Lawyered – Episode 72
Legal Ethics & Professional Conduct ft. Brooke MacKenzie
Episode Transcript

HUSEIN 00:00 This is episode 72 of Lawyered. I'm Husein Panju, and on this episode we're speaking with Brooke MacKenzie about the area of legal professional conduct and legal ethics. First up, we'll be speaking about the new duty of technological competence for lawyers. Various provincial law societies have added some new language regarding the use of technology, and we'll find out what it means for lawyers practically. Next, we'll speak about a high profile conflicts case involved with the Canadian US branches of the law firm Dentons LLP. A new decision out of the state of Ohio is providing some new guidance on when multiple branches are or are not one firm. We'll also speak about a new BC Law Society decision regarding lawyer's duty of confidentiality as it relates to their spouses. And in our Ask Mandate segment, we'll canvas some questions submitted by members of our patron community, including topics about billing practices, ethical dilemmas, and mandatory minimum wage for articling students. All that and a lot more is coming up in just a bit. This is Lawyered.

HUSEIN 01:20 Hello, hello and welcome to another episode of Lawyered, the podcast. I hope you're all having a great summer so far. This episode is being released in mid July. So I know that many of our listeners recently got called to the bar. Some are on their summer break from school or work. Some people, like myself, are starting to get back into the physical office. Some are wishing that they were not going back in the physical office. Whichever category you're in, I hope you're keeping well and thanks for listening to the show. And if you are commuting, podcasts or perhaps this podcast, they're a great way to pass the time. Just something to keep in mind. On our last episode, we covered a bunch of legal topics related to this area of freedom of expression. We spoke about political speech in the context of Toronto's city ward configuration. I also spoke about some new guidance on anti-SLAPP motions and also our very controversial Supreme Court case about stand up comedians and the jokes that they make. And our guest for that episode was Abbas Kassam from the Ryerson Centre for Free Expression. It's a very lively discussion and at times controversial. By the very nature, these topics about free speech often listed very strong opinions. And I hope that this episode helped to canvas how the laws change in this respect. And I hope at times reasonable people can disagree about some of these important issues about speech and expression, those sorts of things. You can find that episode in our archive or whichever platform you're currently listening to this episode and that's episode number 71. Now, the interview that you're about to hear is about a very important topic. We initially intend to be called Legal Ethics, but it's been renamed Legal Professional Conduct given the contents of the interview. And speaking for myself, I initially thought that these rules of conduct are kind of just there and they say what they say, and that's about it.

HUSEIN 03:26 But for me, this episode and this interview helped to showcase that there's actually a lot of meat to these issues, and a lot of these questions are still being asked to this very day. And even if you're not a lawyer, I think that these topics help to demonstrate that there's some of these big issues in professional regulation that are still alive, and I would suspect it would cross different professions as well. And I felt very lucky to record this episode with a guest who is not only a friend, but it's also someone who regularly writes and speaks about

these very topics. I hope you'll enjoy it. And here is our interview with Brooke Mackenzie.

HUSEIN 04:07 And on today's show, we're very excited to have Brooke MacKenzie. Brooke is a counsel at St. Lawrence Barristers LLP, and she was called to the bar in 2013. And she began her career McCarthy Tetrault before cofounding a litigation boutique called Mackenzie Barristers in 2016. For the past nine years, Brooke has maintained a civil and regulatory litigation practice concentrated on professional responsibility and liability issues, health law and appellate advocacy. Brooke has significant appeal experience having appeared before the Supreme Court of Canada, the Court of Appeal of Ontario, the Federal Court of Appeal, and Divisional Court numerous times. She regularly represents lawyers, paralegals, and health professionals when regulatory or disciplinary issues arise. And in addition to her advocacy practice, Brooke frequently provides legal opinions and practical advice to law firms and lawyers on the professional obligations, including duties to clients when lawyers transfer firms, confidentiality and privilege issues, and regulations regarding law practice management, and ownership. Brooke has also acted on numerous motions for the disqualification of counsel and is conducting comprehensive research on Canadian Court's treatment of conflict of interest allegations, culminating in the publication of her paper called Explaining Disqualification, an Empirical Review of Motions for the Removal of Council in the Queen's Law Journal. She was awarded the OB Foundation Chief Justice of Ontario Fellowship in Legal Ethics and Professionalism for this same work. And Brooke has always served as Adjunct Professor of Odsuites Hall Law School, and her writing on official responsibility toward law and civil procedure is widely published, including in the Supreme Court Law Review, Annual Review of Civil Litigation, and the Canadian Bar Review. So Brooke, thanks for joining us on the show today.

BROOKE 05:59 Thank you for having me.

HUSEIN 06:00 Outside of the introduction, I also want to know that we also were colleagues in the same year of law school. Our guests would also be interested to know that beyond her legal achievements, Brooke is also a former Jeopardy champion from a couple of years ago. Does this still come up in your day to day life, people asking you trivia questions or what it's like to be on Jeopardy and those types of things?

