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Required Readings:

Model Code, Chapter 5; Chapter 3, Rule 3.7 and Commentaries.

Required Readings:

Model Code, "tribunal", Chapter 3, Rule 3.2-2 and Commentary; Chapter 5, Rule 5.7 and Commentaries; Chapter 7, Rule 7.2 and Commentaries.

Required Readings:

Model Code, Chapter 3, Rule 3.5-6 and Rule 3.5-7 and Commentaries; Chapter 5, Rule 5.1 and Commentaries.

Introduction

I'm pleased to present to you my Note on Canadian Professional Responsibility, March 2023 Version. Let me state this from the outset: there is virtually no difference between the NCA syllabi of January 2022 and March 2023. So, if you already purchased my January 2022 Version of the PR note, you don't have to bother about purchasing this March 2023 Version.

As a candidate preparing for your NCA exams on Professional Responsibility, the first thing you must note is that the primary source of reference is the Model Code of Professional Conduct (Model Code) as developed by the Federation of Law Societies of Canada (FLSC). The syllabus does not cover each of the different provincial rules and codes that regulate lawyers and you are not expected to read all of these as you may not be tested on them. (Leave this for your Bar Admission Process after your NCA qualification). So, I advise you to read the Model Code thoroughly; get familiar with it. It is the easiest way to understanding this subject. You may download and print a copy of the Model Code which is available free at https://flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf. I also recommend that you have it with you in the exam hall for reference purposes.

According to the NCA syllabus, this course has 3 main objectives:

1. Concepts – to help students develop a sense of what the profession is all about and to identify lawyers' roles and responsibilities in the profession. In achieving these two aims, the student's attention is drawn to issues of lawyering and the profession. These include self-regulation, the nature of the adversary system, demographics and diversity, ethical and professional obligations associated with specific practice roles and contexts, and ethical balance between zealous representation and a commitment to the public interest and access to justice.

2. Skills – which helps students to think about the professional issues that arise in practice, how they arise, and how they can (and in some cases) *must* be dealt with.

3. Focused critical thinking – which encourages students to think critically and imaginatively about the current and future opportunities and challenges in the legal profession; and to

encourage them to think about what works and what doesn't work, and the available alternatives.

This Note was prepared with substantial references, quotations, and excerpts from NCA required text on Professional Responsibility, as per the current NCA syllabus and I have used it extensively, significantly and substantially to prepare this note. Then adequate references are made to the FLSC Model Code. I have reproduced extracts from the NCA syllabus at the beginning of each Chapter, all delineated in italics. In fact, I have modelled this Note exactly in line with the sections and chapters in the syllabus, so it may be easy for cross-referencing. I have also endeavoured to summarize the facts and ratios of all the cases contained in the syllabus, in addition to citing and reporting many others contained in the required texts and others. I have equally incorporated useful materials from several other sources.

This version of the Note includes (some) abridged versions of the required article(s) as listed in the syllabus. This abridgement includes important points, quotations and excerpts from the articles in such a way that I have been able to reduce a 53-page article, for instance, to just about 10 pages. This version also includes all the articles contained in the chapters of the required text. I have deliberately compiled this as Appendix to the Note, so it doesn't disrupt your normal reading. This has extended the pages of this note to about 265. But I've been told that those articles are equally essential because NCA may set questions on them.

It's always a tough task trying to compress about 2000 pages of materials into a note of about 265 pages that will still cover all topics. It's a challenge trying to do this without leaving out important points. It's amusing when students desire shorter notes. I've always jokingly told them to blame it on the NCA syllabus. But the truth is: anything shorter than this note could be detrimental as you won't be getting all the required knowledge.

In all, I have tried to achieve the objective of making this note concise but comprehensive, because I know many NCA candidates have to shuffle their time between work and study. But I believe I have achieved my aim of making this note a stand-alone material that can help you pass the exam, without prejudice to the requirement for you to read through the required texts.

Wishing you a successful outcome in your Canadian Professional Responsibility exam.

