An Ethics Primer for Criminal Lawyers

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Criminal Law Boot Camp

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Ethical practice in criminal litigation is subject to constant temptation and difficult to enforce, but essential to the administration of justice. Bending the rules to win a case, please the client, increase the lawyer's profile, improve the retainer, achieve promotion, better an irritating adversary, or to achieve what the lawyer believes is the correct result, is prohibited. It not only ruins the lawyer's reputation, it diminishes the integrity of the system itself. It will also ruin any chance for the criminal lawyer to enjoy his or her career.

Unethical and unprofessional conduct in criminal practice can be observed every day, unfortunately, granted much of it of the less serious kind. The public's perception of the defence lawyer as a dishonest mouthpiece for a criminal is very troubling and wrong, but sometimes lawyers are their own worst enemies. You will not see good counsel trashing the judge, prosecutor or police to their client or their client's family, but you do see and hear this outside courtrooms frequently. Resolve never to do this.

The Code of Conduct applies equally to all lawyers. The overarching duty is the duty to be honest and to act at all times with integrity. This paper simply looks at some of the common ethical challenges likely to face the criminal lawyer.

1. ETHICAL RULE NUMBER 1

Upon admission to the bar, lawyers in Alberta swear the following oath:

> That I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, her heirs and successors according to the law.
>
> That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability. I will not seek to destroy anyone's property. I will not promote suits upon frivolous pretences. I will not pervert the law to favor or prejudice anyone, but in all things will conduct myself truly and with integrity. I will uphold and maintain the Sovereign's interest and that of my fellow citizens according to the law in force in Alberta.

The Preface to the *Code of Professional Conduct* provides insight as to how the ethical obligations of lawyers in Alberta will be assessed:

> Disciplinary assessment of a lawyer's conduct will be based on all facts and circumstances as they existed at the time of the conduct, including the willfulness and seriousness of the conduct, the existence of previous violations and any

> mitigating factors. A lawyer may seek an opinion from the Law Society with respect to a proposed course of conduct which, if followed, will generally protect the lawyer against subsequent disciplinary action…
>
> … The willingness and determination of the profession to achieve widespread compliance with this Code is a more powerful and fundamental enforcement mechanism than the imposition of sanctions by the Law Society. A lawyer must therefore be vigilant with respect to the lawyer's own behaviour as well as that of colleagues. However, it is inconsistent with the spirit of this Code to use any of its provisions as an instrument of harassment or as a procedural weapon in the absence of a genuine concern respecting the interests of a client, the profession or the public.

In ***R. v. Neil*, 168 C.C.C. (3d) 321 (S.C.C.)** at para.14, Binnie J. observed that:

> …If a litigant could achieve an undeserved tactical advantage over the opposing party by bringing a disqualification motion or seeking other 'ethical' relief using 'the integrity of the administration of justice' merely as a flag of convenience, fairness of the process would be undermined…

The interpretation provisions of the Code indicate that the conduct of a lawyer is "governed by the Code in its entirety rather than by any part in isolation" and further indicates that, where it appears that one ethical obligation may conflict with another:

> … Examining the applicable provisions of the Code and analyzing how various duties and obligations interact should resolve any apparent conflict. The duty of zealous representation, for example, is seen to be subject to law and professional ethics and does not require a lawyer to follow the client's instructions regardless of circumstance.

Importantly, in assessing a lawyer's conduct, the interpretation provisions of the Code also indicate that:

> A trivial or technical breach of this Code without significant consequences is unlikely to be sanctioned. A lawyer's intentions and the willfulness of conduct are also relevant (see paragraph (c)).

The *Alberta Code of Conduct*, Chapter 10 begins with the following Statement of Principle:

> "When acting as an advocate, a lawyer has a duty to advance a client's cause resolutely and to the best of the lawyer's ability, subject to limitations imposed by law or professional ethics."

The *Code of Conduct* C. 10, r. 4 provides that a lawyer shall not personally advise a client to threaten to lay criminal or quasi-criminal charges or threaten to make a complaint against a lawyer to the Law Society for the collateral purpose of enforcing the payment of a civil claim or securing any other civil advantage. The relevant commentary includes the following:

> ... However, it is improper to threaten another person with criminal, quasi criminal charges or Law Society complaints or promise that charges or complaints will be withdrawn, in an attempt to gain a financial or other benefit for the client.

Obviously, these same principles would be applicable to criminal practice.

C. 10, Commentary G. 2 provides as follows:

> The exclusive right of lawyers to speak for another citizen before a body that wil adjudicate that person's legal rights and obligations creates corresponding **duties not only to the <u>client</u>, but to opposing <u>parties</u>, the <u>Court</u>, <u>others involved in the litigation process</u> and <u>society</u> at large.** The duty to zealously represent the client is therefore not unqualified. Lawyers must actively participate in safeguarding the fairness, integrity and propriety of judicial proceedings, including efforts to govern the behaviour of clients and witnesses. (emphasis added)

2. DISCLOSURE

The requirement of full and timely disclosure by the Crown may well be the single most important change in modern criminal practice. It carries with it serious obligations on counsel from both sides and requires a high level of trust between adversaries. It has also led to an increasing level of reckless personal attacks by counsel on both sides on the integrity of each other and the police. The latter is to be deplored. Deliberate improper conduct by lawyers or police in the handling of disclosure is rare, thankfully. It should not be the lawyer's first allegation, and it should never be made without a foundation.

In ***R. v. Stinchcombe*** **[1991] S.C.J. No. 83 (S.C.C.),** Sopinka J. indicated, at para. 20, that the Crown, when making determinations as to the relevance of information to be disclosed need not produce what is clearly irrelevant, but they must "err on the side of inclusion". Transgressions with regard to that duty constitute "a very serious breach of legal ethics": see para. 20. On the