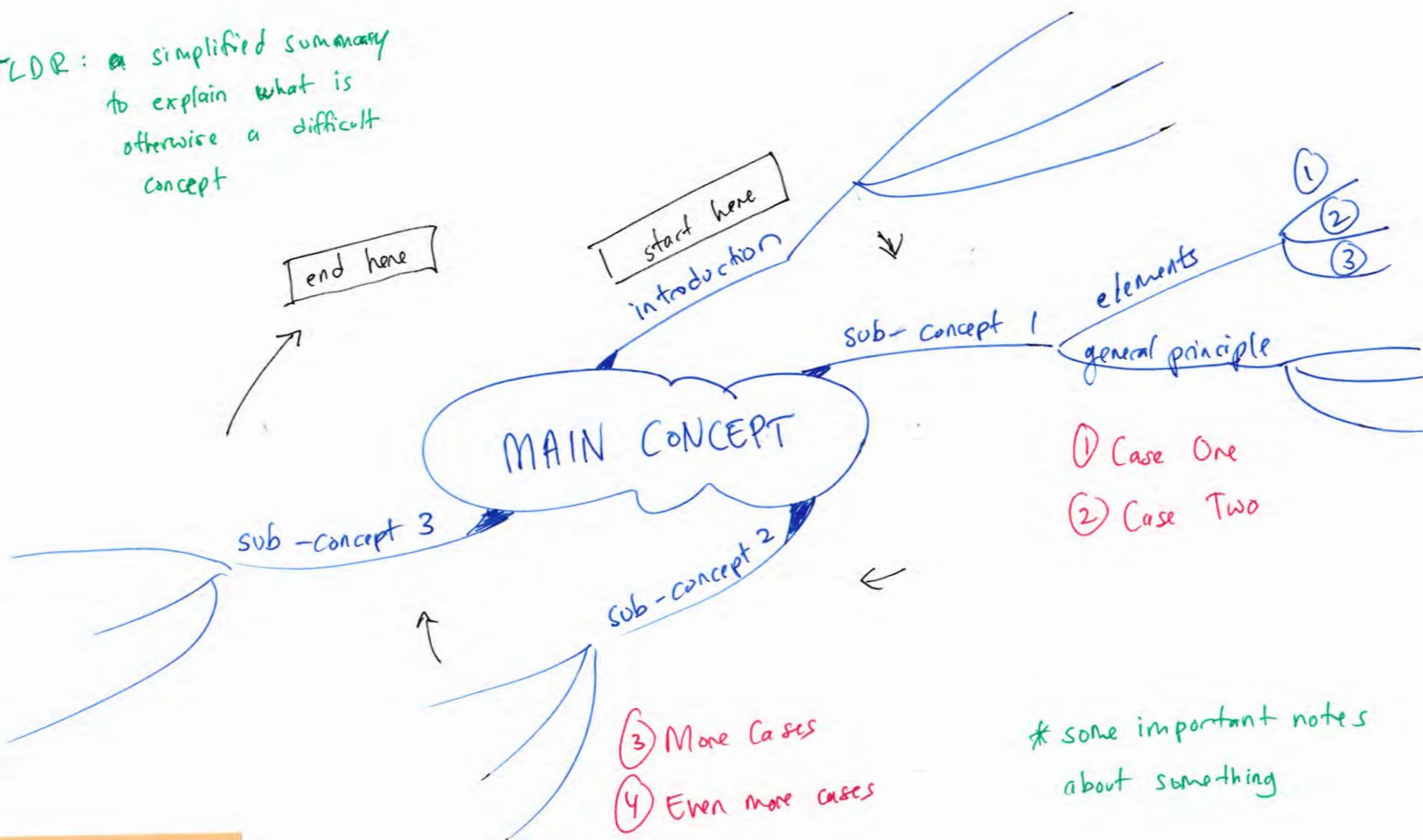
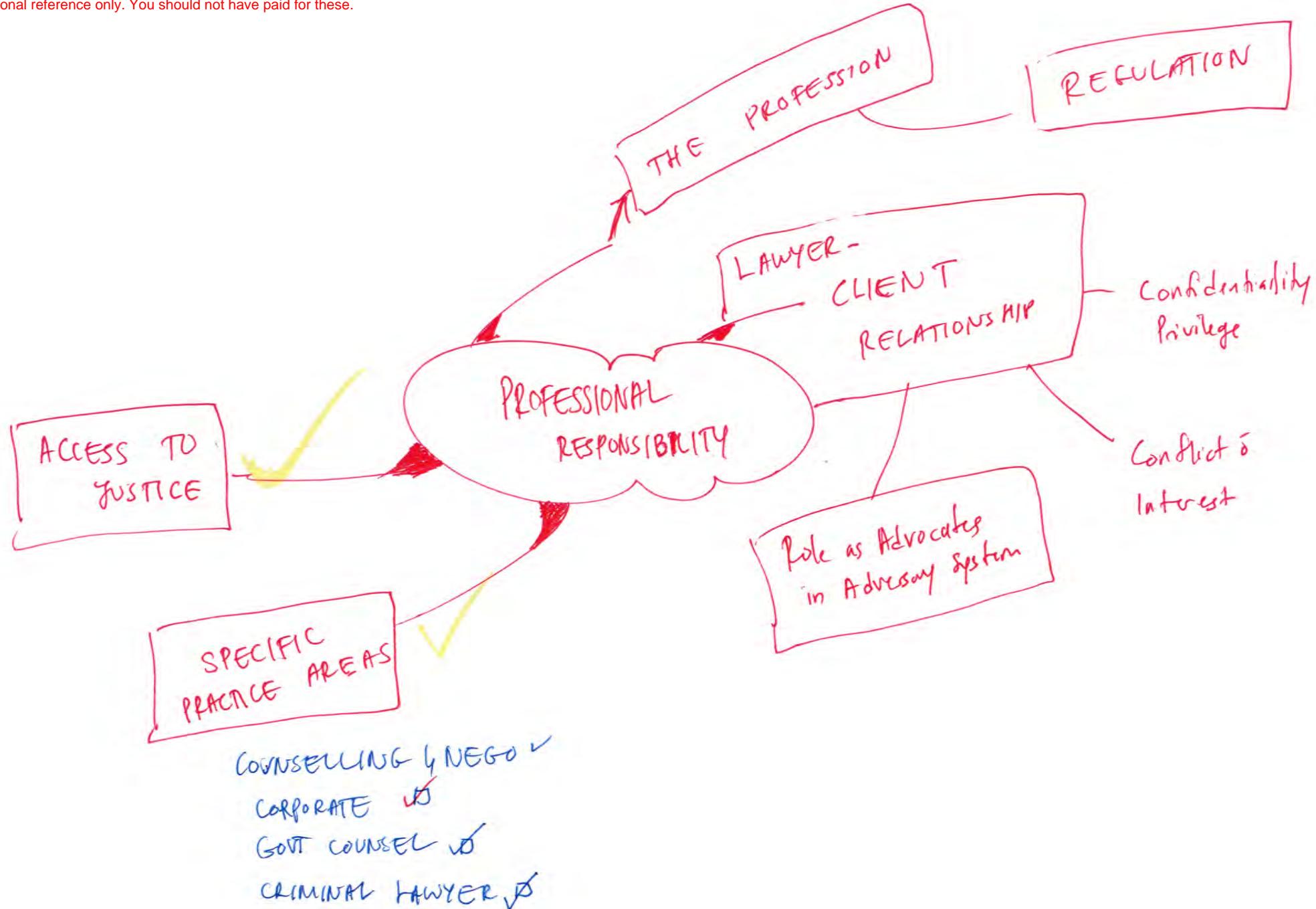


