Mackenzie Lawyers & Ethics: Professional Responsibility and Discipline

Release #3, 9/2025

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Lawyers & Ethics

Professional Responsibility and Discipline

Volume 1

Gavin MacKenzie
of the Ontario Bar

Thomson Reuters™

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Lawyers & Ethics: Professional Responsibility and Discipline

Gavin MacKenzie

Release No. 3, September 2025

A practical, contemporary text dealing with the issues of professional responsibility regularly confronting lawyers in Canada in every area of practice. A valuable reference source for the practising lawyer and the student. Specific types of ethical problems arising in the major areas of practice are identified, and insightful, practical solutions presented. Areas of practice discussed are criminal, civil litigation, estates, real estate, corporate and in-house counsel. A substantial portion of the work is devoted to discipline proceedings.

What's New in This Release

This release features updates to Chapter 23—Admission to the Bar, Chapter 25—Rules of Professional Conduct and Chapter 26—Discipline Proceedings.

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Highlights

§ 23:3—History and Application of the Good Character Requirement
In a 2025 decision [*Afolabi v. Law Society of Ontario*, 2025 ONCA 257 (Ont. C.A.)] the Court of Appeal for Ontario reversed a decision of the Divisional Court [2023 ONSC 6727] holding that applicants for licences were denied procedural fairness by the Law Society's refusal to hold an oral hearing before denying their applications on good character grounds. The applicants for licensing had obtained answer sheets that duplicated examination questions and provided answers.

The Law Society's Director of Licensing wrote to the applicants to say that the evidence supported the conclusion that they had engaged in prohibited actions, and that the appropriate administrative outcome was to deem void both the exam results and the applicants' registration in the licensing process. The Director of Licensing also wrote that the applicants could re-register for licensing but only after one-year; that if they chose to re-register in Ontario or any other jurisdiction, they must disclose that they had been sanctioned by a regulatory body; that the Law Society might conduct a further investigation into their good character; and that the Law Society would share the Director's decision with other Canadian and territorial law societies… The applicants sought judicial review of the decision of the Licensing Director… The Court of Appeal allowed the Law Society's appeal, and held that the Licensing Director's decision was administrative, rather than quasi-judicial.

To Charlotte, Travis, and Brooke.

About the Author

Gavin MacKenzie is one of the co-founders of the Toronto litigation boutique MacKenzie Barristers, where his practice focuses on civil appeals and professional responsibility and liability issues. He has appeared as counsel before courts at all levels including the Supreme Court of Canada. Mr. MacKenzie has been honoured by induction as a Fellow of the American College of Trial Lawyers.

Since 1993 he has been rated "AV" (pre-eminent) for legal ability and adherence to high ethical standards by Martindale Hubbell. He is listed in Best Lawyers in Canada in the fields of Administrative and Public Law, Alternative Dispute Resolution, Appellate Law, Class Action Litigation, Legal Malpractice Law, and Product Liability Law. In 2011 Mr. MacKenzie was named Toronto Lawyer of the Year in the field of legal malpractice, and in 2013 he was named Toronto Lawyer of the Year in the field of Appellate Law. Mr. MacKenzie has been selected by American Lawyer Media and Martindale-Hubbell as a Top Rated Lawyer in Canada, and has also been recognized by the Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada.

Since his call to the bar in 1977, Mr. MacKenzie has frequently represented lawyers, other professionals, and regulatory bodies in disciplinary proceedings. From 1990 to 1993 he served as the Law Society of Upper Canada's Senior Counsel with responsibility for professional discipline. He has frequently been retained by lawyers and law firms to provide opinions and expert evidence on issues of professional responsibility.

Mr. MacKenzie was elected as a bencher of the Law Society of Upper Canada in 1995 and was re-elected in 1999, 2003, and 2007. He has served as chair of the Society's professional regulation committee (which is responsible for professional conduct and discipline policy), and proceedings authorization committee (which is responsible for authorizing the initiation of discipline proceedings against lawyers). He has also served as co-chair of the Society's strategic planning committee. From 1998 to 2000 he served as co-chair of the task force on the reform of the Law Society's Rules of Professional Conduct, a process that culminated in the adoption of new Rules of Professional Conduct that came into force on November 1, 2000. Mr. MacKenzie has also served as counsel to the Canadian Bar Association's Ethics and Professional Issues Committee, whose recommendations resulted in significant reforms to the CBA's Code of Professional Conduct that were adopted by the CBA's Council in 2004.

In February 2006, Mr. MacKenzie was elected as Treasurer (head) of the Law Society of Upper Canada. He was acclaimed to further one-year terms as Treasurer in June 2006 and June 2007.

In addition to *Lawyers & Ethics: Professional Responsibility and Discipline*, Mr. MacKenzie is the author of articles published in the *Canadian Bar Review*, the *Law Society of Upper Canada Gazette*, the *Advocates' Society Journal*, *Reid's Administrative Law*, the *Canadian Journal of Law & Jurisprudence*, and the *Alberta Law Review.* He wrote *The Profession* column for the *Law Times* for many years and is a frequent speaker at continuing education programs. He has taught civil litigation, administrative law and the *Charter of Rights*, and professional responsibility in the Ontario bar admission course. He has served as an Adjunct Professor of Legal Ethics at Osgoode Hall Law School.

Mr. MacKenzie is a former director of the Canadian Institute for the Administration of Justice, the Advocates' Society, and of LINK — the Lawyers' Assistance Program. He is also a former council member of the Canadian Bar Association Ontario and the Toronto Medico-Legal Society.

Mr. MacKenzie was awarded an honourary Doctor of Laws (LL.D.) degree from the Law Society of Upper Canada in 2010 in recognition of his contributions to the legal profession.

Acknowledgments

I am grateful to Dean Marilyn Pilkington of Osgoode Hall Law School, who read the manuscript and made many valuable suggestions.

I am also grateful to Allan Rock, who somehow found time to read the manuscript and wrote a thoughtful foreword during a period of his life when he had many other pressing responsibilities.

My friend and sometime colleague, the late Stephen Traviss, generously made available his extensive library of materials on professional responsibility. Anna Burnowicz, Charlene Weston and Josephine Cunningham typed the manuscript and made countless revisions without once losing the good humour that has made them such a pleasure to work with.

Foreword

Among the challenges facing the legal profession in the current age, none is more urgent than the need to preserve and foster its ethical values at a time when the business aspects of practice demand so much of our attention. Faced with increased competition, the relentless pressure of cost, the disappearance of many traditional sources of work and the growing complexity of the law, lawyers in practice must struggle on a daily basis to balance their roles as professionals and as proprietors.

The profession has attempted to meet this challenge in various ways. Professional responsibility is now taught in both law school curricula and in bar admission courses. Leaders of the profession have spoken out against the rising trend toward commercialism, and law societies everywhere are encouraging a critical re-assessment of our approaches and standards. These measures have succeeded only partially.

Until now, those engaged in efforts to maintain ethical standards have been without a reliable reference work capable of relating rules of professional conduct to the daily demands of practice. With his work on Lawyers and Ethics, Gavin MacKenzie has met that need. By furnishing a text that combines a restatement of ethical norms with a realistic understanding of the modern law office, Mr. MacKenzie has made a lasting contribution to legal literature and to the cause of professionalism.

The book's value derives in great part from the rounded perspective that Mr. MacKenzie brings to the task. For many years a busy litigation lawyer with both civil and criminal retainers, he has extensive first-hand knowledge of the demands of the practice environment. Mr. MacKenzie's caseload included, as a significant component, the defence of lawyers and other professionals facing allegations of misconduct. For a time, he served as counsel to the Discipline Committee of the College of Physicians and Surgeons. He also carried briefs for individuals seeking admission and re-admission to professions in circumstances in which their fitness was in issue. He therefore had occasion to test and examine, in a wide variety of contexts, the very essence of what it means to be a professional.

In recent years, Mr. MacKenzie has served as Senior Counsel, Discipline, for the Law Society of Upper Canada, a role in which he has earned a widespread reputation not only for his skills as an advocate, but also for his fairness in the process and the soundness of his judgment in issues relating to professional conduct.

Mr. MacKenzie's varied and balanced experience ensures that this book is not merely an academic or theoretical analysis: on every page, there is evidence of his keen awareness of the highly complex task that the modern lawyer faces. The rules of professional conduct are brought to life in examples often drawn from the author's own experience, and the principles underlying the rules are illustrated dynamically. By these means, the rules are rendered more meaningful than ever before to those of us who must, in practice, harmonize those obligations that we owe at once to clients, colleagues, the court and our governing body, and which all too often seem to pull us in different directions.

