

ETHICS, PROFESSIONALISM AND THE CRIMINAL LAW

M.A. CODE J.

A Note About These Materials

Legal Ethics is a topic that has not been taught at Canadian law schools until recently. In an important article written in 2000, which you will have read in the first year Ethics Bridge Materials, Adam Dodek summed up the current status of Legal Ethics teaching and scholarship in Canada:

As an academic subject, Canadian legal ethics is somewhat of an oxymoron. Careful scrutiny of the course offerings at law faculties across the land leads the observer to conclude that ‘legal ethics’ is not particularly a priority at Canadian law schools. In fact, a comprehensive survey found that Canadian legal educators have not been doing justice to the subject for many decades. The observer would not be disabused of this notion by examining Canadian legal scholarship. While specialized law reviews have appeared over the last decade, once again legal ethics has been forgotten.

The dearth of interest in legal ethics in this country – diplomatically described by Mr. Justice Iacobucci as ‘a subject that is not well represented in Canada’ – is difficult to comprehend. Whatever career path lawyers elect to follow, it is certain that they will encounter ethical issues in the practice of law. Over the course of their careers, many lawyers can and do successfully avoid some of the core subjects of the LL.B curriculum such as torts, property, constitutional law, and criminal law. Yet, questions of legal ethics or issues of professional responsibility are unavoidable. Legal ethics is the applied philosophy of lawyering; it goes to the heart of what it means to be a lawyer and how to attempt to mediate between the conflicting duties that members of the profession owe.

Despite this *cri de coeur*, legal ethics remains a woefully ignored subject in Canada. In fact, until only recently there were very few books on the subject. However, in the last few years, Canadian interest in legal ethics has begun to germinate as evidenced by a growing number of publications in this area. This essay reviews some of the recent publications in both Canada and abroad against the background of the development of a scholarship of legal ethics in Canada.

See: Adam Dodek, *Canadian Legal Ethics: A Subject in Search of Scholarship* (2000) 50 University of Toronto Law Journal 115.

As a result of its relative infancy, there is no single or dominant set of teaching materials on the subject of Legal Ethics in Canada. A group of law professors, who now teach this subject at Canadian law schools, recently set about the task of developing a national Casebook on Legal Ethics. It is to be published next year. The materials that are included herein are mainly the draft chapters for that national Casebook, including a chapter that I authored on Criminal Law Ethics.

Accordingly, the materials are somewhat experimental and I will appreciate your feedback on their utility and effectiveness.

Michael Code,
Assistant Professor
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CRIMINAL LAW ETHICS

Michael Code*

A. INTRODUCTION: COUNSEL'S "DUAL ROLE" IN THE ADVERSARY SYSTEM

The criminal law is executed, almost exclusively, through the medium of court room trials. The form of trial adopted in this country is the adversary system where the case is presented to the trier by two opposing parties, each entitled to be represented by counsel. The trial can be shortened, for example, by a guilty plea where certain essential facts are admitted, but the means of resolving a criminal accusation is still some kind of adversarial trial, leaving aside exceptional practises such as mediation and diversion.

Given this context, it is not surprising that the most important ethical duties and dilemmas in the criminal law can all be traced back to the roles that counsel for the Crown and counsel for the defence are expected to play in the adversarial system of trial. The simplistic view is that the Crown is not entitled to take a purely adversarial position but must act as a quasi-judicial minister of justice whereas defence counsel is entitled to take a purely adversarial approach. For example, in the case of *R. v. Boucher*,¹ Justice Rand famously described the Crown's role in these non-adversarial terms:

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. [Emphasis added.]

In a similar vein, Justice Sopinka described defence counsel's contrasting role as "purely adversarial" in *R. v. Stinchcombe*:²

* Assistant Professor, University of Toronto, Faculty of Law. I wish to thank Mr. Justice M. Rosenberg, Professor T. Farrow and David Layton who provided helpful comments on an earlier draft of this chapter.

¹ (1954), 110 C.C.C. 263 at 270 (S.C.C.).

² (1992), 68 C.C.C. (3d) 1 at 7 (S.C.C.).