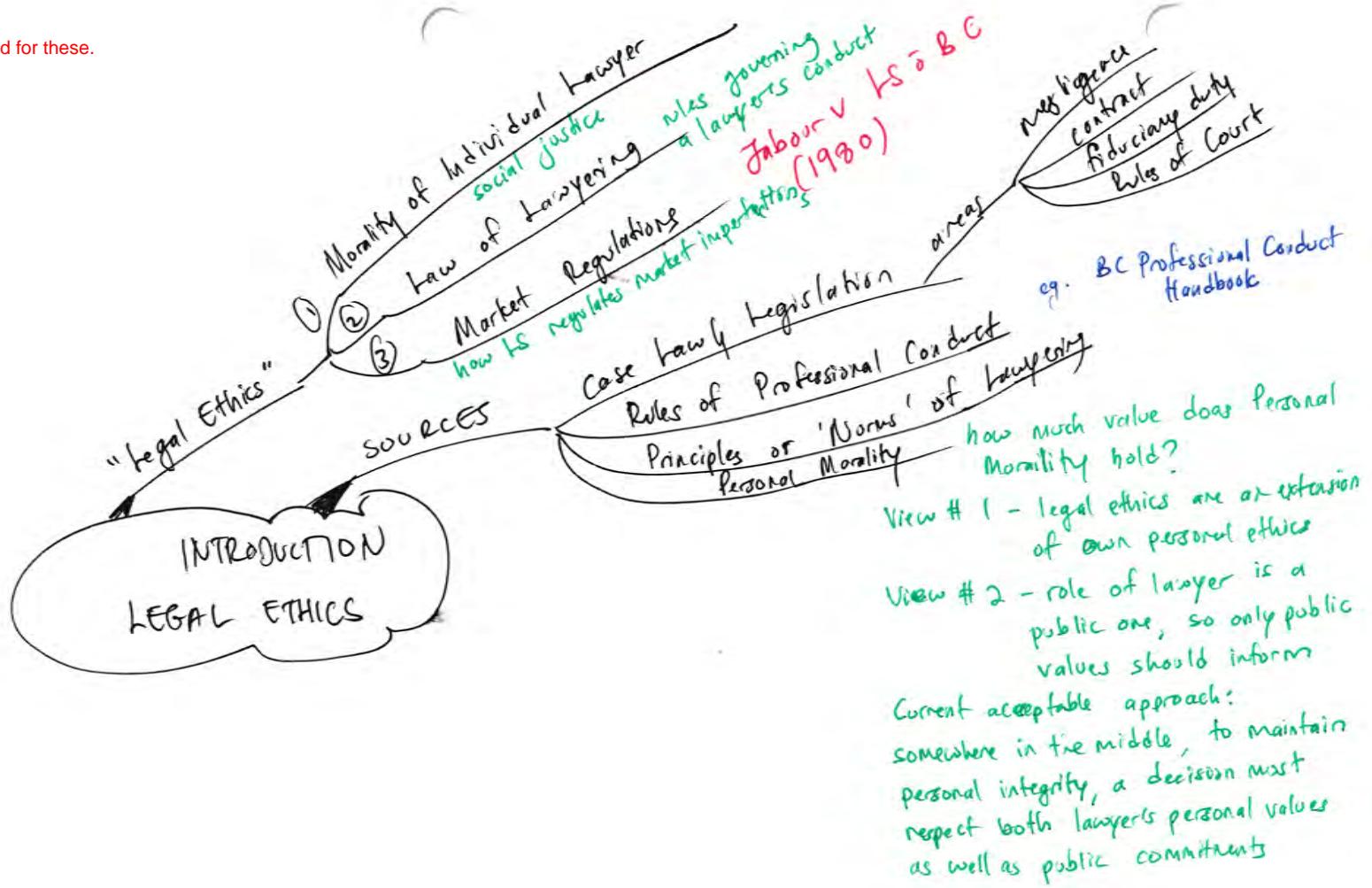
TLDL: a simplified summary
to explain what is
otherwise a difficult
concept



how to read this
mindmap: CLOCK-
WISE. Start at
1 o'clock and end
at 11 o'clock

This is an example sheet.





View # 1 - legal ethics are an extension of own personal ethics

View # 2 - role of lawyer is a public one, so only public values should inform

Current acceptable approach:
somewhere in the middle, to maintain personal integrity, a decision must respect both lawyer's personal values as well as public commitments

Jabour v LS & BC 1980

- J advertised his services and listed sample fees
- LS disciplined J for "conduct unbecoming of a member"
- H: LS has general power to determine what conduct acceptable

ETHICAL LAWYER

LOYALTY

- Core moral requirement or value traditionally associated with legal practice
- The lawyer-client relationship brings 2 central obligations:
 - ① Lawyer must place client's interest above ALL OTHERS
 - ② " " above their own interest
- **R v Neil (2002 SCC)**
 - a lawyer's duty of loyalty requires them to give **ZEALOUS REPRESENTATION** and to not "soft paddle" their defence of a client out of concern for another client
 - duty of loyalty is essential to the integrity of the profession and the administration of justice
 - Duty of loyalty engage 3 dimensions
 - ① Duty to avoid Conflict of Interest
 - ② Duty of Commitment to Client's Cause
 - ③ A duty of candour

See also Model Code 3.4-1.

Szarfer v Chodas (1986)

- The test to determine if lawyer used confidential information for his own purposes or to disadvantage his client = the onus on the fiduciary to prove
 - ① They acted reasonably
 - ② Made no personal use whatsoever of the C.I.

JUSTICE

- Loyalty emphasizes a lawyer's duty to his client, but Justice puts a duty on the lawyer to [Make the Best Effort to Achieve the Most Appropriate Resolution in Each Case]
- Keep in mind 5 duties owed by the Lawyer:
 - ① To the State
 - ② To the Courts and Tribunals
 - ③ To the Client
 - ④ To other Lawyers
 - ⑤ To oneself

Rv Murray 2000

- In some situations, particularly in Criminal law, overemphasis on loyalty can lead to unethical conduct that does not promote justice
- Video tapes containing dramatic evidence of crime pre-existed the lawyer-client relationship and therefore not privileged

INTEGRITY

- Integrity principle = breaches of Ordinary Morality that violates the integrity principle may constitute Conduct Unbecoming of a Lawyer, which in turn Warrants Professional Sanction
- "ordinary morality" e.g. Lawyer who sleeps w/ 14 y.o. girls and manipulating their vulnerability = breached ordinary moral (and a criminal sexual assault), but did not breach any "lawyer morality" = could still warrant professional sanction

Alice Wooley

- compared CBA and ABA -
- CBA Code: "the lawyer must discharge with integrity all duties owed to clients, the court, other members of the profession and the public"
- ABA has no such rule, leading to the issue of "over-representation" based on 2 principles:
 - ① Zealous partisanship
 - ② Moral non-accountability
- * not as simple - moral non-accountability is also alive in Canada

R v Neil

- Neil hired law firm to represent him in defending a series of criminal charges
- Neil's assistant, Lambert, hired Lazar from the same law firm to represent her
- Lazar sat in during Neil's interview with the lawyer to gain advantage for Lambert
- In another instance, Lazar referred Neil's old client to a police officer who was investigating Neil's other charges

HELD: firm owed a duty of loyalty to NEIL

Szurfer v Chodor (1986)

- Lawyer (Df) was in the course of rep'g Pl. in an action for wrongful dismissal
- Df learned Pl was experiencing mental issues and severe psychological problems -
- Pl's wife was a legal secretary who worked at Df's office temporarily
- Df had an affair w/ Pl's wife

HELD: ① Df acted unreasonably, causing injury to Pl and violated his trust ② Df gained knowledge of Pl's marital problem through his initial representation & used it to his personal benefit

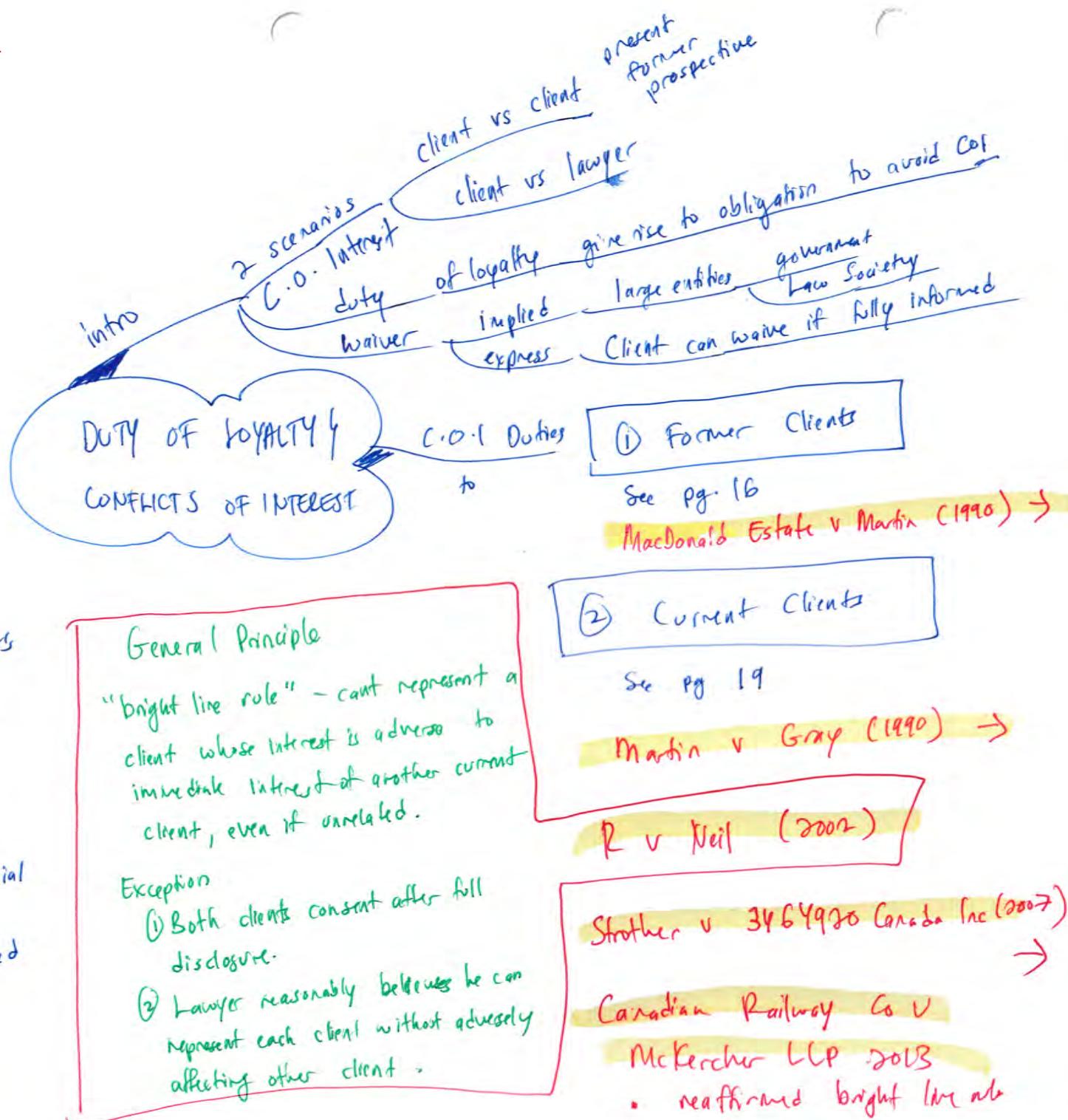
* Highest duty of a fiduciary is to act to advance clients interest and avoid acting to client's detriment.
Failure to adhere to this duty can mean misconduct on part of lawyer.

