

Schulich School of Law  
Dalhousie University

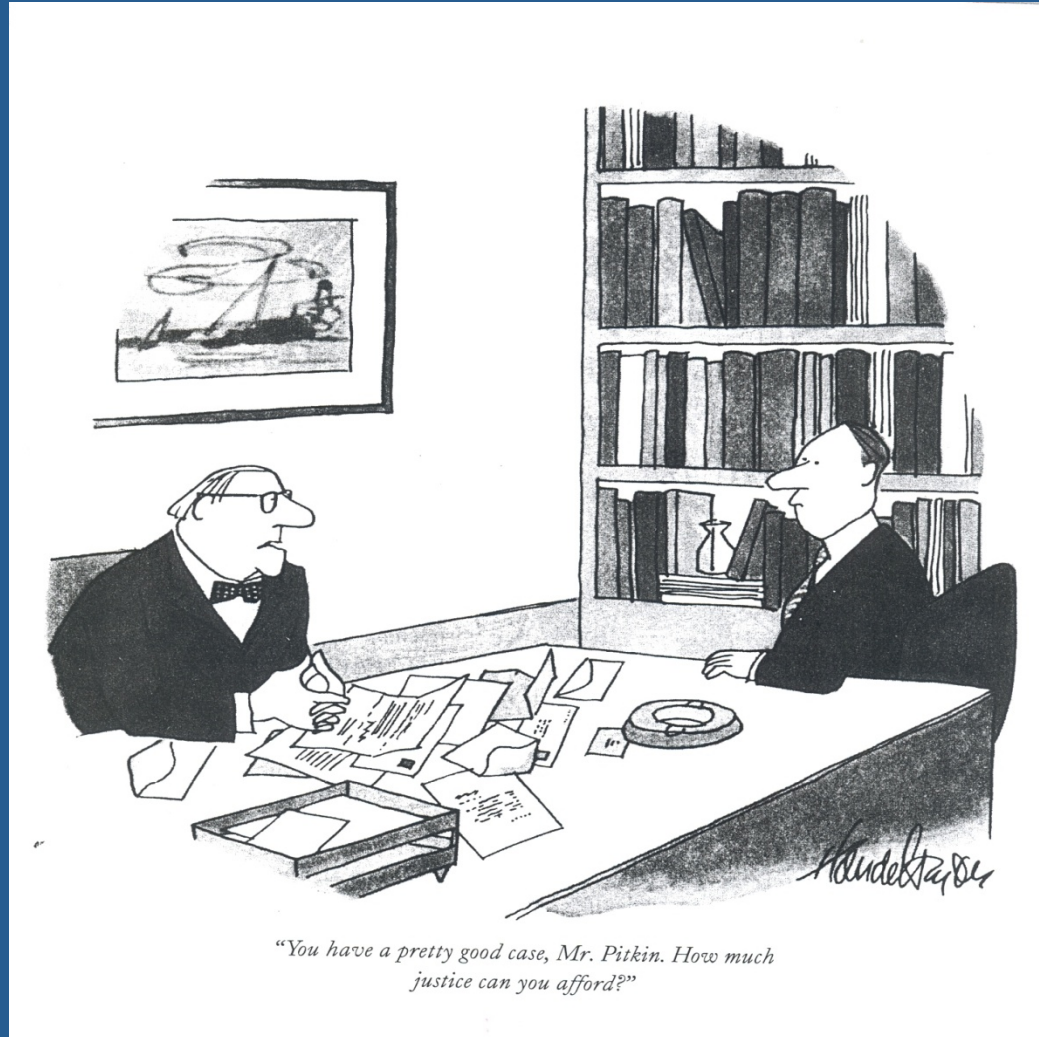
Pro Bono Students Dalhousie

# Pro Bono Service and Professional Responsibility

Professor H.A. Kaiser, Faculty Advisor

# Pro Bono Students Dalhousie

## Pro Bono Service and Professional Responsibility



Charles Barsotti, *The New Yorker Book of Lawyer Cartoons*

## Why Is This Training Session Being Offered?

- many of you are just beginning to understand the fundamental characteristics and obligations of the legal profession
  - your outlook may be distorted by inaccurate cultural images of lawyers
  - your comprehension may be limited by a simple lack of information
- the role of the Pro Bono volunteer is less onerous than that of the lawyer
  - **but students must conduct themselves in a manner which is broadly consistent with standards imposed on practicing lawyers**

## What Are the Goals of This Training Session?

- to acquaint you with the **basic features** of what it means to be acting under the broad **umbrella of the legal profession**
- to ensure you have a grasp of the **overall standard of conduct** expected of you
- to illustrate the **dimensions of responsibility** you are undertaking

## Goals of this Training Session (continued)

- to explain some of the rules and principles of professional responsibility and to show you their **implications** for your role
- to point the way towards **resolving any ethical dilemma** you may face
- to provide you with some **basic reference materials** for review now and possible use as your placement unfolds



"I am a member of the legal profession, but I'm not a lawyer in the pejorative sense."