I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. In contrast, the defence has no obligation to assist the prosecution and is entitled to assume a purely adversarial role toward the prosecution. The absence of a duty to disclose can, therefore, be justified as being consistent with this role. [Emphasis added.]

Although the above pronouncements are often cited as authoritative they, in fact, present only a partial picture. The modern reality of counsel's role in a criminal trial, and their accompanying ethical duties, is far more complex. On the Crown side, there is no longer any question that prosecuting counsel is entitled to take an adversarial position by advocating forcefully for a conviction, assuming that is a legitimate result on the evidence. As Justice L'Heureux Dubé put it in *R. v. Cook*,³ speaking for a unanimous Court:

Nevertheless, while it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence (*Boucher v. The Queen* (1955), 110 C.C.C. 263; *Power, supra*, at p. 616), it is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth; see, for example, *R. v. Gruenke* (1991), 67 C.C.C. (3d) 289, *per* L'Heureux Dubé J. Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism: *R. v. Bain* (1992), 69 C.C.C. (3d) 481; *R. v. Jones* (1994), 89 C.C.C. (3d) 353; *Boucher, supra*. [Emphasis in the original.]

More recently, in *R. v. Rose*,⁴ Justice Binnie explicitly stated that “while Crown counsel are expected to be ethical, they are also expected to be adversarial”.

By the same token, it is an over-statement to say that defence counsel's role is “purely adversarial”. Shortly after the passage quoted above from *Stinchcombe*, Justice Sopinka went on to state the following:⁵

The tradition of Crown counsel in this country in carrying out their role as “ministers of justice” and not as adversaries has generally been very high. Given this fact, and the obligation on defence

³ (1997), 114 C.C.C. (3d) 481 at 489 (S.C.C.). Also see: *R. v. Savion* (1980), 52 C.C.C. (2d) 276 at 289 (Ont. C.A.); *R. v. Bain* (1992), 69 C.C.C. (3d) 481 at 495-7 (S.C.C.); *R. v. Daly* (1992) 57 O.A.C. 70 (Ont. C.A.).

⁴ (1998), 129 C.C.C. (3d) 449 at 463 (S.C.C.).

⁵ *Supra* note 2 at 12.

counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge. [Emphasis added.]

The fact that defence counsel have duties “as officers of the court”, which compete with and constrain their otherwise “purely adversarial” role, was best expressed by Lord Reid in the famous English tort case, *Rondel v. Worsley*:⁶

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client’s case. As an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client’s wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. By so acting he may well incur the displeasure or worse of his client.... [Emphasis added.]

It can be seen from the above excerpts from the leading cases that both Crown counsel and defence counsel, in fact, have “dual roles” in the criminal trial. The Crown is expected to be fair, objective and dispassionate in presenting the case for the Crown but is also expected to argue forcefully for a legitimate result (which will often be a conviction). The defence is expected to vigorously represent the interests of the accused but is also expected to remain independent of the client and be mindful of various over-riding duties to the court.

In short, the proper ethical roles of Crown counsel and defence counsel in our adversarial system are complex and nuanced. Counsel on both sides must carefully hold in balance their duties to the side of the dispute that they represent as well as their competing duties to the ideals of the overall justice system. The leading Canadian commentators on the subject of criminal law ethics have always recognized the existence of these complex competing duties.

The oldest Canadian text on the subject, Mark Orkin’s *Legal Ethics, A Study of Professional Conduct*,⁷ describes counsel’s “dual role” in the following terms:

⁶ [1967] 3 All E.R. 993 at 998 (H.L.). Also see: *R. v. Lyttle* (2004), 180 C.C.C. (3d) 476 at 493-4 (S.C.C.); *R. v. Samra* (1998), 129 C.C.C. (3d) 144 at 158-9 and 168 (Ont. C.A.); *R. v. Felderhof* (2003), 180 C.C.C. (3d) 498 at 536 and 539 (Ont. C.A.).

⁷ (Toronto: Cartwright & Sons Ltd., 1957) at 12-13.

