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Principles and Practice of Professional, Ethical and Legal Responsibility for Family Law Practitioners

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Summaries of, and excerpts from, decisions, legislation, authors, and reports on principles and practice of professional, ethical, and legal responsibility, published during the period, primarily, from June 2000 to June 2002.

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1.0 INTRODUCTION

Nature Of Paper

This anthology summarizes, and excerpts from, judicial decisions, book and journal scholarship, legislation and reports, published primarily from June 2000 to June 2002, which address (i) selected principles of responsibility – professional, ethical, and legal - governing the law avocation and (ii) the practise of those theorems of responsibility, particularly by "family law" practitioners. (Unless essential to understanding of the text, footnotes are omitted from excerpted material.)

Previous Papers

Four previous comparable anthologies have been published: "Scruples" (1987), 2 C.F.L.Q. 151-197 (canvassing the period from date of legal memory to 1986); "Scrutiny" - National Family Law Program, 1996 (covering 1986 to 1996); "Security" - National Family Law Program, 1998 (covering 1996 to 1998); and "Sanity"- National Family Law Program, 2000 (covering June 1998 to June 2000).

Caveat

Accompanying this anthology (likewise its ancestors) is a caveat; as important as the anthology itself. The caveat is articulated by the Honorable Michel Proulx of Quebec Court of Appeal and David Layton, Vancouver civil and criminal litigator, in *Ethics And Canadian Criminal Law*, the most recent (2001) substantial work about lawyer responsibility in Canada ("responsibility") (Toronto: Irwin Law, at p.3):

> … while certain … [responsibility] issues yield to reasonably clear answers, on many occasions identifying or applying the proper standards can be a maddeningly challenging exercise. Reasonable people can differ as to the proper … approach to apply in a given situation. Legal … [responsibility] is not an exact science, with every problem amenable to a set and indisputable resolution. What can be most frustrating about the study of lawyers' … [responsibility] is the elusiveness of a widespread consensus on many important issues.

Moreover, Justice Proulx and Mr. Layton caution (at p. 3):

> Our legal culture undergoes constant and inevitable change, and so too, then, do expectations and standards pertaining to lawyers' behaviour. What was contentious fifty years ago may seem totally unproblematic today, and vice versa. Or the preferred method of approaching an issue may change dramatically over time. Ideas about legal … [responsibility] by no means mutate daily, yet …. [t]his topic, …, is definitely not static.

Practising Lawyers In Canada

The constituency of responsibility comprises (as of 31 December 2000) 81,237 lawyers; 84.1% of whom (68,288) - including 33 % (22,562) female lawyers - hold practicing status (Federation Of Law Societies Of Canada, 25 June 2002).

Challenges Facing Lawyers Practising Family Law In Canada

Issues of responsibility are most likely to present, frequently and meddlesomely, not to mention expensively, for those lawyers who practise in Canada - on behalf of civilians or the state - what customarily, if not curiously, is called "family law"; although more accurately, if not awkwardly, is the "law of uncoupling".

Accounting, principally, for practice-encumbering responsibility issues in family law is clientele; described by Justice Thorpe of the Family Division of England's High Court:

> Those who undergo both marital breakdown and contested litigation in its wake are generally, if transiently, emotionally and psychologically disturbed. Being unstable they are vulnerable. A great deal of hope and faith is invested in their chosen advocate who becomes for a short phase in their lives protector and champion.

Presumably, Montreal family law lawyer Andrew Heft was mindful of the acutely stressful practice milieu, for which this clientele also accounts, when, in April 2002, he told a Southam Newspapers reporter, "[t]he best thing you can do to protect yourself is not to get married unless you absolutely must" (Diekmeyer, Peter. The Telegram (St. John's: 28 April 2002), p. A9).

Cost Of Family Law Lawyer Services In Canada

This milieu, no doubt, significantly contributes to the often-substantial representational cost of resolving (by negotiation and/or litigation) family law disputes. The results of a national survey of lawyer fee ranges in family law practice were included by Professor Allan C. Hutchinson in his book *Legal Ethics And Professional Responsibility* (Toronto: Irwin Law), in 1999, in the table following:

	High ($)	**Average Range ($) / (Average ($))**	**Low ($)**
Uncontested divorce	15,000	525-1,250 (775)	100
Contested divorce	90,000	2,535-14,725 (6,715)	500
Separation agreement	6,000	575-1,800 (985)	100
Child custody and support	50,000	2,650-10,650 (5,140)	250

Lawyer Responsibility

(a) Sources

Governing responsibility in family law practice (and, in law practice generally) are components that Justice Proulx and Mr. Layton characterize as "diverse and fluid"; which, "taken together, serve to develop and reflect the general principles that shape lawyers' actions and ideals, … " (p. 3). They include "formal codes of professional responsibility, the views and writings of lawyers, events actually occurring in the courtroom, the demands and needs of clients, disciplinary decisions by governing bodies, judicial pronouncements, the expectations of the public, and the teachings and reflections that occur in law schools" (p. 3). Together with scholarship in books and journals, and other sources, they "constitute the legal culture that frames and influences" responsibility (p. 3).

Adequately understood and appropriately applied, these components of responsibility should eventually inculcate law practitioners with the ability to instinctively identify and respond competently, in practice, to professional, ethical, and legal responsibility issues.

(b) Professional And Ethical Responsibility

The principal code of responsibility in Canada is the *Code of Professional Conduct*. This document had its origins in the *Canons of Legal Ethics* (very general statements of principle), established by the Canadian Bar Association on 02 September 1920; materially influenced by comparable Canons adopted by the American Bar Association in 1908. Canada's *Canons of Legal Ethics* were, on 25 August 1974, replaced by the *Code of Professional Conduct*, comprised of general rules and supporting commentary ("CBA Code") which, in turn, in August 1987, was substantially revised and was, in August 1995, amended by addition of Chapter XX (regards non-discrimination). The Code is undergoing further review; detailed in Appendix A to this paper.

Historically, the Code was largely or entirely adopted by law societies of the provinces and territories. About half of the societies currently continue to do so. The recent trend among the other societies, Justice Proulx and Mr. Layton conclude, has been "to create codes of conduct that are more detailed, comprehensive, and contemporary …. [which] translates into rules that bear diminishing resemblance to the CBA Code, …" (p. 11).

Both the CBA Code and provincial/territorial codes "offer a formal expression of standards of conduct expected of lawyers. They say a lot about the role that lawyers play in the legal system and about the profession's collective beliefs and expectations as to appropriate behaviour. There is a constant tensions between the desire to articulate lofty ideals in a hortatory code [that may be described as "professional responsibility"] while at the same time providing specific and practical guidance to lawyers who encounter ethical problems [that may be described as "ethical responsibility" governing discipline]. All Canadian codes on some level try to accomplish both tasks" (Proulx, Michel and Layton, David, p. 11).