# What Do We Mean When We Discuss Law as a “Profession”?

- *structural or institutional component*<sup>1</sup>
- autonomy and self-governance are assured through statutes and law societies
- “on the understanding that the profession will exercise these powers in the public interest” (NSBS, *Code of Professional Conduct*, 6; last amended May 26, 2017)

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1. Buckingham, et al, *Legal Ethics in Canada: Theory and Practice*, 23.



# What Do We Mean When We Discuss Law as a “Profession”?

(cont’ d)

## *moral or ethical component*

- “moral mandate” of the profession
  - “nor merely a business, **it is a public service.**”
    - requiring faithful, loyal and competent service
      - which preserves the integrity of the legal system<sup>2</sup>
- “A special ethical responsibility comes with membership in the legal profession.” (NSBS, 6)

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2. *Ibid.*, at 13.



- professions are *learned*
  - “from the nature of the act professed”
  - *confers an obligation to serve* thoughtfully and rigorously
- professions have
  - “historically *a cultural, and ideal side*”<sup>3</sup>
  - “...a profession is practiced in a spirit of public service...”
  - “...even if done with no expectation of reward”<sup>4</sup>
- There must be “**ethical principles that, at the highest level, are immutable**, and a profession that dedicates itself to practice according to the standards of competence, honesty and loyalty.” (Federation of Law Societies of Canada, *Model Code of Professional Conduct*, last amended March 14, 2017, 7)

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3. Roscoe Pound, “What Is a Profession?”

4. *Ibid.*



*"You seem to know something about  
law. I like that in an attorney."*

# Elements of Professional Service: Integrity, Competence and Quality of Service

–required to be present for all levels of the legal profession:

Integrity	<ul style="list-style-type: none"><li>- honesty</li><li>- trustworthiness</li><li>- having and adhering to principles</li></ul>
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Competence	<ul style="list-style-type: none"><li>- possess and apply relevant knowledge, skills and attributes</li></ul>
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Quality of Service	<p><b>Basic <u>Relative Standard</u>:</b></p> <ul style="list-style-type: none"><li>- provide a standard of practice at least equal to a competent student in a like situation</li></ul> <p><b><u>Additional Elements</u>:</b></p> <p>also includes:</p> <ul style="list-style-type: none"><li>- respect</li><li>- compassion</li><li>- loyalty<sup>5</sup></li></ul>
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“quality of service” ... “goes beyond mere skill and may fairly be said to embody respect for and loyalty to others”

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5. Beverly G. Smith, “The Lawyer as a Professional.”

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"I JOINED THE SCHOOL WRESTLING TEAM, BUT DUE  
TO INSURANCE AND LEGAL CONCERNS, WE'RE ONLY  
ALLOWED TO WRESTLE WITH OUR CONSCIENCE."

# Sources of Guidance

## Canadian Materials

- **The Nova Scotia Barristers' Society, *Code of Professional Conduct* (last amendment, May 26, 2017)**
  - see also other provinces, *e.g.* Ontario and British Columbia
- **The Canadian Bar Association, *Code of Professional Conduct* (2009)**
- **Federal of Law Societies of Canada, *Model Code of Professional Conduct* (last amendment, March 14, 2017)**
- Buckingham, et al., *Legal Ethics in Canada; Theory and Practice*
- Dalhousie Law School, Course Materials in *Legal Profession and Professional Responsibility*
- Allen G. Hutchinson, *Legal Ethics and Professional Responsibility*
- G. MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*
- Beverly G. Smith, *Professional Conduct for Lawyers and Judges*
- Wooley et al, *Lawyers' Ethics and Professional Regulation*

## Other Jurisdictions

### – **United States**

- American Bar Association, *Compendium of Professional Responsibility, Rules and Standards*; See also: ABA, *Standing Committee, Pro Bono and Public Service*: abanet
- Charles W. Wolfram, *Modern Legal Ethics*
- Jeffery M. Shaman, et al. *Judicial Conduct and Ethics, 3rd Ed.*

### – **United Kingdom**

- Frances Silverman, *Handbook of Professional Conduct for Solicitors*

### – **Australia and New Zealand**

- G.E. Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*
- Duncan Webb, *Ethics, Professional Responsibility and the Lawyer*





My owner  
is a pro bono  
lawyer.

Selflessness  
is so weird,  
particularly  
in a lawyer.