R v Murray (2000)

- Bernardo removed tapes from his home on advice by lawyers
- Video showed B 4 wife raping 2 young girls they later murdered
- Lawyer, upon receipt of the tapes went to the LS for advice. Told "certain material" of the accused should be delivered to the Trial Judge in a sealed package
- The tapes were turned over to prosecution which demonstrated conclusively of Bernardo b/wife's guilt, however lawyer concealed the tapes for 17 months

HELD: Lawyer lacked Mens Rea to be convicted of Obstruction of Justice by concealing tapes

No mindmaps available
for "FORMATION"
and "PRIVILEGE".



F Hs v UC v Hunter (2007)

Law Society of Upper Canada v. Hunter (2007 LSUC)...Conflict when having sex with your client

- F: - Lawyer had sexual/romantic relationship with his client for over 2.5 years while retained by her on family law matter without recommending that she obtain independent legal advice or that she retain a different lawyer
- Before revealing to her his 2 other relationships, d-bag attempted to rectify the situation by getting her to sign a copy of Rules of Prof. Conduct re: conflicts of interest between lawyer and client, acknowledging that he had complied with the rule in their relationship
- He made continued attempts to get his client to confirm his position, contributing to her concern and emotional distress

- I: - Did H engage in professional misconduct with regard to his conflict of interest in handling his sexual relationship with his client?

- J: - Of course yes, for LS...H received 60-day suspension and fine of \$2,500

- A: - May raise confidentiality concerns, as here complainant alleged he came onto her using conf. info
R: - **Lawyer must provide disclosure regarding conflict issues so the client can make an informed decision**

Martin v Gray 1990 SCC

G suing M, M hired T and D. D now working for G.

Issue - what is the standard to be applied in determining whether a law firm should be disqualified from continuing to act in litigation by reason of a COI?

Analysis - this is a disqualifying COI

two-part test

1. Did lawyer receive confidential info attributable to a solicitor and client relationship relevant to the matter at hand

- there was a prior relationship related to the retainer from which it is sought to remove the solicitor
- could infer that confidential info was impaired UNLESS the solicitor satisfies the court that no information was imparted which could be relevant
- satisfaction must withstand the scrutiny of the reasonably informed member of the public

2. is there a risk that the info will be used to the prejudice of the client?

- a lawyer who has relevant confidential info is automatically disqualified from acting against a client or former client
- with respect to partners or associates in a firm, the concept of imputed knowledge is unrealistic given the size of modern firms

however, may draw the inference that lawyers who work together share confidence, UNLESS the court is satisfied on the basis of clear and convincing evidence that all **reasonable measures** have been taken to ensure no disclosure will occur by the tainted lawyer to the members of the firm engaged against the former client

- such reasonable measures include institutional mechanisms o Chinese walls o cones of silence
- until the governing bodies of the legal profession approve of these measures and adopt rules respecting their operation, it's unlikely that a court would accept their existence as evidence of effective screening

undertakings and conclusory statements in affidavits insufficient

- o difficult to verify
- o public not likely to be satisfied without additional guarantees

court concerned with 3 competing values

- § concern to maintain high standards of the legal profession and the integrity of the justice system
- § the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause
- § the desirability of permitting reasonable mobility in the legal profession

by —

Facts

- Appellant's solicitor was assisted by junior member of his firm who was privy to many confidences. Junior member later joined law firm representing respondent. Appellant applied to provincial superior court to have law firm representing respondent declared ineligible due to conflict of interest. Application granted but then reversed by Court of Appeal

Issue: What is the standard applied when considering disqualification due to conflict of interest?

Holding: Appeal allowed: Court of Appeal judgement set aside, superior court judgement restored

- Standard that applies: Whether firm can provide clear and convincing evidence that disclosure did/will not occur + whether reasonably informed person satisfied that no disclosure occurred/will occur

Reasoning

· Conflict of interest threatens the integrity of the system; creates appearance of impropriety. Three values to consider:

1. High standards of legal profession and integrity of justice system
2. Litigant should not be deprived of his/her choice of counsel without good cause. Not an absolute right, subject to reasonable limits
3. Desirability of permitting reasonable mobility in legal profession. Emergence of all-purpose firms = mergers & more mobility of lawyers. Conflict of interest can arise more readily, doesn't mean should make standard for what constitutes conflict of interest more lax

· Use of confidential matter not susceptible to proof so test includes reasonable person standard
i.e. reasonably informed person of the public would be satisfied that no use of confidential info occurred (public perception is important!)

· Test requires 2 questions answered:

1. Did lawyer receive confidential info attributable to solicitor-client relationship relevant to the matter at hand?
2. Is there a risk this info will be used to the prejudice of the client?

Ratio

· Lawyer who is heavily involved with client is irrebuttably presumed to have received and imparted confidential information (since lawyers that work together are presumed to share confidences)

· Sanctity of communication is essential in order to maintain the confidence of the public and the integrity of profession

"Our judicial system cannot function properly if doubt or suspicion exists in the mind of the public that the confidential information disclosed by a client to a lawyer may be revealed"

Strother v. 3464920 Canada Inc., 2007 SCC 24, [2007] 2 SCR 177

The background facts

- Robert Strother was a partner at Davis & Co., a Vancouver law firm. His speciality was film-based tax shelter investments. He initially represented a company called Monarch Entertainment under an exclusive written retainer agreement, which prevented Davis from acting for competitors in film financing schemes.
- However, the Minister of Finance announced amendments to Canadian tax law to do away with film-based tax shelters. Strother told Monarch that the shelter vehicles were effectively dead, so Monarch wound down its business and the written Davis retainer expired.
- Darc, a former Monarch employee approached Strother with a new idea for a way around the government policy. Strother agreed to help the employee start a business, getting a favourable tax ruling, and taking a major share in the new business (became partner with Darc in new business).
- Despite the lapse in the written retainer, Monarch continued its relationship with Davis & Co. to explore other tax-driven investment schemes. But Strother did not tell Monarch of the way around the closing of tax shelters or the favourable tax ruling. Once Monarch did learn the facts, it sued Strother and Davis & Co.

Issue: Did Strother and Davis violate their duty to Monarch?

- Although Monarch's particular tax-shelter retainer had come to an end, Monarch still retained services from Davis (on a more limited retainer). Was it part of Strother's duty to provide candid advice on all matter relevant to the continuing retainer?

What did the Supreme Court decide?

- The Supreme Court, by a 5-4 majority, upheld the British Columbia Court of Appeal's finding that Strother had acted in breach of his fiduciary duty to Monarch, when he set up a rival business, but failed to advise Monarch how it could take advantage of a tax ruling.
- Could Strother's take a personal interest in a business directly competing with Monarch's business? Or was there a risk that his representation of Monarch would be seriously compromised by his own stake?
- **Strother's personal interest affected his ability to provide zealous representation to Monarch.**
- But the Supreme Court felt that the Court of Appeal erred in making an excessive disgorgement remedy.

Instead of requiring Strother to pay to Monarch all of his profits from his competing film business, he was required to account for his personal profit gained directly from his film business and from his earnings as a law firm partner derived from billings to Monarch, but only for a fifteen month period, while he was acting both as a partner in the law firm and as a business competitor of Monarch. Once he resigned from the partnership, he had no duties to his former client, Monarch.