BROOKE 06:23 It does to the extent, but I meet new people. People are always interested in talking about Jeopardy if they know about it, and I'm always happy to talk about it because it is definitely the most interesting thing about me.

HUSEIN 06:34 Well, I don't know. But do you feel like your training for the game show helped at all? Was there any overlap between the trivia and your legal work?

BROOKE 06:44 It is. Actually it's because you're sort of thinking on your feet and drawing logical conclusions, but really it's that I have a fair bit of useless knowledge and that I also was going to say I don't think I'm good at trivia. I think that I'm good at Jeopardy. I'm able to figure out the clues even though I really don't know the

underlying information, but I watch it every night. It's pretty cool to have been on TV and won a little bit of money, and it certainly didn't-- for some people who go on the show, it ruins Jeopardy for them. But no, I still watched it last night as I always do, as I have done for the last several years. So it was a lot of fun. Although I do like to say that I've now retired from trivia because I don't want to lose to people in pub trivia and have them gloat that they beat the person who was on Jeopardy because I am sure that there are many people who can beat me in pub trivia.

HUSEIN 07:46 Like, "Oh, look, it's Miss Jeopardy." Well there's something to be said about quitting while you're ahead.

BROOKE 07:52 Exactly. Exactly.

HUSEIN 07:55 So we have a number of interesting topics to talk about today in this topic of legal ethics and regulation. Now, the use of technology in the legal profession is not a new development, but it certainly become more accentuated over the last couple of years from virtual hearings to improve document sharing and a lot more. Further, there's always been a recent push to specifically require legal professionals to be familiar with technology as part of their professional competence requirements. And there are some developments happening across jurisdictions in Canada. So, Brooke, before we get into the changes, from your own experience, have you noticed any specific changes in the way that lawyers have been using technology, particularly since the pandemic?

BROOKE 08:39 I mean I think we've all noticed changes because the pandemic forced the legal profession to finally enter the 21st century. Personally, I have not been in a courtroom or a physical tribunal space since early 2020. All my appearances have been video conferences. And another element of that is not only are the appearances online, but all the documents are electronic. For the most part, all the judges and counsel are viewing PDFs electronically or through some sort of court document system like CaseLines. Another big one is that we can finally serve documents by email and file documents electronically. And one thing that I really love is that rather than choose between meeting with a client in person, which requires travel time, or having a phone call, most of my meetings are video conferences, whether they're on Zoom or Teams. So then I think it's a great compromise. It took a global pandemic to get us here, but we're now providing more value to clients by we can do things more quickly and sometimes more effectively.

HUSEIN 09:48 So, coinciding with these changes was back in 2019 before the Pandemic, the Federation of Law Societies of Canada had updated its Model Code of Professional Conduct to specifically address use of technologies. Can you tell us a bit more about what this said?

BROOKE 10:07 Sure. So to be technical about it, they changed the commentary to the rules. But this is still important. So this is all about-- it's all under the heading of the rule about lawyer competence, which provides quite simply that a lawyer needs to perform legal services to the standard of a competent lawyer. So what the

Federation did is that they added commentary to provide guidance about what a competent lawyer is. And the recent amendment's saying that a lawyer needs to develop an understanding of an ability to use technology relevant to the nature in an area of the lawyer's practice and responsibilities. It also talks about how lawyers should understand benefits and risks associated with technology, recognizing specifically their duty to protect confidential information. The commentary also notes that the level of technological competence required is going to depend on whether the user understanding of technology is necessary to the nature and area of the lawyer's practice and whether the relevant technology is reasonably available to the lawyer, considering their client's requirements, their geographic locations. You can imagine rural areas maybe don't have the internet capabilities to have quick video conferencing, and so putting that on a lawyer might be unreasonable. So it's really about making tech competence part of the toolbox of skills that a lawyer needs to have to serve clients competently and effectively.

HUSEIN 11:46 So this is the Model Code by the Law Societies of Canada. Can you tell us a bit more about how this has played out like one step beyond?

BROOKE 11:55 Absolutely. So the Model Code is the result of all the provincial law societies coming together and trying to harmonize their professional conduct rules. This was done in 2014. And since then, the Model Code will propose changes from time to time, and it's up to the provincial law societies to adopt those proposed changes. So as of a couple of weeks ago, it was just Alberta, Manitoba, Nova Scotia, New Foundland, Saskatchewan, Yukon, and the Northwest Territories that had adopted it. There are still some outliers, but actually, as of late May, the Law Society of Ontario has also committed to adopting this commentary in their rules.

HUSEIN 12:37 What do you think about law societies prescribing this duty of technological competence on its licenses?