- **Manuel Akinshola**

Section A

THE LEGAL PROFESSION:

LAWYERS IN SOCIETY AND A SOCIETY OF LAWYERS

In accordance with the NCA syllabus, this first section of the note will revolve around two fundamental and recurring questions. They are:

1. What is the legal profession?

2. What is the role of the lawyer in the legal profession?

The purpose of those two questions is to engineer the student to think about what the legal profession actually is, and what the relationship of the legal profession is with other commercial endeavors. How is it different from those other commercial endeavors in the society?

In addition, the student will have to think about the role of the lawyer in relation to her clients, the profession and the public. This thought must be with specific reference to the relevance of the personal integrity of the lawyer, her morality, honour, candour, communications, etc., in the course of the practice of her profession.

And to provide adequate answers to these thoughts, Chapters 1 and 2 of this Section have been designed to provide insights into issues relating to the profession and the professionalism of the practitioners.

Chapter 1

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

In this Chapter, you will study materials and discussions that relate to lawyers' ethics and professional regulation. This will include materials relating to the ethical obligations of lawyers in legal practice. It will also include materials that discuss the main sources of lawyers' guidance and obligations as they make frequent ethical decisions in their day-to-day legal practice.

Issues to consider:

1) *What is a profession?*
2) *What is the "public interest"?*
3) *The role of lawyers and the profession in legal process and the regulation of society.*
4) *Law as a business and law as a profession: what is the difference? Is there a conflict? Must it be a "one-or-the-other" question? What is at stake in this discussion?*
5) *The power, opportunity and responsibility of lawyers in society.*
6) *What is legal ethics? What is the orientation of the lawyer's value framework? What role do various principles play in determining the obligations of a lawyer? Loyalty? Integrity? Justice?*
7) *Lawyers' obligations to themselves, clients, the court and society: is there a conflict?*
8) *Lawyers as moral or morally neutral actors: should personal honour, personal morality, etc. play a role in the lawyering process? What are the various arguments on either side of this question? What Model Code provisions animate both sides of this question? If there is a conflict, how should it be resolved? Whose morals are we talking about: the lawyer's, client's, society's, others?*

See the article, **Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers**, by Tim Dare, at page 183 below.

a) What is a Profession?

Generally, a profession is defined as a paid occupation, one that is founded upon a specialized (and often) prolonged educational training and a formal qualification. The purpose of a profession is to supply objective service to members of the public who need them, for a direct and definite compensation. Thus, a profession is different in many respects from a trade, vocation, business or an industrial enterprise.

In relation to law, the question that arises is as follows: is the practice of law a profession or a business? The answer is well established that the practice of law is a profession, and not a business or a skilled trade or vocation. Of course, there is a similarity between the two in the fact that some of the aims of both a profession and a business are to render service and to make gain. The difference between a business and a profession is that the chief end of a trade or business is personal gain while the chief end of a profession is public service.

b) What Is The "Public Interest"?

Public interest is an abstract notion but it essentially refers to the welfare or well-being of the general public and of the society. Examples of public interest include the public welfare and the public good. It also includes the common good which means that the public has a common purpose.

Public interest is important because it relates to what matters to everyone in the society, that is, the general welfare, the security and well-being of everyone in a particular community.

In the practice of law, public interest is important because the primary duty of the lawyer is to act in the interest of the public, which should always come first, over and above the personal interest of the lawyer or even before that of the client in many cases.

c) The Role of Lawyers and the Profession in Legal Process and Society

What is the role of lawyers and the profession in legal process and the regulation of society?

In the first instance, we must always remember that the law profession is a self-regulated one. This means that the practice of law is regulated by lawyers themselves through an institution established and recognised by law. This institution is basically the law society of each province which has the sole statutory authority of regulating law practice. And since only lawyers can become members of the law society, it follows, therefore, that it is lawyers who regulate themselves, devoid of any governmental intervention or supervision by any external body.

From the above, we are able to determine that lawyers play the primary role of regulating how the law profession functions, how law practice should be conducted, who should be admitted to the profession, what academic and other qualifications

should be possessed by applicants, what professional standard should be maintained by those admitted into the profession, what should be the complaint and discipline procedure, etc.