The appealing blend of principle and practice is perhaps best exemplified in Mr. MacKenzie's insightful treatment of the subject of conflicts, a difficult, elusive area requiring an especially rigorous effort in order to reconcile compet-

ing considerations and values.

Nor is the work intended just for courtroom lawyers, despite the emphasis on litigation in Mr. MacKenzie's own professional experience. The book takes on, in a straightforward manner, the way in which the rules of conduct find application in a variety of other practice settings, whether in the boardroom, in the service of government, among corporate counsel or in a general practice.

Canadian lawyers have waited a very long time for a text that treats these subjects fully and with authority. In Mr. MacKenzie's work, we now have a thorough and scholarly resource, the enduring value of which is that it relates every principle to a practical setting and every rule to the realities of practice. The profession, and ultimately the public, are in Mr. MacKenzie's debt.

Allan M. Rock Q.C.

Introduction

> If you want to take dough from a murderer for helping him beat the rap you must be admitted to the bar.[1]

Let it be said at the beginning that in the eyes of many members of the public today the legal profession is a self-interested and non-accountable elite that is undeserving of the privilege of self-government.

This professional image persists in spite of many innovations for which the organized bar seldom claims or receives credit — innovations such as legal aid programmes, funded and administered largely by lawyers; clinic funding programmes, lawyer referral services, and other services designed to improve the accessibility and quality of legal services, especially for those unable to afford to retain lawyers privately; mandatory certification by public accountants of lawyers' financial statements as a condition of annual membership renewal; full-time staffs of lawyers, accountants, and investigators who inquire into and prosecute allegations of professional misconduct; public discipline hearings; mandatory errors and omissions insurance coverage (with minimum coverage levels that in Ontario were raised from $50,000 to $1,000,000 during the 1980s); and lawyers' funds for client compensation, which were first established in Alberta in 1939 and in Ontario in 1954, which are fully funded by the profession, and which reimburse claimants who sustain financial losses as a result of lawyers' dishonesty.[2]

There are sound reasons, having to do largely with the independence of the bar, that it is still fundamentally important that the legal profession retain the right of self-government.[3] That right is jeopardized by the public's increasingly antagonistic attitude toward lawyers. Most people share Henry Adams' disheartening conclusion that "no priesthood ever reforms itself."[4]

The reasons for lawyers' unfavourable image are complex. To some extent it is a problem shared by professions generally in an age characterized by a sceptical public that has come to embrace George Bernard Shaw's epigram that "every profession is a conspiracy against the laity."[5] It is undoubtedly true that lawyers, who defend others ably, have done a poor job of defending themselves.[6]

A primary reason for this negative image has to do with the public's perception of lawyers' ethics. More than ever before, the qualities associated with

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[1] This quotation from *In the Best Families* by Rex Stout (Boston: G. K. Hall & Co., 1991, first published 1950) introduces William H. Simon's "The Ideology of Advocacy: Procedural Justice and Professional Ethics" [1978] Wisconsin L.R. 29.

[2] See Kenneth E. Howie, "Lawyers Under Fire", Law Society of Upper Canada Gazette, vol. 25, no. 2 (June, 1991), pp. 164-171. The advances of the last quarter century throughout Canada and the United States are vividly illustrated by reading Murray Teigh Bloom's book *The Trouble With Lawyers* (New York: Simon & Schuster, 1969), which depicts a profession indifferent to victims of negligence and dishonesty, without lawyers' funds for client compensation or mandatory professional liability insurance, and with a discipline process that was secretive, casual and ineffective.

[3] These reasons are explored in chapter 27.

[4] Quoted by Bloom, *supra*, note 2, p. 351.

[5] Quoted by Jacques Barzun in "The Professions Under Siege", Law Society of Upper Canada Gazette, vol. 12, no. 4 (December, 1978), p. 344 at 346.

[6] Howie, *supra*, note 2, p. 164.

lawyers include (among more becoming traits) a preoccupation with money; egocentricity; attitudes variously described as pompous, patronizing, condescending and arrogant; and tendencies to turn everything into a debate to be won, to complicate problems, to make more work and generate higher fees, and to distort or conceal the truth by resorting to technicalities (or worse) in the interest of winning.[7] In the estimation of many, lawyers are far more interested in their clients' interests (and their own) than in the welfare of society. In a decision of the Supreme Court of Canada released in late 1990, Justice Cory wrote of "lawyers soldiering on in the cause of justice."[8] In the view of many members of the public, the soldiers are mercenaries rather than patriots.

I use the term "lawyers' ethics" because it is more comprehensive than either "professional responsibility" or even "legal ethics." For many lawyers, "professional responsibility" has come to connote a rather narrow field of black letter law, whereas "legal ethics" is concerned primarily with lawyers' role morality.[9] Canadian writing in both fields, though particularly the former, has been dominated by a consideration of rules of professional conduct. But rules of professional conduct have only a limited role to play in enhancing public confidence in the profession. The influence that such rules have on lawyers' attitudes and behaviour, moreover, is slight. Little real progress is likely to be achieved by continually rewriting those rules.[10]

What is needed in addition to rules of professional conduct is a searching and methodical re-examination by lawyers of their roles in a rapidly changing society.[11] Canadian rules of professional conduct are based for the most part on the traditional model of the sole practitioner who has competent, individual, adult clients in a general practice. To a considerable extent, this traditional model has been overtaken as a result of the great diversity of clients, lawyers, and contexts in which legal services are provided. Corporate clients, government agencies, clients with disabilities, and the poor are unlike the traditional paradigm and are unlike one another. There are few similarities in the practices of high technology law specialists in large Bay Street law firms, lawyers who practise before regulatory and administrative tribunals, store-front general practitioners, lawyers employed by clinics designed to serve low income individuals, lawyers employed by government agencies, lawyers who defend persons charged with serious crimes, lawyers who represent public or special

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[7] See George A. Reimer, *Ethics: The DRs and Beyond* (Marina Del Ray, California: Joseph-son Institute of Ethics, 1992), p. 3.

[8] *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 at 1270; see Words and Phrases for the judicial definitions of "Chinese Wall", "Cone of Silence", "Conflict of Interest", "Mischief", "Possibility of Real Mischief Test", "Probability of Real Mischief Test", "Substantial Relationship Test" from this case.

[9] See Susan Wolf, "Ethics, Legal Ethics, and the Ethics of Law" in David Luban (ed.), *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* (Totowa, New Jersey: Rowan & Allen-head, 1983), p. 38; Gerald J. Postema, "Self-Image, Integrity, & Professional Responsibility" in the same volume, p. 286 at 310; David Luban, "Calming the Hearse Horse: A Philosophical Research Program for Legal Ethics" (1981) 40 Maryland L.R. 451; and W. Brent Cotter, *Professional Responsibility Instruction in Canada: A Coordinated Curriculum for Legal Education* (Montreal: Conceptcom, 1992), pp. I-6 to I-7.

[10] See Stephen Toulmin, ?Ethics and Equity: The Tyranny of Principles?, Law Society of Upper Canada Gazette, vol. 15, no. 3 (September, 1981), p. 240, particularly at p. 244; Postema, *ibid.*, p. 310; Reed Elizabeth Loder, ?Tighter Rules of Professional Conduct: Saltwater for Thirst? (1987-88) 1 Geo. J. Legal Ethics 311 at 333; and R.D. Gibbons, Review of *Professional Conduct for Canadian Lawyers* by B.G. Smith (1990) 69 Can. Bar R. 385 at 387.

[11] See Harlan Fiske Stone, "The Public Influence of the Bar" (1934-35) 48 Harvard L.R. 1 at 10; Gibbons, *ibid.*, p. 387.

interest groups, lawyers who rub shoulders with influential politicians and sit in on behalf of wealthy corporations at drafting sessions of legislative committees, and lawyers who draft wills, administer estates, and convey property in county towns. The legal profession today is much more pluralistic and heterogenous than ever before.[12]

Indeed, we no longer have a single, unified, legal profession; we have many different subprofessions.[13] For this reason, this text is organized in such a way that the ethical problems of lawyers practising in particular fields, in non-traditional ways, and for non-traditional clients, are dealt with separately. The considerations relevant to whether lawyers have conflicts of interest that may be waived by informed client consent are different if the lawyers are negotiating partnership agreements rather than litigating partnership disputes. They are different again if the lawyers are leaving employment with government agencies to resume private practice in related fields, or if they are acting in class actions for clients whom they have never met. The conflict of interest problems of criminal defence lawyers who may have to cross-examine former clients are different from those of developers' lawyers who have invested in their clients' projects.