In the United States, the original *Canons of Professional Ethics* (very general statements of principle were adopted by the American Bar Association on 27 August 1908 and replaced on 12 August 1969 by the *Model Code of Professional Responsibility* (which distinguished between professional principles and ethical disciplinary rules). The *Model Code*, in turn, on 02 August 1983, was replaced by the *Model Rules of Professional Responsibility*. The *Model Rules*, like the CBA Code, integrates professional principles and ethical discipline rules and furnishes supporting commentary. About two-thirds of United States bar governing bodies have approved standards

based on the *Model Rules.* The remaining one-third of bar governing bodies copy, more or less, the *Model Code.* The *Model Rules* are undergoing major revision based on the November 2000 proposals of the Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct.

Perhaps the most exhaustive compendium on lawyer professional and ethical responsibility in the United States is the 2-volume Third Restatement of Law Governing Lawyers, published in 2000 by the American Law Institute.

Access to documents governing, and commentaries elucidating, professional and ethical responsibility is provided by the Canadian Bar Association and American Bar Association websites. Responsibility issues are also addressed within the American Bar Association by the Center for Professional Responsibility, whose extensive publications include *the Professional Lawyer* magazine.

(c) Legal Responsibility

Common law, equity, and legislation govern legal liability of lawyers in Canada. Professional and ethical responsibility principles, rules and commentaries, such as incorporated in the CBA Code and provincial/territorial codes, do not have the force of law. They are, however, respected by courts as representing important public policy. Per Sopinka J. (for the Court) in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at para. 18:

> A code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings. See, for example, *Law Society of Manitoba v. Giesbrecht* (1983), 24 Man. R. (2d) 228 (C.A.). The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy.

2.0 SOURCES AND STANDARDS OF RESPONSIBILITY

2.1 Professional And Ethical Responsibility

"Professionalism v. Ethics"

(2001), 12 *the Professional Lawyer* 9 (Winter 2001)

It is important to consider the meaning of the terms, "ethics" and "professionalism." A good definition of professionalism is that of Delaware Chief Justice E. Norman Veasey, Chair of the national Conference of Chief Justices, who said:

> What is the difference between ethics and professionalism? Ethics is a set of rules that lawyers must obey. Violations of these rules can result in disciplinary action or disbarment. Professionalism, however, is not what a lawyer must do or must not do. It is a higher calling of what a lawyer should do to serve a client and the public.

Former Georgia Justice Harold G. Clarke also well articulated the difference between ethics and professionalism:

> . . . ethical conduct is the minimum standard demanded of every lawyer while professional conduct is a higher standard that is *expected* of every lawyer. (Emphasis added).

Professionalism is often viewed as merely an aspirational goal, with the consequence that unprofessional behavior need not be accompanied by a concern of being disciplined by courts or bar disciplinary authorities. However, judicial attitudes toward such disregard are changing. Justice Veasey, who also chairs the Board of the National Center for State Courts, has stated:

> Abusive litigation in the United States is mostly the product of a lack of professionalism. Lawyers who bring frivolous lawsuits who engage in abusive litigation tactics are unprofessional. They need to be better regulated by state supreme courts and better controlled by the trial judges who, in turn, are supervised by state supreme courts. . . . Lack of professionalism is a cancer which also infects office practice.

Washington, D. C., litigator Robert Saylor stated that Rambo lawyering or hardball lawyering is "like pornography, you know it when you see it." Saylor also said, "I have never lost to a Rambo style litigator."

The problem may be even more fundamental than the distinction between ethics and professionalism. Professor Wendel states, "[L]awyers' understanding of legal ethics is,

jurisprudentially speaking, decades behind their conception of the law as it applies to everyone else."

Fortin v. Chrétien,

[2000] S.C.J. No. 51 (QL), Gonthier J. for the Court, at paras. 11-18

. . . .

¶ 11 For many years, the Quebec legislator has made the practice of certain professions subject to restrictions and various control mechanisms. The Professional Code, R.S.Q., c. C-26 ("P.C."), which was first enacted in 1973, now governs the 44 professional orders constituted under the Act. It establishes a body, the Office des professions du Québec, whose function is to see that each order carries out the mandate expressly assigned to it by the Code, which is the principal reason for the existence of the order: to ensure the protection of the public (ss. 12 and 23 P.C.). In pursuing this fundamental objective, the legislature has granted the members of certain professions the exclusive right to perform certain acts. Under s. 26 P.C., the exclusive right to practise a profession "must not be granted except in cases where the acts done by these persons are of such a nature and the freedom to act they have by reason of the nature of their ordinary working conditions are such that for the protection of the public they cannot be done by persons not having the training and qualifications required to be members of the order".

¶ 12 The legal profession is one such profession. Section 128 … [of the Act respecting the Barreau du Québec, R.S.Q., c. B-1 ("A.B.")] provides that the following acts, performed for others, shall be the exclusive prerogative of the practising advocate or solicitor: (a) to give legal advice and consultations on legal matters, (b) to prepare and draw up a notice, motion, proceeding or other similar document for use in a case before the courts, or (c) to prepare and draw up an agreement, petition, by-law, resolution or other similar document relating to the incorporation, organization, reorganization or winding-up of a corporation, while only an advocate may plead or act before any tribunal, except those listed in s. 128(2)(a).

¶ 13 In return for this monopoly, the legislature has imposed a number of obligations and responsibilities on the people who perform these exclusive acts. The Barreau du Québec is responsible for the implementation of, compliance with and enforcement of those rules. In that regard, the Barreau ensures the quality of its members' professional training, including the conditions under which they complete their training period, and verifies their capacity to undertake and continue to practise their profession (s. 94(i) P.C., s. 15(2) A.B., and Regulation respecting professional training of advocates, R.R.Q. 1981, c. B-1. r. 7). It has the privilege of issuing, refusing, withdrawing or suspending the permit to practise the profession and entry on the Roll of the Order and, in particular, it has established a system of professional inspection for that purpose (ss. 40, 45 to 55.1 and 90 P.C., Regulation respecting entry on the Roll of the Order of Advocates, R.R.Q. 1981, c. B-1, r. 8, and Regulation respecting the procedure of the professional inspection committee of advocates, R.R.Q. 1981, c. B-1, r. 10).

¶ 14 The Barreau has also adopted a code of ethics governing the general and special duties of the professional towards the public, his clients and his profession, particularly the duties to discharge his professional obligations with integrity, refrain from acts that are derogatory to the dignity of the profession, refrain from incompatible responsibilities and avoid conflicts of interest, and respect professional secrecy (s. 87 P.C. and Code of ethics of advocates, R.R.Q. 1981, c. B-1, r. 1).

¶ 15 In addition, the Barreau has established a conciliation and arbitration procedure for the accounts of members of the Order which may be used by persons having recourse to the services of the members to challenge the amount of fees demanded (s. 88 P.C. and Regulation respecting the conciliation and arbitration procedure for the accounts of advocates, (1994) 126 O.G. II, 4691). It determines terms and conditions for custody and disposition of sums of money held in trust by advocates for the account of their clients and establishes an indemnity fund to be used to repay amounts of money used for improper or illegal purposes (s. 89 P.C. and By-law respecting accounting and trust accounts of advocates, R.R.Q. 1981, c. B-1, r. 3).

