

---

# PROFESSIONAL RESPONSIBILITY – STUDY GUIDE

---

## TABLE OF CONTENTS

---

---

<b>A. The Legal Profession: Lawyers in Society and a Society of Lawyers.....</b>	<b>3</b>
<b>1. Professions and Professionalism: The Profession of Law and Law as a Profession .....</b>	<b>3</b>
Farrow, “Sustainable Professionalism” .....	3
Casebook, Chapter 1: Introduction to Legal Ethics .....	5
Model Code (Overview) .....	9
<b>2. Regulation of Lawyers and Regulation of the Legal Profession .....</b>	<b>9</b>
Casebook, Chapter 2: The Legal Profession and Lawyer Regulation in Canada.....	9
Casebook, Chapter 3(C): Competence, Quality of Service and Candour .....	14
Casebook, Chapter 13: Issues in Regulation .....	16
Law Society of British Columbia v. Trinity Western University, 2018 SCC 32 .....	19
<b>B. Ethics, Lawyering and Professional Regulation .....</b>	<b>20</b>
<b>1. The Lawyer-Client Relationship .....</b>	<b>20</b>
Casebook, Chapter 3: The Lawyer-Client Relationship .....	20
<b>2. The Preservation of Client Confidences .....</b>	<b>24</b>
Casebook, Chapter 4: The Lawyer’s Duty to Preserve Client Confidences .....	24
<b>3. Conflicts of Interest .....</b>	<b>29</b>
Casebook, Chapter 5: The Duty of Loyalty and Conflicts of Interest .....	30
<b>4. The Adversary System and Lawyers as Advocates.....</b>	<b>34</b>
Casebook, Chapter 6: Ethics in Advocacy .....	34
Blank v. Canada (Minister of Justice), 2006 SCC 39 .....	39
Groia v. Law Society of Upper Canada, 2018 SCC 27 .....	39
<b>C. Some Specific Practice Areas .....</b>	<b>40</b>
<b>1. Ethics and Dispute Resolution: Counselling and Negotiation.....</b>	<b>40</b>
Casebook, Chapter 7: Counselling and Negotiation .....	40
<b>2. Ethics and the Practice of Criminal Law .....</b>	<b>43</b>
Casebook, Chapter 8: Ethics and Criminal law Practice .....	43
Cooper, “The ‘Good’ Criminal Law Barrister” .....	47
<b>3. Lawyers in Organizational Settings: Corporate Counsel .....</b>	<b>49</b>
Casebook, Chapter 9: Lawyers in Organizational Settings: Corporate Counsel .....	49
<b>4. Government Lawyers .....</b>	<b>51</b>
Casebook, Chapter 10: Government Lawyers.....	51
<b>D. Access to Justice.....</b>	<b>53</b>
Casebook, Chapter 12: Access to Justice .....	54

# A. THE LEGAL PROFESSION: LAWYERS IN SOCIETY AND A SOCIETY OF LAWYERS

---

## 1. PROFESSIONS AND PROFESSIONALISM: THE PROFESSION OF LAW AND LAW AS A PROFESSION

---

FARROW, "SUSTAINABLE PROFESSIONALISM"

This article challenges traditional visions of lawyering by articulating a new discourse of professionalism that is sustainable (personally, politically, ethically, economically, and professionally).

- This new discourse seeks to make good on aspirational promises of equality, access to justice, and the protection of the public interest
- It reflects fact that lawyers want to be more responsible for the welfare of parties other than their clients; want a work-life balance; want to practice in "alternative" areas, etc.
  - Rejects the idea of lawyers as members of a homogenized, single-tasked profession
- Discourse of sustainability can be threatening (fearful of replacing the "spirits of dead generations")
- Critiques of the dominant model of lawyering are often framed in terms of "moral lawyering" (connote a common understanding of what counts as "moral")
  - Which are then criticized as underplaying the institutional role of the lawyer in the adversarial system, while overplaying the relevance of a lawyer's individual moral choices

### I. Legal Ethics and Professionalism

- In this context, ethics involves an inquiry into "how one should live one's life" or "the rule of human life"
  - Legal ethics is thinking about how to live in the context of law and how lawyers ought to act in the context of the profession
- Using "legal ethics" and "professionalism" interchangeably generally works, however, what one considers professional can depend on moral deliberations about what is ethical
  - It is important to maintain a conceptual distinction between what's professional (under codes of conduct) and what's ethical (as guided by personal moral deliberation)