What does the decision mean for the Canadian legal profession?

The *Strother* case arises from unusual facts, but its implications are important for all lawyers.

1. The courts take conflicts seriously, and will impose sanctions for breach. This case has been lengthy, public and expensive.
2. The Supreme Court reaffirmed its so-called bright-line test in *R. v. Neil*, and provided additional guidance on how it is to be applied.
3. While the scope of a lawyer's retainer is governed by contract, the lawyer-client relationship is overlaid with certain fiduciary responsibilities which are imposed by law. Those duties may go beyond what the parties have contracted for.
Source of the duty is not just contractual (i.e. the retainer), it arises from circumstances creating a relationship of trust and confidence from which flow obligations of loyalty and transparency
4. Loyalty includes putting the client's business ahead of the lawyer's business.
5. **Lawyers are at risk if they engage in outside businesses in direct competition with clients. Their duty to zealously represent their client's interests may be compromised by their personal stake. Law firms should closely scrutinize the activities of their partners in external businesses. They may face liabilities if there is a problem.**
6. Lawyers must be candid in their advice to clients, but must not reveal confidential information of other clients.
7. Retainer agreements are important in defining the scope of the work and the relationship.
8. Lawyers can act for commercial competitors as long as they can properly and fully represent the legal interests of both clients.
9. In some highly specialized practice areas or particularly in small communities, some degree of overlapping representation is inevitable. Clients may be taken to have consented to situations that might otherwise be conflicts, depending on the evidence.
10. The normal use of prior work-product as models or precedents within law firm is perfectly acceptable as long as the first client's confidential information is not employed. "Recycling precedents is the life-blood of corporate law practice".

Representative's About

NCA notes prepared by Iman M.

For personal reference only. You should not have paid for these.

GM Acceptance Corp of Canada v Isaac Estate (1992)

Advocacy & Civility

Schreiber v Mulroney (2007)

R v Lytle (2004) SCE

- cross examiner may pursue any hypothesis that is honestly advanced on strength of reasonable inference, experience or intuition

= no requirement for evidentiary foundation for every factual suggestion put to a witness

R v Sweeney (1987)

- lawyer convicted of attempted obstruction of justice for counselling his client to give evasive evidence - pretend to be forgetful, breach of duty as officer of court

must not cross over to ~~misleading~~ vigorous representation conduct based on personal conscience good faith

Negotiation

AB Code

- lawyer can't mislead during nego, must quickly correct if misunderstood
- duty of client to advise to avoid or end litigation if dispute will admit fair settlement

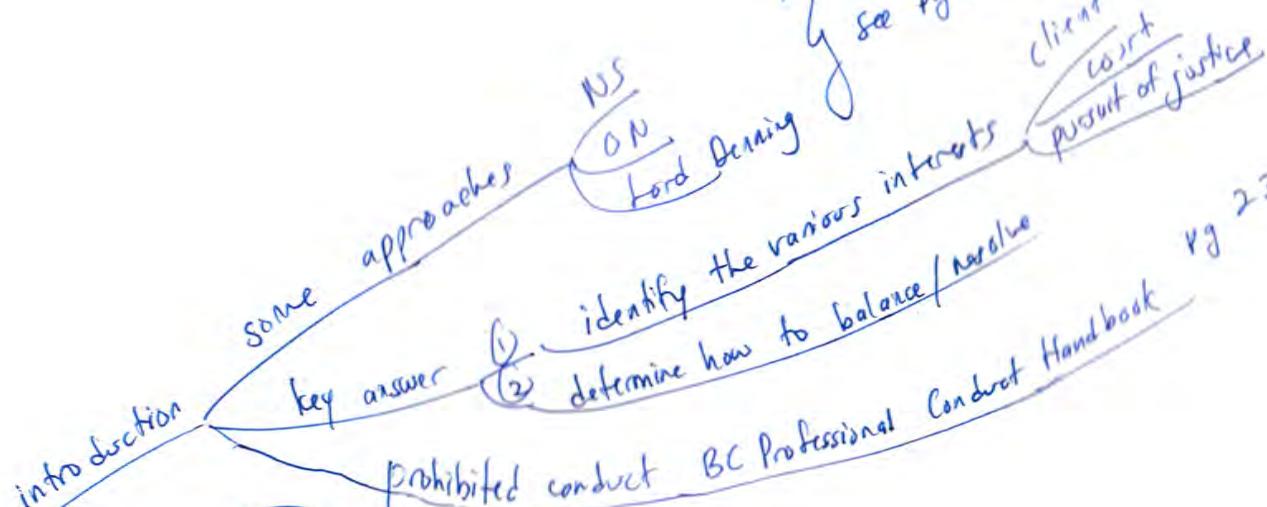
BC Handbook 3(3)

LAWYER AS AN ADVOCATE

Pre-trial Ethics

Pleadings

Discovery



Duties

- ① Not pursue unmeritorious steps in litigation process

- ② Take full advantage of legal procedure that benefit client

* Abuse of process to commence or defend actions on grounds that are not / have no chance of becoming legitimate or meritorious

* Step taken to embarrass, inconvenience or harass another party is always IMPROPER

Grossman et al v Toronto GTH (1993)

- hospital only produced patient's chart
- PL brought motion that Hospital should produce further documents - successful HELD: duty of counsel and parties in making Full, Fair and Prompt Discovery - Solicitor has duty to advise client on this - very essence of civil litigators.

DCB v Zellers Inc. (1996) ①

- GM: three points on representations and the law:

- a) Courts don't expect counsel to search out unreported cases, although if counsel knows of an unreported case in point, he must bring it to court's attention
- b) "On point" does not mean cases whose resemblance to case at bar is in the facts; it means **cases that decide a point of law**
- c) Counsel cannot discharge his duty by not bothering to determine whether there is a relevant authority; in this context ignorance is no excuse

General Motors Acceptance Corp. of Canada v. Issac Estate (1992 Alta. QB) ...Must inform court

- F: - Facts of a case were entirely parallel to a case determined by the Alberta Court of Appeal which neither counsel referred to in their factum despite the fact that counsel for the plaintiff had appeared for the plaintiff in that case as well
- I: - What happens to a lawyer when they try to outsmart a judge?
- J: - For D...simply a scheme to get around rules, costs against the solicitor
- A: - Here, the judge happened to know of the case, waited for counsel to bring it up in oral submissions but neither did
 - When judge mentioned case, P's counsel "remembered" it; judge's knowledge triggered counsel's disclosure of his knowledge of it
 - Conversely, counsel for D was not aware of case
 - Therefore, counsel can't fail to disclose b/c case is "distinguishable"; it's judge's role to decide if it's distinguishable
- R: - **The duty to bring relevant law to attention of the court is founded on proposition that counsel has obligation to court to assist in duly administering the law, as well as a duty to his client and that, in some circumstances, the former may override the latter**