The text is divided into four parts. The first part deals with ethical problems primarily of interest to lawyers who practise before courts and tribunals (though chapters 1, 3 and 8, which deal with the public image of lawyers, confidentiality, and civility respectively are relevant also to lawyers who have not donned their gowns since the day they were called to the bar); the second part deals with such access to justice issues as legal aid, advertising, solicitation, contingency fees, and relations with the media; the third part deals with issues primarily of interest to lawyers who practise in fields that do not usually take them to court (though, again, chapters 14, 15, and 16, which deal with counselling, negotiating, and mediating respectively are relevant to all lawyers); and the final part deals with the regulation of the profession. Separate chapters on conflicts of interest are included in the first and third parts, and the particular conflict of interest problems encountered by lawyers practising in the fields of criminal defence, mediation, real estate, estates, corporate law, and in government service are addressed in chapters 7, 16, 17, 18, 20, and 21 respectively.

It does not follow from the proposition that lawyers' ethics should be considered more broadly than has traditionally been the case in Canada that rules of professional conduct should be neglected in a study of lawyers' ethics. The widespread adoption by law societies of rules of professional conduct is one of the most important developments in the field in the last quarter century. Relevant rules of professional conduct are reviewed and discussed.

All common law Canadian jurisdictions have adopted rules of professional conduct that are based, with some variations, on the Federation of Law Societies' *Model Code of Professional Conduct*. In this text, provisions of the *Model Code* have been cited in footnotes where relevant (abbreviated as "FLSC Code"), along with the rules of law societies that vary FLSC Code provisions (abbreviated as "B.C. Rule", "Alta. Rule", etc.).

This text makes much more extensive use of American materials than is customary. In the United States the ethics of lawyers has become a subject of

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[12] See Charles Wolfram, *Modern Legal Ethics* (St. Paul, Minnesota: West, 1986), pp. 147-148; and Geoffrey C. Hazard, Jr., "Has the Practice the Common Identity to Create a Program of Development?", National Law Journal (November 9, 1992), pp. 15-16.

[13] See H.W. Arthurs, "Law, Society and The Law Society", a paper delivered to the Law Society of Upper Canada's Strategic Planning Conference, September 25, 1992, published in Osgoode Hall Law School *Continuum*, vol. 19, no. 1, p. 26 at 26-27 (1993).

intense interest during the last 50 years. In his 1975 book *Lawyers' Ethics in an Adversary System*[14] and in his earlier articles on which it was based[15] Monroe Freedman argued that the duties of loyalty and confidentiality owed to clients in the adversary system may require criminal defence counsel to discredit witnesses they know to be telling the truth, to give clients legal advice when they have reason to believe that the knowledge imparted will tempt their clients to commit perjury, and even in some circumstances to lead testimony they know is false.

Not all of Freedman's controversial conclusions have been widely accepted, but his influence has nevertheless been considerable. He emphasized, perhaps for the first time, the fundamental incompatibility of the various professional duties that are enshrined in rules of professional conduct, and he drew some stark conclusions.[16]

Freedman stimulated debate about the profession's ethics primarily among lawyers, law teachers and law students. At about the same time, Watergate galvanized opinion about the ethics of lawyers among the American public generally. Of the 20 or more central figures in the Watergate scandal all but three[17] were lawyers. Many served jail terms for burglary, obstruction of justice, or perjury, and were disbarred. (Richard Nixon resigned from the California bar under threat of disbarment). The resulting public disdain for the Watergate lawyers' contempt for the law and for ethical standards was tempered somewhat by admiration for the special prosecutors and judges who exposed their corruption.[18]

Americans' heightened interest in the ethics of lawyers has found expression in a rich body of literature. Charles Wolfram's *Modern Legal Ethics*[19] is probably the most comprehensive and useful treatise on the subject ever published anywhere, and is only one of many published over the last 25 years. The Georgetown Journal of Legal Ethics, which has been published quarterly since 1987, is devoted exclusively to issues of the ethics of lawyers. Geoffrey C. Hazard, Jr., a professor at Yale Law School and a prolific writer in the field, and Lawrence A. Dubin, a professor at the University of Detroit School of Law, alternate as bi-weekly columnists on ethical issues for the National Law Journal. Philosophical works such as *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics*[20] and *Lawyers and Justice: An Ethical Study*[21] have explored in depth themes and issues that were rarely even identified until the 1980s.

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[14] (New York: Bobbs-Merrill, 1975).

[15] "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" (1966) 64 Michigan L.R. 1469; and "Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course" (1969) 21 Journal of Legal Education 569. See also Monroe H. Freedman, *Understanding Lawyers' Ethics* (New York: Matthew Bender & Co., 1990).

[16] See Luban, *supra*, note 9, p. 10.

[17] H.R. Haldeman, Jeb Stuart Magruder and Dwight Chapin were not lawyers.

[18] See Martin Garbus and Joel Seligman, "Sanctions and Disbarment: They Sit in Judgment" in Ralph Nader and Mark Green (eds.), *Verdicts on Lawyers* (New York: Thomas Y. Crowell Co., 1976), p. 47; David Riley, "The Mystique of Lawyers" in the same volume, p. 81; Gerry Spence, *With Justice for None* (New York: Random House, 1989), p. 29; and Daniel Novak, "Watergate's Legacy to the Legal Profession", National Law Journal, May 16, 1994, p. A-19.

[19] *Supra*, note 12.

[20] *Supra*, note 9.

[21] David Luban, *Lawyers and Justice: An Ethical Study* (Princeton, New Jersey: Princeton University Press, 1988).

In Canada, our literature is embarrassingly sparse by comparison.[22] At least to the extent that it is fair to gauge such matters by reference to scholarly and professional works, the Americans in this field are at least a decade ahead of us. I have accordingly swallowed my anti-continentalism and cited American sources liberally.

One of my purposes in writing this text is to try to contribute in some small way to a critical examination by the profession of the reasons for the deterioration of public confidence in lawyers. I hope that it will be read as well as referred to. It will be kept current with supplements annually. Comments, criticisms, and information about developments in the field from across the country would be greatly appreciated.

Gavin MacKenzie
Unionville, Ontario
May 12, 1993

[22] The only full length treatises on the subject are Mark Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright and Sons, 1957) and Beverley G. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Butterworths, 1989). Articles in the field have appeared in publications that include the Law Society of British Columbia's The Advocate and the Law Society of Upper Canada's Gazette.

Introduction to the 25th Anniversary Edition

In 1990 I decided to write a book on legal ethics. It was a subject I had not studied in law school — I remembered that a seminar on legal ethics had been offered then, in the early- to mid-1970s, but I didn't take it, and neither did anyone I knew. But in my first dozen or so years at the bar, a significant part of my practice included representing lawyers in discipline proceedings, and I had developed an interest in the subject. No one in Canada had written a book on legal ethics since Mark Orkin in 1957, and I thought lawyers and law students might find a contemporary text useful.

It took me three years of evenings, weekends, and holidays — a year of research, a year of writing, and a year of revising. I wrote it in the library of our young family's home in the country north of Unionville, where I enjoyed the frequent interruptions of our children. The youngest, Brooke, was two the year I started work on the project.

It quickly became apparent to me that the Americans were years ahead of us in their thinking and writing about legal ethics. Monroe Freedman's 1975 book *Lawyers' Ethics in an Adversary System* opened up a whole new way of thinking about the subject. David Luban, Geoffrey Hazard, and Deborah Rhode were among the leading scholars who wrote thoughtfully about issues that had rarely been discussed before the 1980s. Charles Wolfram's comprehensive 1986 treatise *Modern Legal Ethics* became the model for the standard Canadian book I wanted to write. I wrote in the Introduction to the original edition of *Lawyers and Ethics* that in Canada "our literature is embarrassingly sparse by comparison."

That is no longer true. We now have our own rich academic scholarship on legal ethics. The many Canadian legal scholars who have led the way in creating it include Adam Dodek, Alice Woolley, Brent Cotter, Allan Hutchinson, Richard Devlin, Paul Paton, Randall Graham, Stephen Pitel, and Malcolm Mercer. Wolfram, Freedman, Luban, and Hazard were all law professors and, with the exception of Malcolm Mercer, so are all these Canadian scholars.