The law societies in Canada function as the regulator, and their functions are governed by law as well as rules governing the practice of law and all other aspects of the regulatory process.

d) Law as A Business and Law as A Profession: What Is the Difference?

Is there a conflict? Must it be a "one-or-the-other" question? What is at stake in this discussion?

As we have noted above, law practice is widely taken to revolve around the legal profession of lawyers and their training, licensure, ethical responsibilities, client obligations and other matters related to law practice. The practice of law is all about the zealous, ethical representation of clients. Lawyers by virtue of the nature of their profession are also assumed to have entered into a social contract to represent the society by defending the rule of law.

Therefore, the practice of law is traditionally regarded as a noble calling and not just a job. With this viewpoint, the interests of society are advanced by the existence of a genuine legal profession which has a commitment to the promotion and preservation of the public good. Lawyers here are regarded as more than just service providers operating a market-driven business. They are members of a profession. This is in contrast to those who believe that law practice is a legal industry in which lawyers operate businesses in the law.

But this is not to totally overlook the business aspect of law practice which aims to provide legal buyers with 'more for less' within acceptable risk parameters. Today, lawyers and law firms provide legal services with innovative and technological additions which take service delivery beyond what it used to be. Many proponents argue here that the delivery of legal service today requires not only legal expertise but also technological and business acumen to succeed. So, the lawyer will not rely only on her knowledge of the law to succeed in law practice but also on law office (business) management which includes both personnel and machineries.

In the same vein, the view that law is basically to serve the public interest has been challenged by many, who argue that law should not be seen as 'one or the other', i.e., either as a profession or as a business. They argue that law practice is a profession as well as a business and should be run as such. This argument comes from people who believe that for a law practice to survive, it must make profit. And that a lawyer who solely relies on her technical expertise in today's world may find it impossible or difficult to survive in the stiff competitive delivery of legal service.

So, some do not see a conflict in this viewpoint because they believe that the law profession can be successfully managed as a business.

e) The Power, Opportunity and Responsibility of Lawyers in Society

As we have previously stated, the legal profession is a creation of statute. It does not exist as of right. By virtue of the law, members of the legal profession enter into a bargain with the society in which they promise to conscientiously serve the public interest, even if to do so may, at times, be at their own expense. In return for this promise, lawyers are afforded some privileges. These include the privilege to self-regulate, the exclusive right to perform certain functions, the privilege of a special status, etc.

This special status enjoyed by lawyers in the society comes with special responsibilities, and this is constantly emphasized, perhaps as a reminder to the practitioner. For instance, Rule 1.03 of the Rules of Professional Conduct of the Law Society of Ontario provides that "a lawyer has special responsibilities by virtue of the privileges afforded to the legal profession and the important role it plays in a free and democratic society and in the administration of justice". The commentary to Rule 4.06 of the same Rules declares emphatically that a lawyer's responsibilities are greater than those of a private citizen.

The Model Code also refers to this special status enjoyed by lawyers in relation to their special responsibilities in some specific situations. In Commentary 3 to Rule 5.6-1, the Code reminds lawyers that judges and members of tribunals are often prohibited from defending themselves in the face of scrutiny and criticism by the public. And that this prohibition, therefore, imposes special responsibilities upon lawyers to avoid petty, intemperate criticisms or those not supported by belief that it is meritorious. This is because such unjustified and unwarranted criticisms coming from lawyers may diminish respect for the legal system.

Commentary 1 to Rule 6.3-5 which deals with discrimination, also provides as follows: “A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws”.

The lawyer’s duties and responsibilities to the society may also be evident in such areas as the protection of the principles of democracy and the rule of law. “The professional responsibility to understand and support these principles arises by virtue of the critical role that lawyers play in democracy and the rule of law”, as asserted by Sylvia Corthorm and Reena Goyal in their treatise: A Lawyer’s Duty to Society.

f) What Is Legal Ethics?

What is legal ethics? What is the orientation of the lawyer’s value framework? What role do various principles play in determining the obligations of a lawyer? Loyalty? Integrity? Justice?