IV. ADVOCACY AND CIVILITY

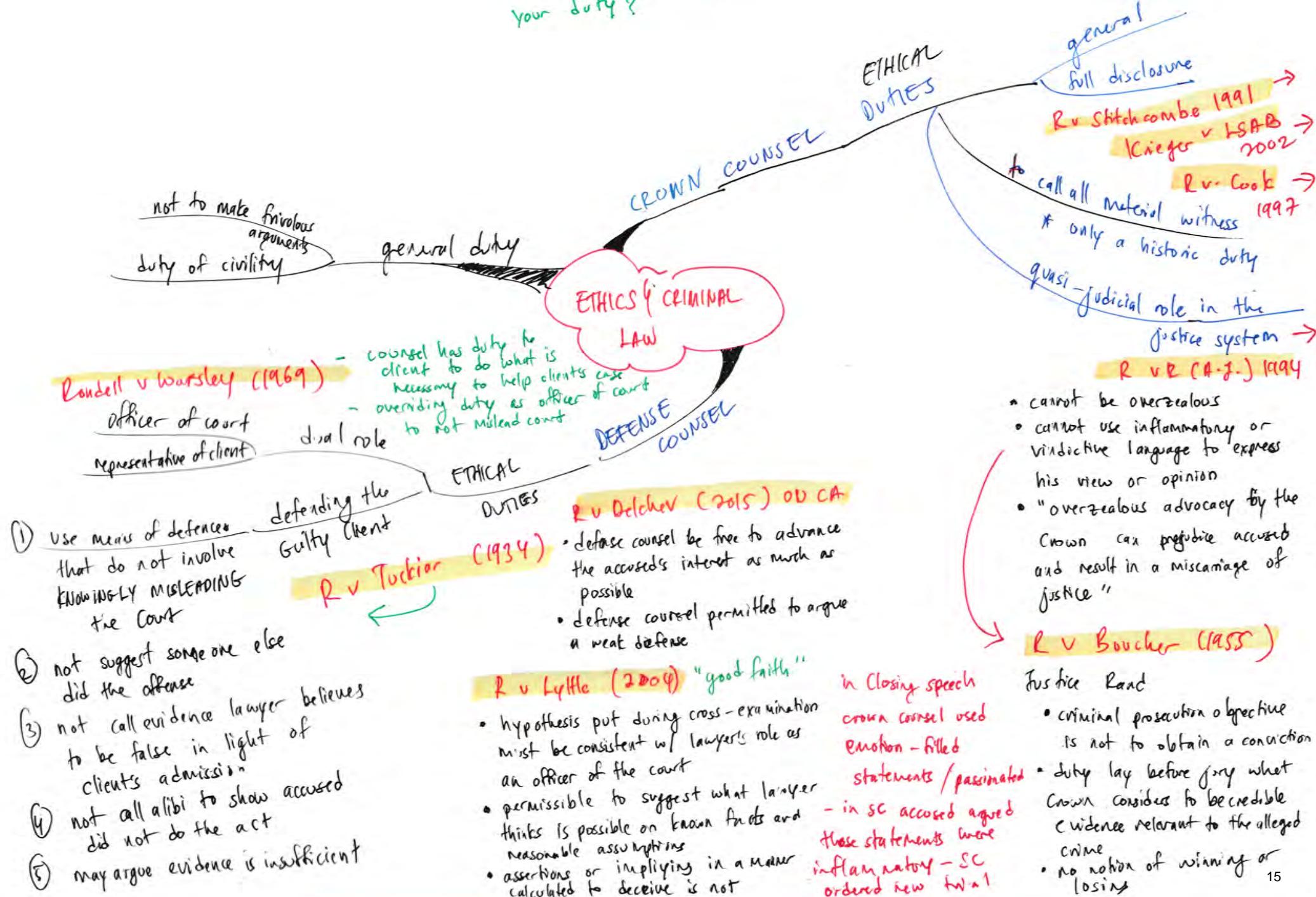
- "Civility" as applied by law societies has 2 central meanings:
 - a) Includes requirement that lawyers treat each other and those participating in justice system, with degree of politeness
 - b) Includes obligations—also enshrined independently in LS codes of conduct—on lawyers to act fairly, honestly and with utmost integrity in their dealings with other lawyers and members of the court
- Civility helps to ensure lawyers uphold their duties as officers of the court and improve public's perception of the administration of justice
- Sources of the obligation include:
 - Court's inherent jurisdiction to govern proceedings in courtroom, including lawyers' conduct within those proceedings
 - Codes of conduct contemplate high level of lawyer civility
 - Best practice civility codes provide guidance for courts, lawyers and regulators
 - Lawyers' own personal ethics play important self-regulating role

Schreiber v. Mulroney (2007 FTC) ...Advocates must be civil in court proceedings against each other

- F: - Schreiber served Mulroney with a statement of claim; M disputed jurisdiction of ON
 - S's counsel Anka agreed that while jurisdiction issue was being resolved, M would not file a statement of defence and he would not be noted in default
 - The parties then had disagreement and Anka obtained default J contrary to his agreement with Mulroney...M then moved to set aside the default J against him
- I: - Did Anka do anything wrong?
- J: - For the former PM...actions taken by S's counsel to obtain default J were egregious and wrong; counsel breached his obligations to et and counsel for M
- A: - M indicated clear intention to defend the action by arguing that ON lacked jurisdiction over matter
 - If P obtains default J to which he is not entitled, default jmt is to be set aside
 - Anka breached his agreement with M's lawyer Prehogan when he sought default J, an egregious breach he had no right to commit and S had no right to instruct Anka to commit
 - He also did not give Prehogan any advance notice he was going to note M in default or take default J proceedings – this constitutes sharp practice and breaches principles of civility
 - Instead, he continued to conceal the fact that he had sought default J by suggesting there were interlocutory matters to be dealt with
- R: - **Lawyers who breach their agreement not to seek default J will have the J overturned**

QUESTION: a client knowingly lies to the court, what is your duty?

Model Code S.1-3



R v Stetchcombe (1991)

- lawyer charged with criminal breach of trust
- accused's former secretary gave a statement favorable to the defence
- Crown advised defense counsel of the statement but refused to disclose
- Held: Crown has a broad duty to disclose to Defence all material evidence whether favorable to accused or not
EXCEPTION: privileged info, protect informants and witness safety or ongoing investigation

Krieger v Law & Society & AB (2002)

- prosecutor delayed disclosure of test results that would implicate a different person in a homicide
- an internal investigation by the Deputy Attorney General (his employer) found the delay unjustified - reprimanded and removed from case
- later the accused filed complaint to LSAB, Krieger challenged LSAB's JD
HELD: LSAB had JD to determine if his act was in bad faith or dishonest, regardless AG had reviewed it as an employer

R v Cook (1997)

- accused charged with causing bodily harm
- Crown decided not to call victim as a witness
- HELD: no duty of the Crown to call witness nor do they have a specific duty to call any complainants to the witness stand - how to present the case is Crown's decision / at their discretion absent evidence of abuse

R v Tuckiar (1934) Australian HC

- aboriginal convicted of murdering police officer with spear
- Crown's case made based on accused's statement, one more damaging than the other
- Defense counsel believed he could not continue to defend after accused's confession
- HELD: defense counsel may continue to defend accused if he/she believes that accused is guilty and must not disclose communications w/ accused

R v Li (1993)

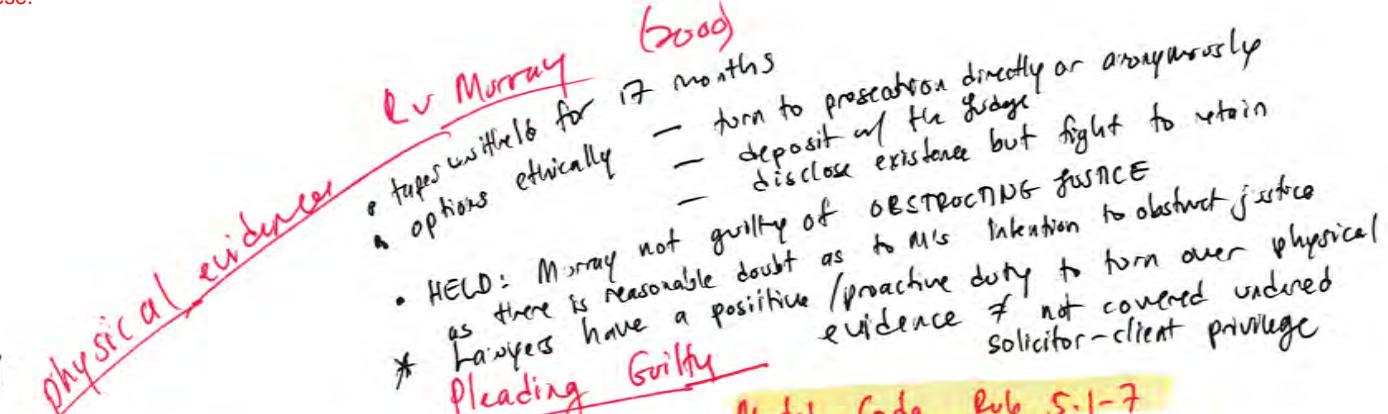
- client admitted to robbery
- Held: counsel entitled and had duty to test proof of case in every proper way
- cross-examined w/ **acquiring knowledge of guilt** and raised doubt on ID

Model Code

can: S.1-1[10] **how to proceed with knowledge of guilt**

R v Shearing (2002) SCC

- defence counsel in cross-examining sexual assault complainants do not have the same latitude given the equality and privacy at stake
- Justice Binnie: most instances of adversarial process allows cross-examiners to resort to unproven assumptions and innuendos in an effort to crack untruthful witness, sexual assault cases should be decided WITHOUT RESORT to assumptions and innuendos, but defence have to instead work with facts e.g. reaction to trauma or abuse
- Also, concerns that such withdrawal would preclude the jury's opinion of the accused is dismissed b/c as speculative



R v Johnson (2014)

- Defense counsel cannot assist a client in entering a plea of guilty unless the client is prepared to admit his guilt and admit facts required on the essential elements
- counsel in this case also advised client how to answer plea inquiry w/out being struck
- = counsel did not meet ethical and professional obligation to the court and pleas of guilty was struck to remedy risk of miscarriage of justice

R v S.K. (1995)

- essential in plea bargaining that accused is prepared to admit facts that support conviction
- if not, the offence has to be proven beyond reasonable doubt in order to convict/sentence
- a court misled = miscarriage of justice
- F: guilty plea by lawyer while accused always maintained innocence

DEFENSE COUNSEL ETHICAL DUTIES continued

Defending Sexual Assault

MISLEADING THE COURT

Model Code 5.1-2

R v Hegeleboff (2016)

- knowingly and falsely present misrepresenting evidence & forcefully attempt to place their client's case in the best light possible

R v Jenkins (2001)

- defense counsel allowed to withdraw from case as new information accused conveyed to him would render any further presentation by the counsel to court as misleading - court accepted

CORPORATE COUNSEL

Difference from private attorneys

- ① Represent an organization ≠ an individual.
- ② Ethical rules have formulated largely based on the litigator in mind, while the corporate counsel mostly deals with transactional work
- ③ In addition to representing the organization, the corporate counsel is also employed by it. Does this affect her independence?

