal - our firm was in the news a lot last year just for acting in his divorce.

JOAN
I didn't know, but I do now, because I ran the conflicts check
(MORE)

JOAN (Cont'd)
and found out that a couple of the LeBlanc partners are about to close a real estate deal for him -- they've been on it for 6 months or something.

BECKY is floored, with the full weight of JOAN's situation,and, now, her own as well having dawned on her. JOAN takes a beat before continuing.

JOAN
Becky, what do I do?

FADE TO BLACK

ANSWER GUIDE: CONFIDENTIALITY

I INTRODUCTION

This scenario introduces a variety of dilemmas in relation to the ethical obligation of confidentiality, with a difficult question of conflict of interest introduced late in the scenario.

As will be seen in the scenario, the enthusiastic young lawyer, desperate for advice, enters into a serious conversation with a more senior lawyer of her acquaintance in a public setting – a cocktail party. In the course of so doing she identifies a difficult situation with various ethical issues imbedded in the dilemma and shares with the senior lawyer information that she has received in the representation of a client.

The scenario invites consideration of:

- the problematic nature of the circumstances where the conversation takes place;
- whether by participating in this conversation, the senior lawyer has entered into a lawyer-client relationship with the junior lawyer;
- the confidentiality issues in the situation discussed by the younger lawyer;
- whether the confidentiality obligations and (and potentially disclosure obligations or authorizations) are consequently applicable to the senior lawyer; and,
- whether the representation by the senior lawyer's firm of one of the participants in the transaction generates a problematic conflict of interest for senior lawyer.

II CONFIDENTIALITY

Both the jurisprudence and Codes of Professional Conduct place lawyer-client communications on a special plane. Lawyers have an almost inviolable obligation to preserve and protect the confidences of their clients. This obligation is at the centre of the lawyer-client relationship. And, while the legal duty, usually understood as lawyer-client ***privilege***,[1] may be limited to private communications between the lawyer and his or her client for the purpose of obtaining legal advice, the ethical obligation to preserve client confidences is much broader. Proulx and Layton describe the duty in this way:

> The lawyer's duty to keep confidential all information received as a result of representing a client is a linchpin of the professional relationship. The scope of this

[1] See for example, Adam Dodek, *Solicitor-Client Privilege* (Toronto: Lexis-Nexis, 2014)

duty is exceptionally broad, demanding that counsel take great care in handling all information pertaining to or affecting a client.[2]

The scope of this ethical duty is made clear in the statement of the duty of confidentiality, Rule 3.3-1 and Commentaries 2, 3 and 4 of the Federation of Law Societies of Canada's Model Code of Professional Conduct (Model Code):

Both courts and the Model Code have expanded upon both the importance of the duty of confidentiality and on particular exceptions to confidentiality. A number of these features and exceptions, and their application, are addressed in this scenario..

III THE CONVERSATION AT THE COCKTAIL PARTY

As is evident from the scenario, Joan takes the opportunity of an encounter at the cocktail party to seek out advice from Becky, her former mentor. While the lawyers move to a less central area of the reception, their conversation is clearly taking place within earshot of others, including the waiter. Joan discloses confidential information about a client, the client's situation and the names of the clients involved.

Rule 3.3.1 of the Model Code provides:

> Confidential Information
>
> 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;
> (c) required to deliver the information to the Law Society; or
> (d) otherwise permitted by this rule.

As noted in Commentary 2 to this Rule, and in the jurisprudence, the ethical duty to maintain client confidences is much broader than the legal duties associated with lawyer-client privilege. As the Rule and Commentaries make clear, the ethical obligation applies to all information obtained in the course of the client representation and requires the lawyer to take special care to avoid even unintentional disclosures.

The discussion undertaken by Joan in so public a setting clearly puts at risk client confidences. While the client whose interests are discussed is not a client of the more senior lawyer, Becky, and it is probably not a specific violation of any duty of

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[2] M. Proulx & D. Layton**,** *Ethics and Canadian Criminal Law***, (**Toronto: Irwin law, 2001), at p. 9.

confidentiality on her part to listen to the conversation, one would expect that the senior lawyer would caution the junior lawyer more effectively than through her half-hearted 'this might not be the place' observation well after significant discussion had already occurred between them.

At the same time, given the possibility, even likelihood, of a lawyer-client relationship arising between Joan and Becky as a result of this conversation (discussed below), it is likely that an obligation of confidentiality is owed to Joan in this situation and that Becky should have insisted on their conversation taking place at another time and location where confidences would not be at risk of being inadvertently disclosed to others. As a consequence, to the extent that the conversation between Joan and Becky is a lawyer-client conversation, the public nature of the conversation is problematic for both Joan and Becky.

IV A LAWYER-CLIENT RELATIONSHIP BETWEEN JOAN AND BECKY

The lawyer's duty of confidentiality only arises where there is a lawyer-client relationship. But, probably to Becky's surprise, such a relationship can come into existence more immediately and with more informality that many lawyers appreciate. In the scenario Joan confirms that Becky sometimes works for other lawyers and then jumps right into the account of her dilemma. As well, at one point Becky suggests that 'this might not be the place', half-heartedly proposing a meeting 'tomorrow', suggesting that she appreciates the more substantive dimensions of their conversation. Nevertheless, Joan relentlessly continues the conversation and Becky appears to acquiesce.

Three features of the Model Code suggest a lawyer-client relationship and the application of confidentiality to the conversation. First, the Model Code provides a broad definition of 'client':

> "client" means a person who:
>
> (a) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or
>
> (b) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf

Part (b) of this definition is a recent addition to the Model Code and to Codes in most Canadian jurisdictions. It is intended to address the circumstances where a person has a reasonable expectation of having become a client even where, as in the present case, the normal indicia are absent.

Second, to further emphasize the point, Commentary 1 to this definition states, "A lawyer-client relationship may be established without formality."

Third, the Model Code creates an explicit exception to confidentiality for a lawyer seeking legal or ethical advice from another lawyer. Rule 3.3.6 of the Model Code provides:

> A lawyer may disclose confidential information to another lawyer to secure legal or ethical advice about the lawyer's proposed conduct.

It is also important to give consideration to the question of the moment in time when a lawyer-client relationship may be regarded as having commenced, at least for the purposes of the application of the doctrine of confidentiality. Such a relationship, or at least the key dimension of lawyer-client confidentiality, begins at the earliest possible moment. As Lamer J stated in *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, [1982] S.C.J. No. 43, at para. 32 [SCR]. :

> When dealing with the right to confidentiality it is necessary, in my view, to distinguish between the moment when the retainer is established and the moment when the solicitor-client relationship arises. The latter arises as soon as the potential client has his first dealings with the lawyer's office in order to obtain legal advice.

These points suggest that the most likely interpretation of the conversation between Joan and Becky is that it represents the initial aspects of a lawyer client relationship, and not merely an inappropriate discussion commenced by a junior lawyer.

- First, the commencement of the exchange between the two lawyers suggests that Joan is aware of Becky's experience in providing advice to lawyers and appears to follow up the conversation, one in which Becky participates, by seeking advice in that context.
- Whether fully appreciated by Becky or not, this may constitute a 'reasonable conclusion' on Joan's part that Becky has agreed to provide legal services. Neither a retainer nor formality are required for the formation of a lawyer-client relationship. Since it is appropriate for lawyers to disclose confidential information to other lawyers in order to seek ethical advice, Joan could reasonably be of the view that she is doing just that.
- Becky may legitimately doubt the legitimacy of a lawyer-client relationship based on the 'public' nature of Joan's communications but not on the basis of the fact that in her effort to obtain advice Joan communicates a client's confidences to her.

On balance, a lawyer-client relationship appears to have come into existence as a result of this conversation.

This is significant for two reasons. First, while the 'public' location of the conversation is problematic, and clearly a matter of poor judgment on Joan's part (and perhaps Becky's as the conversation unfolds), the communications from Joan to Becky

would not, in and of themselves, be a violation of lawyer-client confidentiality, Rather, they could be characterized as communications that fall within the 'legal or ethical advice' exception.. Second, as noted below, if problematic aspects of Joan's client's communications to her provide Joan with a discretion to disclose the confidential information conveyed to her, it is possible, perhaps likely, that similar discretion to disclose attaches to Becky as well.