# Overall Standard of Conduct for Pro Bono Students

- keeping in mind

- reasonable expectations for the *knowledge and skill level* of law students

- which increase with **seniority**

- and that Pro Bono students must work *under the supervision* of a practicing lawyer (or the equivalent, such as a faculty member)

## Supervisory Responsibility

- “A **lawyer** has complete professional responsibility for all business entrusted to him or her and **must directly supervise** staff and assistants to whom the lawyer delegates particular tasks and functions.” (NSBS, 6.1-1)
- “A principal or **supervising lawyer is responsible** for the actions of articulated clerks [and students] acting under his or her direction” (NSBS, 6.2-2[1])

- **Pro Bono students should:**
  - *render a quality of service*
    - which is commensurate with reasonable expectations of a student enrolled in the same year of study and working with a similar level of supervision,
    - and which evinces a keen awareness of the ethical dimensions of the lawyer's role

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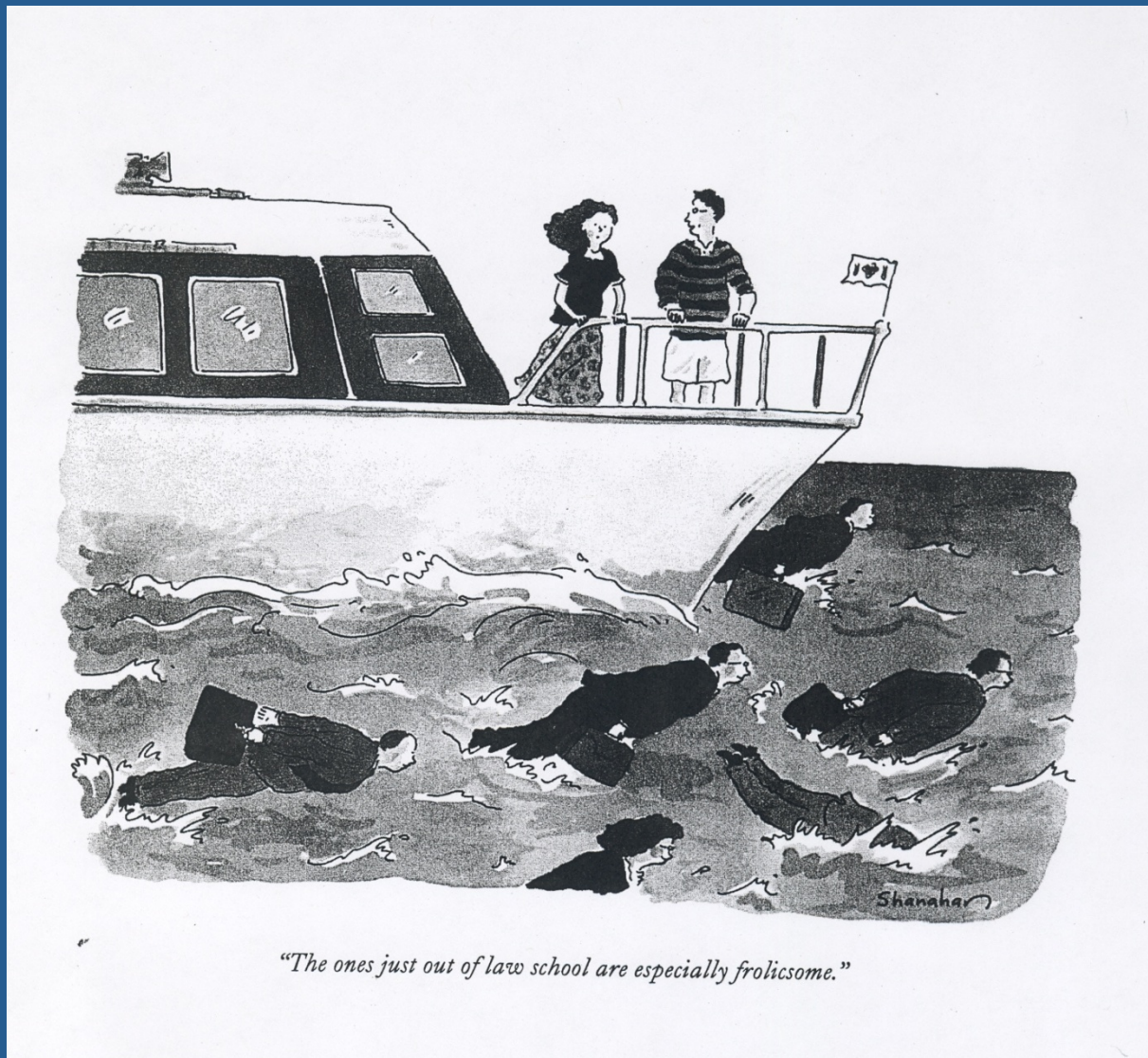
"She's at that awkward stage in law school  
between knapsack and briefcase."

## Dimensions of Responsibility and Accountability

- to **yourselves**: students should have high expectations of themselves; successful completion of Pro Bono Dalhousie service will heighten self-confidence and awareness
- to your **client organization**: clients have reasonable expectations of student performance standards
- to your **supervising lawyer**: the lawyer trusts in you and is responsible for your work

- to **Pro Bono Dalhousie**: the organization has an institutional reputation to protect and must maintain ongoing relationships with its partners
- to the **Schulich School of Law** and **Dalhousie University**: both institutions are concerned to serve the public and can hold students accountable for very serious misconduct
- to **Law Societies**:
  - while having no direct authority during PB service, students may be required to disclose any outstanding University (or other) disciplinary sanctions upon application for articles that arise during PB volunteer work
  - similarly, reports can be made to law societies concerning grave examples of misconduct or incompetence