BROOKE 12:45 Honestly, I've known two months about it. Because on the one hand, personally, I think that we had a duty to be competent with technology already. Because technology is so integrated in our businesses and our lives that it ties into the other professional obligations. You can't honor your duty of confidentiality to clients if you don't know how to send an email and send your client's confidential information to the wrong address on a regular basis. You can't honor your professional obligations of providing competent service at fair and reasonable fees if you're still taking 12 hours to look through hard copy reporters when you could conduct a couple of searches on CanLII in 30 minutes. So I think that we already had obligations that need to be interpreted in the context that we live in now. And underlying that, there was sort of a duty of technological competence. We didn't need these rules to still have a requirement to serve our clients with a certain amount of technological knowledge. All that being said, there is real value in including technology expressly in our rules. So lawyers are on notice that this is important in adopting this commentary. The Law Society of Ontario really pointed out that they're making a point of not prescribing specific measures or tools but making it context specific and prescribing to the principle of proportionality. And they pointed out these factors, but what's necessary? What geographic location are you in? And they really wanted to make sure they

weren't adding anything unduly burdensome. I think that this also makes sense in the context that, generally speaking, the governance of the profession is done by older members of the profession who may not be quite as comfortable with the technology. And we certainly don't want to make it impossible or difficult for very bright and legal minds to practice law because they have trouble with Zoom. But we do want to be clear, this technology is important for serving clients. It makes things more cost effective. It makes things more efficient. It is here to stay. And so it's part of your practice needs to be to adopt it. What that specifically means, we're not going to prescribe, but you need to figure this out.

HUSEIN 15:27 I'm going to use the word dinosaur, but if you are one of these lawyers who's strongly with technology, what are some things that lawyers and law firms can do to become a bit more familiar or comfortable with using technology as part of their own practice?

BROOKE 15:43 Sorry, I should take a step back and say that it isn't necessarily correlated to age. I think that's--

HUSEIN 15:48 No, not at all.

BROOKE 15:49 Some people are more comfortable with technology than others. And that's okay. And there are a few different ways to deal with it. I think the bottom line, the increased use of technology in our profession means that there are certain new skills that everybody needs to learn. Ways that they can do that could be by hiring a consultant to teach them things, going to others in their firm to ask questions that you might think are stupid, but really they're essential to practice. How do I share my screen? Is it different to share my screen on Teams versus Zoom? Because I need to show the court this document, and I'm used to handing up a piece of paper to the bench, and I can't do that anymore. What are the different ways that I can put myself on and off of mute on Zoom? There are also things that lawyers suggest if this is difficult, sometimes it's going to come down to hiring someone who can help you with these things, whether it's an assistant or if part of students' roles is managing the technology, which is something that you see in a lot of cases that you'll have senior counsel as the advocate and the junior council navigating the screen share. I actually had a situation recently that a failure to be conscious of these things really showed and created a problem. So I was in a hearing the other day and on the break, a lawyer on the other side who was a senior, highly regarded litigator, who I'm sure holds himself to high ethical standards, had his camera and his audio on during the break when he took a call from another client and discussed their litigation strategy at length. And the other lawyers in the Zoom meeting shouting and waving their arms, trying to get this guy's attention and say like, "You're not on mute. We can hear you. We can see you. You're not on mute." And he didn't catch on. So these things have serious implications, and all lawyers need to be sure that use of technology doesn't undermine the highest ethical standards they hold themselves to.

HUSEIN 18:17 Numerous large law firms have branches in different countries as a manner of servicing various clients around the world. However, the larger the firm, the larger also is the potential for client conflicts. And the recent appeals case out of

the State of Ohio recognized the practical effect of such a conflict, which again involves the Canadian US branches of the same law firm known as Dentons. And the outcome of this decision may well reshape the way that firms structure their own client engagement. But before we get into it, can you just give us a brief primer on how conflicts work in general?

BROOKE 18:54 So there are two main types of conflicts between clients. One that comes up primarily with current clients is one based on the duty of loyalty. So lawyers owe a duty of loyalty to their clients, and that means that they can't act directly adverse to that current client's immediate legal interest. Or, put more plainly, you can't act against your own client even in an unrelated matter, unless that client provides informed consent. Another type that can arise with either current, but frequently it's raised with former clients, you no longer owe a duty of loyalty to a former client, but you still owe a duty to keep their information confidential. So conflicts can come up on the basis of confidential information when clients have reason to believe that there is a risk that the confidential information that they gave to their law firm could be used against them if it's relevant to another matter. So the conflict there is that lawyers owe a duty of candor to their clients. They need to be honest and candid with their clients. And if you have confidential information, there's two types of issues there. One is clients are entitled to trust that lawyers won't use their confidential information against them. And it also creates the issue that if you take on one matter for a new client and you have relevant confidential information in your mind or in your firm's files about a former client that's relevant to the matter, you're then not honoring your duty of candor to the new client because you're not telling them relevant information that you have. The only way that you could tell that information is if you breach your other duty of confidentiality to your former client. So there's a conflict there. You can't honor one duty without breaking the other.

HUSEIN 20:49 The case we were talking about relates to this law of obstruction known as the Swiss Verein. Can you tell us what this structure looks like and how it works practically?