Failure to appreciate the dual role of the lawyer as an officer of the Court and the representative of his client has been responsible for much misunderstanding of the lawyer's true function. The bar is an important part of the Court; originally the serjeants [the earliest English barristers] were on almost an equal footing with the judges and as fellow members of the great guild which administered the law they and the judges addressed one another as "brother" and lodged together at the Serjeants' Inns. To this day the lawyer is neither the servant of his client nor of the Court. He is, in the words of Lord Eldon, "an officer assisting in the administration of justice", and his status as an officer of the Court has been one of the most important influences in formulating the ethical principles which govern his conduct.

...

The preamble to the Canons of Legal Ethics approved by the Canadian Bar Association sums up his status and responsibilities in these words:

"The lawyer is more than a citizen. He is a minister of justice, an officer of the Courts, his client's advocate, and a member of an ancient, honourable and learned profession. In these several capacities it is his duty to promote the interests of the State, serve the cause of justice, maintain the authority and dignity of the Courts, be faithful to his clients, candid and courteous in his intercourse with his fellows and true to himself".

The most recent Canadian text on the subject, M. Proulx and D. Layton's *Ethics and Canadian Criminal Law*,⁸ uses the same "dual role" terminology as Orkin did and applies it mainly to Crown counsel but also to defence counsel:

An analysis of the prosecutor's specific ethical obligations must begin with a delineation of the role and the general duty of the Crown. The Crown's unique role in the administration of the criminal justice system shapes the ethical responsibilities of prosecutors. Though in many ways the standards of conduct for prosecutors are similar to those for defence lawyers, prosecutors cannot be guided by the exact same principles applicable to the lawyer appearing for the accused. As we will see, there are particular constraints imposed on prosecutors on account of their "dual role" in the system, constraints that simply would not apply to defence counsel. Granted, defence lawyers to some extent also occupy a "dual role", in the sense that as "officers of the court" they cannot be purely adversarial and exclusively committed to their clients at the risk, for instance, of misleading the court. But defence counsel's obligations to the court are not nearly as extensive as the prosecutor's broad duties to the public interest.

...

This notion that prosecutors must temper partisanship has been expressed by stating that counsel appearing for the prosecution should regard themselves as "ministers of justice". By "minister of justice", we are referring to the role of a public officer engaged in the administration of justice (*not* to the federal cabinet minister who is elected to Parliament and heads the Department of Justice).

...

The flip side of the prosecutor's role as a minister of justice is the necessary tempering of the partisan function undertaken by most other lawyers. As the CBA Code states, in adversary proceedings the ordinary lawyer's function as advocate is "openly and necessarily partisan". Accordingly, the lawyer is not normally obliged to assist his or her adversary. But we have seen that the prosecutor, as a "minister of justice", cannot wholeheartedly embrace partisanship. Does

⁸ (Toronto: Irwin Law, 2001) at 638-641 and 645-647.

this mean, however, that the prosecutor cannot work hard in seeking to secure a conviction? Just how vigorous and zealous can the prosecutor be in presenting a case?

Ultimately, the prosecutor is not only a minister of justice, but also an advocate. As an advocate, he or she is expected to discharge all duties with competence, earnestness and vigour. In *R. v. Cook*, the Supreme Court of Canada affirmed that in the adversarial process the Crown can act as a “strong advocate” and that it is permissible and desirable that prosecutors vigorously pursue a legitimate result to the best of their ability. The Court went so far as to add that the prosecutor as strong advocate is a critical element of this country’s criminal law mechanism. As respected English barrister David Pannick says, “the obligation to act fairly does not mean that the prosecuting counsel is compelled to avoid advocacy”. The prosecutor’s distinct mission thus requires that he or she advance the case as advocate, while at the same time taking measures to protect the opponent’s case as well.