V CONFIDENCES SHARED IN THE CONVERSATION

The ethical implications of the conversation between Joan and Becky can be divided into four parts. The first three are associated with a lawyer's duty of confidentiality and associated exceptions to that duty. The last is the disclosure of client information by Joan that suggests a potential conflict of interest on Becky's part.

1. Location of the Conversation

The scenario is intended to highlight the inappropriateness of a conversation of this nature being carried on in such a public location. While the opportunity and temptation for Joan are obvious, this does not justify communications and disclosures of this nature in such an environment. And, as the scenario tries to convey, once commenced, the discussion can get carried away to the point where quite private information is exchanged and where the lawyers themselves may become oblivious to the setting.

The Model Code articulates high expectations of privacy and confidentiality with respect to client information. Situations similar to the one presented in the scenario are noted in the Model Code, Rule 3.3, Commentary 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. Apart altogether 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.

While the junior lawyer initiated the conversation, and is at fault for doing so, the senior lawyer is also responsible whether she participated in the conversation or was only on the receiving end of the communications, and also bears responsibility as well. She may not have violated a duty in relation to client confidences but her continuing

participation in the conversation, at this location, was unprofessional. She should have been more forceful in ending the discussion and insisting that it be continued at another time and place, in private.

2 Confidential Information Concerning Joan's Client's Questionable Behaviour in the Buyout

In the scenario, a series of communications take place. Joan informs Becky of:

- the client's wish to buy out a business partner;
- the name of the client (Gordon Oates);
- questionable information that suggests fraud upon or the misuse of her law firm's trust accounts;
- threats by the business partner against her client;
- the existence of material in a shoebox now in Joan's possession that appears to confirm this information;
- the communication from Oates to Joan that he intends to threaten physical violence against the business partner to ensure his acquiescence in the sale and his silence in relation to Oates' questionable dealings; and
- the identity of the business partner (Lance Fredericks);

Assuming that the information, though conveyed from Joan to Becky in highly inappropriate circumstances, as noted above, was nevertheless a form of lawyer-client communication, two particular aspects of this information still pose special problems for both Joan and Becky.

a) Assisting s Client in the Commission of an Offence

It appears from Joan's assessment that her client, Oakes, intends to commit or is in the process of committing crimes. A lawyer has a clear obligation not to assist a client to do so. Model Code Rule and Commentaries dealing with 'Dishonesty, Fraud by Client' provide:

3.2-7 When acting for a client, a lawyer must never knowingly assist in or encourage any dishonesty, fraud, crime or illegal conduct, or instruct the client on how to violate the law and avoid punishment.

Commentary [1]

A lawyer should be on guard against becoming the tool or dupe of an unscrupulous client, or of others, whether or not associated with the unscrupulous client.

Commentary [2]

A lawyer should be alert to and avoid unwittingly becoming involved with a client engaged in criminal activities such as mortgage fraud or money laundering. Vigilance is required because the means for these, and other criminal activities, may be transactions for which lawyers commonly provide services such as: establishing, purchasing or selling business entities; arranging financing for the purchase or sale or operation of business entities; arranging financing for the purchase or sale of business assets; and purchasing and selling real estate retainer

Commentary [3]

Before accepting a retainer, or during a retainer, if a lawyer has suspicions or doubts about whether he or she might be assisting a client in dishonesty, fraud, crime or illegal conduct, the lawyer should make reasonable inquiries to obtain information about the client and about the subject matter and objectives of the retainer. These should include verifying who are the legal or beneficial owners of property and business entities, verifying who has the control of business entities, and clarifying the nature and purpose of a complex or unusual transaction where the purpose is not clear…

If it turns out that Joan takes these steps and is satisfied that the client's plans are not within the law, she would be expected to counsel the client to abandon these plans and if the client is not prepared to do so, she would be required to withdraw from the representation.

The Model Code provides in Rule 3.7-7, 'Obligatory Withdrawal':

> A lawyer must withdraw if:
>
> (a) discharged by a client;
>
> (b) a client persists in instructing the lawyer to act contrary to professional ethics;
>
> …
>
> Continued representation of a client in circumstances where the lawyer would be expected to assist the client with 'dishonesty, fraud, crime, or dishonest conduct' would constitute a violation of Rule 3.2-7 and would be 'contrary to professional ethics'.

What about the lawyer's duty to preserve client confidences in these circumstances? As a general rule, lawyers have a duty to keep their clients' confidences, even in circumstances where a client has engaged in unlawful behaviour and in situations where the client has conveyed an intention to engage in unlawful behaviour. This duty continues after the representation of the client has ended, whether through the conclusion of the retainer, the dismissal of the lawyer by the client or by the lawyer's withdrawal. This duty is acknowledged implicitly in Codes of Professional Conduct, even in situations where injury to third parties may nevertheless occur.[3] Woolley provides this example:

> Specifically there may be circumstances where a lawyer knows that her client committed a crime of which another person is convicted. Under the current ethical rules, a lawyer in that situation cannot disclose the existence of such information, even to trigger counsel for the accused bringing an application under the "innocence at stake" exception.[4]

b) Threats of Violence by Joan's Client Against his Business Partner

It will be recalled that the Model Code identifies categories of exception to the otherwise strict obligation to preserve client confidences. Lawyers must not disclose confidential information unless:

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[3] One clear example is the expectation that lawyers will keep client confidences about past crimes even if someone else is wrongfully accused or convicted of the crime. See *R*. v. *McClure* and *R*. v. *Brown*, 2002] 2 S.C.R. 185; [2002] S.C.J. No. 35 .

[4] Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Markham, Ontario: Lexis-Nexis, 2011) at p. 135.

(a) expressly or impliedly authorized by the client;
(b) required by law or a court to do so;
(c) required to deliver the information to the Law Society; or
(d) otherwise permitted by this rule (on Confidentiality).

With respect to what is commonly referred to as 'future harm', both the courts and the Codes of Conduct create an exception to confidentiality in limited circumstances, depending on the nature of the future harm under consideration. In *Smith* v. *Jones*, [1999] S.C.J. No. 15, [1999] 1 S.C.R. 455, the Supreme Court of Canada ruled that, as a matter of public policy, lawyer-client confidentiality and privilege may give way to public safety in strictly circumscribed circumstances. Cory J. stated:

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.

In identifying the circumstances in which a public safety exception to confidentiality and privilege would operate, Cory J. set out three requirements:

- that information in the lawyer's possession identifies a clear risk of harm to the victim;
- that the re is a risk of serious harm – in particular, 'that the intended victim is in danger of being killed or of suffering serious bodily harm'; and
- that the threat to the victim is 'imminent'.

Not any future harm will meet these requirements. As Cory J noted:

The disclosure of planning future crimes without an element of violence would be an insufficient reason to set aside solicitor-client privilege because of fears for public safety.

It is clear from this set of requirements that the matter in question must be a serious risk to a victim in circumstances where it will at least be possible that an intervention may prevent the harm to the intended victim. The public safety exception is focused not on disclosure for its own sake but where disclosure of the threat is liable to be the only means by which the harm can be averted.

The Model Code builds upon this understanding:

Future Harm / Public Safety Exception

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.

This Rule identifies the three elements from *Smith v. Jones* and notes the prophylactic reason for the exception – that disclosure is necessary to prevent the death or harm.

Another aspect of the Model Code's Rule, is that the disclosure of the confidential information is discretionary, and the discretion is reposed in the lawyer. He or she 'may' disclose. This is consistent with *Smith v. Jones*, where the Supreme Court adopted the position of the British Columbia Court of Appeal that disclosure was discretionary but not mandatory.[5]

In the scenario, the questions to be addressed are:

- Does the lawyer have information of sufficient reliability to reach a determination on the general question of 'public safety/future harm'?
- If so, are the criteria – clear risk, a risk of serious bodily harm or death, and imminent risk – met in this case? And
- If so, should exercise her discretion to disclose the information in an effort to help prevent the harm from occurring, and what criteria should she use to make this decision?