BROOKE 20:59 Sure. It's a legal business structure under Swiss law. It's sort of a voluntary association of businesses. But unlike sort of a casual association that we might have in Canada or the US, it's actually a legal person the same way that a corporation or an LLP is. It has bylaws and a board and auditors. And the idea is that each independent office that's part of the Swiss Verein has limited liability vis a vie the others and operate globally under one brand while operating independently as far as profits and losses and liability and regulation is concerned. So the idea is that the Canadian branch wouldn't be subject, for example, to European law firm regulation or American law firm regulation, but they can still hold themselves out as we're one big law firm that serves the whole world.

HUSEIN 21:58 Right. And I guess there's benefits for brand recognition as well. Now whether they're the same firm, one place, it's essentially the same firm elsewhere. Is that it?

BROOKE 22:05 Exactly. It provides referral opportunities within the firm for international clients but also the firm here, Dentons, on their website. Yesterday, I checked, and it says, "We're the world's largest law firm." And the branding opportunity, I think, is one of the major benefits.

HUSEIN 22:24 Now I understand that there's a number of decisions that are part of the overall chronology. This is a case that involves a Canadian practice, and the case name is Revolaze LLC versus Dentons US LLP et al. And again, we'll throw the links up on the website and the show notes if you want to find it yourself. Can you walk us through what the relevant facts are for the purpose of this issue?

BROOKE 22:48 Sure. So the underlying dispute was about patent infringement. And simply put, the plaintiff, Revolaze, was a company that invented a process to use lasers to make denim jeans look worn or faded. So they suspected that various denim companies were illegally using their process, their patented technology. So they hired Dentons to file a complaint against various suspected infringers. And one of those suspected infringers was The Gap. Now, The Gap then brought a motion to disqualify Dentons US as council for the plaintiff, Revolaze, on the basis that Dentons Canada represented The Gap on several other matters. So what's the problem with this? The Gap argued that there were two main issues. First, The Gap was a current client of Dentons Canada. And so Dentons, they argued all of Dentons owed a duty of loyalty to The Gap and couldn't act against them. Second, The Gap alleged that Dentons Canada had a-- their solicitor client relationship with The Gap meant that Dentons US had access to their confidential information that was relevant to the case, and so they should be disqualified on both of those basis.

HUSEIN 24:18 What was Dentons position on this issue?

BROOKE 24:20 So they opposed disqualification for a couple of reasons. First, they said Dentons US and Dentons Canada are separate law firms. Even though they're part of the same Swiss Verein structure, we don't impute conflicts of interest to each other. We don't have access to each other's client files. We don't share profits and losses. We are financially and operationally separate. So that was their main pitch. But they also pointed out a few things. They pointed out that Dentons Canada had, in their retainer agreement with The Gap, included a line in which The Gap waived potential future conflicts. In reply, The Gap came out and said, "Well, actually, we know that you knew about the conflict. You talked to Revolaze about it, and you didn't tell us. So you also breached your duty of candor to us."

HUSEIN 25:15 So eventually this ended up getting to a US court. So how did they rule on this conflict issue?

BROOKE 25:22 So when this got to the ITC, they declared that the Dentons Verein was a single law firm for the purpose of the American Professional Conduct Rules, or the American bar association, or ADA has modeled rules that are adapted-- sorry, adopted by most US states, Ohio included. So the US rules are generally consistent with the Canadian conflict rules. But notably, the US rules provide that a law firm includes not only a partnership or professional corporation, but also

any other association authorized to practice law. So the Canadian rules in Ontario, they don't define a law firm as including another association. So that's a key difference in American and Canadian law here. And what the ITC found was the Verein was a single law firm given this definition. Now, there isn't a lot of case law about the Swiss Verein structure, which is why this case is so interesting. There's one New York case from 2010, though, that the court held that when a firm holds itself out to the world as one firm, it would be an ethical violation for them to go represent both sides of the suit. So the ITC saw it, when they accepted that as applicable to this case and The Gap pounced on this. They pointed out that Dentons holds itself out on its website and elsewhere as a single law firm that offers seamless delivery of services.

HUSEIN 26:59 I know that this is having a lot of lawyers talking, not just in the US but in Canada as well. So given this, what are some things that you think lawyers and law firms should be considering in terms of proactively addressing conflicts that might arise?

BROOKE 27:14 Well, I think what's important is that this issue that we just talked about, that the way that you hold yourself out matters. Judges generally aren't crazy about technical arguments. And so I think that the one thing that matters not only for Swiss [Verein?] firms, but this also affects lawyers who practice in association with others, who share space with others. The way that you hold yourself out matters. And I think there is some risk if you hold yourself out as being joint in practice with others, you need to consider conflicts in that context, and there are ways to address that. Be clear on your retainer agreements, on your website, what your firm is, and what it isn't.

HUSEIN 28:04 And what about lawyers who practice in the same chambers. They share office space or share receptionists or those sorts of things. Do you think that there's a potential risk there that they should be considering in these situations?