It is often said that there is no universally accepted definition of legal ethics. But generally, lawyers’ ethics relates to the ethical obligations of lawyers, both as an individual and also as a member of organizations. It addresses the constraints on the conduct of a lawyer in terms of the rules, principles and obligations she is required to comply with while in legal practice. It also deals with the lawyers moral and ethical aspirations in her decision-making process, most especially where she is given the discretion by the rules or law on how to act.

Lawyer’s ethics also considers what the implications are for the life of a lawyer in fulfilling the lawyer’s role. This question becomes important when a lawyer has to consider whether her own ethical life is affected by the course of helping a client to achieve a goal of which the lawyer does not approve. The question then becomes, “Can a good lawyer be a good person”? as asked by Charles Fried in his article, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*.

When it comes to the issue of legal ethics, some questions arise for consideration, viz: Is legal ethics law? Who should decide the requirements of being an ethical lawyer: is it the lawyer herself, other lawyers, the law society, the court, the public? What should a lawyer do when she encounters an individual conflict in her main duties as a lawyer? Whose interest should be considered when deciding what is ethical – the lawyer’s? Interest of other lawyers? Interest of the public? Interest of the profession?

Professional regulation is centered on the issue of ethics in legal practice. Here, the focus is on how to determine what should be the ethical constraints on lawyers' conduct and how to enforce these constraints. Presently, all Canadian lawyers are regulated substantially through self-regulation, which means that the rules and standards are set by lawyers themselves. These rules include admission to the practice of law, the lawyer's ethical conduct while in practice and the enforcement of the applicable rules and standards.

Law Society of BC v. Jabour

Jabour was a senior lawyer practising in Vancouver, BC. He placed 4 advertisements in newspapers advertising his services and the legal fees attached to each service, as well as his opening hours. He also mounted a large illuminated sign over his office. The Benchers of the Law Society of British Columbia set up a committee which found Jabour guilty of conduct unbecoming a member of the Law Society and recommended his suspension for six months.

Jabour challenged his suspension claiming that the Law Society's ability to regulate its members was contrary to the federal competition legislation, and also that restrictions on his right to advertise his services violated his right to freedom of speech.

The court held as follows:

1. That it was the intention of the Legislature to vest broad powers in the Benchers, which may include power to prohibit any conduct that is contrary to the best interest of the public or the profession.
2. That although there is no specific power granted in the law to prohibit commercial advertising by members, this power, like all other powers, is granted as part of the broad regulatory power conferred by the Act.
3. That Benchers are given a general power to determine what conduct is to be acceptable in the practice of law and even outside the practice for those who are members. So, whether the advertising carried out by Jabour constitutes conduct that is subject to disciplinary proceedings is a matter for the Benchers to determine as part of their general regulatory powers.
4. That the Benchers have the power to prohibit the type of advertising carried out by Jabour and to discipline with respect to that type of advertising.

(Please note that the Supreme Court of Canada later held in **Rocket v. Royal College of Dental Surgeon {1990} 2 SCR 232** that very broad advertising restrictions are contrary to the Canadian

Charter of Rights and Freedom. Consequently, most Law Societies have relaxed their restrictions on lawyer advertising, though some still remain).

Sources of Legal Ethics

There are basically 4 sources of ethical conduct for lawyers, and they are discussed as follows:

1. *Case Law and Legislation* – they place constraints on what a lawyer can do or cannot do. Case law and legislation here may include regulations, and they are the most significant source of guidance for lawyers on what is required of them to act ethically. The following offer us examples of the ways and manners case law and legislations place constraints on lawyers in legal practice:
    - Law of negligence – requires lawyers to meet some basic standards of professional competence;
    - Law of fiduciary duties requires that lawyers must act with loyalty when acting on their clients' interest. And that the interest of the client must be put before those of others or even those of the lawyers themselves;
    - Law of contracts – the courts have held that the scope of a lawyer's retainer agreement is governed by contract, and, therefore, the law of contracts governs the specific obligations of a lawyer to her client under an oral or written retainer agreement;
    - Law of taxation – applies when a lawyer or client obtains court assessment of a lawyer's bill and the order for it to be paid as assessed, and this provides lawyers with guidance on their ethical obligations when charging their clients;
    - Law of evidence and the doctrine of solicitor-client privilege – relates to the importance of the lawyer's obligation of confidentiality to her client;
    - Rules of court – deal with the lawyer's ethics in the conduct of a case. It also places a duty on the lawyer to avoid acting where there is (a likelihood) of conflicts of interest between the lawyer and her client, whether current or former;
    - In criminal law – and for the purpose of fair trial, the defence lawyer has a legal duty to provide effective assistance to the accused and identify the constraints to the proper conduct of a prosecution. This duty also prevents a lawyer from withdrawing from a representation without ethical justification.

