ETHICAL DECISION MAKING

Law Society of Nunavut

May 2015
Questions??

Ask at any time.
What is an ethical lawyer?

• Duty of Loyalty to the Client
  – Zealous advocacy
  – Avoid conflicts of interest
  – Keep confidentiality
  – Absolute candour with the client
    • *R. v. Neil SCC 2002*
Other actors are owed duties

- Can you think of some?
  - Clients
  - Court
  - Other lawyers
  - The profession
  - Justice itself
  - Support staff
  - Trust beneficiaries
  - Witnesses
Duty to do Pro Bono

• Owed to just about every actor in the justice system
  – Client
  – Courts
  – Other lawyers
  – Access to justice
  – ...

Factors in unethical conduct

• Can you name some:
  o Substance abuse
  o Billing pressure
  o Family stress
  o Others?
  o Self-Deception
I always want to do the right thing, but so often it interferes with my legal practice.
Losing sight of the ethical goal

1. Rationalizing bad conduct
2. The Slippery Slope of ethical decisions
3. Somebody else’s problem
4. Self deceit

If we fail to see our own actions as unethical, then we deceive ourselves into acting in self interested ways.
How ethical decision making is different from business problem solving and from advising clients
BUSINESS SCHOOLS

• Six-Step Process
  o Identify the problem
  o Analyze the problem
  o Generate Potential Solutions
  o Select and Plan the Solution
  o Implement the Solution
  o Evaluate the success or failure
ETHICS & LAW ANALYSIS

- Identify the stakeholders and relevant facts
- Identify the core ethical duties
- Consider possible courses of action
- And the positive & negative consequences of each action
- Balance the positives & negatives
- Make and implement a decision
Did I mention the exam?

"Now does this violate the Rule Against Perpetuities?"
Ethical Decision Making

The Exam
Lawyer – Client 1

After questioning about his income as a headwaiter, Morley Cammaleri, asked his lawyer Jody Eberle whether he should have told opposing lawyer Gary Bettman about the cash tips in addition to the credit card tips distributed by the bistro manager. Matt is adamant he won't pay more support.

What should Jody do?
Correcting Misinformation
Model Code Provisions

Upon becoming aware that the court is under a misapprehension as a result of submissions made by the lawyer or evidence given by the lawyer's client or witness, a lawyer must (subject to confidentiality) immediately correct the misapprehension.

A lawyer must not implement instructions of a client that are contrary to professional ethics and must withdraw if the client persists in such instructions.
Springfield lawyer, Lionel Hutz, is retained to draft Ned Flander’s will, after a messy divorce. The divorce agreement requires Ned to leave his ex-wife a pewter chalice. The details of the divorce agreement made headlines in the local paper, the Springfield Shopper. While reviewing Ned’s estate planning questionnaire, Lionel realizes that Ned lives next door to his former client, Homer Simpson. Later that evening, Lionel runs into Homer at the Kwik-E-Mart and is about to tell him that Ned is now divorced and that he is busy drafting Ned’s new will with a clause relating to the chalice. Lionel is a member of the Nunavut Law Society and the Springfield Law Society. There is no conflict between the Nunavut and Springfield Codes.
CONFIDENTIALITY

- Is it okay to talk about a particular matter that has already appeared in a public forum or is otherwise available from public sources?
  - Yes
  - No
Relationships to Clients

Model Code

• “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 authorized by client, or required by law, a court, or the Law Society to do so).

• Provided that there is no infringement of the lawyer’s obligations to the client, the profession, the courts, or the administration of justice, a lawyer may communicate information to the media and may make public appearances and statements.
Coleman Reese, acts as corporate counsel for Wayne Enterprises. The company is buying an office building from Bigtime Investments in a multi-million dollar deal. As part of the closing documents, Coleman has received a statement of adjustments from Bigtime’s lawyer. Coleman finds an error on the statement relating to a property tax adjustment on the land. The error reduced the cash to close by a paltry $200.00. Should Coleman say anything to counsel for Bigtime?
“A lawyer must avoid sharp practice and must not take advantage of or act without fair warning upon slips, irregularities or mistakes on the part of other lawyers not going to the merits or involving the sacrifice of a client’s rights.”

• But...Is it sharp practice to fail to remind another lawyer about a limitation that is about to expire?
Senior litigation partner, Denny Crane, asks you to help his son, Donny, on the sale of his residence. Donny has signed the transfer of land. You are drafting the trust letter in preparation for closing. Denny suddenly barges into your office. He’s concerned that the buyers will be unable to close on time as he hears they are having trouble obtaining financing. Denny demands a provision in the letter charging interest at the rate of 50% per annum on entire the cash to close from the closing date until funds are received by. Denny also insists that when the cash is delivered to you, that you make the net sale proceeds payable to him personally, because Donny owes him some money.
TRUST CONDITIONS

• “A lawyer must not give an undertaking that cannot be fulfilled and must fulfil every undertaking given and honour every trust condition once accepted.”

• And... Who is your Client anyway?
• Can a third party ever give instructions
• Is the lawyer in a conflict here?
Trust Conditions – her Majesty

• Government lawyers cannot accept trust conditions imposed on by private practitioners on funds received from them unless they also have a trust account.