Danny Shanahan, *The New Yorker Book of Lawyer Cartoons*

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**"The way I see it, unethical ethics are  
better than no ethics at all!"**

# Selected References to the Nova Scotia, the FLSC Model Code of Professional Conduct and the CBA *Code of Professional Conduct* - with Adaptations and Annotations for Pro Bono Students

## Integrity

Pro Bono Students have a duty to *discharge with honour and integrity*:

- (a) every duty owed to: clients, lawyers, the courts, the profession and the public
  - Recognizing that “Integrity is the fundamental quality of any person who seeks to practice as a member of the legal profession.” (N.S. 2.1-1; F.L.S.C. 2.1-1)

- Key elements of Integrity:
- *Positive* features
  - trustworthiness
  - fairness
  - honesty
  - sincerity
  - candour
  - probity

## *The Integrity Obligation and Negative Aspects of Professional Behaviour:*

- *avoidance of questionable conduct or conduct* which reflects adversely on the justice system, the profession, the Law School, or PB
- *e.g.* fraud; untruthfulness; taking improper advantage of vulnerable people; lack of frankness; failing to live up to promises;
- “committing any personally disgraceful or morally reprehensible offence which reflects upon the lawyer’s integrity” (CBA, 2)

# The Integrity Obligation and Implications for Students:

- conceptualize your duties in advance of your placement
  - consider ways in which you can display the positive features of integrity
  - ensure you are aware of the kinds of conduct that might infringe this Rule
- remain aware of your responsibilities throughout your assignment





## Competence

- PBSC students have a *duty to be competent* to perform all the legal services requested by the client

## Guiding Principles

- “has the ability and capacity to deal adequately with all legal matters undertaken on the client’s behalf” (NSBS, 3.1-2[1]CBA, 5-6; FLSC, 3.1-2[1])

- **Competence Requires:**

- “knowing general legal principles and procedures and the substantive and procedure for the areas of law in which the lawyer [student] practices” (NSBS, 3.1-1(a))

- identify facts, issues, client objectives, options

- do: legal research; analysis; applying law to facts, writing and drafting, within the terms of your assignment and under supervision

- establishment of appropriate student-client relationship

- communicate in timely and effective ways

- perform all functions conscientiously and diligently

## – Competence and Its Key Elements:

- have or acquire the capabilities to respond to client needs
- disclose to the client when you feel your expertise limits your effectiveness
  - and discuss how client needs can be met

## – Implications

- think about your knowledge and skill base
- attempt to upgrade your capabilities within reason before and during your service
- promptly admit when you encounter an uncomfortable situation



## Quality of Service

PBSC Students have a *duty to serve*;

- “competent, timely, conscientious, diligent, efficient and civil” (NSBS, 3.2-1)
- and to *provide a level of service* at least equal to that expected of a similarly situated student
  - “duty to provide a quality of service at least equal to that which [law students] generally expect of a competent [law student] in a like situation.” (NSBS, 3.2-1[2])

## Quality of Service:

### Implications

- remember that “quality of service” goes beyond mere skills
- allow for your imperfections, but aspire to excellence
- keep your commitments; dedicate yourself to the client’s welfare
- keep in touch and respond to requests; develop good work habits
- don’t let assignments drift: if Law School intrudes, explain when you’ll be able to fulfil your role

## Examples of expected practices (NSBS 3.2-1[5]) :

- “(a) keeping a client **reasonably informed**;
- (b) **answering reasonable requests** from a client for information;
- (c) **responding** to a client’s telephone calls;
- (d) **keeping appointments** with a client, or providing a timely explanation or apology when unable to keep such an appointment;
- (e) taking appropriate steps to **do something promised** to a client, or informing or explaining to the client when it is not possible to do so;
- (f) **ensuring**, where appropriate, that all **instructions are in writing** or confirmed in writing;
- (g) **answering**, within a reasonable time, any communication that requires a reply;



- (h) ensuring that work is done in a **timely manner** so that its value to the client is maintained;
- (i) **providing quality work** and giving reasonable attention to the review of documentation to avoid delay and unnecessary costs to correct errors or omissions;
- (j) maintaining office staff, facilities and **equipment adequate** to the lawyer's practice;
- (k) informing a client of a proposal **of settlement**, and explaining the proposal properly;
- (l) providing a client with **complete and accurate relevant information** about a matter;
- (m) making a prompt and complete **report when the work is finished** or, if a final report cannot be made, providing **an interim report** when one might reasonably be expected;
- (n) **avoiding the use of intoxicants or drugs**, that interfere with or prejudice the lawyer's services to the client;
- (o) **being civil.**"



*"Here's a dilemma. Should the disclaimer for our client's new sleeping pill read, 'May cause drowsiness' or 'May not cause drowsiness'?"*

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*"And should you retain us, Mr. Hodal, you'll find  
that we're more than just a law firm."*

## Honesty and Candour When Advising Clients

PBSC students must be *honest and candid* in providing legal information and other services to clients