GM issues w/ ignition 2014

- corporate counsels found to be at odds with protecting company reputation and public interest

Enron 2001

- in-house counsel played a key role in arranging SPV's and SPE to obscure Enron's finances
- one counsel even invested in such SPV, getting a big ROI in breach of C.O.L rules
- other counsels took note and raised concerns but other attorneys and management did not respond

US enacted Sarbanes-Oxley, among others obligated lawyers to report corporate fraud, as well as violation of securities law or breach of fiduciary duty
= lawyers role as gatekeepers Canada? ↪

GOVERNMENT LAWYERS

Icon = work for the government

Icon = advise on public policy, bringing or defending civil actions for government, prosecuting criminal or regulatory offences, designing/drafting legislation

Everingham v Ontario (1991)

- Crown's counsel spoke to plaintiff in a case against the state without his counsel present
- Rule 10, Commentary 14, Rules of Professional Conduct of the Law Society of Upper Canada
 - an opposite party who is professionally represented should not be approached or dealt with save through or with the consent of that party's lawyer
- HELD: Crown's counsel overlooked the rules = disqualified from continuing litigation (a special responsibility)

Everingham v Ontario (1992)

- Upon appeal HELD: Crown counsel have same standard of professional conduct as any other lawyers in Ontario
- Despite the error of law, the removal order stands but on grounds that appearance of unfairness, oppression and deprivation of counsel by virtue of private unrecorded conversation without any notice to the patient's counsel either before or after the interview.

Rule 3.2-3 + Commentary 1-2
Rule 3.2-8 (a)-(c) Comm. 1-6
Rule 3.3-3

Wilder v Ontario (Securities Commission)

2001 ON CA

- OSC alleges Wilder in a letter to them contained misleading or untrue statements
- OSC tried to reprimand Wilder under a proceeding under the Securities Act
- Wilder, his firm and LS of Upper Canada filed suit to prohibit proceedings

Divisional Court : OSC's proposed exercise of JO is not inconsistent w/ LSUC's role, lawyers not immune from OSC's regulatory power
ONCA : held -

- ① OSC has JO over lawyer regardless member of LS.
- ② OSC have JO to reprimand BUT ONSC added OSC have to proceed in a way that does not infringe client-solicitor privilege

Sanctions for Misconduct

(5) Adams v LSAB (2000)

- disbarment, minor (16yo)
sexually exploited, also his client

(6) LSUC v Hunter (2007)

- conflict of interest not discussed when having a 25 year sexual relationship w/ client
- 60 days suspension and 25k fine

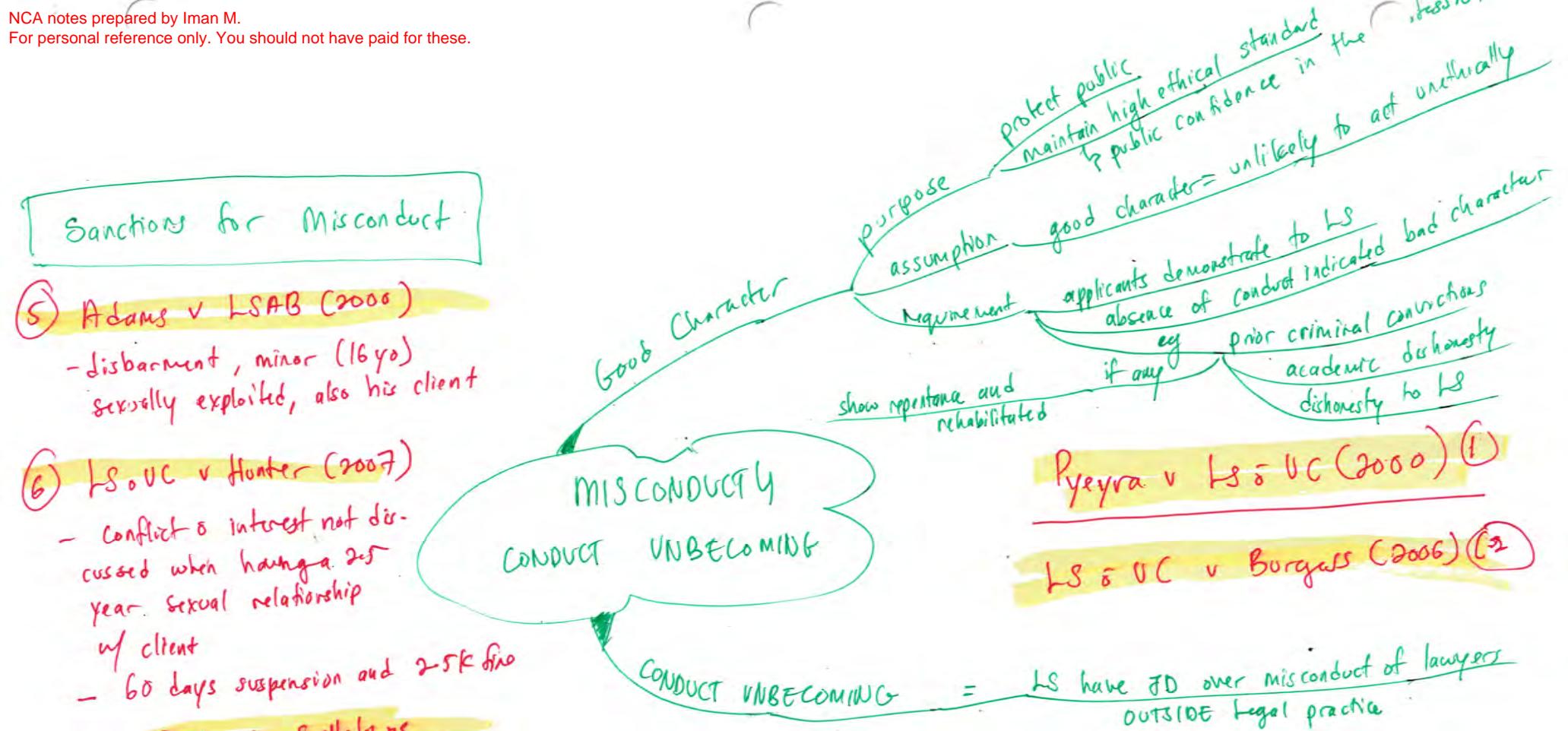
See also Groia in Syllabus

Unauthorized Practice of Law

(7) LSUC v Boldt

See Trinity Western
Uni (in Syllabus)

SELF REGULATION
as a discussion
see page 44



Preyera v LSUC (2000) (1)

LSUC v Burgess (2006) (2)

= LS have JD over misconduct of lawyers
OUTSIDE legal practice

2 types

broadly narrowly Misconduct substantially though not technically related to his conduct in Legal Practice

ANY behavior

- that LS thinks is "conduct unbecoming" of a member
 - eg. animal abuse, public nudity, bouncing cheques

Cwinn v LSUC (1980)

LSAB v Sychuk (1999)

Mindmap for
"TERMINATION"
is not available.

PART SEVEN – OTHER LAWYER DUTIESI. COUNSELLING AND NEGOTIATION1) GENERAL

- See Professional Conduct Handbook, chapters 1-3
- Counselling often takes place in private settings
 - Consider impact on need for ethical rules and content of those rules
 - Consider the potential for conflict b/t those rules and other rules of professional conduct such as duty of loyalty to client
- Vital to public to know the law; lawyers provide important service of telling them what the law is, esp. b/c most clients lack means of accessing the law
 - If law is ambiguous, e.g. wording of statute or conflicting decisions, lawyer must also provide his opinion as to the law's true content
 - Lawyer may also have to apply the law to client's circumstances
 - Client may ask lawyer to advise him how to proceed
 - There can be tension in counselling process b/t client autonomy and lawyer expressly or implicitly making the decision for client b/c client is there for advice and guidance
- Important ethical issues:
 - a) Can lawyer ever advise client to break law?
 - b) Can lawyer provide advice that could be used by client as a basis for subsequent decision to break law?
- In counselling clients, lawyer can't just tell them what they want to hear; lawyer is obliged to be honest and candid; advice must be clear and in terms that client can understand
- No rule on negotiating in BC, and no norm of practice to clarify misunderstandings on behalf of the parties involved
- Alberta rule: "This rule expresses an obvious aspect of integrity. In no situation, **including negotiation**, is a lawyer justified in deliberately misleading an opposing party"
 - W: startling proposition for most lawyers in BC that their duty to guard against the other side resulting in an inadvertent misrepresentation
 - In BC, no duty to correct an accidental misrepresentation
 - W: no duty on defence counsel to correct a factual misapprehension of the court

