Professionalism Case Studies - Facilitator’s Guide

What is my role as facilitator?
Your role is to keep the discussion on track and productive and to create an environment for fruitful discussion, the sharing of ideas, and the exploration of different approaches to the issue. As a facilitator, you are generally responsible for the following:

- Introducing the topic
- Maintaining organization and time in the session
- Confirming the objective
- Creating an open forum for discussion
- Asking open-ended questions to stimulate thought
- Making sure everyone has an opportunity to participate
- Reinforcing and clarifying the content

How do I run a facilitated discussion session?
- At the beginning of the discussion, introduce yourself and set a positive tone for the session
- State your role/position, goals and hopes for the session
- Make the group objective clear before the conversation begins – the group must agree on this before it can move on to generate alternatives or an action plan
- Encourage participation by opening with an ice-breaker that gets the participants talking early in the session
- Ask someone to volunteer to be your “what have we learned” reporter for the end of the session
- Make sure you are knowledgeable about the topic and feel comfortable with people questioning your sources of information
- If you are asked a question that is beyond your expertise, offer alternative strategies and resources
- Your role is not to lecture or answer the questions. Don’t be judgmental – allow everyone to express their views so that they will feel comfortable about contributing to the discussion
- Do not accept answers such as “I would call the Law Society.” Turn those kinds of answers around by saying, “You’re the Law Society. What would you tell the lawyer in this case?”
- In closing, summarize the discussion and ask the volunteer to give the “what have we learned” report and then emphasize one or two points that the group thought was good to keep in mind
- Stick to timelines
How do I encourage discussion among group members?
One of your main responsibilities is to encourage discussion of the issues. There are several ways to do this, including acting as a devil’s advocate to encourage conflicting opinions. You can also offer real-world scenarios and examples. Be sure to ask lots of open-ended and follow-up questions, such as:

- What would result if…?
- What facts would you select to show…?
- What approach would you use to…?
- How would you use…?
- What inference can you make…?
- What is the relationship between…?
- What evidence can you find…?
- What things justify…?
- What could be changed to improve…?
- How would you test…?
- What way would you design…?
- What outcome would you predict for…?
- How could you select…?
- How could you prove…?
- How would you prioritize…?
- What information would you use to support…?

How do I handle challenging group members?
The over-talker has plenty to say and likes to be the first person to say it. Remind everyone in the group that it is an equal participation group so if you have 5 people in the group, you want each person to contribute 20% to the discussion. If the problem continues, talk to the person outside of the group and ask for help in getting some of the other members to contribute more.

The non-talker is the quieter person in the group who doesn’t say much. Try calling on him or her periodically to contribute and provide lots of affirmation for the contribution.

The tangent-starter can quickly get the group off track. Feel free to allow the person to go off on these tangents once in a while but then firmly bring the group back on track. If this becomes a problem, speak with the person outside of the group and express your appreciation for their contribution and share with them the challenges you have in facilitating the group, and ask for help in keeping it on track.

The insensitive person gives advice, makes fun of answers and other people, cuts people off or does other things that may offend group members. This person is detrimental to the group. Remind everyone of group guidelines and speak with this person outside of the group and offer advice on how he or she can be a better group member.
Keep in mind that **young lawyers** may feel too intimidated to speak for fear of getting it wrong. Be especially encouraging of these members and be sure to affirm their participation.

**What are the signs of a successful facilitated discussion?**

- Each member of the group contributes
- Only one member of the group speaks at a time and the others actively listen
- Members are prompt and come prepared
- The group stays on topic
- Members are free to ask questions and provide constructive criticism

**CPD Hours**

As the group facilitator you must submit a CPD Activity Application Form to have your group approved in order to be able to report your hours. Include the case discussed, group members and meeting date. A study group meeting can last up to three hours.

**Other Resources**

Each of the Professionalism Case Studies has a case specific Facilitator’s Guide. This helps you to guide the discussion and provides references to related sections of the *Code*. Be sure to also review the ‘Professionalism Case Studies Study Group Guide’ and ‘APPENDIX A: Professionalism Questions by Practice Area’.
APPENDIX A: Professionalism Questions by Practice Area

Administrative Law

- Ethical obligations, to clients and to administration of justice, when appearing at a hearing with no transcript
- Dealing with unrepresented persons on the other side
- Who is the client in different situations e.g. government counsel, tribunal counsel
- As rules of evidence are more relaxed before administrative tribunals, does this relax lawyer’s discovery obligations under the Rules?