On the whole, it appears to be a difficult to assess. The threat seems to fit the criteria of seriousness and imminence. However, there may be some doubt about whether the threat was seriously intended. Joan seems to have heard the communication as a threat, understands the context and motivation for the threat and has taken it seriously. As well, there seems to be some detail, suggesting the likelihood, and hence the 'clarity' of the risk. At the same time, it is difficult to know for sure that the threat will be implemented, and there is clearly time for the matter to be resolved without resort to the violence threatened. Presumably this would be a matter for judgment by Joan based on her understanding of her duties to the client and to the public interest.

As well, on the understanding that a lawyer-client relationship exists between Joan and Becky, Becky is now privy to confidential information, though on a 'second-hand' basis. She may herself be required to consider whether she is entitled to disclose the information to prevent the harm, particularly if Joan elects not to do so. This is awkward for her, partly since Joan is on the front lines and presumably better able to address the seriousness of the threat. It is additionally awkward since the target of the threat is Fredericks, a client of her firm. Nevertheless, these may not absolve Becky of the obligation to at least consider her entitlement or duty to disclose the information in order to protect Fredericks from harm.

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[5] It should be noted that in some jurisdictions the Code of Professional Conduct provision establishing the exception to confidentiality in such circumstances imposes a ***mandatory*** obligation on the lawyer to make disclosure of sufficient confidential information to prevent the death or harm.

c) The Contents of the Shoebox and Their Significance

Another aspect of Joan's dilemma, associated with her client's potentially criminal activities, is her having taken possession of the shoebox and its contents.

As a general rule, lawyers are required to take great care in the preservation of client property in their possession. Rule 3.5-2 of the Model Code provides:

> A lawyer must:
> (a) care for a client's property as a careful and prudent owner would when dealing with like property; and
> (b) observe all relevant rules and law about the preservation of a client's property entrusted to a lawyer.

As Commentary 2 to this Rule notes, "These duties are closely related to those regarding confidential information."

However, the nature of the property in question raises problems. Assuming that the material in the shoebox points in the direction of criminal misconduct, and the material is more than written communications between the client and her lawyer, it is quite possible that Joan is in possession of physical or 'real' evidence of a crime. While not specifically confidential information, it is nevertheless information and evidence that the client presumably anticipated would remain confidential.

The law with respect to physical or real evidence of a crime is relatively straightforward. In the first instance, Joan made a mistake by allowing herself to come into possession of the material. A lawyer cannot keep possession of inculpatory evidence since in many cases his or her private possession will constitute the crime of obstruction of justice. As Gravely J noted in *R. v. Murray*, [2000] O.J. No. 2182, 144 C.C.C. (3d) 289 , the lawyer in such circumstances has three choices:

> (a) Immediately turn over the tapes to the prosecution, either directly or anonymously;
> (b) Deposit them with the trial judge; or,
> (c) Disclose their existence to the prosecution and prepare to do battle to retain them.

In addition, the Model Code provides the following Commentary for guidance on this issue:

> Rule 3.5-2, Commentary 2 and 3
>
> [2] A lawyer is never required to take or keep possession of property relevant to a crime or offence. If a lawyer comes into possession of property relevant to a crime, either from a client or another person, the lawyer must actin keeping with the lawyer's duty of loyalty and confidentiality to the client and the lawyer's duty to the administration of justice, which requires, at a minimum, that the lawyer not violate the law, improperly impede a police investigation, or otherwise obstruct the course of justice
>
> Generally, a lawyer in such circumstances should, as soon as reasonably possible:
>
> (a) turn over the property to the prosecution, either directly or anonymously;
>
> (b) deposit the property with the trial judge in the relevant proceeding;
>
> (c) deposit the property with the court to facilitate access by the prosecution or defence for testing or examination; or
>
> (d) disclose the existence of the property to the prosecution and, if necessary, prepare to argue the issue of possession of the property.
>
> [3] When a lawyer discloses or delivers to the Crown or law enforcement authorities property relevant to a crime or offence, the lawyer has a duty to protect the client's confidences, including the client's identity, and to preserve solicitor and client privilege. This may be accomplished by the lawyer retaining independent counsel, who is not informed of the identity of the client and who is instructed not to disclose the identity of the instructing lawyer, to disclose or deliver the property.

The complications in Joan's situation are that a) it is not clear that a crime has been committed as opposed to merely being planned or contemplated by her client; and b) there do not appear to be any proceedings under way with respect to which the materials in the shoebox constitute evidence. This makes it impossible and probably inappropriate to turn the material over to the authorities. At the same time, continuing possession of the shoebox is itself a problem. Probably, given the obligation of the lawyer not to assist a client in the commission of an offence, discussed earlier, and the likelihood that the lawyer will withdraw from the representation, the shoebox should be returned to the client, the normal requirement when a lawyer terminates the representation of a client, as provided in Model Code Rule 3.7-9(b).

VI BECKY'S CONFLICT OF INTEREST

Assuming that Becky has entered into a lawyer-client relationship with Joan, an immediate dilemma for Becky is that her firm represents Lance Fredericks, the business partner of Joan's client, Oakes. Becky's lack of resolve in insisting that a proper time and location for the conversation between her and Joan has made it impossible for her to check whether a conflict of interest might exist if she undertakes to advise Joan, and she acquired a significant amount of confidential information from Joan before she discovered the conflict. While Becky may not be the lawyer who handles Fredericks' legal work, clients are clients of the whole firm, not merely of the individual lawyer who handles their work.

As a consequence, the issue is whether Becky is in a 'current client conflict'. The rules in relation to such conflicts are set out in a series of decisions of the Supreme Court of Canada and in Rule 3.4 of the Model Code. Rule 3.4-1, 'Duty to Avoid Conflicts of Interest', and Commentaries 1 and 6 provide:

> 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
>
> As defined in these rules, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. 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. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.
>
> Commentary 6
>
> The rule reflects the principle articulated by the Supreme Court of Canada in the cases of *R. v. Neil* 2002 SCC 70 and *Strother v. 3464920 Canada Inc.* 2007 SCC 24 regarding conflicting interests involving current clients, that a lawyer must not represent one client whose legal interests are directly adverse to the immediate legal interests of another client without consent. This duty arises even if the matters are unrelated.

This approach has been confirmed and more fully articulated by the Supreme Court in *McKercher v. CN et al*, [2013] 2 S.C.R. 649. The jurisprudence, consistent with these provisions, may be summed up in this way. A lawyer may not represent two current clients whose legal interests are immediate and directly adverse to one another without the clients' consent and without the lawyer being satisfied that there is no substantial risk that his or her representation of the client will be adversely affected by other interests. However, where it would be unreasonable for the client to expect that the law firm would decline to represent the 'other' client, it may be possible for the law firm to continue to act concurrently.

In these circumstances although not in direct adversity with one another, the two clients – Joan and Fredericks – appear to have interests that are immediate, 'legal' and adverse. The objective of Joan's interest is to obtain advice in order to manage her relationship with Oakes, whose interests are, to say the least, in direct conflict with the interests of Fredericks. Becky's advice to Joan is in many ways advice to or for Joan's client, Oakes. Nevertheless, it is also possible that the advice Becky might provide to Joan would advance Fredericks' interests, by ensuring that at Fredericks doesn't get coerced into a business sale, and does not get beaten up.

The main problem, however, as the earlier analysis indicates, is that Becky is now possessed of confidential information from Oakes that undercuts Oakes to the potential advantage of Fredericks. Whatever Oakes is contemplating, it can hardly be fair or ethical for his confidential information to become available to his business adversary. There is a good argument that in the circumstances Oakes should get no legal help from Joan. At the same time , since Joan herself is bound by confidentiality even after the termination of the representation of Oakes, the information Oakes shared in confidence with her should not be allowed to be shared with Fredericks through the agency of Becky's representation of Joan, absent the a decision to disclose confidential information about the potential assault, pursuant to the 'public safety/future harm' exception.

It seems unlikely that the Becky could loyally represent Joan's interests while at the same time ensuring that Fredericks' interests were fully served by the firm. The only option – an '11th hour option' with its own difficulties – might be the construction of ethical screens between Becky and other members of her firm to protect the confidential information Becky has acquired from coming to be known to those members of the firm representing Fredericks. However, it is also possible that Joan, fully apprised of the situation and having thought about the implications, would no longer wish to be represented by Becky.