I was, and am, a practitioner, not a legal academic, and my book was intended for lawyers working in the trenches and students who aspired to join us. It consisted of more description than prescription, though I did call upon lawyers to re-examine their role in society at a time when the business aspects of practice demanded increasing attention. In some chapters I advocated for reform. I envisioned the book as a hardcover volume I would place on a shelf and refer to from time to time until it became obsolete. My publisher decided that it should be published in two editions, a practitioners' edition that would be supplemented with reference to rule changes and new cases at least annually, as well as a softcover students' edition, which could be updated in future editions if there was sufficient interest in the work (the 6th student edition is being published this year).

One evening a year or two after the original edition of the book was published, I had it in my hands at home as I looked up a passage I hoped to use in a case I was working on. Brooke, who must have been about six at the time, was surprised. "You're reading your own book," she said, in a surprised tone of voice. "Yes," I replied, and I explained why. "But you *wrote* it," she said. "You already know how it will turn out."

But I didn't. I had my doubts whether the rate of change in the field would sustain a pace of a supplement every year, but my skepticism (at least in this

instance) was unjustified. In the first supplement I made changes to the Introduction and to 21 of the book's 27 chapters. I added sections on Discrimination and the Representation of Clients Under a Disability. Over the years I added sections on the Inadvertent Disclosure of Confidential Information, the Innocence at Stake Exception to the duty of confidentiality, Communicating with Represented Parties and Witnesses Prior to Trial, Dealing with Self-Represented Parties, Duties Arising from Responding to Requests for Proposals and Inquiries from Potential Clients, Conflict Management, Remedies for Breaches of Conflict Rules, Interim Suspensions and Costs in Conduct Proceedings, and Duties upon Leaving a Law Firm. Chapter 12 in the original edition consisted mostly of an argument that contingent fees should be allowed in Ontario, as they were in every other jurisdiction in North America; it became irrelevant when the Government of Ontario agreed. The case law evolved in many ways. The Federation of Law Societies' *Model Code of Professional Conduct* supplanted the Canadian Bar Association's *Code* as the basis for most provincial and territorial law societies' rules of professional conduct. The language changed: Chinese walls became ethical screens; the organization that had quaintly been calling itself the Law Society of Upper Canada these last 221 years decided to burst into the 19th century and become the Law Society of Ontario.

Brooke became a lawyer in 2013. She has authored many scholarly articles and an LL.M. thesis, and is the 2017-2018 recipient of the OBA Foundation Chief Justice of Ontario Fellowship in Legal Ethics and Professionalism Studies. She is much more of a legal scholar than is her father. She and I co-author a column titled "Conduct Becoming" in the CBA's *National* magazine. She is a practitioner, too. After a few years practising litigation at McCarthy Tetrault, she and I started our own boutique litigation firm concentrating on civil appeals and professional responsibility work. Next year she will become the co-author of *Lawyers and Ethics*. So no, Brooke, you never know how it will turn out.

Gavin MacKenzie
Toronto, Ontario
April 2018

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be explained by factors other than character, and its significance can be mitigated by remorse."[40]

A series of decisions of the Law Society Tribunal in 2020 illustrate that the seriousness of prior misconduct is a less important consideration than evidence of rehabilitation. In one case, an applicant was denied a licence because of a continuing pattern of personal attacks, threats, and attempts to blame others for his own actions, which included disruptive and inappropriate conduct in law school and while articling.[41] A second applicant was denied licensing by a majority of the Hearing Division as a result of her lack of candour in disclosing conduct that had resulted in her being censured twice while she served as a judge in Pakistan.[42] On the other hand, an applicant who had been convicted of manslaughter at age 19 while a member of a small-time gang was permitted to be licensed 15 years after his conviction and 10 years after his release on full parole, where he had fully accepted responsibility for the choices he had made.[43] Similarly, an applicant who as a young adult had provided material support to a terrorist organization over a two-year period was permitted to be licensed as he had grown and learned since his serious misconduct.[44]

In a 2024 decision[44.1] the Ontario Divisional Court upheld a decision of the Law Society Tribunal Appeal Division, which upheld a decision of the Law Society Tribunal Hearing Division, granting an application for licensing by an applicant who had sexually abused young children, including his own child, ten years earlier. The Tribunal accepted an undertaking by the applicant that he would not meet with children unsupervised and added this term as a condition of his licence to practice. The Tribunal accepted evidence at a six-day hearing that though the applicant had minimized his behaviour he had ultimately been open and diligent in acknowledging his past misconduct. The hearing panel found that the applicant was currently of good character. The Appeal Division and the Divisional Court held that the hearing panel's decision was reasonable.

The Tribunal has repeatedly stated that it may be appropriate to have a degree of humility about its ability to accurately ascertain the absence of good character.[45]

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[40]*Polanski v. Law Society of Ontario*, 2020 ONLSTH 115 at paragraph 172.

[41]*Polanski v. Law Society of Ontario*, 2020 ONLSTH 115.

[42]*Sohail v. Law Society of Ontario*, 2020 ONLSTH 38.

[43]*George v. Law Society of Ontario*, 2020 ONLSTH 23.

[44]*Sriskandarajah v. Law Society of Ontario*, 2020 ONLSTH 122.

[44.1]*Law Society of Ontario v. A.A.*, 2024 ONSC 5971 (Ont. Div. Ct.).

[45]*Solomon v. Law Society of Upper Canada*, 2013 ONLSHP 112 (L.S.U.C. Hearing Panel) at paras. 17-18; *Law Society of Upper Canada v. Libman*, 2015 ONLSTH 42 (Ont. L.S.T.H.) at para. 10.

Time will tell whether an argument can successfully be marshalled that the good character requirement is unconstitutionally vague.[46] In the meantime, the mischief of the requirement's unpredictability consists less in its effect on applicants who are denied admission after a hearing than in its effect on potential lawyers who may be deterred from pursing a career in the law because of uncertainty over their prospects of admission. Even in the United States only about 50 applicants a year—.2 per cent of all applicants—are denied admission.[47] There are no data on the deterrent effect of the good character requirement. It is clear, nonetheless, that subjectivity and inconsistency in the application of the requirement make predictions almost impossible. It is fair to surmise that risk-averse students and others are dissuaded from attending law school for fear of exclusion, though the likelihood of rejection is in fact slight. Others may well overestimate the likelihood of their persuading an admissions committee of their rehabilitation.[48]

Predictions are almost as impossible for law societies, who can be—and are—of little assistance to inquiring potential applicants. Both of the Ontario applicants whose cases are discussed in some detail above wrote to the Law Society before or shortly after they began law school to inquire about their prospects for admission in light of their criminal records. Both were told that their records "may, *prima facie*, prevent you being called to the Bar"[49]—whatever that means. Both chose to pursue their legal education in the hope that if they were successful and conducted themselves responsibly over the next few years, they could persuade the Law Society of their rehabilitation. As we have seen, one gained admission and one did not. The unsuccessful applicant could have done nothing more than he did to prove his worthiness—no criticism was made of his post-conviction conduct. One could predict the results of the two cases as accurately by rolling dice.

The arbitrariness of the good character requirement is especially troubling in a profession devoted to the preservation of principles and the protection of the rights of the unpopular.[50] Nor is it clear that the unstated premise underlying the good character requirement—that law societies are capable of predicting future professional misconduct based

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[46]*See Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.); and *R. v. Wyssen (1992)*, 10 O.R. (3d) 193 at 201-203 (Ont. C.A.), *per* Finlayson J.A. (concurring in the result). For a discussion of the applicability of s. 7 of the *Charter of Rights and Freedoms* in professional discipline proceedings see § 26:2. In the United States, the requirement has survived constitutional challenges based on vagueness on the dubious ground that long term usage has given "well-defined contours" to the term: *Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 at 159 (1971). See also *Konigsberg v. State Bar of California*, 353 U.S. 252 (1977).

[47]Deborah L. Rhode, "Moral Character as a Professional Credential" (January 1995) 94 Yale L.J. 491, p. 516.

[48]Deborah L. Rhode, "Moral Character as a Professional Credential" (January 1995) 94 Yale L.J. 491, at pp. 517-518.