¶ 16 Lastly, to ensure compliance with the standards imposed by law and the Code of ethics of advocates, the Barreau has established a committee on discipline that is responsible for dealing with every complaint made against a professional, investigating their conduct and imposing penalties ranging from a reprimand to a fine or permanent striking off the Roll of the Order (ss. 116 to 161.1 P.C.).

¶ 17 The special rules governing the practice of the legal profession are justified by the importance of the acts that advocates engage in, the vulnerability of the litigants who entrust their rights to them, and the need to preserve the relationship of trust between advocates and their clients. In Attorney General of Canada v. Law Society of British Columbia, [1982] 2 S.C.R. 307, at p. 335, Estey J. explained as follows the need to regulate the professional activity of members of the Bar (cited with approval in Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869, at p. 888) as follows:

> There are many reasons why a province might well turn its legislative action towards the regulation of members of the law profession. These members are officers of the provincially-organized courts; they are the object of public trust daily; the nature of the services they bring to the public makes the valuation of those services by the unskilled public difficult; the quality of service is the most sensitive area of service regulation and the quality of legal services is a matter difficult of judgment.

As persons in whom public trust is invested, advocates play a very special role in the community when they perform these acts reserved to them (see R. v. McClure, [2001] 1 S.C.R. 445, 2001 SCC 14, at paras. 2 and 31). It is the vocation of the Barreau, which, so to speak, makes up for litigants' lack of knowledge and oversees the quality of the professional services provided, to preserve this relationship of trust.

¶ 18 In doing this, the Barreau tends to protect the public not only against improper acts by its members, but also against non-members who provide no assurance of competence, integrity, confidentiality or independence. The Code of ethics of advocates and the provisions relating to

fees or defalcation of amounts of money and to the management of complaints by the committee on discipline apply only to members of the Barreau. That is why it is important to deter others from performing acts that are reserved for advocates, by applying penalties. ….

Michael Hyde and Associates Ltd. v. J.D. Williams and Co. Ltd.

***The Times*, 04 August 2000**

[**Note:** Decision by Lord Justices Norris, Ward, and Sedley (for the Court) sitting in the Court of Appeal of England, filed 05 July 2000.]

In an action for negligence, if the profession itself embraced different views, then the competence of a professional person was to be gauged by the lowest acceptable standard.

The Court of Appeal … so stated on July 5, 2000 when allowing an appeal by architects, Michael Hyde and Associates Ltd. from Judge Grenfell, sitting on Official Referee's business at Salford, awarding £365,325 damages to the claimants, J.D. Williams and Co. Ltd."

LORD JUSTICE SEDLEY said that professional negligence meant falling below a proper standard of competence. In most cases the court, with the help of evidence from the particular profession, would arrive at what that standard was.

But where the profession itself embraced more than one tenable view of acceptable practice, competence would not be measurable by a single forensically determined standard; so that where there was more than one acceptable standard, competence had to be gauged by the lowest of them.

. . . .

3.0 APPLICATIONS OF STANDARDS OF RESPONSIBILITY

3.1 Relationships With Clients - Retainer And Authority

Cab-Rank Rule

Proulx, Michel and Layton, David.
***Ethics And Canadian Criminal Law* (Toronto: Irwin Law, 2001),**
pp. 88-89; 103-104; 83-84; 85; 86

The cab-rank rule, as its name implies, requires barristers to accept any client who requests legal representation, provided that a proper fee is paid and the lawyer is available and competent to take on the work. The central feature of the rule is that barristers do not choose clients based upon the nature of the case or the individual. Consequently, an invidious cause or an odious individual will not be denied access to legal representation. ….

. . . .

Gavin MacKenzie [a practicing Toronto lawyer and author on this subject] argues that the rules of professional conduct in Canada come very close to endorsing the cab-rank principle, given that lawyers are asked not to reject a client because of unpopularity, and urged to be especially slow to refuse a case where the individual will have difficulty in obtaining legal representation. He also draws substantial support from the terms of the barrister's oath used in some provinces which … is suggestive of a cab-rank rule. Yet Professor Allan Hutchinson takes the opposite view, arguing that the Canadian rules afford lawyers the general freedom openly to assert personal morality in deciding whether to accept a retainer. As for Canadian case law on point, there is nothing in the way of binding authority and little more in the realm of principled dicta. One of the few judicial pronouncements in this area, offered by Mr. Justice Krever in *Demarco v. Ungaro* [(1979), 95 D.L.R. (3d) 385], expresses doubt as to whether Ontario lawyers have ever had an obligation to accept any client and rejects the existence of such a duty in civil litigation. Beyond Mr. Justice Krever's observation, the case law offers no real guidance.

…. However, there is one area where lawyers [otherwise in a position to accept retention] are prohibited from declining employment [provided the client is capable of paying the reasonable required fee, no ethical or legal spanner obtains (e.g., relating to conflict of duty, or competence), and the lawyer's schedule permits]: most rules of professional conduct, including the CBA Code, forbid discrimination on the same grounds generally prohibited by human rights legislation. These rules are drafted broadly enough to encompass the decision whether or not to provide legal services. The result is that a lawyer cannot refuse a case on grounds that typically include race, language, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status,

family status, or disability. It is also improper for a lawyer to provide an inferior quality of service based on discriminatory grounds.

. . . .

Perhaps the. most difficult problem associated with the decision to accept or reject a case arises from the example of the unpopular or repugnant client. Taking on a notoriously abhorrent case can cause the lawyer considerable personal risk and discomfort. He or she may be subject to intense criticism in the media and from family and friends. Other clients, both potential and existing, may decide that they are not comfortable with the lawyer's decision to act, with the result that business suffers. Colleagues may shun the lawyer, not wanting to court societal displeasure by any sort of association. Caution may lead the lawyer to perpetual inaction, as the following comment, written in the mid-1960s, laments [D. Pollitt, "Counsel for the Unpopular Cause: The 'Hazard' of Being Undone" (1964-65), 43 N.C.L. Rev. 9, at pp. 17-18]:

> The average lawyer hesitates to participate in the controversial issues of his time. He wonders what his other clients might think. He wonders about the social consequences to himself, his wife, and his family. And he listens to the enemy within. The enemy speaks in a thousand voices, now whispering caution and then whining fear, now pleading in reasonable accents for practicality and self-interests, and then shouting direful predictions of disaster. But above all the voice says wait: wait until your prestige is secure, your voice more powerful; wait for the right time, for the right case. But the right case at the right time seldom comes. And while the lawyer waits, the voice of the demagogue is unanswered and the unpopular client's right to counsel goes by default.

. . . .

The lawyer may also encounter very real difficulties in undertaking the representation in a competent manner, struggling to overcome strongly held personal views in an effort to provide the client with zealous advocacy. The lawyer's individual autonomy and dignity, as reflected in his or her personal morality, is thus not always easily sublimated to the role of advancing a client's case.

"What is a 'terms of engagement' letter?"