Business/Corporate Law

- Up the ladder reporting – to whom do you report and how much can you disclose?
- Producing internal documents – determining what was prepared in contemplation of litigation (most companies take the position that everything was documented with the view of avoiding litigation)

Civil Litigation

- Client lies on the stand – how do you handle this situation?
- Client instructs you not to disclose a specific report or piece of evidence – can you argue it’s irrelevant?
- In satisfying an undertaking to disclose information prior to mediation, you come across relevant information harmful to your client. Do you have to produce this prior to mediation?
- Parties settle between themselves and tell you afterward – what obligations do you owe?
- Threatening criminal proceedings – when does it become a threat if the client on the other side actually committed a crime? What to do if they have – is it using it to your advantage to simply report the crime? Is it a threat if you actually report it?
- What to do when hearing is pending and you can’t get instructions from client?

Criminal Law

- New lawyer assists client within his/her comfort zone but then same client charged with more serious offences (i.e. charges with mandatory sentencing minimums) outside that comfort zone. How should new lawyer handle this?
- In accepting a cash retainer, is there a proceeds of crime issue to be considered?
- In mental health/criminal context, who instructs and can lawyer make decisions without instructions when dealing with fitness to stand trial and NCR issues?
Issues when dealing with immigration clients whose immigration status may be affected once criminal matter completed

In preparing client/other witnesses, obligations when asked to provide the “right answers”

Confidentiality: may be questioned by media or police regarding whether someone is your client; issues with youth and parents paying the bill; sureties and bail; contact by other lawyers to see if you represent someone

Conflicts issues involving co-accused and whether interests same

Conflicts issues when Crowns become defence counsel and vice versa. Can you represent those you previously prosecuted/charged? Any particular issues with former Crowns if Crown truly indivisible such that Crowns all have same knowledge of people previously before the courts?

Who owns disclosure? Can you give it to your client or the successor lawyer?

Issues involving medical report disclosure

What to do when you have possible physical evidence of a crime in your possession?

Can you cross-examine a former client and, if so, under what circumstances?

Client lies on the stand

Crown makes an error in not disclosing criminal record, what are your obligations?

Duties when your client withdraws instructions to plead guilty

What to do if your Legal Aid client won’t accept your advice but the Legal Aid Office has told you that client will not get another Legal Aid certificate?

If you’re appointed to represent someone by Court of Appeal (s.684 of Criminal Code), can you still withdraw if breakdown in communication?

Analysis of withdrawal issues in R. v. Cunningham

Estates/Wills

Conflict between beneficiaries and estate trustee

Conflict between estate executor not acting in the best interests of the estate – is the lawyer hired to act for the estate trustee or for the estate?

Who can waive confidentiality and privilege on behalf of the testator?

Power of attorney for property – determining date of effectiveness and validity (most substantial but elements of practice management)

Who is client when power of attorney being used?

Potential conflicts around dual will situations

Potential conflicts when acting for grantors in drafting powers of attorney to their children
e.g. you draft the power of attorney for grantor and the children later contact you asking for a copy or claiming that power of attorney now in effect

Can you represent client in drafting will if that client names you as a beneficiary? Are your obligations met if you send client for ILA?
Real Estate

- Confirming the validity of a power of attorney for property
- Can lawyer sign on client’s behalf when client out of the country or unavailable?
- Can mortgage broker sign on lender or borrower’s behalf?
- Undertakings – getting expiry dates, being released, holding money in trust for extended periods of time, irrevocable directions
- Fraud – can you warn victim? What, if anything, can you disclose to the police?
- Extent of your due diligence e.g. enforcement charge on title and client says not his name
- What to do if couple, who retained you to sell matrimonial home, can’t agree on how to split sale proceeds?

Family Law

- Acting for both spouses when parties agree on settlement terms
- Acting for new boyfriend of spouse when acted for opposing spouse in past
- How to rely on children’s evidence i.e. mom is instructing you to put forward child’s evidence; court will not appoint children’s lawyer
- What if spouse dies in middle of proceedings? What to disclose? Who gives instructions?
- Client wants to sign unfavourable separation agreement, i.e. no spousal support or even worse, no child support (child support is the right of the child)
- Client wants to waive child support for transfer of matrimonial home – can you facilitate this?
- Can you do real estate transaction for sale of matrimonial home when acting for only one spouse?
- Issues if police ask you to assist in investigation of your family client’s murder by his/her spouse?

Professional Responsibility – General

- Difference between confidentiality and privilege
- Confidentiality when the information is a matter of public record/ knowledge
- What to do when you receive a subpoena or police arrive to search your office
- Situations when a lawyer may be “knowingly” assisting the client to do something dishonest or dishonourable
- Issues when lawyer from firm is appointed as a judge and then firm members appear before that judge
- Communicating with a Judge outside court or via letter
- Dissuading a witness from appearing in court, for example spouse in domestic violence matter
- Relations with jurors
- Missing client – no instructions, what to do?
• What is “good cause” for withdrawing?
• What is “materially prejudiced” to the client for mandatory reporting?
• Where lawyer is victim of fraud, what, if anything, can he/she disclose to police?
• Trust accounts and third parties – need to ensure that trust accounts are not used by clients as bank accounts
• Supervision of, and delegation to, students