Although case law and legislation provide the most significant source of ethical guidance for lawyers, yet many issues are not addressed by case law and legislation.

2. *Rules of Professional Conduct* – all Canadian provinces have provincial law societies which, as one of their duties, prescribe rules of professional conduct to regulate lawyers practising within that province. These rules cover a wide variety of subjects from admission and licensing to clients' management, confidentiality, record-keeping, etc. Each provincial law society has its distinct rules but in 2009, the Federation of Law Societies of Canada (FLSC) published a Model Code of Professional Conduct which virtually all provincial law societies have adopted, except Quebec. This was with a view to creating a uniform model code for all lawyers in Canada.

   Thus, the rules of professional conduct are another great source of guidance for lawyers when making ethical decisions, especially in moments of uncertainty.

3. *Law Society Disciplinary Decisions* – these are found on law society websites, CanLII and Quicklaw and they provide insights into what constitutes professional misconduct (i.e., unethical conduct of a lawyer in legal practice) or conduct unbecoming (i.e., conduct of a lawyer outside legal practice). However, these decisions are narrow in their application because they focus on specific misconducts, especially those clear violations of legal duty such as stealing client's funds.

4. *The Principles or norms of lawyering* – there are certain situations in which all the other 3 sources of ethical conduct fail to provide guidance to a lawyer when making a decision. In this situation, the lawyer may have to rely on certain principles or norms to guide her conduct. These principles and norms may be dictated by the important societal role that lawyers fulfill, or by the requirements of ordinary morality, or by the foundational morality of the legal system, or by that individual lawyer's own integrity. For example, in making a decision of which client to act for, a lawyer may be left to rely on the principle and norms of lawyering where the rules of conduct or case law leaves the decision entirely to her discretion.

Some Thoughts About "Ordinary" Ethics

"Ordinary" ethics in this context may refer to general morality, i.e., the idea of morality that applies to every human behaviour or to every individual, regardless of his profession. But we shall relate ordinary ethics to the legal profession in many instances.

The way we think about being an ethical lawyer might affect the way we think about being a good lawyer. The two dimensions of ethics are:

1) ethics as a series of rules that constrain human behaviours, and
2) ethics as a general set of aspirations that we all strive to achieve.

And from these two general dimensions arise many philosophical schools of thought about ethics. Some of these schools of thoughts are as follows:

1. **Virtue Ethics** – this Aristotelian theory postulates that each individual possesses virtues which orientate them towards ethical conduct. For example, if a lawyer who possesses the virtue of honesty, loyalty or compassion is faced with an ethical decision, she will apply those virtues of honesty, compassionate conduct or loyalty to the client in exercising her judgment to arrive at a decision. Conversely, the lawyer who possesses vices will have those vices orientate him/her away from ethical conduct or decision.

   According to this theory, it is not the virtue ethics in itself that brings about this effect, but the possession and cultivation of these virtues contribute to the combination of human flourishing, human character and practical judgment. This is because the mere possession of virtue is not sufficient; it must be accompanied by the ability to apply practical judgment to those virtues in any given situation.

   The theory of Virtue Ethics argues that it is our virtues of character, when exercised through our practical judgment, that lead us to ethical action. This is in contrast to the Kantian theory (below) which postulates that it is the existence of specific rules (not virtues or vices) that provide ethical guidance. To Virtue Ethics theorists, the pursuit of virtues is the precondition for human flourishing.