BROOKE 28:17 I think that those sorts of either sole practitioners or small firms are able to make it pretty clear. The chambers arrangement is not uncommon. And shared space, I think, is something we're seeing increasingly in lots of industries. So the representation point is valuable. But there are other considerations in those contexts, particularly about confidential information. Are you, also as part of your shared space arrangement, saving files on the same server? Do other people have access to the file? Do you have shared reception who has access to your emails, for example, and they also have access to another firm's email? Because this can apply staff too. A big one is can others overhear your conversations? Are you having a client call, and there's a risk that the person in the office next to you with a totally separate firm could be acting on the other side or could be getting this relevant confidential information? So it's about the same principles of duties of confidentiality but not so much about holding yourself out as looking at, in substance, what are those obligations and what are the risks around you that could threaten those obligations?

HUSEIN 29:45 One of the most important legal professional obligations is a duty of confidentiality. Given the sense of nature of their work, lawyers are expected to safeguard the information that they learn about and the nature of their work.

And a new decision from the British Columbia Law Society Tribunal provides some greater emphasis on this exact duty, particularly as related to lawyers keeping information confidential from their own spouses. So, Brooke, I know that there's confidentiality obligations attached to lawyers across the country. Can you just provide us a bit more clarity about what this obligation means in practice?

BROOKE 30:20 Of course. So lawyers have a duty not to disclose any and all information concerning the affairs or business of their client that the lawyers acquired in the course of the professional relationship. Now, generally speaking, if you're in a law firm, the client has retained the firm, not the individual lawyer. So it's understood that you can discuss these matters amongst your colleagues within the firm who also owe that client a duty of confidentiality. But as against the rest of the world, the information you get from your client is a secret. Importantly, this duty lasts forever. It survives the solicitor and client relationship. It even survives the client. The client could have died. The corporation could have dissolved. You still owe that duty of confidentiality as a lawyer, so it's a pretty high obligation.

HUSEIN 31:14 Are there any exceptions to this duty?

BROOKE 31:17 There are a few, although they are quite limited. So first, when the client consents to the disclosure, whether that's express or implied. What does it need to have implied consent? It can be when you need to disclose certain basic information to do the job you were hired to do, calling up opposing council and saying, "I'm representing so and so." Filing a document of the court that has the client's name on it. So consent is a big one. Also when you're required by law, court order, or the Law Society to do so. Another big one if there is imminent risk of death or serious bodily harm. And disclosure of the confidential information is necessary to prevent the harm. So that's a pretty strict obligation when lawyers are facing, whether criminal or civil or professional discipline proceedings sort of allegations, and the lawyer needs to defend themselves. The key thing about all these exceptions, though, is that you only share as much confidential information as is required for the purpose.

HUSEIN 32:22 So the case we're going to be talking about, it's known as the Lessing case, and this citation is 2022 LSBC 6. It's a very interesting fact pattern. Can you walk us through what happened in the case?

BROOKE 32:37 Sure. It's a really interesting case. So a family lawyer had shared client emails, affidavits, other file material with his wife. And this information, it was a family lawyer. So it was stuff that was shared with the lawyer in the context of separation or child custody proceedings, highly sensitive stuff. Disclosures about their partners or their own infidelity, mental health concerns, other private medical information, histories of child abuse. This is not just confidential information, but it's particularly personal and sensitive confidential information. Then the family lawyer who had been doing this separated from his own spouse, who was the recipient of the disclosures of this sensitive information. And a few months later, she went and complained to the Law Society that he had breached his duty of confidentiality to these clients. The lawyer tried to defend himself by

saying, "Oh, I just sent these emails to my wife so she could print them out at home, and I could do some work from home." But it really just didn't hold water. It was clearly an excuse after the fact as part of the court found. She had provided information to the court saying she never worked for him or didn't work for him. And he never told her don't look at the material. On the contrary, one of the emails had the subject line bedtime reading, and he had said things to her to the effect of, "Oh, you have to read this." Or, "You won't believe this" when providing the emails. So they were pretty bad facts for this lawyer.

HUSEIN 34:07 So when this got to the tribunal stage, I think we have a sense of what they found. But can you tell us a bit more about what the tribunal was reasoning in their decision?

BROOKE 34:17 Sure. So the conclusion was that this lawyer had breached his confidentiality obligations and committed professional misconduct. But the court had some pretty sort of harsh words. They said that the lawyer had disclosed, intentionally and for warped or callous purposes, exceedingly sensitive personal and confidential information of the clients. The court was particularly turned off by sort of the reference line bedtime reading and sending these things. They found this was not incidental. The words the court used was that it was a flagrant violation of the most private and personal confidences shared with him in his capacity as a lawyer for the clients.

HUSEIN 35:00 A lot of lawyers are friends with each other. So I know it's not uncommon for lawyers to talk about what they're working on with their colleagues. Right? Is that even permitted?

BROOKE 35:10 So the specific line is not particularly clear. The commentary refers to things about how the rule may not apply to information that is public, but they don't take a clear stance on that. You might consider the scope of the rule. Information about the business and affairs of the client obtained during the course of the representation is pretty broad. Now, I think there is some information that is not necessarily captured within that. Comments about at a high level about the kinds of cases you're working on, the kinds of legal issues that come up, particularly when there are things that could be public that they're in court, is something that I don't think we're going to see Law Society prosecutions about that. The issue here was, I think in particular how egregious it was. It was repeated. It was intentional. And it was for these, they said, "Warped and callous purposes." But really the lawyer was gossiping about the clients and betraying their trust. One thing that I think is really important to remember from the commentary to the rules of professional conduct is that it says that a lawyer needs to avoid indiscreet conversations, even with their family, about the client's affairs. And they should shun gossip even if the client is not named or otherwise identified. So err on the side of keeping it to yourself is the bottom line.