Of course, there can be a great difficulty in reconciling the adversarial nature of the prosecutor’s role with the non-adversarial duty of a “minister of justice”. It has been said that “our adversary system makes it extremely difficult to be a fair prosecutor”, and that “the potential is there for terrible conflict”. Consider, for example, the heavy pressures placed upon Crown counsel to win cases as a means of securing career advancement. “The most idealistic prosecutor would have few illusions about his future prospects if every person he prosecuted were to be acquitted. This is, perhaps, rarely taken into account at a conscious level but it adds to the overall ethos of rivalry and hence the need to win”. A special strength of character is thus required if Crown counsel is to resist getting too caught up in a “culture of winning” or a “conviction psychology” and is not to lose sight of the need to make sure that the accused is treated fairly. As we have seen, the comments by Mr. Justice Rand in *Boucher* come close to endorsing the view that the prosecutor must remain entirely oblivious to the prospect of victory or defeat. Certainly, in some cases a prosecutor has to concede either that the Crown’s case has not been proven or that an injustice would occur in the case of a conviction. To the extent that we can speak of winning, the victory lies in doing justice, not in gaining a conviction.

...

Another way of posing the same question is to ask whether the prosecutor as minister of justice can act in a zealous manner. The ethical norm of zealous advocacy properly applies to a prosecutor, to the extent that as an advocate he or she can work hard to persuade the trier of fact. Once again, however, we stress that this zeal must be exercised within proper limits, consistent with the primary duty to the public interest. One should perhaps therefore speak of a “controlled zeal”, a modified version of the traditional zealous advocate.

...

In a perfect world, the boundary between acceptably zealous advocacy by the Crown and impermissible prosecutorial abuse would always be clear and not open to disagreement. But drawing fine lines in black and white is not realistic. The controversy over the acceptable degree of advocacy practised by Crown counsel will probably never cease, given the dynamics of the adversary system and the inherent tension between a prosecutor’s dual roles as minister of justice and forceful advocate.

Leading academic commentators on legal ethics have described the lawyer’s purely adversarial role, on behalf of the client, as “neutral partisanship”. The lawyer’s competing role, as an officer of the court or minister of justice dedicated to ideals such as truth, justice and

fairness, is often referred to as “moral activism”. Neither of these theoretical models for legal ethics is entirely satisfactory, in the criminal law context, if they are seen as mutually exclusive. Counsel in a criminal case must be both a “neutral partisan” and a “moral activist”.⁹

In the text that follows we will explore the most important ethical duties of Crown counsel, of “officers of the Court” (which includes both Crown and defence) and of defence counsel. As you read about each of these duties reflect back on the “dual role” of counsel and try to situate the particular rule that emerges on the continuum between counsel’s adversarial duties to the party that he/she represents and counsel’s over-riding duties to the court and to the ideals of the justice system. Ask yourself whether the rule favours counsel’s adversarial role or whether it favours counsel’s duties to the court and ask whether it strikes the right balance.

⁹ For an excellent discussion of the theoretical debate, see: R. Atkinson, “How the Butler Was Made to Do It: The Perverted Professionalism of the Remains of the Day” (1995) 105 Yale L.J. 177.

THE COMPETING ETHICAL DUTIES OF COUNSEL THAT MUST BE HELD IN BALANCE

A. PARTISAN DUTIES TO THE CLIENT:

- (i) ***Loyalty:***
no conflicts of interest.
- (ii) ***Confidentiality:***
protect solicitor and client privilege.
- (iii) ***Zealous advocacy:***
protect the client's best interests by fearlessly pursuing every issue that can legitimately be raised.
- (iv) ***Competence:***
only take on those cases that are within counsel's area of skill and training.

B. PUBLIC INTEREST DUTIES TO THE COURT:

- (i) ***Never mislead the Court:***
state the facts fairly and accurately; refer to all relevant authority, whether favourable or unfavourable.
- (ii) ***Never distort the search for the truth:***
suborning perjury and secreting incriminating real evidence are the most dramatic examples of this ethical duty.
- (iii) ***Never unduly delay or frustrate court proceedings:***
making responsible admissions of obviously proveable facts and not making frivolous arguments are the best examples of this duty.
- (iv) ***Civility:***
show respect and courtesy towards all participants in the justice system; never make unfounded or irrelevant personal attacks on your opponent.