[49]See *Re Rizzotto*, reasons of Convocation, September 14, 1992, p. 5.

[50]See Deborah L. Rhode, "Moral Character as a Professional Credential" (January 1995) 94 Yale L.J. 491, at pp. 512, 551-552 and 569-570.

on applicant's prior criminal records—is a valid one. Even highly trained psychologists and psychiatrists have poor records in predicting future deviance based on a small number of isolated prior acts, particularly if the prior acts were committed in dissimilar settings. The difficulty in formulating accurate predictions may be attributable largely to the critical importance of situational pressures in influencing conduct. Character screening has not been shown to be an effective way of identifying applicants likely to engage in professional misconduct in the future.[51]

A comparison of the procedural and substantive requirements in admission and disciplinary proceedings is instructive. In admission hearings the Law Society has the initial burden of demonstrating there is an issue whether the Applicant is of good character, but the burden then shifts to the Applicant to demonstrate on a balance of probabilities that he or she is of good character as of the date of the hearing.[52] The burden is on the Law Society to prove past misconduct that is not admitted.[53] The meaning of "good character" has not been precisely defined, though it is now clear that it is possible for applicants to prove rehabilitation sufficient to be called to the bar regardless of the seriousness of their past offences.[54]

Although the misconduct of lawyers, who owe duties to clients, courts, and their profession, among others, is quite obviously more probative of the future risk that the same lawyers will re-offend than is the misconduct of persons in different situations who owe no such duties, both procedural and substantive requirements imposed by law societies have been consistently more solicitous of lawyers than of applicants for admission.[55] In discipline proceedings the burden of proof is on the law society's counsel, who must prove specific allegations of professional misconduct based on cogent evidence of clear and convincing weight. Although the scope of the term "professional misconduct" is not exhaustively defined by legislation, the guidance provided by rules of professional conduct is virtually always sufficient to obviate debate about whether the alleged misconduct is culpable. The term has a more precise meaning than the amorphous "good character" requirement.

The legitimacy of monitoring post-admission conduct relevant to the

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[51]Deborah L. Rhode, "Moral Character as a Professional Credential" (January 1995) 94 Yale L.J. 491, at pp. 509, 554-560.

[52]*Nsamba v. Law Society of Ontario*, 2020 ONLSTH 122 at paragraph 3.

[53]*Polanski v. Law Society of Ontario*, 2020 ONLSTH 115 at paragraph 178.

[54]See, for example, Evlynne Gilvarry, "Society Enrols Rehabilitated Murderer as Student", Law Society of Upper Canada Gazette, no. 19 (May 22, 1991), p. 4; *and Re Rizzotto*, reasons of Convocation of the Law Society of Upper Canada, September 14, 1992, p. 20. In *Shore v. Law Society of Upper Canada* (2009), 96 O.R. (3d) 450 (Ont. Div. Ct.), an applicant for admission who had destroyed a document that was relevant to a criminal proceeding, and had misled the Crown about the existence of that document, was admitted to the Law Society based on a finding that she had shown remorse and insight into her behaviour and was, at the time of the hearing, of good character.

[55]See Deborah L. Rhode, "Moral Character as a Professional Credential", Yale L.J. 491, at pp. 546-547 (January, 1985).

practice of law cannot be doubted. By way of contrast, it is generally difficult to justify denying to applicants who have been guilty of offences committed at a time when they did not have the duties of lawyers, the opportunity to prove their worthiness. Contraventions of the law by persons duty-bound to uphold it assume an entirely different dimension.[56]

The primary focus of the admission and discipline functions of the governing bodies of self-governing professions should be on conduct directly relevant to the practice of law. Yet the reports are replete with instances in which lawyers who have been guilty of serious misconduct in their capacity as lawyers, and who pose a continuing danger to the public, have been permitted to continue to practise law, while others have been prevented from doing so by reason of conduct that may pose no threat to the public at all. In 1983, in Indiana, a lawyer was suspended from practising for 45 days for habitually neglecting cases, deceiving clients, and withholding clients' funds.[57] In the same year, in the same jurisdiction, a lawyer was disbarred for growing his own marijuana.[58] The state bar at the same time presided over an admission system that concerned itself among other things with "bounced cheques, political commitments, and consensual sexual activity."[59]

Law societies depend primarily on self-reporting to identify applicants who may not meet the good character standard. Good character will be presumed unless the applicant self-reports circumstances that may raise concerns (or the Law Society learns of such circumstances independently). In some jurisdictions applicants are asked whether they have ever been found guilty of a criminal offence; in others they are asked whether other events in their past may call their character into question; in yet others they are asked more specific questions about their family, civil claims brought by or against them, voluntary and involuntary commitments to institutions, diagnoses of mental illness, and whether they have ever been dismissed from their employment for unsatisfactory work.[60] At least some such questions are objectionably intrusive, and are of doubtful value in determining an applicant's fitness to be called to the bar.

In Ontario, applicants must answer 13 questions about such matters as their history of offences and allegations of academic misconduct. Where the answer to any of the questions is affirmative, the applicant must provide full particulars and supporting documents. An applicant who makes a false or misleading representation or declaration on or in connection with an application, by commission or omission, is deemed thereafter not to meet, and not to have met, the requirements for the is-

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[56]Deborah L. Rhode, "Moral Character as a Professional Credential", Yale L.J. 491, at p. 587 (January, 1985).

[57]*Re Holloway*, 452 N.E. 2d 934 (1983).

[58]*Re Moore*, 453 N.E. 2d 971 (1983).

[59]Deborah L. Rhode, "Moral Character as a Professional Credential", Yale L.J. 491, at p. 591.

[60]Deborah L. Rhode, "Moral Character as a Professional Credential", Yale L.J. 491, at pp. 573-576 and 581.

suance of a licence.[61] The Law Society Tribunal has held that this provision should not be interpreted to disqualify an applicant for inadvertent omissions or misstatements, but that a finding that an applicant has deliberately made a misleading or false representation is determinative of the application.[62]

In a 2025 decision[62.1] the Court of Appeal for Ontario reversed a decision of the Divisional Court[62.2]holding that applicants for licences were denied procedural fairness by the Law Society's refusal to hold an oral hearing before denying their applications on good character grounds. The applicants for licensing had obtained answer sheets that duplicated examination questions and provided answers.

The Law Society's Director of Licensing wrote to the applicants to say that the evidence supported the conclusion that they had engaged in prohibited actions, and that the appropriate administrative outcome was to deem void both the exam results and the applicants' registration in the licensing process. The Director of Licensing also wrote that the applicants could re-register for licensing but only after one-year; that if they chose to re-register in Ontario or any other jurisdiction, they must disclose that they had been sanctioned by a regulatory body; that the Law Society might conduct a further investigation into their good character; and that the Law Society would share the Director's decision with other Canadian and territorial law societies.

The applicants were told they could request a review of the Licensing Director's decision by the Law Society's Executive Director of Professional Development and Competence, and they did so. The Executive Director found the decision reasonable and pointed out that the applicants had been given opportunities to make written submissions.

The applicants sought judicial review of the decision of the Licensing Director. The Divisional Court found the decision to void the applicants' examination results to be reasonable but that the Law Society had breached the applicants' rights to procedural fairness by voiding their registrations in the licensing process without holding a hearing. The Court relied upon a provision in the *Law Society Act* that requires a hearing to be held before an application is refused because the applicant is not of good character and pointed out that the Licensing Director's decision imposed on the applicants a permanent stain on their reputations. The Law Society had effectively refused to licence the applicants because due to concerns about their good character without holding a hearing and making a finding that the applicants had engaged in intentional misconduct.

The Court of Appeal allowed the Law Society's appeal, and held that the

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[61]By-law 4 under *Law Society Act*, section 8(2).

[62]*Levinson v. Law Society of Upper Canada*, 2009 ONLSHP 98 at pages 92-94; *Sohail v. Law Society of Ontario*, 2020 0NLSTH 38; *Polanski v. Law Society of Ontario*, 2020 ONLSTH 115.

[62.1]*Afolabi v. Law Society of Ontario*, 2025 ONCA 257 (Ont. C.A.).

[62.2]*Mirza et al. v. Law Society of Ontario,* 2023 ONSC 6727 (Ont. Div. Ct.).