Taking all of this into consideration and assuming that a lawyer-client relationship had initially been established between Joan and Becky, it is Becky should probably withdraw from the representation of Joan and assist in finding another experienced lawyer who can provide legal and ethical advice to Joan.

Legal Ethics in Canada

The Duty of Loyalty and Conflicts of Interest

The Duty of Loyalty and Conflicts of Interest

Accompanies Chapter 5 of

Woolley, Devlin, Cotter & Law, *Lawyer's Ethics And Professional Regulation*, 2d ed,
(Markham: LexisNexis Canada Inc, 2012)

Suggested Approach

i) Invite a co-facilitator (e.g. a grad student) for this class.

ii) Have students watch the video in class (7 minutes) and take notes on attached sheet.

iii) Facilitator extracts key issues in a large-group discussion.

iv) Have co-facilitator map out issues on the board using the answer guide for direction on core issues, e.g. client-client conflicts, lawyer-client conflicts.

v) Give the script to students, so they have the text to work with.

vi) Lead facilitator draws out analysis and co-facilitator adds to initial map on the board

ISSUES	RELEVANT CODE PROVISIONS AND CASE LAW

ISSUES	RELEVANT CODE PROVISIONS AND CASE LAW

The Duty of Loyalty and Conflicts of Interest

INTERIOR ALMA'S OFFICE

ALMA the firm's managing partner, is in her office, working at his desk. GEORGE and ERNIE enter.

ALMA
Come on in, fellas. I did have a chance to look at that note you sent me last night, but I would like you to walk me through what you need.

GEORGE
It's a conflict we need to manage. Jennifer brought in this real estate development client a couple of weeks ago. Her client, Condo Communities, is trying to buy and develop a big piece of oceanfront land next to that upscale golf course, Bandon Highlands, in Cumberland County. She has a small team working on it already.

ALMA
(nodding)
Yes, I help her set up a team for that.

GEORGE
Well, here's the deal. A resource company that specializes in energy exploration has approached Ernie, and they want to buy the same piece of property. Ernie's conflict check flagged it, and he came to me yesterday. I advised him that, managed properly, handle both files. We need separate teams and we need screens in place. Jennifer and her team can handle the Condo Communities bid, and Ernie and his team can handle this new client's bid. What's their name again, Ernie?

ERNIE
Nova Energy.

ALMA
The fracking company?

ERNIE
Well, that's not all they do, but yeah, this will be about fracking. This plot of land looks great as a shale gas prospect.

ALMA
George, are you sure we can do this? Condo came to use first, and we are already working on the file. I think we should say no.

GEORGE
Who's the ethics counsel in this meeting, Alma? Look, we can represent both. They're just business competitors, so it isn't a conflict.

ERNIE
(jumping in enthusiastically)
And we really want to be able to say yes. Nova needs both the land and the subsurface rights, and this will be big money. I need Mary Morrissey and Sami Salloum and probably one other experienced lawyer who is good with the public and the media. I am no good on camera and we'll need a good public face on this.

ALMA
Ernie, this could be bad for us. This fracking type of exploration is ugly and controversial, and our reputation could end up in the toilet.

ERNIE
Nah, with the right people, I can manage the fallout. And, Alma, this could be big. If we do this right and get a win, Nova will move all of their legal work here. The legal fees just for the development of this project will be enormous, nevermind the other things they have coming down the road. And George tells me that the Condo people just came to us as a one-off. If they win the bid,

(MORE)

ERNIE (Cont'd)
they've got another firm that'll do all of the sales work and financing on the individual condos.

GEORGE nods. ALMA pauses a moment to think.

ALMA
OK, I'll put the screens in place, but you can't have your dream team. I can free up Morrissey, but Salloum is already working on the Condo side of this. You can have Mary and your pick of the juniors who haven't seen the Condo file yet.

GEORGE, who had been checking his phone, perks up at hearing this.

ERNIE
Alma...

ALMA
Best I can do. I have a whole firm to run here.

ERNIE
(resigned)
It's like having one hand tied behind my back without Salloum, but if it's the best you can do. At least we're on the file.

ALMA
You'll do fine, Ernie. Good luck!

ERNIE leaves. GEORGE stays behind.

GEORGE
Alma, Morrissey and Salloum are both available. Salloum is our best at these land acquisitions, and we both know that he wasn't assigned to the Condo file. What's going on?

ALMA
Jennifer asked me for Salloum last week, and I decided to say yes this morning. I know you're the ethics counsel, Especially now that we're going to represent Nova, I don't want it to look like we're putting all of our resources towards ensuing that we fail in the one thing that Condo Communities retained us to do.

GEORGE looks a bit skeptical, but agrees.

GEORGE
OK.

GEORGE leaves. ALMA sits for a moment, looking reflective.

INTERIOR JENNIFER'S OFFICE

JENNIFER sits at her desk in a small, cluttered office. ALMA knocks on the door and then enters without waiting for an answer.

ALMA
Hey, Jennifer, how are you?

JENNIFER
Great, but swamped these days. What brings you by?

ALMA
It's that Condo file. Great work bringing them in as clients.

JENNIFER
Thanks! They are really great to work with, and we have the chance to put something really stunning down by the ocean in Cumberland county. Do you know the spot?

ALMA
I do. Very well, actually -- my parents have a cottage that back onto the golf course there. My Dad built it himself many years ago, and then they retired up there. It's such a nice spot. That's why I'm here.

JENNIFER
Great. How can I help?

ALMA
Ernie has a client -- Nova Energy -- after the same land for shale gas exploration. George says that, from an ethics point of view, we can represent both. He'll come by and talk to you about it, but it'll be important that your team stays clear of any confidential information about Ernie's client, and keep his team away from any information about your client.

JENNIFER
OK, no problem.

ALMA
I'm not that comfortable with the conflict, but George calls the shots this kind of thing, and he says we're fine. Speaking of your team, I'm adding Sami Salloum.

JENNIFER
Wow, that'll be great! Sami is the best we have. But you said 'no' to putting him on the team when I asked last week. I mean, thanks, but, what changed your mind?

ALMA
Well, your job just got a lot more difficult now that Ernie from upstairs is in the competition. But I'd appreciate if you didn't mention to anyone that I said 'no' when you first asked for Sami. This stays just between us.

JENNIFER
(nodding)
Yeah, of course.

ALMA
I'm not wild about taking on this conflict, or about fracking in general for that matter. And my partner -- you know her -- is about as anti-development as you can get. She went ballistic last night when I told her that Nova Energy wanted to start fracking up by my parents' cottage.

JENNIFER
So, what do you want me to do?

ALMA
I want you to win! You're on the verge of making partner, and having some success here could put you over the top. Let me know if there's anything else you need to make this deal happen.

ANSWER GUIDE:
THE DUTY OF LOYALTY AND CONFLICTS OF INTEREST

I INTRODUCTION

A lawyer's duty of undivided loyalty to his or her clients is a central dimension of professionalism. As Binnie J. stated in *R*. v. *Neil*, [2002] S.C.J. No. 72, [2002] 3 S.C.R. 631:

> [T]he defining principle — the duty of loyalty — is with us still. It endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained …. [6]

One of the main components of the lawyer's duty of loyalty is the duty to avoid conflicting interests. However, it is much easier to state this duty in general terms than to apply it, or to fully appreciate the complications it can present in the context of a modern law practice. As Alice Woolley recently wrote:

No area of the law governing lawyers consumes more time, creates more confusion and frustration, or causes lawyers more difficulty in their practices, than the rules governing conflicts of interest.[7]

For this reason alone, the creation of a scenario that examines various aspects of a lawyer's duty of loyalty to one's client is a valuable, even critical dimension of legal ethics for lawyers.

The scenario presented here examines at lest two different aspects of a lawyer's duty to avoid conflicts of interest. The first is situations in which a conflict of interest exists, or may come to exist, between or among the interests of two or more clients. These are often referred to generically as 'client-client' conflicts. The second is situations in which a conflict of interest exists, or may come to exist, between the interests of a client and the interests of the lawyer or someone close to the lawyer. These are often referred to as 'lawyer-client' conflicts. While both types of conflict are grounded in the lawyer's duty of loyalty, and lawyers' obligations are similar in both, the jurisprudence and the Codes of Professional Conduct articulate specific sets of obligations for lawyers in the two situations. The following guidance in relation to the scenario is therefore divided into two sections in order to examine the two dilemmas separately.