HUSEIN 36:53 Which is probably a good practice even outside of the professional obligations.

BROOKE 36:58 Absolutely.

HUSEIN 36:59 Right. So I mean the facts here do seem quite specific, both in terms of the actual lawyer's conduct, and in terms of how this even came to light. Again, I think it was the former spouse who actually went to the Law Society directly. So, given that, do you have any thoughts about whether this case will be significant for lawyers or regulatory professionals?

BROOKE 37:23 So I think that the significance here is that this is the only Canadian case that I'm aware of when a lawyer was found to have committed professional misconduct because they disclosed client information to their spouse. Now, this is not to say that there are cases that clear lawyers of professional misconduct for having done so. This is just the first time I've seen this as an issue in Canadian discipline proceedings.

HUSEIN 37:46 And I imagine it's a small sample size as well.

BROOKE 37:48 Exactly. It's entirely consistent with the text of the rules. But we're all taught in law school and with the Law Society that it's very clear to us about our confidentiality obligations, but we didn't have any case law about consequences. It's now clear that this prohibition on sharing client's confidential information with anyone, even your spouse, can and will be enforced when appropriate. It wasn't a borderline case of a lawyer venting to their spouse about a frustrating meeting with a corporate client on a no names basis. This was actively gossiping about deeply personal information that was shared by a client to someone they trusted at one of the worst times in their life. And so all of these factors came together to create this precedent. In terms of impact for the rest of us, I think the rules have always been clear and they continue to be clear. What we now have, in addition, is case law that shows that this is going to be enforced even when it's your spouse. This isn't just commentary. We can enforce this because it is a problem.

HUSEIN 39:09 As listeners will know, one of the bonus rewards that we have for members of our patron community is the opportunity to submit questions that they want to hear our guests answer on the show. We do a call up for these questions about a week or so before each recording. So if you want to learn more about how to do that and the other bonus rewards for members, you can find out more on our website, which is lawyeredpodcast.com/patreon. So, Brooke, we got a number of questions about this area of legal ethics and regulation. The first one from the mailbag is about a very current and somewhat controversial issue. Now, in a recent vote, the Law Society of Ontario narrowly passed the motion to implement a mandatory minimum wage for articling students. And the question just generally, is what are your thoughts on this?

BROOKE 39:58 So I was pleased that it passed, but really frustrated that it was so close. It should not have been that close. Mandatory minimum compensation for articling students is something that the Law Society of Ontario agreed on back in 2018, and this implementation was put on hold because of COVID. Priorities changed. They didn't have the capacity to do this. But a new group of benchers, in my view, took advantage of this putting it on pause to try to relitigate the issue. Frankly, I don't see how as a self-regulating profession, we can maintain public confidence

and trust to self-regulate if we're not able to treat the newest and most vulnerable members of our profession with respect and decency of providing a mandatory minimum compensation. I of course appreciate articling students are learning, but they work hard and they add value to a lawyer's business.

HUSEIN 41:06 I won't ask you to defend the opposing side, but can you articulate what exactly were the opponents of this saying?

BROOKE 41:13 Sure. So the arguments about requiring a mandatory minimum wage were essentially that they would reduce the number of articling spots available to incoming members of the profession.

HUSEIN 41:26 Yeah. And in fairness, there is kind of "articling crisis" right now where it's very difficult for students to find positions, right?

BROOKE 41:33 Yes. And it is a tricky situation that a requirement for entry into the profession is subject to the market. Here's why I disagree with that argument. First, I think this is an assumption that the number of articling spots would be reduced. And as far as I understand, to the extent there is economic literature about increases or imposition of a minimum wage, it actually doesn't bear out this assumption of reduced availability of jobs. So you mentioned an articling crisis, but articling is not the only way to get the experiential requirement to enter the profession anymore. So it used to be a big problem of, "Hey, all these people are subject to the market, and they can't get in the profession despite going through law school and passing the bar because they just can't find a job. They don't have the connections." That maybe used to be valid, but now we have the law practice program. We have an integrated practice curriculum in a few Ontario law schools. So the market is not the impediment, and I think to treat our articling students fairly and to send a message to the public that we can responsibly self-regulate. Frankly, I think that a mandatory minimum compensation for articling students was the only reasonable choice.

HUSEIN 42:56 The next question is so how can lawyers ethically defend their clients in cases where they know that their client is guilty or liable for the very thing that they're charged with? And I mean I've been asked this numerous times in my career, how do you defend someone who's guilty and how can you defend criminals and whatnot. So what are your thoughts on this kind of ethical issue?