- non-legal matters, such as “the business, economic policy or social complications”
- may be areas where the student’s advice is sought and this may “be of real benefit to the client”
- although the student should point to “any lack of experience or other qualification in the particular field and should clearly distinguish legal advice [information] from other advice” (NSBS, 3.1-2[10])

# Being Honest and Candid:

## Implications

- disclose the factual and legal bases of your research and opinions
- ensure the client understands that
  - while you can assist the client and supervising lawyer in reaching a position on a matter
  - you are ***not entitled to provide a final opinion*** on complex issues on which the client can rely, although you can contribute to the supervising lawyer's work
  - **“A lawyer must not permit a non-lawyer to: ... (b) give legal advice”** (NSBS, 6.1-3 (b))
  - **“a non-lawyer does not include an articulated clerk”**
  - **law students are not clerks and therefore cannot give independent legal advice**
  - although they can provide the type of legal information expected in the circumstances

## Honesty and Candour:

### Implications

- do not be over-confident
- try to assist the client and lawyer to become informed of their true position
- “The advice [information] must be open and undisguised and must clearly disclose what the lawyer [student] honestly thinks about the merits and probable results.” (NSBS, 3.2-2[2])
- ensure that you disclose the parameters of your research noting any constraints, limits or boundaries of your work



## Confidentiality

PB Students must *hold in strict confidence* all information acquired in the course of their relationship with the client

- *and may disclose* only:

- where permitted by the client

- or according to the law, a court, a Society requirement and professional standards (NSBS, 3.3-1)

- the duty of secrecy continues even after the assignment has ceased

## Implications

- discern from the lawyer and client as soon as possible

- what information they will permit or want you to disclose



## Exceptional Situations: Bodily Harm

- a minimal amount of confidential information may be disclosed
  - “when the lawyer [student] believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm” (NSBS, 3.3-3)
    - consider: “likelihood” of the “potential injury and its imminence”; absence of feasible preventative alternative; “circumstances under which the lawyer acquired the information” (NSBS, 3.3-3(3))

## Exceptional Situations: Organizational Irregularities

- inform the lawyer and client when you believe a disclosure of information should or must be made
    - when a student “becomes aware that the organization may commit a dishonest, fraudulent, criminal or illegal act” (or of “an imminent risk” of bodily harm or death)
      - **the student must consult with the supervising lawyer**
        - who should consider whether the situation is exceptional, thereby permitting or requiring disclosure
          - or whether the lawyer must ask for a reconsideration by the highest authority within the organization or withdraw
- (See CBA, “Whistleblowing,” at 22-23)

It turns out "fiduciary"  
means you have to give it back.



## **Conflicts of Interest:**

### **The Fiduciary Relationship and the Duty of Loyalty**

–conflicts of interest rules:

- “founded in the duty of loyalty which is grounded in the law governing fiduciaries”
- “lawyer-client relationship is based on trust”
  - “a fiduciary relationship”
  - “[student] has a duty of loyalty to the client” (NSBS, 3.4-1 [4])

## **Impartiality and Conflict of Interest**

–See examples in NSBS, 3.4-1[10]

## Avoidance of Conflict of Interest

- PB students are unlikely to encounter conflict situations
  - but must assiduously avoid any conflicting interest
    - within the “**bright line rule**”
      - prohibits representation of “one client whose legal interests are directly adverse to the immediate legal interests of another client” (NSBS, 3.4-1 [1])
- *But also* where there is:
  - “a substantial risk that a [student’s] [**loyalty** to/or] representation of the client would be **materially and adversely affected** by the [student’s] own interests or the [student’s] duties to another current client, a former client, or a third person”
    - “more than a mere possibility” (NSBS, 3.4-1[2])



## Withdrawal

PBSC students should *not withdraw their services* “*except* for good cause and on reasonable notice to the client” (NSBS, 3.7-1)

- the student “must try to minimize expense and avoid prejudice to the client and must do all that can reasonably be done to facilitate the orderly transfer ...”, of the file; (N.S.B.S., 3.7-8)

## Implications

- PBSC students should complete their assigned tasks
  - unless there is a good reason to withdraw from an assignment
- Good reasons to withdraw could include:
  - being asked to do something which is inconsistent with the student’s role;

## When To Withdraw:

- discovery that the project is unfeasible or that, even after efforts to upgrade his or her skill and knowledge, the student's competence would be exceeded by continuing
- inability to complete an assignment due to competing academic (or other) commitments
- there are situations of “Obligatory” and “Optional” withdrawal (N.S.B.S., 3.7)