As will be noted in the scenario and the guidance that follows, in almost all of these situations the duty to preserve client confidences, the duty of commitment to a client's cause and the duty of candour are implicated. These are noted in the jurisprudence and in Codes of Professional Conduct as elements of the duty of loyalty, and will be remarked on, as appropriate, in this Guide.

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[6] R. v. Neil, 2002 S.C.C. 70, [2002] 3 S.C.R. 631, at para. 12.

[7] Alice Woolley. Understanding Lawyers' Ethics in Canada, 2011, LexisNexis Canada, at p. 215.

A. The Client-Client Conflict

As the scenario unfolds, it becomes clear that the law firm has recently been retained to represent a client, Condo Communities, in relation to the acquisition of land for a substantial condominium development. A lawyer in the law firm, Jennifer, is handling this work with a team of other lawyers at the firm. Another lawyer in the firm, Ernie, has been approached by another client, Nova Energy, with an interest in acquiring the same land in order to pursue energy exploration on the property. Ethics counsel at the firm George, along with Ernie, meet with the managing partner, Alma, to discuss the situation and conflict in an effort to work out the means by which Ernie can represent Nova without there arising a disqualifying conflict of interest between the interests of Condo Communities and Nova Energy.

B. The Lawyer-Client Conflict

At the same time, and unknown to other lawyers in the firm, managing partner Alma has a personal interest in the outcome of the competition for the property, partly motivated by her parents' ownership of a retirement property in the immediate vicinity of the land and partly because of her romantic partner's adamant opposition to exploration and development of the nature that Nova Energy would undertake if it were to acquire the land in question. She informs Jennifer of this personal interest as well as the importance of Jennifer's success, and secretly strengthens Jennifer's team in order to assist in this regard.

It is also worth noting that the law firm's long term client representation, and revenue prospects, may be better served by the success of one client in acquiring the property, as opposed to the other.

II CLIENT-CLIENT CONFLICTS OF INTEREST

1 The nature of the potential conflict.

Assuming that Ernie has been retained by, or comes to be retained by, Nova Energy, a potential 'current client' conflict of interest arises. The features to be noted in this aspect of the scenario are:

- First, since the representation of Condo and Nova would occur concurrently, this is a situation of 'current' client representation as opposed to 'former client' representation. As noted below, different rules apply to 'former client' conflicts.
- Second, it should be noted that the two clients are being represented by different lawyers in the law firm.
- Third, the nature of the representation is that two clients are bidding for the acquisition of the same property, as opposed to, for example, two clients who are suing one another.
- Fourth, so far, the communication of the respective clients' confidences appears to have been limited to communication with the lawyers who will be representing their respective interests, communications with the Ethics Counsel, George, and, briefly, with the law firm's managing partner, Alma.

2 Legal and Ethical Framework

The jurisprudence and Codes of Professional Conduct make clear that a lawyer owes a fiduciary duty of loyalty to one's client. In *Neil*, Binnie J. stated:

> The duty of loyalty is intertwined with the fiduciary nature of the lawyer-client relationship. One of the roots of the word fiduciary is *fides*, or loyalty, and loyalty is often cited as one of the defining characteristics of a fiduciary …. [8]

In a similar vein, Commentary 5 to Rule 3.4.1 of the Federation of Law Societies' Model Code of Professional Conduct (Model Code) provides:

> The Fiduciary Relationship, the Duty of Loyalty and Conflicting Interests
>
> [5] The value of an independent bar is diminished unless the lawyer is free from conflicts of interest. 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 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.

In addition, this duty extends to the whole firm, and not just individual lawyers in the firm.[9]

The governing rule associated with situations where a law firm represents two clients concurrently – the 'bright line rule' - was articulated by Binnie J. in *Neil* and recently confirmed by the Supreme Court of Canada in *McKercher*:

> 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.[10] [Emphasis in original]

As noted in *McKercher*:

- the clients must both be *current* clients of the law firm;
- the bright line applies to *related and unrelated* matters;
- there must be *immediate* and *direct* adversity between the interests of the clients;
- the adverse interests must be of a *legal* nature;

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[8] *Neil*, supra, note 1, at para. 16.

[9] *Neil, supra,* note 1, at para. 29.

[10] Canadian National Railway v. *McKercher et al* [2013] 2 S.C.R. 649*,* at para. 27

- the bright line does not disqualify a law firm from representing a client who seeks to *abuse* it; and
- the bright line does not apply in circumstances where it would be *unreasonable* for a client to expect that the law firm would not act against its interests in the matter.

Where clients provide informed consent to the adverse and otherwise conflicting representation, the bright line will usually not apply.

The second dimension of the lawyer's duty to avoid conflicts of interest is that there not be a substantial risk of impairment of the representation. In *Neil,* the Supreme Court adopted the description of 'substantial risk' set out in the American Restatement:

> as 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".

This description is also captured in one part of the definition of 'conflict of interest' in the Commentary to Rule 3.4-1 of the Model Code:

> As defined in these rules, a conflict of interest exists when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. 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. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest.

As well, where there is no 'legal' adversity and the concurrent representation does not constitute a 'substantial risk', it may be possible for a law firm to represent the two clients whose interests are adverse, provided that adequate steps have been taken to ensure that client interests are not compromised. This usually requires care with respect to the preservation and protection of client confidences, but will also require that the lawyers' duties of commitment and candour are not compromised. With respect to the question of 'commercial conflicts', Binnie J., writing for the majority in *Strother* stated:

> [c]ommercial conflicts between clients that do *not* impair a lawyer's ability to properly represent the legal interests of both clients will not generally present a conflict problem. Whether or not a real risk of impairment exists will be a question of fact.[11]

[11] *Strother v. 3464920 Canada Inc.* 2007 S.C.C. 24, [2007] 2 S.C.R. 177, at para 55, [Emphasis in original]

This principle is set out in Rule 3.4-4 of the Model Code and related Commentaries:

Concurrent Representation with Protection of Confidential Client Information

3.4-4 Where there is no dispute among the clients about the matter that is the subject of the proposed representation, two or more lawyers in a law firm may act for current clients with competing interests and may treat information received from each client as confidential and not disclose it to the other clients, provided that:
(a) disclosure of the risks of the lawyers so acting has been made to each client;
(b) each client consents after having received independent legal advice, including on the risks of concurrent representation;
(c) the clients each determine that it is in their best interests that the lawyers so act;
(d) each client is represented by a different lawyer in the firm;
(e) appropriate screening mechanisms are in place to protect confidential information; and
(f) all lawyers in the law firm withdraw from the representation of all clients in respect of the matter if a dispute that cannot be resolved develops among the clients.

Commentary
[1] This rule provides guidance on concurrent representation, which is permitted in limited circumstances. Concurrent representation is not contrary to the representation where there is a conflict of interest provided that the clients are fully informed of the risks and understand that if a dispute arises among the clients that cannot be resolved the lawyers may have to withdraw, resulting in potential additional costs.

[2] An example is a law firm acting for a number of sophisticated clients in a matter such as competing bids in a corporate acquisition in which, although the clients' interests are divergent and may conflict, the clients are not in a dispute. Provided that each client is represented by a different lawyer in the firm and there is no real risk that the firm will not be able to properly represent the legal interests of each client, the firm may represent both even though the subject matter of the retainers is the same. Whether or not a risk of impairment of representation exists is a question of fact.

[3] The basis for the advice described in the rule from both the lawyers involved in the concurrent representation and those giving the required independent legal advice is whether concurrent representation is in the best interests of the clients. Even where all clients consent, the lawyers should not accept a concurrent retainer if the matter is one in which one of the clients is less sophisticated or more vulnerable than the other.

[4] In cases of concurrent representation lawyers should employ, as applicable, the reasonable screening measures to ensure non-disclosure of confidential information within the firm set out in the rule on conflicts from transfer between law firms (see Rule 3.4-26)

These provisions are enhanced by Rule 3.4-2 and Commentaries, the 'client consent' provisions of the Model Code:

> Consent
> A lawyer must not represent a client in a matter when there is a conflict of interest unless there is express or implied consent from all clients and the lawyer reasonably believes that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client.
> (a) Express consent must be fully informed and voluntary after disclosure.
>
> Commentaries
>
> [1] Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.
>
> [2] The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

In addition, even where the bright line is satisfied, it will also be necessary for the lawyers to be satisfied that the represent each client can be undertaken without one client representation adversely affecting the other. This is often regarded as the 'substantial risk' test, now identified by the Supreme Court of Canada in *McKercher* as a second, additional requirement in order to avoid a conflicting representation.