PROBLEMS – CRIMINAL LAW AND ETHICS

Problem 1

A three-month-old baby vanishes, following which the police arrest the child's babysitter. The police try to convince the suspect to draw a map indicating the location of the baby, who they believe might still be alive. The suspect refuses to co-operate, but later provides just such a map for her lawyer. The lawyer refuses to release the map to the authorities, instead attempting to use the document as a bargaining chip in negotiating a plea agreement. The authorities respond by obtaining a search warrant to seize the map.

Does the lawyer have an ethical obligation to hand over the map? Can the police seize the map from the lawyer with a search warrant? Why or why not?

Problem 2

You act for a corporate client that leases computer systems to large businesses, and has annual revenues in the vicinity of \$50 million. Much of your work for the client involves drafting and reviewing agreements to ensure that your client is protected in case the lessee defaults. Your client also deals with banks in order to obtain funds with which to run its own business, and you act in respect of some of these transactions. Frequently the funds from the banks are secured using your client's interest in leases and property in the computer systems.

One of your client's employees calls you at work and wants to meet. At the meeting she tells you that many of the leases are shams. The company is fabricating much of the documentation and accounting entries in order to obtain advances from the banks. You ask for proof, and the employee shows you a number of documents that support her claim. You determine that fraud has indeed occurred, and realize that you unknowingly provided legal services that helped perpetrate the fraud.

Is the information regarding the existence of the fraud covered by solicitor and client privilege? What steps should you take?

Problem 3

Jones is charged with robbery. The only issue is identity, that is, whether he was the individual who drove the getaway car. He tells you that he has an alibi for the night in question as he went to a movie with his brother-in-law. You interview his brother-in-law, who confirms the alibi and seems credible. The brother-in-law provides you with a ticket stub from the movie on that night. Your client does the same.

A key Crown witness is Mrs. Robinson. While there is other evidence implicating your client, her evidence will be particularly important in determining the outcome at trial. Mrs. Robinson is a senior citizen. Her line of vision was arguably somewhat obscured by trees at the relevant time. She testified at the preliminary inquiry and was very nervous. Nonetheless, she picked

your client out of a photo array. Her description of the getaway car driver, provided to the police, matched your client in many respects. She is very certain in her identification.

The day before the trial your client's sister, the brother-in-law's wife, comes to your office. She says that the alibi is a sham, and that your client has convinced her husband to commit perjury. She says that her husband did indeed go to the movie on the night in question, but with her. She shows you her credit card statement, which indicates that she paid for two movie tickets on that night. The ticket stub provided to you by her brother, she says, was in fact hers.

What do you do? Can you still call the brother-in-law and your client to testify about the alibi?

Problem 4

The accused is charged with sexual assault. Cross-examination of the complainant proceeds with the clear aim of raising a reasonable doubt as to consent. Defence counsel makes no attempt to challenge the complainant's identification of the accused as her attacker. The Crown closes its case. The defence lawyer opens the defence case by stating that he will call a witness who will testify as to encountering a calm and collected complainant soon after the alleged assault, the implication being that she exhibited no signs of distress that one might ordinarily associate with a violent attack. The accused interrupts at this point to say that he didn't have sex with the complainant at all – he was somewhere else, and wants to call a witness who can provide an alibi. He complains that his lawyer is ignoring his wishes.

From an ethical point of view, has the defence lawyer acted improperly in not challenging the identification evidence and in running a consent defence? Why or why not?

Change the facts so that, according to the client's wishes, the lawyer runs an identification defence. The defence has also successfully applied to have the client seated at the counsel table. During defence counsel's cross-examination of the complainant the client constantly interrupts the process by gesturing at his lawyer. The lawyer is forced to break off the cross-examination on numerous occasions in order to discuss matters with his client, who wishes to give substantial input as to the conduct of the cross-examination.

Must the lawyer agree to continue with this arrangement? Why or why not?

Alter the facts so that on arrest the client makes a statement to the police that is highly incriminating. Counsel has reviewed the facts and law thoroughly but is unable to come up with any good argument for excluding the statement. The client nonetheless insists that the lawyer bring a *Charter* application to try to exclude the statement. It is his only chance, he says, and he is the one who has to do the time in jail.

Must the lawyer agree to bring the motion?