2. **Utilitarianism (Consequentialism)** – this theory rejects the idea that ethics is a matter of individual character based on virtue or vice (as postulated by Virtue Ethics) or that ethics is based on the abstract concept of right or wrong. Rather, the most ethical action is that right action which is most likely to do the greatest good for the greatest number of people. And if this greatest good was not possible, the most ethical action is the right action that will bring the least harm to the fewest number of people. This is in line with the notion that human beings want to maximise their self-interest, and the society in which the overall human interests are maximised

is the best society. According to this theory, the aim of a society should be to achieve "the greatest good for the greatest number".

Utilitarianism is also consequentialist in that it is more a way of judging whether a decision is ethical, and not only as a means of reaching that decision. While it may not be possible to assess the consequences of an action or decision in advance, the consequences after the fact will justify assessing the action or decision as good or bad, or as ethical or unethical.

3. **Kantian/Deontological Theories of Right of Action** - postulates that it is the existence of specific rules (not virtues or vices) that provide ethical guidance. The theory asserts that morality is dictated by rules; for instance, it is because honesty is mandated by rules (e.g., the rules of professional conduct) that makes it unjustifiable/unethical for a lawyer to lie or steal client's money. Kantian theory rejects the notion that it is the significance of consequences that is important in the assessment of whether an action/conduct is moral or not. Rather, it is the existence of rules which forbid such conducts and provides guidance that dictate whether an action/conduct is moral or not. Therefore, if a rule applies to a conduct, such rule must be applied regardless of the consequences of doing so in any particular case.

   Kant's theory recognises that humans have the capacity of reasoning, which is the freedom of choice and action. Therefore, any moral rule or duty must respect this categorical imperative. This means that the only principles which should guide your actions are those which should also apply to every other free, reasoning person. Therefore, you must treat every person as having a free will and not make them merely the means of the exercise of your own free will.

4. **Postmodernism** – This theory does not posit a new way of ethical reasoning or another way of defining ethical conduct. Rather, it is a method of intellectual criticism; it merely notes the impossibility or implausibility of the traditional approaches to what it means to be ethical, as discussed above, because there is no calculus by which moral ideas or judgment can be tested and perfected. The theory asserts rather that ethical decisions must be made through the subjective viewpoint of the individual making them, through his/her own judgment and moral intuitions only. The individual will take personal responsibility for the ethical decision he/she makes, and will not be aided in that decision-making process by any of those abstract traditional concepts of good or evil, or of consequences.

In summary, the postmodernist believes that an individual faced with an ethical dilemma must simply apply his/her intuition and judgment, decide on the course of action to take, provide justifications for taking that course of action, and then take responsibility for that decision.

5. **Pluralism** – according to this theory, there is no single source of guidance in making an ethical decision. Rather, the individual faced with an ethical dilemma will weigh and measure different (and occasionally conflicting) values in different circumstances, and may apply those values all together in order to make a decision about the required ethics in that particular situation. So, the individual will not depend on only a single source (e.g., virtue, rules or consequences) in reaching an ethical judgment but may consider all of these. And after weighing all these values, he will be required to exercise judgment, make a decision, provide justification for that decision and then take responsibility for it.

g) Lawyers' Obligations to Themselves, Clients, The Court and Society: Is There A Conflict?

Lawyers have varied and diverse obligations while performing their duties as law professionals. Some of these obligations include to the client, to the court, to the society, and even to themselves. And as naturally expected, many of these obligations conflict with one another, leaving the practitioner in ethical dilemmas.

The lawyer's obligations shall be discussed in more details in specific practice instances in subsequent chapters of this note, but let's examine a summary of these obligations and duties in the following paragraphs:

1. Duty to clients: since Canada operates the adversarial system in litigations, legal ethics demand that the advocate will resolutely advance the interest of their clients.

   Please note, however, that the duty to resolutely advance a client's cause is subject to ethical obligations that are intended to ensure that the administration of justice works properly. For example, a lawyer is under an ethical duty not to deliberately refrain from bringing a binding legal/judicial authority to the notice of the court or tribunal which she considers to be directly on point and is not mentioned by any other party. This obligation must be performed even if such authority is not favourable to her client's case.