3 Application to the Scenario

In the Scenario, it is clear that:

- the law firm intends to [and perhaps already does] represent two current clients;
- there is immediate adversity at least in the sense that the two clients are engaged in a competition for the same property;
- there is no sense that the creation of the conflict is 'tactical' or an abuse of the process associated with client representation; and
- it is unlikely that either client's expectation of the firm avoiding conflicts of this nature would be 'unreasonable'.

However, one critical aspect of the scenario does not satisfy one prerequisite of the bright line rule – the requirement that the adverse interests be 'legal'. As noted in *Strother,* business or commercial conflicts do not directly engage the bright line rule. Consequently in this situation, provided that the firm is satisfied that a) it can undertake the concurrent representation with 'substantial risk' to the representation of either client and b) that it can manage client confidences appropriately it could represent both clients without being in a conflict of interest.

With respect to the latter requirement, the law firm appears to be undertaking the establishment of two separate, independent teams to represent the two clients and is establishing screens and other institutional mechanisms to ensure independent concurrent representation that does not compromise the interests of the two clients. While the details are incomplete, this appears to be an attempt to satisfy the requirements set out in Rule 3.4-4 of the Model Code.

Nevertheless, a number of questions arise regarding whether the law firm is complying with Rule 3.4-4.

- Has the disclosure been adequate to enable the clients to make informed decisions regarding their representation by the firm?
- In particular, has there been adequate disclosure of the risks, in particular to Nova?
- Have the clients received independent advice with respect to this representation?

All of this is related to the question of whether there is 'substantial risk' to the either client as a result of the representation. This, as noted above, is a question of fact. Some additional questions might be asked:

- Will the separate representation, and separation of client information, ensure that the lawyers are able to provide confidentiality and commitment to their respective clients' interests?
- Has the law firm already violated its duties in this regard through the communication between the managing partner Alma and the lawyer representing Condo, Jennifer?
- Will the potential for greater benefits to the law firm in terms of future work if one client prevails put the other client's interests at risk?
- Are there other factors that could cause the representation of one client to be diluted?

In many respects these 'substantial risk' factors are exacerbated by the potential lawyer-client issues discussed below.

III LAWYER-CLIENT CONFLICTS

As noted above. the commentary to Rule 3.4-1 of the Model Code provides:

> a conflict of interest exists when there is a *substantial risk* that a lawyer's loyalty to or representation of a client would be *materially and adversely affected by the lawyer's own interest* or the lawyer's duties to another client, a former client, *or a third person*. 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. A client's interests may be seriously prejudiced unless the lawyer's judgment and freedom of action on the client's behalf are as free as possible from conflicts of interest. (Emphasis added)

The Code and the jurisprudence contemplate that it may not only be loyalty to another client that could create a risk that a lawyer's loyalty and commitment to a client would be adversely affected. A lawyer's own interests in conflict with those of a client could be generate a substantial risk of inadequate representation through a moderation of the lawyer's of loyalty to the client or inadequate commitment to the client's cause.

2 Application to the Scenario

As noted above, these questions of substantial risk are questions of fact. Will any of the following factors constitute a substantial risk that the law firm's loyalty and commitment to the cause of either client will be moderated or compromised?

- In the scenario, Ernie observes that in the event that Nova Energy wins the competition to acquire the land in question the law firm will benefit from legal work to a far greater degree than if Condo Communities acquires the land.
- Unknown to any of the lawyers involved in the matter, with the exception of Jennifer, the managing partner, Alma, has a personal interest in the success of Condo Communities in the competition for the land – the interest of her parents and the interest of her romantic partner.
- Unknown to anyone in the firm other than Jennifer, Alma has intentionally strengthened the legal team supporting the Condo bid, presumably with the intention of tipping the scales in favour of Condo.

The first point invites consideration of whether the financial interests of the law firm are liable to cause there to be a substantial risk that Condo Communities' legitimate expectations of high quality, committed representation will not occur because the law firm may prefer (and advance) Nova's bid more effectively.

The second and third points, tilting against the interests of Nova and in favour of Condo, is the managing partner's personal interest in the success of the Condo bid. Whether this strong personal interest generates a substantial risk for Nova is open to question. However, where Alma has acted on this preference by strengthening the legal team supporting Condo by providing that team with the law firm's top talent, and intentionally denying it to the representation of Nova, suggests that the loyal, committed representation of Nova by the firm may already have been put at risk.

It will also be recalled that there is available an option for clients to give consent to a potentially conflicting situation. However, for consent to be operative, as noted above, the client must be informed of all relevant factors that could adversely affect the client's interests. Commentaries 1 and 2 to Model Code Rule 3-4-2, Consent, provide:

[1] Disclosure is an essential requirement to obtaining a client's consent. Where it is not possible to provide the client with adequate disclosure because of the confidentiality of the information of another client, the lawyer must decline to act.

[2] The lawyer should inform the client of the relevant circumstances and the reasonably foreseeable ways that the conflict of interest could adversely affect the client's interests. This would include the lawyer's relations to the parties and any interest in or connection with the matter.

It is hard to imagine that Nova would give informed consent [and particularly if the client obtained independent advice] if fully informed of Alma's personal interests and her decision to tip the scales in favour of Condo by her assignment of lawyers in the matter.

Even were the client to provide consent, it is questionable whether the lawyer should act. The obligation to avoid conflicts is not resolved solely by virtue of client consent. Rule 3.4-2 of the Model Code requires that the lawyer must also 'reasonably believe that he or she is able to represent each client without having a material adverse effect upon the representation of or loyalty to the other client'.

It would therefore appear to be incumbent on the law firm to decline to represent Nova Resources in the matter, given that there would appear to be a substantial risk that their representation by the law firm would be impaired by Alma's personal interests and actions in support of Condo.

Legal Ethics in Canada

Professionalism and Civility

Professionalism and Civility

Accompanies Chapter 6E of

Woolley, Devlin, Cotter & Law, *Lawyer's Ethics And Professional Regulation*, 2d ed, (Markham: LexisNexis Canada Inc, 2012)

Suggested Approach

i) Give out question sheet to students

ii) Watch the video (10 minutes) pausing after scenes 2, 3, 5, and 6, and allow time for students to briefly make notes on sheet.

iii) Give the script to students.

iv) Facilitate a large group discussion.

Definition of Incivility

"Potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy" (*Doré*, paragraph 61).

Links

Law Society of Upper Canada v. Groia, 2014 ONLSTA 11 (CanLII), http://canlii.ca/t/g69qb

Laarakker (Re), 2011 LSBC 29 (CanLII), http://canlii.ca/t/fn6cd

Doré v. Barreau du Québec, [2012] 1 SCR 395, 2012 SCC 12 (CanLII), http://canlii.ca/t/fqn88

Cherkewich (Re), 2014 SKLSS 3 (CanLII), http://canlii.ca/t/g6dd4

Professionalism and Civility Questions

Scene 2: Elevator

1. Does this scene raise an incivility issue?

2. If so, should something be done about it?

3. If so, what is that something, and who should do it?

Scene 3: Examination for discovery

1. Does this scene raise an incivility issue?

2. If so, should something be done about it?

3. If so, what is that something, and who should do it?

Scenes 4 and 5: Hallway / Court Room

1. Do these scenes raise an incivility issue?

2. If so, should something be done about it?

3. If so, what is that something, and who should do it?

Scene 6: Maria's Email

1. Does this scene raise an incivility issue?

2. If so, should something be done about it?

3. If so, what is that something and who should do it?

Scene 7: Charles' Email

1. Does this scene raise an incivility issue?

2. If so, should something be done about it?

3. If so, what is that something, and who should do it?

Scene 8: Back to the regulators

1. What is the proper forum for regulating incivility? Provide reasons.

Final Question: To what extent, and in what way, is context vital to an understanding of incivility? (E.g. criminal or civil; large jurisdiction or small jurisdiction; gender, race, culture and class.