HUSEIN 43:19 I have a few thoughts. In fact, I think it is a very good question that individual lawyers need to consider. I think when we talk about legal ethics, we're not talking about what is morally right and morally wrong, but something that you might call role morality. Or what does one need to do in this role to serve effectively in that role? I prefer the term professional responsibility or professional conduct because it's not about what, as a human, is right and wrong. It's about what, as a lawyer, is appropriate or inappropriate. And in that context, it's not just common but I think necessary for some lawyers to defend clients who they personally disagree with because of the institutional value of everybody having access to representation when fundamental rights such as liberty are at stake. Every individual needs to decide for themselves what kinds of cases they are comfortable doing day to day and what kinds of cases they aren't

comfortable doing day to day. There is no obligation on any individual lawyer to take every case they are asked to act upon. And if, for whatever reason, you are uncomfortable with particular cases. I personally made the decision for myself that I wasn't interested in criminal defense or criminal prosecution for a variety of reasons that ultimately came down to I think that I would be a better advocate in a civil context. I think it's essential that there are plenty of lawyers who do act in that context, but I don't think that I'm the best one. So in terms of personal decisions, I think that that is an important calculation for lawyers to make because I don't think that you're going to meet your professional obligations of loyalty and resolute advocacy if you have a fundamental problem with that. The other piece that I want to know, though, is that lawyers have duties to clients but also to the administration of justice. So defending someone who you know is guilty, it's actually a little bit more nuanced. You don't say they're innocent, they didn't do it. It would be a violation of the rules of professional conduct to know that a client committed the crime that they are accused of and to advance the position that they did not do it. That would be--

HUSEIN 46:06 Knowingly misleading the court.

BROOKE 46:07 Exactly. But those lawyers can certainly take advantage of every available defense to excuse or justify the behavior or to have evidence excluded because the state acted improperly, for example. So it's not quite the same as, "Oh, I'm saying that a client I know is guilty is not guilty." It certainly is trying to get a not guilty verdict for a client who may have done the things they are accused of doing. But our justice system is a little bit more complicated than that. So the rules of professional conduct hold us to upholding the administration of justice by not misleading the court while still taking advantage of every available defense for our clients.

HUSEIN 46:59 On a very different note, my question is about billing practices. The question is, are there any best billing practices that can ensure that clients are being fairly charged while also ensuring that the lawyer's actual work is being reflected? What I understand that to be is sometimes you kind of feel like as a lawyer, you're spending so much time on a certain part of your work so maybe should not have taken you that much time. But at the same time, you have your own billing pressures to your firm and the client's paying. So what are your thoughts on this issue?

BROOKE 47:31 So I love this question because it's something I've been struggling with for the last 10 years.

HUSEIN 47:35 I think we've actually spoken about this socially on a couple of occasions, too.

BROOKE 47:39 I think so. And when we were in law school together, about a decade ago, I actually wrote and published a paper about value based billing. And we discussed how what I said is the billable hour has misaligned incentives for lawyers. It could incentivize breaches of professional conduct rules. It could be disproportionate. And in 2016, when I started a firm, I was really excited about the opportunity to

try these creative billing arrangements, whether it's fixed fees or capped fees, partial contingency fees. And I became a little frustrated because they all have problems too. Capped fees, I found myself in a situation where a client was asking me to do all sorts of things that really it was their job. They kind of asked-- it was in-house counsel and kept asking me to do their job. And I couldn't say, "Hey, you're paying for this." Because I had a capped fee for the litigation.

HUSEIN 48:38 It's like an in-house regulatory council. I come across lawyers all the time where it's very clear that they're on a flat fee structure, and it's very evident when that fee has expired, but the engagement continues.

BROOKE 48:51 And it really shouldn't be. You shouldn't find yourself in a situation. I'm getting worse service because we reached the cap, and now the lawyer owes professional obligations to do good work for their clients and advance their client's interest for as long as they're a client. Whether you're getting paid by the hour still, or whether your capped fee is done. Working with clients to figure out how do we align our incentives in a way that works with this file. So I found a partial time element and a partial success element can be helpful. You have to work with your client to define what does success mean? Is it getting the appeal dismissed? Is it reaching a settlement of X dollars or more? And if we achieve that together, the lawyer gets compensated for helping them achieve that to provide that value. But there's still sort of a time element to reflect the work done. The last point I have on this is, I think, looking by the hour and saying, "Okay, it cost $1,500 to write this letter." That seems obscene that this four page PDF cost $1,500. And when I first started, the firm was doing this. That drove me insane. But then I realized that you really should look at it from the other side, which is the one of the values that I'm providing to the client. And this $1,500 four page letter that I did made a lawsuit against this client for tens of thousands of dollars go away. So it was actually a really good investment for this client to pay me $1,500 to write a letter. So I think there are different ways of looking at it. Ultimately, I think the goal is aligning incentives and providing compensation that reflects both the work done and the value provided to the client, whether that's time based or not. It's not about this particular task, but it's about what I'm accomplishing for the client.