Canadian Bar Association and Canadian Bar Insurance Association.
***Great Expectations* [:] *A lawyer-client handbook* (Ottawa: 2002), pp. 19-20**

A "terms of engagement" letter is a letter your lawyer may send to you and that you would usually sign and send back. It sets out what your lawyer is going to do and how much it is likely to cost. A "terms of engagement" letter may include information on:

1. the nature of the legal problem;

2. the services the lawyer will provide;

3. the goals you have identified;

4. the strategies you and your lawyer have discussed;

5. the information you have agreed to provide about the tasks to be done;

6. a statement of what tasks you have to do (send in documents, make a list, etc.);

7. the role of the people in the law office and what they will be doing;

8. a schedule of events, along with factors that could affect the schedule;

9. an explanation of how fees will be calculated and what disbursements are likely to be made;

10. a cost estimate and the factors that might affect the total cost of legal services;

11. the amount that is owing immediately as a retainer, and what portion of this is refundable if you decide not to proceed;

12. the lawyer's billing practice - how often you will be sent a bill and when and how much interest will be charged on amounts owing;

13. a statement that the lawyer is in a *conflict of interest* and/or that the lawyer will not take on a case that would create a conflict of interest, now that you have retained the lawyer's services;

14. a description of how you will be kept informed of developments and how you will be contacted to give instructions on important decisions and major steps; and

15. the next steps that the lawyer will be taking, and when the lawyer is likely to contact you again.

A "terms of engagement" letter can be long and detailed. Or, it might not be necessary if your case is straightforward and simple. The advantage of a "terms of engagement" letter is that any misunderstandings can be easily identified before a lot of work has been done on your case.

You and your lawyer can agree on the cost of preparing and discussing the terms of engagement, or you might agree that the time spent on this task will not be charged to you.

Not all work that a lawyer does for you will require a "terms of engagement" letter. Speak with your lawyer to see if such a letter is appropriate in your case.

3.2 Relationships With Clients - Conflicts Of Duty

3.2.1 Generally

Spouses as opposing counsel

Williams, Pam. *National* (Ottawa: The Canadian Bar Association, June - July 2000), p. 52

Dear General Practitioner:
My husband and I are both lawyers and are moving back to our small hometown. We've each been offered positions in different firms. We're concerned because occasions will surely arise where members of our firm will be opposing counsel; on occasion, we may be directly opposing each other. How should we prepare for allegations of conflict of interest from our potential employers and clients?

Homeward Bound in Halifax

Dear Homeward Bound:

You and your husband are wise to address this concern prior to commencing your employment. In these times of complex litigation and increased demands on lawyers to be efficient, it's important that you nip this potential problem in the bud. Clients continue to require lawyers and their firms to be more accountable, especially in the area of conflicts.

There are many "lawyer marriages" in Canada, and there's often concern about the amount of disclosure involved in the typical end-of-day greeting – "How was your day?"

Chapter 4 of the CBA's Code of Professional Conduct states clearly how to deal with confidential information. Lawyers have a duty to hold in strict confidence all information concerning the client's affairs and business acquired in the course of the professional relationship. The lawyer must not divulge such information unless disclosure is expressly or implicitly authorized by the client, required by the law or otherwise permitted or required by the code.

This rule applies to spouses. The guiding principles under the rule confirm that by explicitly directing the avoidance of "indiscreet conversations, even with the lawyer's spouse." Failure to abide by this principle can result in potential professional discipline.

Unfortunately, the answer isn't that simple. The decision to act … [opposite] each other or each other's firm must be balanced against the perception of conflict of interest, especially when financial or personal interests are involved. You should not act when you have a direct or indirect financial interest or when your professional judgment may be compromised.

Although there's nothing to prevent you from acting in a matter involving your spouse's firm, a good starting point for addressing potential conflict allegations is never to act directly

against your spouse as opposing counsel. For other matters involving opposing firms, be up front with your clients and use common sense.

3.2 Relationships With Clients - Conflicts Of Duty

3.2.2 Conflict found

In re L (Minors) (Care proceedings: Cohabiting solicitors)

***The Times*, 27 July 2000, p. 33**

[**Note:** Decision by Wilson J. sitting in the Family Division of the High Court of England, filed 21 July 2000.]

Where two solicitors on either side of a case were cohabiting and that fact could give rise to an apprehension among laymen of bias, the court could make an order to remove those solicitors from the record by declaring that they were no longer acting.

Mr. Justice Wilson so held in a reserved judgment in chambers in the Family Division hearing an application for an order that two solicitors, one acting within the legal department of the local authority, and the other acting within a firm of solicitors representing two other parties in care proceedings, should not both personally retain conduct of the proceedings on the ground that they were cohabiting and that their relationship could give rise to a perception of bias.

On May 22, 2000 Mr. Justice Black gave directions in the proceedings. At the end of the hearing, counsel for Miss L., the mother of one of the children subject of the proceedings, raised the issue of representation in the light of the cohabitation of Miss T with Mr. P. The judge gave directions for the hearing which took place before his Lordship.

. . . .

MR. JUSTICE WILSON said that an elemental component of the jurisdiction of the Supreme Court was power to control its own process and its own officers.

It was not disputed that the court had power to determine whether a particular firm of solicitors should play a role in the forensic exercise of which it was the director.

The court had an analogous power to refuse to hear a particular advocate: see section 27(4) of the Courts and Legal Services Act 1990.

But any exercise of the power represented the erosion of a precious principle, the right of a litigant to choose his legal representatives, and was to be justified by the demands of a principle equally precious, that a situation of apparent unfairness and injustice should be avoided: see *In re a Firm of Solicitors* ([1992] QB 959, 969).

The need for extreme caution in the exercise of the jurisdiction remained.

His Lordship was not attracted to a form of order which purported to regulate what took place behind the doors of the legal department [of the local authority] or the firm.

Where, as in *In re a Firm of Solicitors*, the order was made in separate proceedings, it would take the form of a straightforward injunction. Where, as would be the case here, the order was made in the very proceedings in which the solicitors were no longer to act. The neater course would be to remove them from the record declaring that they were no longer acting.

With one significant exception, most of the domestic authorities cited fell into two categories, each addressing a somewhat different problem from that which confronted his Lordship.

The first category addressed the ability of a firm of solicitors to act for one party in proceedings in circumstances in which they previously acted for another party to them: see *Prince Jefri Bolkiah v KPMG* ([1999] 2 AC 222).

Those criteria were recently applied to care proceedings in *In re T and A (Children) (Risk of disclosure)* ([2000] 1 FLR 859).

The second category of authorities addressed bias against a litigant on the part of a member of the court, whether judge or juror. His Lordship referred to *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet (No 2)* ([2000] 1 AC 119); *R v Gough* ([1993] AC 647; *Webb v The Queen* ([1994] 181 CLR 41) and *Locabail (UK) Ltd. v. Bayfield Properties Ltd.* ([2000] 2 W.L.R. 870).

The authority which fell into neither of the categories was *R v. Batt* (*The Times* May 30, 1996) concerning cohabitating counsel.

Intimate cohabitation was different in kind from professional association of social friendships and the unsuccessful party's discovery of it [intimate cohabitation] after the conclusion of the proceedings would give rise to a grievance, in his Lordship's view justified, to the effect that in part they had been a charade.

There was no doubt that Miss T and Mr. P. were solicitors of high standing and, in his Lordship's view, their professional integrity was not, and in any event on the evidence, could not be called into question.