Licensing Director's decision was administrative, rather than quasi-judicial. Granting the applicants a right to make written representations was, in the Court of Appeal's view, sufficient to satisfy the applicants' rights to procedural fairness. The Court of Appeal relied on the statutory scheme of the legislation and the application of a list of non-exhaustive factors set out in the leading decision of the Supreme Court of Canada[62.3] on when procedural fairness requires an oral hearing.

In a 2022 decision,[63] the Ontario Law Society Tribunal (Appeal Division), by a three to two majority, held that the Tribunal has jurisdiction to hold a licensing hearing after a licence has been granted. In that case, a paralegal who had had been practising for 11 years had failed to disclose on his licensing application that he had previously been disciplined as a realtor. The majority of the Appeal Division held that his licensing application should be dismissed retroactively. The paralegal was free, the majority held, to bring a fresh licensing application, in which he could rely on evidence of his unblemished 11 years of practice in support of his position that he is currently of good character.

§ 23:4 Costs in Licensing Applications

Two competing views of whether an unsuccessful applicant for licensing should be required to pay costs are reflected in the authorities. The first is that the profession as a whole should not be required to bear the costs of an unsuccessful application for licensing.[1] The second is that the tribunal must take care not to penalize in costs the conduct that led to the dismissal of the application, and that costs should not be awarded against an applicant where there has been a possibility of success and the applicant has made genuine attempts to co-operate with the Law Society.[2]

In a 2020 decision,[3] the Law Society Tribunal rejected as a general principle the proposition that the profession as a whole should not bear the costs of an unsuccessful application. The Tribunal differentiated such cases from conduct applications, in which it is generally accepted that a lawyer found guilty of misconduct should bear the costs occasioned by that misconduct.[4] The Tribunal also differentiated between "new" ap-

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[62.3] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.).

[63] *Amendola v. Law Society of Ontario*, 2022 ONLSTA 3 (L.S. Trib. App. Div.).

[Section 23:4]

[1] *Bhopaul v. Law Society of Upper Canada*, 2011 ONLSHP 35; *Zoraik v. Law Society of Ontario*, 2018 ONLSTH 166 at paragraph 8; *Taylor v. Law Society of Ontario*, 2019 ONLSTH 66 at paragraph 5; *Chopra v. Law Society of Ontario*, 2019 ONLSTH 124.

[2] See *Lewin v. Law Society of Upper Canada*, 2009 ONLSTH 62; *Pascar v. Law Society of Upper Canada*, 2014 ONLSTH 177; *Santibanez v. Law Society of Upper Canada*, 2016 ONLSTH 70; and *Ikhuiwu v. Law Society of Upper Canada*, 2018 ONLSTH 49.

[3] *Polanski v. Law Society of Ontario*, 2020 ONLSTH 140.

[4] At paragraph 18.

plicants and applicants seeking relicensing after their prior licence has been revoked; costs will be more readily awarded in the latter situation.[5]

The Tribunal considered the following factors:

- that the applicant was not successful;
- whether the application had a reasonable prospect of succeeding;
- the complexity of the proceeding and the duration of the hearing;
- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- whether any step in the proceeding was improper, vexatious or unnecessary, or taken through mistake or excessive caution;
- the importance of the application for, and the impact of the dismissal on, the unsuccessful applicant;
- the ability of the unsuccessful licensing applicant to pay a costs award;
- reasonable expectations of the parties;
- the costs awarded in other comparable cases;
- the principle that a costs award should not used to penalize an unsuccessful applicant for prior misconduct found in the conduct application;
- the principle of proportionality; and
- the circumstances of the proceeding.[6]

§ 23:5 Alternatives to the Good Character Requirement

Should law societies simply abandon the requirement that applicants for admission to the bar must be of good character? An affirmative answer is tempting. It is unlikely that the composition of the bar would be altered significantly if the good character requirement were eliminated. Few applicants are excluded on character grounds now, though it is impossible to tell how many are deterred from even undertaking a legal education for fear of being excluded after years of study at considerable expense. The considerable resources now allocated to conjectural predictions of professional misconduct could be reallocated to the detection, deterrence, and redressing of actual professional misconduct.[1] The United States Supreme Court observed in a 1971 case[2] that "wise policy", if not constitutional prescription, might dictate greater

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[5]At paragraph 25.

[6]At paragraph 28, following *Law Society of Ontario v. Kamal*, 2019 ONLSTA 20.

[Section 23:5]

[1]Deborah L. Rhode, "Moral Character as a Professional Credential", Yale L.J. 491, at p. 590. Alice Woolley, "Tending the Bar: The Good Character Requirement for Law Society Admission" (2007), 30 Dal. L.J. 27; and Alice Woolley, "Can Good Character Be Made Better? Assessing the Federation of Law Societies' Proposed Reform of the Good Character Requirement for Law Society Admission", electronic copy available at ssm.com/abstract=2262863.

[2]*Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971).

reliance on post-admission sanctions rather than preliminary screening as a means of policing the bar.[3]

Nevertheless, as we have seen, the purpose of the good character requirement is commendable. In some cases, moreover, regulatory authorities *are* able to identify with reasonable certainty applicants who will likely pose a threat to the public if they are admitted to the bar. Public confidence in the profession's ability to govern itself may legitimately be called into question if, for instance, a law society were to admit an applicant who had recently been convicted of an offence involving dishonesty that was committed while the applicant was employed in a position of trust comparable to that of a lawyer.

If the screening process were abandoned by law societies altogether, clients would be required to do their own investigating.[4] The vast majority of clients would have no idea how to go about investigating whether a lawyer has a criminal record. Even if law societies made such information accessible to potential clients, it is likely that few clients would make use of the service. Only a small proportion of potential clients inquire now about lawyers' disciplinary records, though such records are public information in most jurisdictions.

A preferable alternative would be to disqualify for a specified period—say five years after the completion of service of whatever sentence is imposed—all applicants who have been convicted of one or more criminal offences involving dishonesty or violence. If applicants were convicted of no further offences during the specified period, they would be entitled to be admitted.[5] By this means the unfairness and uncertainty of the good character requirement would be eliminated, without public confidence in the profession's ability to govern itself being impaired.[6]

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[3]*Law Students Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971), p. 167; for an interesting discussion of the possibility of requiring applicants to pass an integrity test as a condition of admission, see Marvin J. Huberman, "*Integrity Testing: Is it Time?*" (1997), 76 C.B.R. 47, in which the author concludes that improved teaching of professional ethics and standards and improved enforcement of professional conduct standards would be preferable alternatives.

[4]Deborah L. Rhode, "Moral Character as a Professional Credential", Yale L.J. 491, at p. 590.

[5]See Deborah L. Rhode, "Moral Character as a Professional Credential", Yale L.J. 491, at pp. 586-587.

[6]For a helpful review of the considerations that must be taken into account in devising a better system see Brooke MacKenzie, "Is it Time to Abolish (or Reform) the Good Character Requirement?", Slaw.ca, May 21, 2025.

clients and third parties. Little effort is expended in defining or exploring the ethical dimensions of the practice of law.[13]

The dual purposes of codes of professional conduct—though explicitly recognized for the first time in the Model Code—have been apparent from the outset. The original "canons of ethics" were soon invoked to discipline lawyers, and have since been invoked to find lawyers liable for professional negligence—peculiar uses for purely ethical prescriptions.[14] In a 1990 decision,[15] the Supreme Court of Canada held that though rules of professional conduct are not binding on courts, they should nonetheless be considered important statements of public policy that express the collective views of the profession as to the appropriate standards to which lawyers should adhere. In a 2013 decision,[16] an Ontario Superior Court judge granted leave to appeal to the Divisional Court from an order in which a Master purported to find that a lawyer engaged in "sharp practice" contrary to rule 6.03 (3) of the Law Society of Upper Canada's *Rules of Professional Conduct.* The Court held that under the Ontario *Law Society Act* and by-laws made under the authority of that statute, it is a hearing panel constituted by the Law Society that has jurisdiction to make a determination that a lawyer has breached a rule of professional conduct. To make such a finding is beyond a Master's jurisdiction.

In a 2009 decision,[17] the Supreme Court of Canada stated that "there is an important distinction between the rules of professional conduct and the law of negligence. Breach of one does not necessarily involve breach of the other. Conduct may be negligent but not breach rules of professional conduct, and breaching the rules of professional conduct is not necessarily negligence." Rules of professional conduct are of

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[13]See Charles Wolfram, Modern Legal Ethics (St. Paul, Minnesota: West, 1986), pp. 69-70; and David Luban, Lawyers and Justice: An Ethical Study (Princeton, New Jersey: Princeton University Press, 1988), pp. xxvii-xxviii.