2) COUNSELLING AND ILLEGAL CONDUCT

- 2 Q's:
- a) **Is it ever permissible for a lawyer to advise a client to break the law?**
 - ie: can you counsel a client to break the law to set up a test case to challenge a law that is possibly unconstitutional, such as drug possession, prostitution, etc...
 - Can advise what law is and what conduct would abide the law, but can't advise to break the law
- b) **When can, if ever, lawyers offer advice that would permit the client to subsequently break the law?**
 - Just because a lawyer feels strongly about a cause doesn't make it ethically correct
 - If client asks about possibility of getting caught, may raise questions

Example: client wants advice on assisted suicide,uty to advise a client might trump a lawyer's own moral code depending on circumstances

ABA Rule: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client"

Ontario Rule: "When advising a client, a lawyer shall not knowingly assist in **or encourage** (broader) dishonesty, fraud, crime, or illegal conduct, or instruct the client on how to violate the law and avoid punishment"

- Therefore, in BC, can assist but probably can't encourage

Federation & FS Model Code

Rule 3

- 3.2-2 honesty & candour to client
- 3.2-4 encourage compromise
- 3.2-7 not knowingly assist in or encourage
- 3.2-8 duty when employed by organization

See Canadian National Railway Co. v McKeever LLP (2013)

a lawyer or lawfirm owes a duty of candour to the client. This requires them to disclose any factors relevant to the lawyer's ability to provide effective representation

Neushul v Mellish & Harbey
1967

- Pl borrowed money to lend to a known rogue (known to lawyers Pl retained for the transaction)
- Pl secured loan w/ her house
- Rogue absconded and Pl sued lawyers

HELD: lawyer owed Pl. a duty to advise her so she could take protective steps

See David Luban

COUNSELLING & NEGOTIATION

David Luban (2010)

- role of counselor and advocate is fundamentally different
- counselor = provide independently candid advice, telling client what law requires even if not what he wants to hear
- advocate = a pro-client bias/tilt allowed as it will be countered by counsel of the other side

TEST - would advice be the same if client had wanted an opposite result? if not, failed the litmus test eg Torture Mono

Law Society of Upper Canada v. Sussman (1995 LSDD)...Lawyer can't counsel client to break law

- F: - Lawyer counseled client to breach a court order pertaining to access
- I: - Is the lawyer permitted to counsel client to breach a court order?
- J: - No, for LS...lawyer guilty of professional misconduct
- A: - S argued he had intended to bring variation application but had never done so
 - However, court rejects this arg't
 - Circumstances in which lawyer may counsel client to ignore terms of a mandatory court order are very limited:
 - a) Lawyer must have **reasonable and honest belief** that there's **imminent risk or danger to a child** and **he must make immediate application to court** to have issues determined
 - b) If court makes decision not to vary the outstanding order, client must "trust in the efficacy of the legal system" and adhere to ct order and can then seek a full hearing for a permanent change
 - Here, there was no imminent risk or danger to the child that would have justified lawyer's behaviour
 - Lawyer who counsels client to disobey terms of ct order undermines ct's effectiveness and brings system of justice into disrepute
 - Such behaviour sets undesirable example for ordinary citizens, lawyers and law students
- R: - **The circumstances in which the counseling of unlawful activity of any sort can be countenanced are extremely narrow, have implicit in them the elements of reasonable and honest belief of there being imminent risk of bodily harm, and must co-exist with the requirement that there be an immediate application to a court to have the issues determined forthwith**

3) OTHER ISSUES IN COUNSELLING

- Lawyers are sometimes asked to provide business, financial or strategic advice; if they do, should clearly differentiate b/t this and legal advice
 - Must ensure client is aware of any limitations on their ability to provide non-legal advice, e.g. no financial or accounting training
- If lawyer provides non-legal advice, opens the possibility of client suing him in negligence if advice turns out to be incorrect; such a claim is likely not covered by lawyer's professional insurance, which covers claims based on providing legal services
- If lawyer discovers he has made an error that could damage client's position, he should promptly notify client and discuss how to proceed, including candidly discussing possibility of a claim against lawyer
 - Lawyer should insist that client obtain independent legal advice (from another lawyer) before making a decision
 - Lawyer should also insist on independent legal advice wrt client's transactions in which lawyer has an interest

Negotiation

- Generally, negotiating parties withhold material facts and even make untruthful statements = seen as a game where deception and bluffing are key tactics.
- Court's take on this **Westcom TV Group Ltd v CanWest Global Broadcasting Inc (1996)** and **Doucet & Spielo Manufacturing Inc (2011)**
- Competence : Rule 3 - competent lawyer include negotiation as a skill
- Regulating negotiations by lawyers - does duty to act in GF and with integrity means lawyers unable to conceal information or misrep. during a negotiation? Still debated but generally most provinces do not put extra restriction if negotiation included a lawyer.

Parties in arm's length negotiations commonly conceal their true intentions. Part of the process that positions advanced do not represent what a party truly expects to agree to in the end.

"there is no recognized pre-contractual duty to bargain in good faith"

L.S of NFJ and Labrador v Regular (2005) held that lawyer's letter that deliberately intended to mislead = failure to act with integrity, failure in responsibility to another lawyer and failed to avoid questionable conduct

See also L.S of AB
Code of Conduct
Ch. 7 pg. 472

What is meant by "accessible"?

View # 1 = Lawyer have a professional obligation to improve administration of justice CBA Code Ch XIII

"basic commitment by lawyer to concept of equal justice for all"

View # 2 = Pro Bono ie lawyer MAY assist by participating in legal aid schemes and reduce or waive fees for clients facing hardship CBA Code Guiding Principle 5

* Permissive approach criticized as ineffective in reducing problems.

= ethical client selection is linked to ethical questions of access to justice
when lawyers are able to choose clients based on personal judgments issue
Client's Affordability. Judgments because on recommendations on how to deal

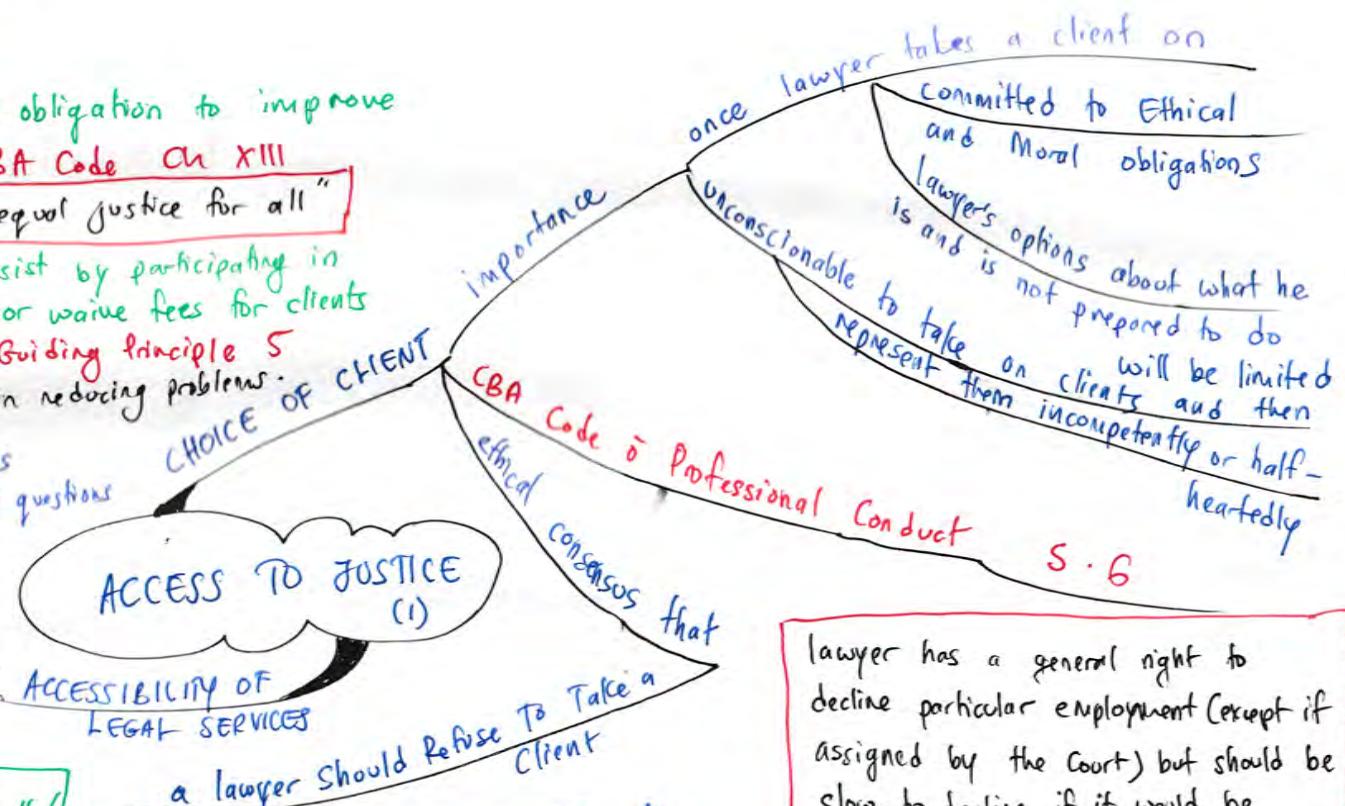
Disagreeing views on taking on "immoral clients", "unpopular clients"