The striking features of the present case were that the application was for care orders; that one of the cohabitants had conduct of the case on behalf not of a respondent but of the local authority; and that there was an adult respondent [Miss L.] who was additional to those represented by the other cohabitant who was not on good terms with them.

Most civil litigation and, until sentence, all criminal litigation comprised a confined investigation of past events. In care proceedings the inquiry went far wider.

The sensitivity of the inquiry and its importance in the future life of the child, and of the surrounding adults, could hardly be overstressed. In this inquiry the role of the local authority, as the arm of the state, was of crucial significance.

The way in which the local authority chose to present their case could have a profound effect on the outcome of the proceedings.

Whatever its rationale, the power of the local authority in care proceedings placed a premium on the importance that they should be seen to act impartially.

To adopt an general formulation to identify the circumstances in which the Court would require one of two cohabitating solicitors to retire from proceedings would be unnecessary and unwise.

His Lordship held only that the fact of Miss T's cohabitation with Mr P gave rise to a reasonable lay apprehension that in the proceedings the local authority might embark upon a presentation of matters relating to Mr. P.'s clients with a favour unmatched in their presentation of matters relating to Miss L. The cohabitation without more grounded the apprehension.

Catholic Children's Aid Society of Toronto v. S.B.,

[2002] O.J. No. 599 (QL) (Ont. Ct. J.), M. Cohen J.
(Summary)

Facts: A local children's aid society apprehended two children (1 and almost 2 1/2 years old), the younger of whom bore serious injuries consistent with "shaken baby syndrome". The mother, who was charged with assault, was currently out on bail. In the various preliminary court appearances in the child protection matter, the parents were always represented by the same lawyer. When the judge raised the issue of a possible conflict of interest, the lawyer assured the court that there was no conflict. Unconvinced and on her own initiative, the judge put the matter over for argument to determine whether the lawyer should be allowed to continue to represent both parents.

On the return date, the court was told that the lawyer was now acting only for the mother and the father would represent himself. In the meantime, the lawyer had prepared an "Acknowledgment and Direction" that each parent signed and in which each of them expressed a desire to keep the services of the lawyer's law firm; each was told of "the potential risk of conflict" in this case, and each understood and accepted that the law firm's withdrawal from the case was necessary "upon the occurrence of any conflict of interest".

Decision: The parents needed to have separate lawyers and the lawyer who had previously acted for both of them could not now act for either of them.

Neither the father's withdrawal from the joint retainer nor the parents' signing of a waiver really addressed the basic concerns raised by the joint retainer. The change merely shifted those concerns into the context of a new question -- namely, whether a lawyer who had been involved in a solicitor-and-client relationship with the father and mother in the same dispute should, regardless of any purported waiver, be allowed to continue to act for the mother.

The test set by the Supreme Court of Canada was whether a reasonably informed person would be satisfied that there would be no use of confidential information to the client's prejudice. So far in this case, both parents supported the same plan but, as the case unwinds, one of them might see the advantage of shifting blame for the child's injuries to the other parent or for diminishing his or her own part and responsibility in those events by raising questions about the other parent's conduct. At that point, the conflict would be obvious. Either the mother's lawyer would have to tone down any relevant questions to the father so as to avoid using her confidential information about the father -- in which case she would be short-changing the mother's case. Or she could exploit that confidential information about the father to make the mother's case stronger, but at the expense of violating her duty of confidentiality to the father.

The rules of professional conduct for lawyers make room for joint retainers in certain narrow circumstances where the clients consent, but they also warn about the increased risk. In this case, the risk was even higher because the parents were unsophisticated and vulnerable. Their signed waiver deserved very little weight, especially when their lawyer invited them to sign it only after the court had directed a motion on the issue of potentially disqualifying conflict.

A court should be very slow to interfere with a party's right to choose a lawyer and should intervene only where it clearly recognizes its over-riding duty to protect the administration of justice.

Schwartz v. Schwartz Estate

(2000), 9 R.F.L. (5th) 391 (N.S.C.A.),
Freeman (for the Court), Bateman, and Hallett JJ.A.,
at paras. 1-3; 21; 28-29

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1. The appellant, Vera Audrey Schwartz, began proceedings for a divorce from William Edwin Schwartz, her husband of 13 years, together with a claim respecting collateral issues, in December, 1993.

2. Proceedings were still pending when Mr. Schwartz died on February 24, 1997, leaving a will executed in December, 1993, after divorce proceedings began. In it he stated that he was making no provision for his wife or their minor son, James Schwartz, "on the assumption that they will, as a result of the aforesaid proceedings, receive their fair share of my assets". After small bequests he left the residue of his substantial estate to the three children he had by former relationships.

3. Mrs. Schwartz continued her claim under the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, as amended, against the estate and beneficiaries. She brought a claim under the *Testators' Family Maintenance Act*, R.S.N.S. 1989, c. 465 on behalf of herself and James Schwartz, who was born February 25, 1983, as his guardian *ad litem*. She and James Schwartz were both represented by Hugh Wright as solicitor in the proceedings involving the estate.

. . . .

21. The conflict between Vera Schwartz and James results from the differences in approach between the two statutes under which they are claiming, Mrs. Schwartz under the *Matrimonial Property Act* and the *Testators' Family Maintenance Act* and James under the *Testators' Family Maintenance Act* alone. Mr. Wright summarizes the nature of the conflict in the appellants' factum:

> There is therefore an actual conflict between the interests of Vera and James. Vera is entitled to claim that all Estate assets are matrimonial assets and therefore subject to division. James is entitled to take the position that some or all of the Estate assets are not matrimonial assets. Vera and the Defendants have taken the position that any matrimonial assets shall be divided evenly. James may choose to take a different position. Vera may argue that certain estate assets are overvalued or undervalued. James may choose to take a different position. The theory of the case advanced by the Estate is that the Will should be upheld and James is only entitled to receive through his mother. Requiring James to act through Vera supports the Estate's theory of the case and deprives James of an ability to make a truly independent claim.

. . . .

28. Once the conflict of interest between Mrs. Schwartz and James was recognized, Mr. Wright was left in an ethically untenable position. It was an error on the part of … [the chambers' judge] to require him to continue to act for both of them when their interests were known to be in conflict. He should have been removed as he requested to be.

29. I would allow the appeals and order the removal of Mrs. Schwartz as litigation guardian and Mr. Wright as solicitor for James. ….

3.2 Relationships With Clients - Conflicts Of Duty

3.2.3 Conflict not found

Children's Aid Society of the County of Bruce v. T.R.,

[2000] O.J. No. 5645 (QL) (Ont. Ct. J.), Brophy J.
(Summary)

Facts: Motion by T.R. to prevent a lawyer from acting on behalf of children in a wardship application. The lawyer had previously acted in other matters for one of the witnesses who had been called in the wardship proceedings. T.R. submitted that the prior relationship resulted in a limitation on the lawyer's ability to cross-examine the witness. The lawyer proposed to turn over the cross-examination of the witness to another lawyer. T.R. also submitted that the lawyer was in a conflict of interest in having previously represented the Children's Aid Society [in unrelated proceedings]. T.R. further submitted that the lawyer was not properly advancing the views and preferences of the children.