[14]See Charles Wolfram, Modern Legal Ethics (St. Paul, Minnesota: West, 1986), p. 69. See also *Enns v. Panju*, [1978] 5 W.W.R. 244 (B.C. S.C.); *Enerchem Shipmanagement Inc. v. "Coastal Canada" (The)* (1988), 83 N.R. 256 (Fed. C.A.); *Major v. Higgins* (1932), 53 Que. K.B. 277 at 283; and John Honsberger, "Legal Rules, Ethical Choices and Professional Conduct", Law Society of Upper Canada Gazette, vol. 21, no. 2 (June, 1987), p. 113.

[15]*MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.); see Words and Phrases for the judicial definitions of "Chinese Wall", "Cone of Silence", "Conflict of Interest", "Mischief", "Possibility of Real Mischief Test", "Probability of Real Mischief Test", "Substantial Relationship Test" from this case. In *Essa (Township) v. Guergis* (1993), 15 O.R. (3d) 573, the Divisional Court held that courts should be reluctant to adopt provisions of the C.B.A. Code in preference to rules of professional conduct duly adopted by law societies in cases in which Code provisions conflict. In *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 (Ont. Gen. Div.), additional reasons (1997), 152 D.L.R. (4th) 102 (Ont. Gen. Div.), the Court emphasized that rules of professional conduct are not exhaustive of either lawyers' professional obligations or the full scope of fiduciary duties as they are defined. See text accompanying notes 18 and 19 to §§ 13:1 et seq.

[16]*Haider Humza Inc. v. Rafiq*, 2013 ONSC 3161.

[17]*Perez v. Galambos*, 2009 SCC 48 (S.C.C.).

importance in determining the extent of duties flowing from a professional relationship, but are not binding on the courts and do not necessarily describe the applicable duty or standard of care in negligence.[18]

In a 2022 decision,[18.1] the Court of Appeal of Alberta overturned a decision whereby a trial judge declined to consider provisions of the Codes of Conduct of Alberta and Saskatchewan in determining whether a lawyer had breached his fiduciary duty to his clients. While not determinative, the Court of Appeal held, Codes of Conduct are relevant statements of policy in determining the existence, scope, and potential breach of the fiduciary duties owed by lawyers to their clients.[18.2] The Court of Appeal also held that expert evidence is admissible to establish that the lawyer was in breach of his obligations under the applicable Codes of Conduct.[18.3]

Similarly, in a 2025 decision of the Ontario Superior Court of Justice,[18.4] the Court rejected a submission that expert evidence about professional standards of conduct as articulated in rules of professional conduct is inadmissible as expert evidence of domestic law. The Court held, rather, that the evidence concerns the standards of practice of lawyers in Ontario, which is an area of expertise outside the regular knowledge of the Court.[18.5]

Canadian rules of professional conduct are patchworks that reflect both purposes referred to above. Some rules are framed in prohibitive language: "A lawyer must not act or continue to act for a client where there is a conflict of interest . . .";[19] "A lawyer must not charge or accept a fee. . .unless it is fair and reasonable and has been disclosed in a timely fashion."[20] Others exhort lawyers to strive for exemplary ethical standards of practice: "A lawyer must encourage public respect for and try to improve the administration of justice";[21] "A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions."[22]

The preface to the 1987 C.B.A. Code makes it clear that no attempt has been made in the Code to define professional misconduct or conduct

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[18] *Perez v. Galambos*, 2009 SCC 48 (S.C.C.), at paragraph 29.

[18.1] *Hudye Inc v. Rosowsky*, 2022 ABCA 279 (Alta. C.A.).

[18.2] At paragraph 36.

[18.3] At paragraphs 34, 37.

[18.4] *Parkin v. The Toronto-Dominion Bank*, 2025 ONSC 1201 (Ont. S.C.J.).

[18.5] At paragraphs 104, 106.

[19] *FLSC Code*, rule 3.4-1.

[20] *FLSC Code*, rule 3.4-1.

[21] *FLSC Code*, rule 5.6-1 and accompanying commentary. See also Stephen E. Sherriff, H. Reginald Watson and Shaun M. Devlin, " 'You Can Run . . . But You Can't Hide': A Guide To Understanding Lawyer Discipline In Ontario", in Franklin Moskoff (ed.), Administrative Tribunals: A Practice Handbook for Legal Counsel (Aurora, Ontario: Canada Law Book, 1989), pp. 117-118; and John Honsberger, "Legal Rules, Ethical Choices and Professional Conduct", Law Society of Upper Canada Gazette, vol. 21, no. 2 (June, 1987), p. 118.

[22] FLSC Code, rule 2.1-2 and accompanying commentary.

unbecoming a barrister and solicitor. Although the Ontario Divisional Court held in a 1985 case[23] that in promulgating rules of professional conduct the Law Society is performing a regulatory function on behalf of the Legislature and government and is therefore vulnerable to scrutiny under the *Charter of Rights and Freedoms*, it would be a mistake to assimilate rules of professional conduct to a statute such as the *Criminal Code*. Not every breach of the rules of professional conduct necessarily amounts to professional misconduct or conduct unbecoming a barrister and solicitor.[24] Conversely, not every act that amounts to professional misconduct is explicitly proscribed by the rules. No rule specifically prohibits the misappropriation of funds held in trust for clients, for example. What constitutes professional misconduct and conduct unbecoming a barrister and solicitor is determined by discipline committees case by case.[25]

Nevertheless, codes of conduct in the United States and Canada have tended to evolve from simple statements of ideals to which members of the profession aspire to mandatory rules designed to be enforced in disciplinary proceedings. This evolutionary process is more complete in the United States. There, as mentioned above, the American Bar Association attempted to serve both ideological and regulatory functions by including in its 1969 Model Code both ethical aspirations and mandatory disciplinary rules. The American Bar Association abandoned this hybrid approach in its 1983 Model Rules, which articulate expected standards of practice in such number and detail that they are more comparable to a regulatory statute than to a traditional code of ethics. The preface to the Model Rules describes what follows as "legal rules", while urging members of the profession to look elsewhere for ethical guidance: "The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." At least one commentator has even suggested that the profession's traditional name for the subject-matter of codes of conduct is obsolete:

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[23]*Klein v. Law Society (Upper Canada)* (1985), 50 O.R. (2d) 118 (Ont. Div. Ct.).

[24]*Fan v. Law Society (British Columbia)* (1977), 77 D.L.R. (3d) 97 (B.C. C.A.). See also *FLSC Code*, rule 3.4-1.

[25]*Stevens v. Law Society of Upper Canada* (1979), 55 O.R. (2d) 405 at 410 (Ont. Div. Ct.). See also Stephen E. Sherriff, H. Reginald Watson and Shaun M. Devlin, " 'You Can Run . . . But You Can't Hide': A Guide To Understanding Lawyer Discipline In Ontario", in Franklin Moskoff (ed.), Administrative Tribunals: A Practice Handbook for Legal Counsel (Aurora, Ontario: Canada Law Book, 1989), pp. 117-118, and § 26:7. The former Alberta rules contained the following guide to its interpretation: "Under the *Legal Profession Act*, the Law Society has broad powers to declare conduct to be deserving of sanction and is not limited to disciplining violations that are expressly or impliedly referred to in this Code. However, the Law Society's primary concern is with conduct that reflects poorly on the profession or that calls into question the suitability of an individual to practise law. Disciplinary assessment of conduct will therefore be based on all facts and circumstances as they existed at the time of the conduct. A trivial or technical breach of this Code without significant consequences is unlikely to be sanctioned. A lawyer's intentions and the wilfulness of conduct are also relevant."

> If we are not talking about right and wrong, but simply what regulatory rules apply, for policy reasons, in particular legal situations, is there any reason to still refer to this branch of legal thought as "ethics"? Will anything be lost if we call it something else, and simply regulate without the moral overtones?[26]

Should Canadian jurisdictions adopt a similar approach? An affirmative answer is tempting, if only because the final step in an evolutionary process seems progressive,[27] if not inevitable. There are, moreover, several cogent reasons for elaborating upon the still quite general admonitions of most current Canadian codes of conduct.

First, some issues of professional responsibility are sufficiently complex that it is impractical to expect individual practitioners to resolve them on the basis of general principles. Guidance from specific rules of professional conduct are a practical necessity for lawyers struggling with conflict of interest problems, for example.