View # 1 = Moral Non Accountability

- lawyer as a neutral agent
- obliged to represent clients interest regardless of client's conduct or attitude
- belief that ① all citizens deserve guide in legal system
② truth will emerge through advocacy
③ it is the judge's, not the lawyer's to decide legal entitlement

View # 2 = Personal Accountability

- lawyers must take responsibility for their choice of clients and strategies they use on the clients' behalf
- law is an instrument of power and people can benefit or suffer as a consequence of legal behavior



lawyer has a general right to decline particular employment (except if assigned by the Court) but should be slow to decline if it would be difficult for the client to find another lawyer; he should help him find another lawyer FOC except in special circumstances

1. Conflict of Interest
2. Lawyer lacks competence in the specific matter.
3. Client has a continuing retainer with previous lawyer.
4. Lawyer has potential to be a witness in a case.
5. There is an illegal purpose.

Proulx and Layton recommends

- generally should reject if personal distaste is so severe that quality of legal representation would suffer as a result
- or if the client's personality is so abrasive that it would impede the lawyer from being a competent advocate
- Other considerations:

In most criminal law matters, the client will be facing possible stigma from a conviction, and perhaps also a serious impairment upon liberty. Access to the protections offered by the legal system through the help of counsel will thus constitute a valuable, perhaps even essential, interest. The strength of this interest must not be ignored or unreasonably discounted. Indeed, defence counsel who accepts this rationale — and virtually all of them do — will be exceedingly slow to reject a client simply because he is the subject of public opprobrium.

- 1) On a somewhat similar note, most Canadian codes state that a lawyer's private opinion about the guilt of an accused person should not constitute the basis to decline employment. Utilizing this rationale for refusing a client would be at odds with a central tenet of the criminal defence lawyer's role. Once a lawyer decides to practise criminal law, choosing a client based on the likelihood he is guilty or not guilty is unacceptable.
- 2) A lawyer's strong and genuine belief that the representation is repugnant is a legitimate consideration in deciding whether to accept a client, although as noted such a belief will usually be eclipsed by the superordinate principle that all individuals charged with a crime are entitled to a defence.
- 3) The repugnance felt by the lawyer should relate to concerns intimately connected to the representation at hand and not merely to the personality of the client. Provided a personality clash does not irreparably cripple the client-lawyer relationship, a client should not be rejected merely because he rubs the lawyer the wrong way.
- 4) A desire to avoid public condemnation for taking on a case and to skirt a real possibility of resulting economic harm to a lawyer's practice are factors that some counsel may take into account. But counsel should be slow to allow public opinion to shape her decision. In any event,

Hutchinson has a different suggestion:

Before taking on any clients, it seems ethically incumbent on lawyers to talk to them. This need not be a one-way lecture to the potential client about the lawyer's ethical values, but it might be a conversation in which lawyer and client outline their basic expectations of each other. Questions lawyers might ask before taking on a client include whether the objective of the case is worthy and whether the means that might be required will be allowed to be used. It is important that lawyers inform potential clients of the ethical limits they place on their provision of legal services — negotiation tactics or cross-examination style. In general, lawyers should treat their potential clients as moral persons who are capable of engaging in debate and changing.²⁴

lawyers whose practices are dedicated to defence work are unlikely to suffer widespread public disfavour or any consequential business loss by taking on any particular case.

- 6) The lawyer can take into account the likelihood that the prospective client can obtain competent representation from other counsel, that is the last-lawyer-in-town factor. This consideration is expressly mentioned in many Canadian ethical codes, which state that a lawyer should be cautious in exercising the right to decline employment if the probable result would be to make it difficult for a person to obtain legal advice or representation, and should generally refrain from doing so merely because the client or cause is unpopular or notorious.
- 7) A client cannot be turned away based on a prohibited ground of discrimination.
- 8) As already mentioned, some criminal defence lawyers refuse to take on entire categories of representation, for example, all individuals facing sex-related charges or all individuals who wish to co-operate with the prosecution. While somewhat uncomfortable with uncompromising refusals to represent clients who fall within a particular category of case, we accept that a dedicated and highly competent criminal lawyer can have a profound moral objection to taking on certain types of representation, in which case it is acceptable to reject such briefs.

Where a lawyer decides not to accept a retainer, for whatever legitimate reason, it is advisable to take certain measures designed to protect the interests of both the lawyer and the individual whose case has been declined. A primary duty owed to the rejected individual is to help in finding a suitable lawyer.²³

Model Code Rule 4.1-1

Lawyer must make legal services available to the public efficiently & conveniently

+ Commentary 4

- similar to CLA Code but in a nutshell also adds
 - general right to decline but right to be exercised prudently
 - should not be merely due to the potential client being unpopular
 - or lawyer's private opinion

2013 Action Committee on Access to Justice

NCA notes prepared by Iman M
in your and Family Matters
For personal reference only. You should not have paid for these.

Duty of Lawyer & the Profession

Arguments that lawyers have an obligation

- ① vocation for public interest
 - ② trusteeship, arising from self-regulating regime and the fact that lawyers collectively and exclusively empowered to provide legal services (monopoly = no one else can provide)
 - ③ market imperfections due to lawyers' unique individual capability (skill and clients' varying legal issues = not an exact free market, difficult to analyze if cost is justified to income threshold)
- Held: ON LAA income threshold not realistic w/a complicated case = to be provided w/ state funded counsel

R v Moodie (2016)

Held: no general constitutional right to legal counsel in proceedings before courts and tribunals dealing with rights & obligations

i.e. s.10(b) of the Charter specific to "on arrest and detention" as such a finding that right to counsel to all proceedings would make s.10(b) redundant

middle lower-middle
don't qualify for Aid
"do-it-yourself" attitude

geographical barrier
eg rural areas

eg State of NY in 2012

started to require SD have pro-bono as condition to admission to State Bar

in 2011 suggested lawyers do 10% pro-bono

individual

COMPETENCE

importance historically

legal address

BARRIERS

what is legal need

legal problems that require legal process

Issues: (a National Survey 2014)

- justiciable problems are widespread - 48% adult CON
- most frequent reported issues are consumer, debt & employment
- people experience more than 1 legal problem at a time
- a small % actually took legal action

knowledge & substantive law & procedure

professional judgement and experience

legal and practice management skills

intellectual and emotional capacity

Duty of Loyalty to Client requires lawyer to be competent & render quality service

few cases of lawyers disciplined for incompetence

① studies = major dissatisfaction involves poor service quality for high price
② Law on Malpractice Codes of Professional Conduct, primarily negligence

CBA Code, Ch II

- lawyer should serve the client in a conscientious, diligent and efficient manner so as to provide a quality of service at least equal to what which lawyers would expect of a competent lawyer in a like situation

See Nova Scotia Barristers Society v Richey (2002 NSLD)

Action Committee (2013)

Roadmap of potential reform initiatives

- ① Build a robust front-end early resolution services sector (ERSS)
- ② Improve accessibility to and coordination of Public Legal Information
- ③ Justice continuum to reflect the population (taking into account language, gender, class, religion, sexual orientation, culture etc.)
- ④ Modernize & expand legal sector
 - innovations / improvements such as
 - unbundling / limited scope retainer
 - appropriate outsourcing
 - increased paralegal scope
 - legal expense insurance broad-based
 - pro bono & low-bono legal care
 - promote services to rural / remote ~~other~~ communities

⑤ Increase LAA funding & scope

⑥ Make Access to Justice a Central Aspect of Professionalism

⑦ Courts & Tribunals to become Fully Accessible Multi Service centres

- accessible & reflect the communities
- multi-service dispute resolution centre
- appropriate service to self-reps
- case management promoted (available)
- accessible and user friendly

Patricia Hughes (2013)

- criticizes roadmap as being 'generic' leaving marginalized population out
- wants to see a more nuanced approach

Ottawa (2007)

- street focused Ticket Defence Program shut down after Access to Justice Act passed, making LSUC regulatory body of all paralegals - TDP are not licensed paralegals