## Must and May Withdraw:

### Optional (3.7-2)

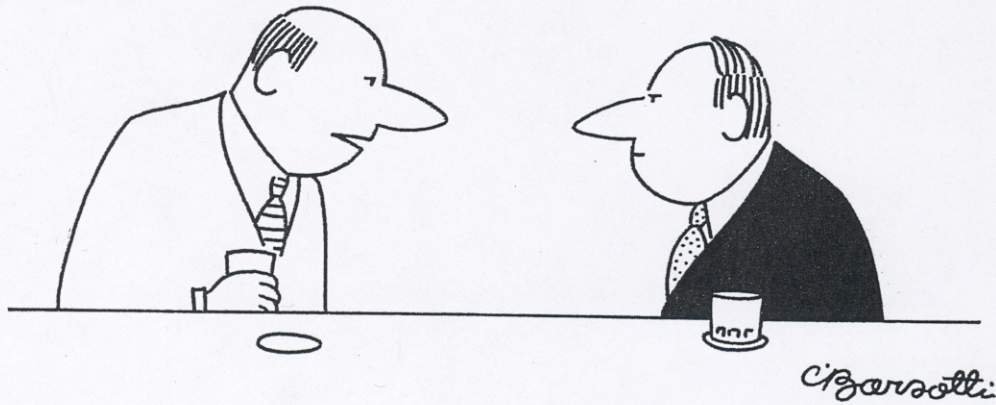
- “a serious loss of confidence between the [student] and the client”

### Obligatory (3.7-7)

- when discharged by the client
- client instructing the student “to act contrary to professional ethics”
- when the student “is not competent to continue to handle a matter”

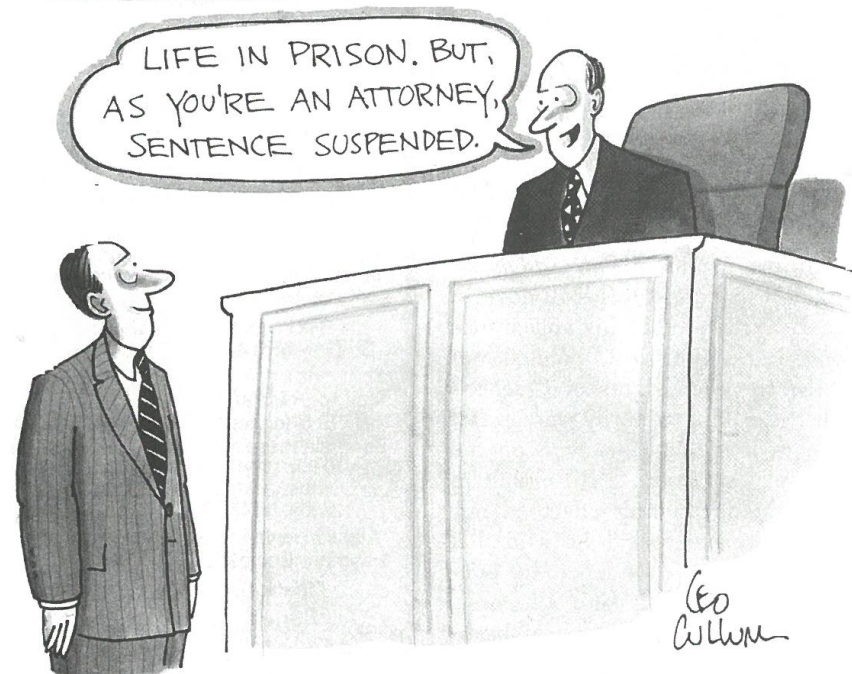
## If You Withdraw:

- In the event of withdrawal, students must:
  - inform the supervising lawyer and client in a prompt and thorough manner
  - inform PB Dalhousie
  - make appropriate arrangement for a successor
    - provide a memo on the work completed, what remains to be done and the limits encountered during the assignment



*"I consider myself a passionate man, but, of course, a lawyer first."*

## PROFESSIONAL COURTESY



## Responsibility to Lawyers and Others

- “A [student] must be courteous and civil and act in good faith with all persons with whom the [student] has dealings in the course of his or her practice.” (NSBS, 7.2-1)

## Responsibility to the Profession Generally

PBSC Students must *uphold the integrity* of the legal profession and of the Schulich School of Law and PB Dalhousie

“a [student’s] conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.” (NSBS, 2.1-1[2])