- True
- False
- Don’t know
Lawyer Hamilton Burger represented his client Molly in a difficult and complex personal injury action. Ham thought that the claim was worth more than a million dollars. After years of discovery and pretrial motions, the matter was settled on the eve of trial for $900,000.

Defense counsel, Perry Mason, has sent Ham the money in trust that Molly sign a release and that Ham file a discontinuance of action. Molly was so excited to hear the money had finally arrived that she suffered a fatal heart attack.
• Does Ham have to return the money because his client cannot sign the release and he cannot comply with the trust condition?

• What if Molly had died before agreeing to the settlement? Could Ham close the deal?
It sounded all cut and dried. The clients were buying a small restaurant and had agreed on everything with the seller.

You said, “Fees are about $2,500; won’t need a written retainer.”

Then, security on the kitchen equipment could not be transferred, a health notice for mice turned up, the landlord didn’t actually pay the utilities....

Your billable time is $25,000 and mounting!
Tips

• Get it in writing.
• Interim bill.
• Communicate, communicate, communicate!
• Other options?
Lawyer – Client 4
Conflicts of Interest – NU Government

FIRST ASK... WHO IS MY CLIENT?

Her Majesty, Queen Elizabeth

And perhaps one day...
Obligations To The Profession - 3 Extortionate threats

• Contained in a letter from opposing counsel:

“...if I have not received the documents in accordance with your undertaking by next Friday, I will have no alternative but to report your conduct to the Law Society”
Tips

• A lawyer must not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten:
  • (a) to initiate or proceed with a criminal or quasi-criminal charge; or
  • (b) to make a complaint to a regulatory authority.

• ...Nor is it improper for a lawyer to request that another lawyer comply with an undertaking or trust condition or other professional obligation or face being reported to the Society. ...

• What if the threat relates to a “collateral purpose?"
• Sometimes you have no choice
Duties to the Profession - Reporting Another Lawyer

At discoveries this morning, lawyer Mickey Mantle, spilled the contents of her reusable Timmy’s coffee cup all over her file. Opposing lawyer, Sandy Koufax noticed that the spill smelled like straight rum. Sandy adjourned the exam until Mickey could attend with only coffee in her cup. Mickey said it was none of Sandy’s “f...in’ business what I drink for breakfast”. Mickey was observed passed out in the lobby of her office building later the same day and the security guard sent her home in cab.

Should Sandy report Mickey to the Law Society?
What is the threshold?

A lawyer must report to the Law Society any conduct of which the lawyer has personal knowledge and which in the lawyer's reasonable opinion, acting in good faith, raises a serious question about the competence, honesty or trustworthiness of another lawyer, or is likely to harm any person.
Client Jose Bautista instructs lawyer Phil Kessel not to sign an unfavourable court order, granted yesterday, for child support. Opposing lawyer Renee Nugent-Hopkins threatens to report Phil to the Law Society unless she has the signed order in her hands tomorrow.

What should Sam do?
Tips

• It’s an “officer of the court” duty

• Court Orders take effect from pronouncement

• “After lawyers agree on the terms of an order, in the absence of exceptional circumstances, there is a professional obligation to sign the order which reflects the agreement”... Veit, J. in *Martin v. Busenius*, 1999 ABQB 100
Obligations to the Court

Ex Parte

Judge Johnny Cochran refused the application without notice (formerly an *ex parte* application) of articling student Nazem Kadri because the affidavit in support was deficient. A beaming Nazem returned to the office with the order signed by Judge Veto in the next court room, filling in the affidavit gaps from her memory and keeping the paper version behind her back.

What’s wrong with this picture?
Tips

• Model Code 5.1-1 & 2
In an application without notice, a lawyer must inform the court of all material facts known to the lawyer that will enable the court to make an informed decision, whether or not the facts are adverse.

A lawyer must not mislead the court nor assist a client or witness to do so.

And...What is the Court of Appeal for anyway?
Assisting fraud?

Dionne Phaneuf’s client, Dewey Cheatum, is re-financing a commercial building. The bank needs to know the cash flow from rents in order to determine if Dewey can afford to carry the loan. If Dewey doesn’t get the loan, he’ll have to sell the building or go bankrupt. One tenant is Dewey’s accountant who basically manages the building in exchange for free rent. Another tenant is Dewey’s wife who runs a small crafts business that’s never paid any money but records show a monthly rent of $1500. His son details cars in the delivery bay. Dewey wants you to prepare leases for them so he can convince the bank the building is full of good paying tenants.

Should Dewey maybe get a new lawyer?
Code Rules

- R. 3.2-7 A lawyer must not advise or assist a client to commit a crime or fraud.
- R. 3.7-7 A lawyer must withdraw upon reasonable notice to the client when:
  - the client persists in instructing the lawyer to act contrary to professional ethics;
  - the client persists in instructions that the lawyer knows will result in the lawyer's assisting the client to commit a crime or fraud;

What if Dionne was also acting for the bank?
Thank You!!