### II. Dominant Model of Professionalism

- Under the dominant model, the lawyer's job is to zealously advance the client's cause with all legal means; to be personally neutral; and to leave ultimate ethical, personal, economic, and social bases for decision to proceed in the hands of the client
- Lawyers should reject non-legal factors such as morality, popularity, religion, power, custom, etc. and be guided only by what the law allows
  - The animating **principle** behind the dominant position is that a client has the freedom to arrange their own affairs within the bounds of the law; lawyers facilitate the client's exercise of moral autonomy
  - The animating principles are embodied in numerous sources of **policy**, notably professional codes of conduct
  - The animating principles of the dominant model resonate in lawyers' daily work and **practice**
  - The dominant model is perpetuated both inside and outside the profession, in **literature, pop culture, and media**
  - Most versions of the dominant model do not focus solely on zealous representation of the client, but also try to balance a lawyer's obligations to act within the limits of the law and to serve as an officer of the court. However, the dominant model struggles to make sense

of extra “duties” put on lawyers to act in the public interest – so an alternative model has developed

### III. Alternative Models of Professionalism

- Critiques of the dominant model see opportunities for lawyers to be guided by extra-legal norms (e.g. religion, morality, politics, and custom)
  - The animating **principle** is that lawyers are self-regulated professionals who have the opportunity and responsibility to act in the furtherance of the “public interest”
  - Code-based and legislative **policy** statements (e.g. “President’s Message” in CBA Code, the *Law Society Act*) support alternative approaches to professionalism
  - Lawyers’ personal morality influences how they **practice** law
- We’re left with two competing choices for understanding legal ethics (either the dominant model or a self-conscious alternative view of professionalism)
- The principles and policies supporting the alternative model fit more naturally with the modern realities of lawyering and reflect the shift towards a “justice-seeking ethic”
  - Yet the dominant model continues to influence professionalism – perhaps because it is actually more compelling (no need for uncomfortable ethical deliberation; it’s a one-size-fits-all model); it is supported by economics (lawyers are paid to adopt a morally role-differentiated professional position); or because alternative models have been weakly presented

### IV. Sustainable Professionalism

- We can find a common ground between the two models (dominant and alternative), in order to build a theory of professionalism that is sustainable and acceptable to both sides
  - The **underlying interest** of the dominant model is the client, while the underlying interest of alternative models is the “public interest” or “justice”; otherwise, both sides agree on the basic justice-seeking premise of lawyering
  - **Sustainable** professionalism redirects progressive ideas through a more sustainable lens, taking into account four fundamental interests:
    1. **Client Interests:** any notion of professionalism must make space for the realization of a client’s legal interests
    2. **Lawyer Interests:** sustainable professionalism takes into account lawyers’ desire to make a fair living, live a balanced life, and make choices about how to proceed in a given context
    3. **Ethical and Professional Interests:** reject idea of lawyers as homogenized group; greater openness to diversity in our notions of professionalism
    4. **Public Interest:** lawyers have a responsibility to solve “collective action problems,” and to take seriously the responsibility to do good in the world
- Both sides (the dominant model and alternative approaches) must think in terms that are sustainable to a wide range of voices and interests; harness the energy of both views to create a theory of professionalism that is sustainable
- How we see ourselves individually as lawyers and collectively as a profession must be addressed in legal education; law schools cannot be value-neutral on the question of values

**Conclusion:** The dominant model is descriptively inaccurate and morally problematic. Instead, we can recast our understandings of professionalism by way of a new, sustainable model; one which is not based on moral superiority, but on individual and collective sustainability

- Move away from client-centred discussion towards a discussion that accepts plurality of voices and preferences (beyond the client)

This casebook is an introduction to what being an ethical lawyer requires and how Canadian jurisdictions regulate lawyer conduct.

***Law Society of British Columbia v. Jabour***

Jabour was a lawyer who, in 1978, published four advertisements in the newspaper for his services, outlining his prices. He was found guilty of “conduct unbecoming” of a member of the law society by the Law Society of British Columbia. The British Columbia Court of appeal was asked to consider the powers of the Law Society to regulate professional misconduct.

The *Legal Professions Act* gives Benchers of the Law Society broad powers as the guardians of the proper standards of professional and ethical conduct. Benchers are not restricted to policing matters of competency and integrity. Rather, they may prohibit “any conduct that is contrary to the best interests of the public or the profession.” Conduct need not be specifically prohibited in order to be the subject of disciplinary proceedings. The power to prevent commercial advertising is granted as part of the broad regulatory power conferred by the *Act* (whether they ought to exercise that power is not the question before the court in this appeal).

\*Note that since this decision, all Canadian law societies have loosened their restrictions on lawyer advertising. Still, the regulation of the legal profession extends beyond matters of competence and integrity, to any matter that is contrary to the best interests of the public or the profession.