Second, many issues of professional responsibility—conflicts of interest again spring immediately to mind—are often addressed by the courts today, on disqualification motions and in solicitors' negligence actions in the conflict of interest example. It would be dangerously misleading to leave practitioners with the impression that such issues may be resolved on the basis of general principles when the applicable jurisprudence has developed relatively elaborate standards. The courts, moreover, will be less likely to defer to law societies if law societies have not articulated principles with sufficient clarity and detail to enable their members to resolve professional conduct problems consistently and responsibly.[28]

Third, lawyers are accustomed to applying black-letter rules, which are conducive to certainty in the law. The notion of determining a permissible course of conduct on the basis of aspirational ethical considerations seems foreign and equivocal.[29] General ideological principles are of limited use to lawyers in answering practical questions of how they should conduct themselves in specific situations.

Finally, if the only standards articulated in a code of conduct are general, they will have to be elaborated *ex postfacto* in contested disciplinary proceedings. Standards are thus developed incrementally through the adjudication process, case by case, like the common law. By inviting contested proceedings, codes of conduct that contain only general principles increase the strain on the limited resources of discipline committees, which already have ample work to do. More importantly, discipline committees are singularly ill-equipped to develop professional

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[26]Mark H. Aultman, "Cracking Codes" (1994) 7 Geo. J. Legal Ethics 735, 737.

[27]See Nancy J. Moore, "Elaborating Standards of Professional Conduct", a paper delivered to the Law Society of Upper Canada's Strategic Planning Conference, September 25, 1992, p. 10.

[28]Nancy J. Moore, "Elaborating Standards of Professional Conduct", a paper delivered to the Law Society of Upper Canada's Strategic Planning Conference, September 25, 1992, pp. 10-13.

[29]See Reed Elizabeth Loder, "Tighter Rules of Professional Conduct: Saltwater for Thirst" (1987-88) 1 Geo. J. Legal Ethics 311 at pp. 311-13.

standards efficiently. Because the standards are not brought home to the practitioner in advance in the profession's code of conduct, discipline committees are likely to bend over backwards to avoid the unfairness to the practitioner of applying an exacting standard retrospectively. Particularly where both parties lead expert evidence, the less rigorous of two suggested standards is likely to be applied for disciplinary purposes, as a result of the heavy standard of proof that must be discharged by Law Society counsel in discipline proceedings.[30]

There are, nevertheless, several equally cogent reasons for codes of conduct to articulate the profession's ideals and ethical aspirations.

First, the profession over the last few years has undergone a sustained period of disillusionment both among its members and in the eyes of the public. A principal cause of disillusionment is an overemphasis by lawyers on the business dimension of the practice of law, and a corresponding belief shared by many members of the public that the profession as a whole is self-interested. Codes of ethics have traditionally

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[30]I am indebted to Mary Eberts of the Ontario Bar, who developed this theme most effectively in an unpublished speech to a regional conference of the Council on Licensure, Enforcement, and Regulation in Toronto on April 28, 1994.

§ 26:23 Incapacity Proceedings

In Ontario, if the law society has reason to believe that one of its members may be incapable of practising law because of physical or mental illness, including addiction to alcohol or drugs, or any other cause. The Law Society may apply to the Hearing Division of the Law Society Tribunal for a determination of whether the lawyer is incapacitated.[1] Such hearings are not discipline proceedings, though on some occasions Convocation has authorized a discipline hearing panel to concurrently conduct a capacity hearing and hear a complaint of professional misconduct or conduct unbecoming a barrister and solicitor.

Whether or not a capacity hearing is held concurrently with a discipline hearing, it must be conducted in accordance with the principles of natural justice. A member is entitled to notice of the evidence to be introduced, to be represented by counsel, to cross-examine witnesses, and to be heard by an impartial panel.

The Hearing Division may order the lawyers to be examined by one or more physicians or psychologists. The lawyer must answer the questions of the examining physicians or psychologists that are relevant to the examinations and the answers given are admissible at the hearing.[2]

If the committee finds that a lawyer is incapable of practising, Convocation will usually suspend the lawyer's rights and privileges for as long as the incapacity exists. In some cases the lawyer's rights may be limited rather than suspended; for example, the lawyer may be restricted to practising under the supervision of another lawyer.[3]

§ 26:24 Readmission

A former lawyer who has been disbarred or given permission to resign may apply to be readmitted.[1] As the Alberta Court of Appeal pointed out in a 1988 case, "[t]he removal of a lawyer form the rolls of the Society is not 'a life sentence'."[2] Applications for relicensing in Ontario are heard by a three-adjudicator panel of the Hearing Division of the Law Society Tribunal.

The considerations that adjudicators must weigh are as follows:

[Section 26:23]

[1]*Law Society Act*, R.S.O. 1990, c. L.8, ss. 37 and 38.

[2]*Law Society Act*, R.S.O. 1990, c. L.8, s. 39.

[3]Other permissible orders are set out in subsection 40(1) of the *Law Society Act*, R.S.O. 1990, c. L.8. See Daniel P. Iggers and John P. Twohig, "The Disciplinary Process of the Law Society of Upper Canada" (1987) 8 Advocates' Quarterly 1 at 8-9; and Stephen E. Sherriff, H. Reginald Watson, and Shaun M. Devlin, " 'You Can Run . . . But You Can't Hide': A Guide to Understanding Lawyer Discipline in Ontario" in Franklin Moskoff (ed.), Administrative Tribunals: A Practice Handbook for Legal Counsel (Aurora, Ontario: Canada Law Book Inc., 1989), p. 115 at 139.

[Section 26:24]

[1]*Law Society Act*, R.S.O. 1990, c. L.8, as amended, s. 27; see also s. 49.42.

[2]*Haunholter v. Law Society (Alberta)* (1988), 88 A.R. 313 at 316 (Alta. C.A.).

(i) The nature and duration of the misconduct.
(ii) Whether the applicant is remorseful.
(iii) What rehabilative efforts, if any, have been taken and the success of those efforts.
(iv) The applicants' conduct since the proven misconduct.
(v) The passage of time since the misconduct.[3]

The weight to be attached to each of these factors will depend on the circumstances of the particular case. The factors will not all be of equal weight in every case.[4]

In a 2000 decision a Law Society of Ontario hearing panel wrote as follows:

"The relevant test is not whether there is too great a risk of future abuse by the applicant of the public trust, but whether the applicant has established his good character at the time of the hearing on a balance of probabilities. The test does not require perfection or certainty. The applicant need not provide a warranty or assurance that he will never again breach the public trust. The issue is his character today, not the risk of reoffending."[5]

In a 1997 case a hearing panel emphasized the importance of the legal profession recognizing rehabilitation by allowing re-licensing, but only in cases in which there is independent evidence that claimed rehabilitation is genuine:

"In our view, the legal profession of all professions has a special responsibility to recognize cases of true rehabilitation. At the same time, however, we must bear in mind that rehabilitation will be claimed by virtually all applicants for readmission, and we must look to independent corroborating evidence before being satisfied that professed rehabilitation is genuine." [6]

In a 2020 decision, an Ontario Law Society Tribunal hearing panel wrote that remorse requires "gaining significant insight". [7] In a 2015 decision an Ontario hearing panel wrote that: "The real test of remorse is a willingness to face one's past behaviour, one's demons, to be totally honest with oneself and take appropriate remedial action."[8]

The privilege of being a lawyer may be regained where the misconduct for which the lawyer was disbarred was committed as a result of a medi-

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[3]*Armstrong v. Law Society of Upper Canada*, 2009 ONLSHP 29 (L.S.U.C. Hearing Panel) at paragraph 29.

[4]*Blackburn v. Law Society of Upper Canada*, 2010 ONLSHP 112 at paragraphs 49 and 51 .

[5]*Re Preya*, report to Convocation dated January 27, 1997, at page 21.

[6]*Re Weisman*, report to Convocation dated January 27, 1997, at page 21.

[7]*George v. Law Society* of Ontario, 2020 ONLSTH 23 .

[8]*T (S. A.) v. Law Society of Ontario*, 2015 ONLSTH 22 at paragraph 97.

cal or psychiatric disorder that is very unlikely to recur because the disorder has been successfully treated.[9]

An earlier version of these onerous stipulations were found to have

[9]*Apostolopoulos v. Law Society of Upper Canada*, 2012 ONLSHP 133.

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