Professionalism and Civility Script

Scene I

INTERIOR DISCIPLINARY HEARING ROOM

Fade in on a conference room where the law society holds disciplinary hearings. Members of the Discipline Panel review documents in front of them, the two lawyers who are the subjects of the proceedings consult with their representatives. The PANEL CHAIR enters the room.

PANEL CHAIR
Alright, I see that everyone is here, so we'll get started. First, I'd like to confirm that all of the parties have agreed to this somewhat unusual format. Mr. Devereaux, you're representing the law society in this matter?

DEVEREAUX
That's correct, Mr. Chair. All of the infractions of the Law Society's code of conduct that are the subject of today's hearing involve the interactions between Mr. Cornell and Ms. Randall, and so all parties have agreed to this joint hearing.

The PANEL CHAIR looks at CORNELL and his lawyer MCKENZIE.

MCKENZIE
Yes, good morning, Mr. Chair. I'm Samantha McKenzie, here representing Mr. Cornell. As Mr. Devereaux says, we have all agreed to the combined hearing and we're happy to have you run the proceedings as you see fit.

PANEL CHAIR
Mr. Bennett that goes for your client as well?

BENNETT
That's correct, Mr. Chair.

PANEL CHAIR
Alright. We begin with you Mr. Devereaux.

DEVEREAUX
Thank you Mr. Chair. The evidence as the law society understands it, reveals incivility and unprofessional conduct on the part of both Mr. Cornell and Ms. Randall...

Scene II

FLASHBACK TO:
INTERIOR CORNELL'S FIRM'S OFFICES HALLWAY OUTSIDE ELEVATOR

CORNELL waits, impatiently, outside the elevator. The elevator arrives, several people exit before RANDALL and her client, HUSBAND. As RANDALL and HUSBAND exit, RANDALL is promptly confronted by CORNELL.

CORNELL
(seething)
You're 35 minutes late, Maria.

RANDALL
(trying to adopt a professional tone, as her client is present)
Hello Mr. Cornell. I'm sorry to keep you waiting -- we had some trouble finding the place. Did you get my text?

CORNELL
Your text? What I'm looking for is a little professionalism, Maria. A little respect for my time and my client's money. (to HUSBAND) Your money too, I suppose.

RANDALL
(still remaining professional, but needing to stick up for herself)
If you have a problem, Mr. Cornell, you can take it up with me and not with my client. Now, we agreed to come to your offices for these discoveries. We've rescheduled twice to accommodate your schedule. And, I left you three messages this week asking about directions to your new offices, exactly none of which were returned. <beat> Now, shall we get started?

CORNELL moves out of RANDALL's path and indicates the direction she should walk. HUSBAND and RANDALL walk side by side while CORNELL follows.

Scene III

INTERIOR CORNELL'S FIRM - CONFERENCE ROOM

The examination for discovery is now well underway. The COURT REPORTER sits at the head of the conference table, WIFE and CORNELL on one side, and HUSBAND and RANDALL on the opposite side.

RANDALL
Mrs. Grover, I'm nearly finished, but I'd just like to ask before I conclude: Are there any other reasons you have for wanting to limit Mr. Grover's access to his children?

CORNELL
Objection. Are you serious? What kind of a question is that?

RANDALL
I'm sorry, what's your objection? You don't think the question is relevant?

CORNELL
I don't think its answerable in the time we have today. Do you want to rephrase?

RANDALL
(to COURT REPORTER)
Can we go off the record?

CORNELL nods his agreement. The COURT REPORTER relaxes.

RANDALL
C'mon, I'm just try to avoid getting screwed again by your famous ambush tactics.

CORNELL
If you were a better lawyer, Maria, you wouldn't always be caught off guard. Now, let's get back on the record. Do you have any more *valid* questions?

RANDALL takes a moment to compose herself, then nods to the COURT REPORTER. The COURT REPORTER gets ready to resume, and we begin to fade out as RANDALL asks pointed questions and WIFE responds.

RANDALL
Mrs. Grover, to your knowledge, does your husband have any substance abuse problems?

WIFE
No.

RANDALL
Has he ever been violent with you or the children?

WIFE
No.

RANDALL
Have you ever known your husband to...

Scene IV

INTERIOR COURTHOUSE

RANDALL anxiously looks at her watch. She looks relieved as she sees HUSBAND walking briskly toward her.

HUSBAND
Sorry, sorry, I know I'm late. My car got impounded last night, so I had to take the bus. Do you know a good criminal defence lawyer for DUIs and stuff like that?

RANDALL
Stuff like that?

HUSBAND
Well, possession, but it's this DUI that I really need help with, cause it'd be my third?

RANDALL
Third DUI? Listen, for future reference, when I ask, "Is there anything else I need to know?", two previous DUIs do qualify as things I need to know.

Randall pauses to think for a moment.

RANDALL
OK, does your wife or her lawyer know about this?

HUSBAND
No, no, this was all -- wait -- why does that matter?

RANDALL
Nevermind. Right now, we're late for court.

SCENE V

INTERIOR COURTROOM

We're now some time into the trial. WIFE is on the stand, and CORNELL is in the middle of conducting his examination-in-chief.

RANDALL
Objection! Your honour, this line of questioning -- this line of attack against my client -- is coming completely out of the blue. This issue was not raised in the Application or the Reply, and was also never mentioned in my extensive questioning of this witness during the discovery process. Your honour, I'm flabbergasted -- this can only be characterized as unfair surprise.

JUDGE
(to CORNELL)
Counsel?

CORNELL
Your honour, throughout the discovery process, and now today, my friend has persisted in the notion that I ought to be helping her out somehow -- telegraphing my entire case, or doing her job for her in discovery. I am a gentleman with every instinct to rescue a helpless damsel in distress, but, frankly your honour, the rules of chivalry extend only so far.

JUDGE
(sighing)
It seems to me this is a rather important piece of evidence. And I see that we are approaching the end of our day. I think we'll adjourn there and I'll hear submissions from both of you on this point tomorrow.

The JUDGE stands up, leading everyone else in the room to stand as well. The JUDGE leaves.

SCENE VI

INTERIOR RANDALL'S OFFICE

Randall's office feels small and crowded. Randall is at her computer, typing furiously.

RANDALL
(typing on screen)
Dear Mr. Cornell: Please be advised that I consider the remarks you made in the courtroom today to be discourteous, unprofessional, misogynistic, and rude. I have contacted the court reporter to obtain transcripts at the earliest possible time, and intend to report your misconduct to the law society. Sincerely, Maria Randall

SCENE VII

INTERIOR CORNELL'S OFFICE

Cornell's office feels luxurious and organized by comparison. Cornell sits at his desk while a colleague stands over his shoulder.

CORNELL'S COLLEAGUE
Man, what did you say to her?

CORNELL
<scoffs> Nothing! She knows she's losing and she's trying to put pressure on me for a settlement. Time to put an end to this.

Cornell turns to his computer.

CORNELL
(typing on screen)
Maria, Thanks for your note. I look forward to seeing the transcript as well, as I'm sure it will show nothing but professional conduct on my part and utter ineptitude on yours. As a professional, I feel I cannot allow you to continue to attempt to gain leverage by shouting "misogyny!" when things don't go your way. As you know, the practice of family law requires collegiality and collaboration among its practitioners. In that
(MORE)

CORNELL (Cont'd)
spirit I have copied the city-wide family law mailing list so that all of my colleagues will know what kind of shrew they are dealing with and what kind of tactics to expect when they see you across the aisle. Best,

SCENE VIII

BACK TO PRESENT:

INTERIOR DISCIPLINARY HEARING ROOM

In the present, DEVEREAUX has just finished speaking on behalf of the law society.

PANEL CHAIR
Thank you Mr. Devereaux. Ms. McKenzie, I'd like to hear from you now. Is your client still taking the position that there was nothing objectionable in his remarks?

MCKENZIE
Mr. Chair, without conceding that the remarks were objectionable, our position is that policing a lawyer's conduct in the courtroom is the exclusive jurisdiction of the trial judge. Had Mr. Cornell said something uncivil during the trial, Ms. Randall ought to have raised it at the time with the judge. She was in the best place to evaluate both the context and the content of anything said in her courtroom. The judge also has all of the tools necessary -- from a verbal rebuke on the record to contempt of court -- to deal with the matter as he saw fit. In the heat of that particular moment, in the context of the trial, the judge evidently saw nothing in my client's conduct or remarks to merit any sanction or admonishment whatsoever.