# Responsibilities of the Profession:

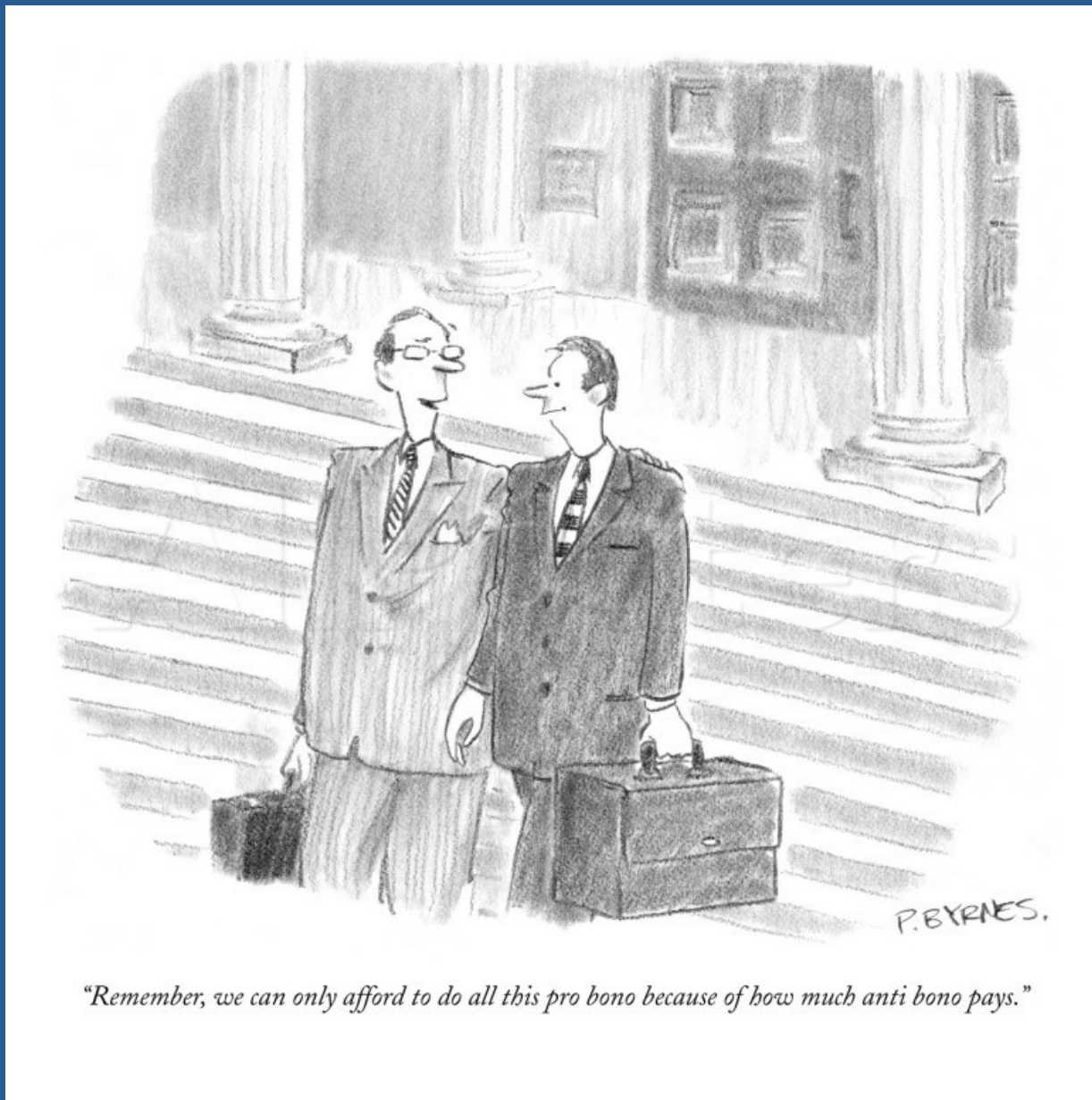
## Implications

- PB students must respect and guard the essential values and principles of the legal profession, PB Dalhousie and the Schulich School of Law
- PB students should disclose to the supervising lawyer and client and PB any serious deficiency that they have caused or that they have observed in other PBSC students (usually after warning the other student)
- “(Students) should encourage (students) who face “stressors and health problems to seek assistance”

## Must Report:

- a student must report, unless it would be either unlawful or a breach of solicitor-client privilege:
  - **misappropriation** of funds
  - “**abandonment** of a law practice”
  - **criminal activity** related to the student’s work
  - conduct raising **substantial questions** as to another student’s “honesty, trustworthiness, or competence”
  - “conduct that raises a substantial question about the (student’s) **capacity** to provide professional services”
  - any other **prejudicial situation** (NSBS, 7.1-3)