HUSEIN 50:57 So the last question I will ask, what are some resources that lawyers, particularly lawyers who are solo and or boutique practices, can employ when they're faced with ethical dilemmas in the course of their practice?

BROOKE 51:12 In terms of resources that one can consult on their own, I'd go to sort of both LAWPRO, the insurer in Ontario. Their website has a ton of useful resources for practice management and risk management. You can Google practicePRO, and there are precedents, there are tips, sheets, checklists, that sort of thing. And the Canadian Bar Association, they have an ethics and professional responsibility section that has also published a ton of resources, including a conflict of interest toolkit and one about ethics in a digital context. So two issues that we talked about today. But I actually think that the most important resource is other lawyers and mentorship.

HUSEIN 51:57 Even if they're not in your specific firm.

BROOKE 52:00 Absolutely. And I think that that's crucial. There are firms where you get assigned a formal mentor, but you don't need that. Find your people. And I cannot emphasize enough the value of having people to talk to about practice issues and ethical dilemmas because these things are complicated, they're case specific, and you need to work it out. But being able to talk through the problem with people who might have had similar experiences or could refer you to others who've gone through similar things is invaluable. And like you said, it doesn't need to be someone in your own firm. If you're a small firm or a solo practitioner, it could be someone you share office space with, someone you used to work for, or a number of legal organizations. The Interior Trials Lawyers Association or organizations based on faith groups or ethic groups, they can provide buddy programs of let's connect this lawyer with someone who can serve as a mentor in the profession. And it also could be peers. It doesn't need to be someone with 20, 30, 40 years experience. When I went from a large firm to a small firm, I really missed the community of peers around me. But I found myself creating a new network of other small firms. Two friends I articled with also started small firms right around the same time, and we regularly call each other just for advice. Have you ever dealt with this before? What do you think I should do here? So I think the number one resource is other lawyers. Don't muddle through it alone. Talk it out and don't be afraid to ask. Because I have benefited so much from mentorship and advice that I've received from other lawyers that now as I'm being experienced, one of the things I love most about my job is being able to pay that forward. One, it feels nice to have other people think that I have some wisdom to offer, but also I learned things from students and lawyers who are junior to me as well. So, seriously, you're not imposing. Find some mentors informally and ask for help when you need it. I think that's the number one way to work through these problems that we all encounter.

HUSEIN 54:26 Yeah. And depending on the issue, it doesn't even necessarily need to be a lawyer per se, right, as long as you're talking about confidential issues. Sometimes just a sense of getting some comments and perspective. And sometimes it feels like, at least from my own experience, you kind of get too in it to see things objectively, so it helps just have a sounding board for someone to talk to.

BROOKE 54:45 Absolutely. You always need to be sort of conscious of professional obligations, conflicts, confidentiality when having conversations, but they are easy to address. And talking out a problem I think is going to get you to a more helpful and productive solution than trying to muddle through it on your own.

HUSEIN 55:11 All right. So that's about it for this episode. So Brooke, I want to thank you so much for taking time to chat with us. It's always nice to have a friend on the show as a guest. I know it's not-- again, to circle back to Jeopardy, it's not the first time that you've answered a bunch of rapid fire questions in quick succession [laughter], but I really appreciate your candor and your openness to chat about these important issues. So thanks again for your time. And I'm sure we'll stay in touch as well in the future.

BROOKE 55:36 Thanks so much for having me, and I'm so glad that you are doing this podcast to try to help make the law more accessible to people and provide exposure to other practice areas and practice issues.

HUSEIN 55:55 And that's all we got for this episode of Lawyered. Thanks for listening. Our guest for today was Brooke MacKenzie, and you can learn more about her and her practice at her firm's website, which is stlbarristers.ca. And Brooke also regularly writes about legal issues and you can check out more of that information online as well. For more about today's show, including links to all of the pages that we spoke about and a transcript of the raw audio, you can find those on our website, which is lawyeredpodcast.com. And on our next episode, we'll be speaking with Maanit Zemel about the area of social media law. Maanit is a claimed expert in this specific area, and we'll be chatting about a number of topics including the right to be forgotten, anti spam legal matters, and a new common law tort of online harassment. So it's definitely worth listening whether you are into TikTok or even if you are not. And if you want to help to improve the show and get some neat and affordable legal rewards, including the opportunity to submit questions for our show, it will really help us out if you can become a patron of our show. You can find more about our crowdfunding campaign at our website, which is lawyeredpodcast.com/patreon. I wanted to give a shout out to a couple of our patrons, including Brian Osler, Candice Cooper, and Andrew Monkhouse. Thank you so much for your support. Our sound editing work was managed by Solomon Krause-Imlach. Our theme music is by Ben Swirsky. And our website is maintained by Steve DeMello. And of course, please be advised that while this show is aimed to be helpful and informative, that it is not legal advice. However, if you do want legal advice, please reach out to our lawyer directly to help you with your particular situation. And if you enjoyed this episode and or learned something from this episode, go ahead and share with a friend or a colleague or someone else who may get value from this as well. And with that, we will see you in two weeks. And until then, keep it legal.