PANEL CHAIR
Thank you Ms. McKenzie. Mr. Bennett, the final issue I'd like to hear from you on is regarding the evidence that your client failed to turn over to the other side.

BENNETT
Thank you Mr. Chair. Just to be clear, we are not talking about evidence in the physical sense. What Ms. Randall had was a request that her client made for a referral to a criminal defence lawyer. That's clearly information that comes within the scope of solicitor-client privilege. Mr. Chair, not only did my client have no duty to turn that information over to the other side, she had a duty not to disclose that information to anyone.

PANEL CHAIR
Thank you Mr. Bennett. And I'd like to extend the panel's thanks to all of you. I'm happy to see that we were able to run this combined hearing in a manner that was both civil and efficient. The panel will now adjourn and the parties will be informed of our decision in due course.

FADE TO BLACK

Legal Ethics in Canada

Access to Justice

Mandatory Pro Bono for Lawyers

Access to Justice: Mandatory Pro Bono for Lawyers

Accompanies Chapter 12 of

Woolley, Devlin, Cotter & Law, *Lawyer's Ethics And Professional Regulation*, 2d ed, (Markham: LexisNexis Canada Inc, 2012)

Suggested Approach

i) Set up classroom with large flip chart sheets on either side of classroom. Bring a sufficient number of permanent markers of different colours.

ii) Watch the video in class (20 minutes).

iii) Pose the following *revised* resolution on chalkboard or screen:

> Be it resolved that each Canadian lawyer will be required to donate either 50 hours per year or the monetary equivalent of 50 hours (calculated based on her or his hourly rate) to access to justice initiatives.

iv) Ask students to vote with their feet by moving to one side of the room or another. Facilitator may allow for a third "undecided" group.

v) Ask students to get into smaller groups and write arguments on flip chart sheets on the walls. Then ask students to move to the opposite side's sheets and write responses to their arguments in different coloured markers.

vi) Have students read each other's arguments.

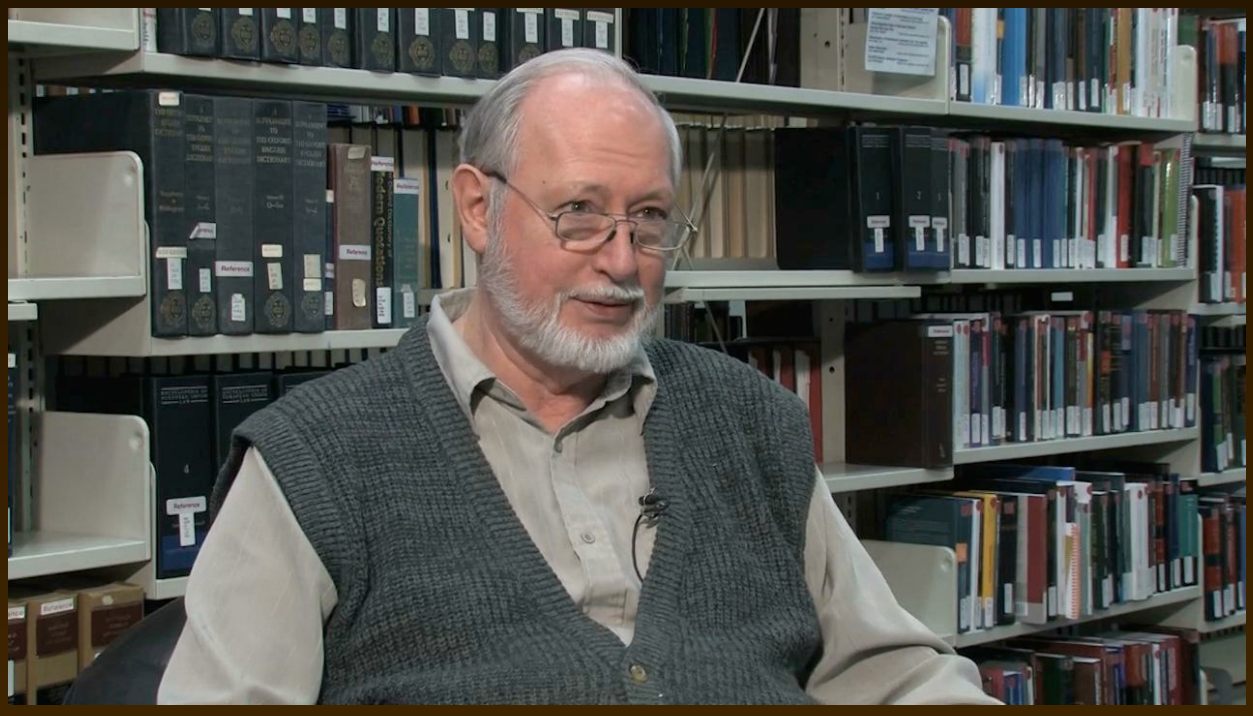
vii) Facilitate large group discussion.

Legal Ethics in Canada

Access to Justice

Self-Represented Litigants

Derek P



Access to Justice: Self-Represented Litigants

Derek P

Accompanies Chapter 12 of

Woolley, Devlin, Cotter & Law, *Lawyer's Ethics And Professional Regulation*, 2d ed,
(Markham: LexisNexis Canada Inc, 2012)

Suggested Approach

Give the following directions to students before class:

i) Complete columns 1 and 3 *as* you watch the video (18 minutes) prior to class.

ii) Complete columns 2,4, and 5 *after* you watch the video, but prior to class.

iii) Bring the completed form to class.

During class:

iv) Facilitate large group discussion

Give the following instruction at the end of class:

v) Complete column 6 following the class discussion.

What are the issues discussed by Derek?	Do you think these are legitimate concerns?	What are the solutions proposed by Derek?	Do you think that the proposed solutions will work?	What solutions would you recommend?	Final Thoughts

Legal Ethics in Canada

Access to Justice

Self-Represented Litigants

Kelly Ann C

Access to Justice: Self-Represented Litigants

Kelly Ann C

Accompanies Chapter 12 of

Woolley, Devlin, Cotter & Law, *Lawyer's Ethics And Professional Regulation*, 2d ed,
(Markham: LexisNexis Canada Inc, 2012)

Suggested Approach

Give the following directions to students before class:

i) Complete columns 1 and 3 *as* you watch the video (18 minutes) prior to class.

ii) Complete columns 2,4, and 5 *after* you watch the video, but prior to class.

iii) Bring the completed form to class.

During class:

iv) Facilitate large group discussion

Give the following instruction at the end of class:

v) Complete column 6 following the class discussion.

What are the issues discussed by Kelly?	Do you think these are legitimate concerns?	What are the solutions proposed by Kelly?	Do you think that the proposed solutions will work?	What solutions would you recommend?	Final Thoughts

Thanks to

Brad Abernethy
Nayha Acharya
Vaughan Black
Kim Brooks
Mary Brown
Cathy Cameron
Justice James Chipman
Christine Conrad
Stephen Coughlan
Jennifer Crewe
Tim Daley
Navid Dehghani
Alexandra Dobrowolsky
Halyna Dobrowolsky
Adam Dodek
Laura Dowling
Trevor Ford
Andrew Fraser
Melanie Gillis
Erin Hennessey
Michael Jackson
Lorraine Lafferty
Kevin Landry
David Layton
Jennifer Llewellyn
Geoffrey Loomer
Julie MacFarlane
Constance MacIntosh
Brenda Martin
Matthew Martin
Anne Matthewman
Naiomi Metallic
Craig Moore (Spider Video Inc.)
Jon Penney
Stephen Pitel
Dianne Pothier
Sue Rice
Laura Robertson
Struan Robertson
Amy Salyzyn
Elizabeth Sanford
Jonathan Shapiro
Deivan Steele
Graham Steele
David Tanovitch
Caitlin Urquhart
Lindsey Wareham
David Wojcik
Faye Woodman
Alice Woolley
Court Services Nova Scotia
Custodial Services Schulich
School of Law