Decision: Motion dismissed. It was prudent for the lawyer to have the cross-examination of the witness conducted by someone else, thereby putting the evidence of the witness before the court and available to be challenged by the appropriate parties. In acting for the Children's Aid Society from time to time, the lawyer was not prevented from representing children through the Office of the Children's Lawyer. That was particularly true in a small community with limited resources. It was inappropriate to second-guess the lawyer's tactics and strategies in determining the children's positions, as long as the lawyer's conduct was ethical. It was not in the children's best interests to have the lawyer removed.

C. (G.) v. Family & Children's Services of Lunenburg (County)

(2000), 10 R.F.L. (5th) 12 (N.S. Fam. Ct.), Daley Fam. Ct. J.
(Summary)

Facts: An articling student worked for a law firm which represented the applicants in a child protection proceeding. The articling student had previously been employed as a social worker with the child protection agency now involved in the proceeding. While employed as a social worker for the agency, the articling student had participated in case conferences concerning the older sibling of the child subject to the proceeding. The respondent agency brought a motion to have the law firm representing the applicants (i.e., the law firm with whom the articling student was working) disqualified on the bases of (i) breach of confidentiality and (ii) conflict of interest.

Decision: Motion dismissed. During her period of employment with the agency, the articling student was not in a solicitor-client relationship with the agency; rather, was a social worker carrying out child protection functions. Any information that the articling student may

have formerly obtained through performance of her social worker duties for the agency concerning the family of the child subject to the proceeding was liable to be fully disclosed under statute governing child protection proceedings. Little or no risk of prejudice to the interests of the child, the agency, or the applicants existed by permitting the law firm to continue to represent the applicants. Further, the need existed to address the best interests of the child as soon as possible. Additional and substantial delay would result if the motion were granted. A reasonably informed member of the public would be satisfied that there was no confidential information received by the articling student, while she was a social worker, which could or would be used to the detriment of the agency, applicants, or child (applying *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235).

Chan v. Siow,

[2001] B.C.J. No. 153 (QL) (B.C.S.C.), Coultas J. (In Chambers), at paras. 1-2; 4-6; 13; 15-20

¶ 1 The parties are husband and wife engaged in litigation. On November 2, 2000, the plaintiff wife commenced this action against the defendant husband seeking, inter alia, orders for divorce, spousal and child support and reapportionment of family assets. By counterclaim, the defendant seeks reapportionment of family assets including his claim for an undivided one-half of the wife's interest in the matrimonial home. Whether or not the matrimonial home is a family asset is in contention.

¶ 2 These Reasons address an application by the defendant for an order restraining the law firm of Georgialee Lang & Associates from acting as counsel and as the solicitor of record for the plaintiff in the action, and for costs.

. . . .

¶ 4 The parties became estranged and they lived separate lives but under the same roof. In October 1999, the plaintiff told the defendant she wanted a divorce. He refused to co-operate. In October 2000, the marriage broke down completely; he threatened her and he was placed on a peace bond and forbidden to be within a one-block radius of the matrimonial home for one year. On November 2, 2000, the plaintiff commenced this action.

¶ 5 The defendant deposes that in late March 2000, he instructed the law firm of Chen & Leung to transfer his interest in the matrimonial home to his son, Steven. He met with Patrick Chen, one of two partners in the law firm, and with Sheila Braaten, a lawyer employed there who prepared the property transfer. The defendant deposes he … [imparted] confidential information respecting the conveyance to them. The transfer was completed on April 12, 2000. The plaintiff was not consulted about the transfer and was not aware of it at the time. [**Note:** Mr. Leung also gave deposition evidence.]

¶ 6 The character of the law firm [of Chen & Leung] and its composition in March 2000 is relevant. Chen & Leung was a firm engaged in general practice consisting of eight lawyers and one student. Mr. Chen and Mr. Paul Leung were the partners. One of the associate lawyers was Shelagh Kinney, employed there from about December 1, 1997 until April 20, 2000 specializing in family law matters. She was not a conveyancer. She left the firm [in April 2000] to join Georgialee Lang & Associates, a firm specializing in family law. ….

. . . .

¶ 13 Ms. Kinney has given evidence by affidavit. In answer to the evidence of the defendant and Mr. Leung, she deposes that to the best of her recollection she never met the defendant (he does not allege that she did) and did not have conduct of nor worked on any file relating to the defendant. ….

. . . .

¶ 15 The leading case dealing with the issue before the court is MacDonald Estate v. Martin, [1990] 3 S.C.R. 1235. Mr. Justice Sopinka delivering the majority judgment said, at p. 1243:

> In resolving this issue, the court is concerned with at least three competing values. There is first of all the concern to maintain the high standards of the legal profession and the integrity of our system of justice. Furthermore, there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession. The review of the cases which follows will show that different standards have been adopted from time to time to resolve the issue. This reflects the different emphasis placed at different times and by different judges on the basic values outlined above.

. . . .

¶ 16 The issue came before the British Columbia Court of Appeal in Rosin v. MacPhail (1997), 142 D.L.R. (4th) 304. ….

[**Note:** Rosin v. MacPhail was a constructive trust proceeding, resulting from breakdown of a 10-year common law relationship, in which the plaintiff brought an application to restrain the defendant's solicitor of record from continuing to act against her. A friend of the defendant, that solicitor had acted for the plaintiff 10 years earlier in her divorce from her prior husband. The chambers judge dismissed the plaintiff's application. The plaintiff's appeal from dismissal of her application was allowed and a restraining order granted.]

. . . .

[Esson, J.A. wrote in Rosin v. MacPhail] …, at paras. 11 and 12:

> 11 The fundamental issue in this case is whether the previous retainer of Mr. Schuck by Ms. Rosin is "sufficiently related" to Mr. Schuck's present retainer by the defendant. If it is, the court will infer that confidential information was imparted unless the solicitor discharges the difficult burden of satisfying the court that no relevant information was imparted. If the two retainers are sufficiently related and if the lawyer fails to discharge the burden, disqualification is automatic.
>
> 12 On the question whether the two retainers are sufficiently related, the judgments in MacDonald Estate are of little direct assistance. Because the two firms [in the MacDonald Estate case] were acting against each other in one cause, the question did not arise.

¶ 17 With respect to whether the two retainers are sufficiently related, the court considered the Professional Conduct Handbook of the Law Society of British Columbia and the Code of Professional Conduct of the Canadian Bar Association, and said at para. 15:

> ...both provisions lay down the same stringent standard, i.e. two matters will be sufficiently related unless the newer one is wholly unrelated to the earlier.