## Justice and the Administration of Justice

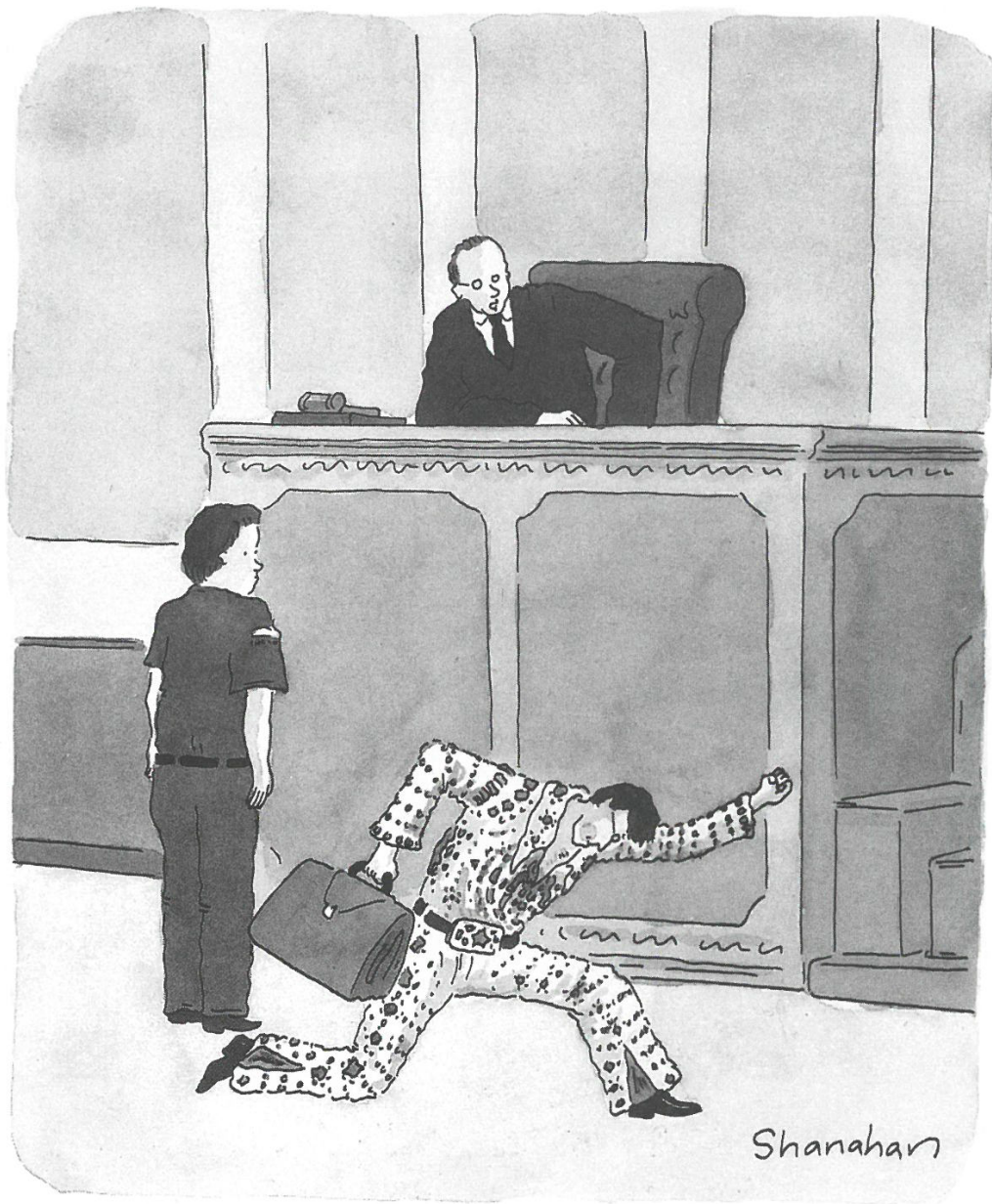
PBSC students have a duty to “encourage public *respect* for and to try to *improve the administration of justice*” (NSBS, 5.6-1)

- and to show their “basic commitment to the concept of equal justice for all within an open, ordered and impartial system” (5.6-1[2])
- “The [student’s] responsibilities are greater than those of a private citizen.” (5.6-1[1])

## Duties of the Justice System:

### Implications

- encouraging respect for the justice system does not preclude exposure of its limits and errors, nor should it restrict *bona fides* criticism
  - however, students should support the administration of justice, where it is “the object of unjust criticism” (NSBS, 5.6-1[3])
- systemic weaknesses that the PB student encounters should be disclosed to and discussed with the lawyer and client
- communicate with the Pro Bono Dal coordinators about how to improve the program based on your experience



*"A unique and stirring plea, counsellor."*

# Advocacy

- Depending upon how your placement is structured you may have a limited advocacy role
  - Or, you could be supporting unrepresented persons who themselves will be advocating their own cases
- Advocacy **involves** resolute and honourable representation, within the limits of the law
  - While demonstrating “candour, fairness, courtesy, and respect” (NSBS, 5.1-1)
- Advocacy **does not** include, for example:
  - Abusing the legal process
  - Permitting dishonesty
  - Misleading statements about the law or facts
  - Dissuading or abusing witnesses

## **Other Notable Chapters:**

### **Duties to the Court** (when acting as an advocate)

#### **Making Legal Services Available**

- in an efficient and convenient manner that will command respect and confidence

### **Public Appearances and Public Statements by Lawyers**

#### **Avoiding Questionable Conduct**

- carry out one's duties "in the spirit as well as the letter" (CBA, 115)

## **Harassment and Discrimination**

- the student has “a special responsibility to respect the requirements of human rights laws” (NSBS, 6.3-1[1])
  - “must not discriminate against any person” (6.3-5)
  - no sexual or “any other form of harassment” (NSBS, 6.3-3/4)

## Resolving Ethical Dilemmas

- consult appropriate *sources* of guidance in available materials
- where appropriate, *review the problem* with the lawyer and client
- where appropriate, *consult* Pro Bono Coordinators and Faculty Advisor
- *act promptly and professionally* to resolve any concerns involving your duties and responsibilities





*"And then it hit me. I've reached that stage in life  
where most of my friends are lawyers."*