¶ 18 The court [in Rosin v. MacPhail] considered the burden of establishing that no confidential information was imparted, saying at paras. 23 and 25:

> 23 The point was considered by Prowse J., as she then was, in Hunt v. Hunt, [1992] B.C.J. No. 1366 (17 June 1992), Vancouver D48296 (B.C.S.C.), in considering whether a lawyer who had been a partner of the petitioner's former lawyer at a time when the former lawyer acted for the petitioner, should be disqualified from acting for the respondent.
>
> . . . .
>
> 25 In the course of submissions, there was a suggestion by Ms. MacLennan that family law is a special category in which the courts should be more ready than in others to restrain a lawyer from acting. Without calling family law a special category, I agree that the court should take into account the notoriously high level of strong feelings and stress which typically affect family law litigants. There may be no other area of litigation to which the words of Cory J., …., so clearly apply. [**Note:** Cory J., writing in MacDonald Estate v. Martin (1990), 77 D.L.R. (4th) 249 (S.C.C.), at p. 272, stated: "Lawyers are an integral and vitally important part of our system of justice. It is they who prepare and put their clients' cases before Courts and tribunals. In preparing for the hearing of a contentious matter, a client will often be required to reveal to the lawyer retained highly confidential information. The client's most secret devices and desires, the client's most frightening fears will often, of necessity, be revealed. The client must be secure in the knowledge that the lawyer will neither disclose or take advantage of these revelations. It is therefore reasonable to assume that the discretion to restrain a lawyer from acting may be applied more readily in the context of family law than in, say, commercial cases."]

¶ 19 The following factors persuade me that "a reasonably informed member of the public" (Sopinka, J. in MacDonald) would conclude that no information was imparted to Ms. Kinney which could be relevant in this action:

1. The defendant deposes that he instructed Chen and Leung to convey his interest in property to his son. He does not allege that he sought advice on family matters from members of the firm or that he discussed family difficulties with them. The transfer was executed; thereafter, he made no legal demands on his wife, nor did he tell her of the transfer. He did not litigate. This action was commenced by his wife many months after the transfer and then only after the defendant was placed on a peace bond.

   I find that the issues in this action are wholly unrelated to the matters of the conveyance.

2. There is no evidence that any members of the law firm discussed the defendant's business or legal affairs with Ms. Kinney …. Ms. Kinney has deposed that to the best of her recollection they did not and that assertion is consistent with the act of a prudent lawyer. Defendant's counsel submits that it is possible, but unlikely, that confidential information about family matters were imparted from Mr. Chen to Ms. Kinney. … [Mr.] Chen has not said that happened. The fact that Mr. Chen is now a judge does not preclude him from giving evidence by affidavit of matters he engaged in practice. That occurs not infrequently after a lawyer is appointed to the Bench.

3. Placing the plaintiff's name in Chen & Leung's "conflicts" system does not persuade me that confidential information about family matters was imparted to members of the firm. The system alerts a lawyer that the firm has conducted legal business on behalf of a party, information that might be relevant should the other party seek to retain the firm's services, in the future.

¶ 20 I am persuaded that the burden on the plaintiff to establish that no information by the defendant was imparted to Chen & Leung that could be relevant in this action, has been discharged. The defendant's application is refused.

. . . .

Paylove v. Paylove

(2001), 23 R.F.L. (5th) 200 (Ont. Sup. Ct. J.), J.W. Quinn J.

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1. This was a motion by the applicant, Deborah Ann Paylove ("wife"), in which she asked to have Mark F. Dedinsky, the solicitor for the respondent, Kenneth David Paylove ("husband"), removed from the record.

2. I dismissed the motion with costs and indicated that written reasons would follow when time permitted.

3. At issue is whether the waiver by, and delay of, the wife are bars to the relief she seeks. The trial is scheduled to commence in two weeks.

4. The material filed on the motion consisted of affidavits from the wife and Mr. Dedinsky. Mr. Bracken appeared for the wife in his capacity as duty counsel and Mr. MacLeod was retained by Mr. Dedinsky to argue the motion for the husband. The wife maintained that Mr. Dedinsky has a conflict of interest. It was the position of the husband that it would be unfair to force him to hire replacement counsel and suffer an adjournment of the trial.

Background

5. In April 2000, the husband was charged by his wife with the criminal offence of threatening. The husband enlisted the services of Mr. Dedinsky, pleaded guilty and was given a non-custodial sentence. He also hired Mr. Dedinsky to provide representation in negotiating a separation agreement with his wife. One of the terms of the sentence prohibited the husband from attending at the matrimonial home. This prevented him from obtaining his personal and financial papers which were needed by Mr. Dedinsky to prepare the usual net equalization payment calculations. Mr. Dedinsky advised a realtor, acquainted with the parties, that he required these papers. The realtor mentioned this fact to the wife and she, in turn, delivered certain material to Mr. Dedinsky on May 8, 2000. On this occasion, Mr. Dedinsky and the wife discussed a number of matrimonial matters and, among other things, the wife made it known that she was afraid of her husband and that he was "coming around and driving by" the matrimonial home. Mr. Dedinsky said he would speak to the husband about these concerns.

6. The next day, May 9th, Mr. Dedinsky wrote to the wife. In part, his letter stated:

> As you know, I am acting for your husband with respect to your recent separation on Saturday, April 15, 2000.
> It is my intention to get all of the relevant documentation from you and your husband, so I can complete a Net Family Property Statement and a proposal for the resolution for all of these matters by way of a formal contract which is also known as a "Separation Agreement."
> I am also trying to resolve this matter in a way which is cost efficient for both of you ...
> As I requested from you when we met on Monday May 8th, to discuss preliminary matters, since you are residing in the matrimonial home and since you apparently have most of all (sic) of the papers ... I would ask that you kindly get copies for me of the following ...
> Our client will be getting an appraisal of the rental home that you have agreed he move into ...

> Finally, once I have all of the documentation from you and once I get all of the appraisals in then I will be preparing a draft Net Family Statement (sic) for review by both you and your husband ...

7. It is not disputed that: on May 8th Mr. Dedinsky explained to the wife that he could not advise her and that she would be obliged to seek her own legal representation; over the next eight weeks or so the wife telephoned Mr. Dedinsky, but he did not return the calls; Mr. Dedinsky asked the same realtor to remind the wife that, although he was attempting to assist with the preparation of a separation agreement, it was necessary that she retain a lawyer, as he could not deal directly with her; and, in late June, she attended upon Mr. Dedinsky, demanded the return of her papers and he complied.

8. The next event, and it is of considerable significance, consists of a letter from Frederick Cameron, a St. Catharines lawyer, dated July 13, 2000 [to Mr. Dedinsky]. It began:

> Please be advised that I am retained by Ms. Deborah Paylove and I understand from my client that you represent her separated spouse, Kenneth Paylove. I further understand that you have spoken directly with my client regarding the matrimonial issues, *however, she is prepared to waive any conflict of interest which may be in existence*.
> (Emphasis added)

A copy of this letter was forwarded by Mr. Cameron to the wife.

9. The parties could not negotiate the hoped-for separation agreement and the wife commenced legal proceedings on October 12, 2000. Thereafter, up to August 14, 2001, there were 15 court appearances by both counsel, some in the presence of their clients and some without. The court file is thick, with the continuing record consisting of four volumes.

10. I do not propose to recite all of the proceedings that were before the court in the 10 months following October 12, 2000, but I note that the wife, by motion, sought orders: for spousal support; for the appraisal of certain realty; requiring the husband to endorse and deliver to her all health-insurance-benefit cheques; and for non-harassment. The husband brought a motion seeking orders that the wife: obtain various property valuations; produce income tax returns; and provide access to all documentation located at the matrimonial home. These motions were argued. There also was a disclosure motion brought by the husband in which the presiding justice ruled on the "sufficiency or insufficiency of the evidence which the wife intends to produce to value her business known as Merle Norman Cosmetics." Finally, I observe that on February 15, 2001, Scott J. ordered that each party "attend for oral questioning under oath, if so required, at a mutually agreeable time to be arranged between counsel." I do not know whether oral examinations actually took place, but it is significant that they were contemplated.

11. Case and settlement conferences were held on November 29, 2000 and June 18, 2001, respectively. On August 14, 2001, Mr. Dedinsky and Mr. Cameron attended before Scott J. and obtained a trial date of December 10, 2001.

12. To that point, not one word appeared in the many affidavits and other documents in the court file as to any unease felt by the wife due to her initial contact with Mr. Dedinsky.

13. In October 2001, the wife and Mr. Cameron parted company over the size of the retainer that he requested to conduct the trial.

14. On October 30th, the wife forwarded a very harsh letter to Mr. Dedinsky, the parting shot being that if he did not withdraw from the case she would report him to the Law Society of Upper Canada. The within motion was filed very shortly thereafter.

15. On November 5th, the wife delivered a Notice of Change of Representation, indicating that, henceforth, she would be acting without the services of a lawyer.

16. The wife swore a two-page affidavit on her motion. It includes these passages:

> 3. The applicant met with Mr. Dedinsky on May 8, 2000 at which time Mr. Dedinsky asked many private and personal questions, which the applicant answered. Mr. Dedinsky asked the applicant to provide him with numerous documents which are listed on his letter ... dated May 9, 2000.
> 4. Mr. Dedinsky asked the applicant to call him, instead of the police, if the respondent violated his probation and told the applicant that he would take care of it.
> 5. The applicant called Mr. Dedinsky's office many times over a period of approximately two months because the respondent was, and still is, stalking her. The applicant's calls went unanswered.
> 6. It became painfully clear that Mr. Dedinsky could not, or would not, restrain the respondent ...
>
> .....
>
> 8. On July 11, 2000, the applicant retained Mr. Fred Cameron as her solicitor, at which time she informed Mr. Cameron that she had spoken to Mr. Dedinsky, in depth, and had provided him with numerous documents.
> 9. Mr. Cameron told the applicant that she could have Mr. Dedinsky removed for conflict of interest, but to do so would prolong the case and, in any event, we could always have him removed later ...
> 10. The applicant spoke to Mr. Cameron, on many occasions, regarding the removal of Mr. Dedinsky, only to be told it was not the right time ...

17. In his six-page affidavit, Mr. Dedinsky deposes in detail to his contact with the wife and specifically he says that she knew: he was acting for her husband only; he could not give advice to her; and if a separation [agreement] were prepared she would have to review it with her own lawyer. Finally, he swore that he did not acquire any confidential information from her.

Discussion

18. In determining whether a disqualifying conflict of interest exists, two primary questions arise: (1) Did the lawyer receive confidential information attributable to a solicitor-client relationship relevant to the matter at hand? (2) Will the confidential information be misused? See *MacDonald Estate v. Martin* (1990), 48 C.P.C. (2d) 113 (S.C.C.). Here, there was no solicitor-client relationship between the wife and Mr. Dedinsky. However, I do not think it is always necessary for such a relationship strictly to exist for a conflict of interest to arise. It is sufficient if the lawyer and the "client" had a relationship pursuant to which the lawyer, in his professional capacity, obtained from the "client" confidential information related to the current litigation. That is the situation here. And, because of the nature of the contact between Mr. Dedinsky and the wife, I think, by analogy to the reasoning in *MacDonald Estate v. Martin*, it must be inferred that confidential information was imparted; subject, of course, to Mr. Dedinsky satisfying the court to the contrary. This burden cannot be discharged simply by deposing, as was done, that no such information was imparted.

19. I venture to say that "confidential information" is information one would not voluntarily reveal to an opposing lawyer. Thus, it is no answer for the lawyer to say that the information eventually would have been disclosed in the discovery process. (The matter would be different if, before the motion to remove the solicitor was brought, all of the confidential information had been revealed in the course of motions, oral examinations and the disclosure required by the litigation process.) "Confidential information" would include such obvious matters as personal expenses, assets and liabilities, but I think it also extends to the personal habits, faults and foibles of the "client," knowledge of which might be valuable to the lawyer in the adversarial world of litigation. It is immaterial that the lawyer, by his dealings with the "client," did not intend to gain some advantage over him or her.

20. With confidential information having been received by Mr. Dedinsky, then, again by analogy to *MacDonald Estate v. Martin*, disqualification is automatic. "No assurances or undertakings not to use the information will avail": see p. 293. However, I do not read the judgment in *Macdonald Estate v. Martin* to automatically override considerations of waiver and delay. In a proper case, they, together or even singly, may nullify the conflict. Here, both waiver and delay are prominently present.

21. The waiver was given by Mr. Cameron, the wife's lawyer. The matter would be much different if the waiver had been obtained by Mr. Dedinsky in the course of his dealings with the wife in May 2000. The waiver was expressed in clear and unequivocal terms [by the wife's lawyer] and Mr. Dedinsky was entitled to rely upon it.

22. The letter from Mr. Cameron of July 13, 2000, waiving the conflict, was copied to the wife. She deposes that Mr. Cameron told her "we could always have him removed later." If that is true, it is a deplorable tactic. However, even if the wife thought that she could have Mr. Dedinsky removed from the record at her convenience, I must not overlook considerations of basic fairness to the husband.

23. A motion of this kind, to a large extent, is a request for equitable relief. As such, delay is a relevant factor. Where there is delay in bringing a motion to remove an opposing solicitor from the record, the delay must be explained. This is particularly so where, as here, during the lengthy delay, the litigation proceeded with gusto. The explanation offered by the wife, I gather, is that Mr. Cameron was waiting for the opportune time to bring this motion and, with the termination of

his retainer, she moved quickly. However, this must pale when consideration is given to the right of the husband to be represented by counsel of his choice and to have his trial proceed as scheduled. Had the wife sought this relief in October or November 2000, she, I have no doubt, would have been successful. But, today is too late.

24. An order of the type herein sought should be made only after balancing the right of an individual to select counsel of his or her choice, public policy and the public interest in the administration of justice and basic principles of fundamental fairness: see *R. v. Speid* (1983), 43 O.R. (2d) 596 at 598 (C.A.).

25. The standard for the removal of counsel is objective; it is that of the reasonably informed member of the public: see *MacDonald Estate v. Martin*, supra, at p. 137. In my opinion, a fair-minded, reasonably informed member of the public would not conclude that the proper administration of justice required the removal of Mr. Dedinsky.

26. The right of a party to be represented by counsel of his or her choice is a fundamental part of our legal system. The right is to be infringed only in cases of clear necessity.

27. The combination of waiver and delay satisfy me that any hardship and injustice to the wife caused by dismissing her motion are outweighed by the unfairness to the husband in depriving him of his counsel of choice on the eve of trial. Whatever might be the intentions of the wife, the effect of this motion upon the husband is that of an ambush.

Conclusion

28. For the reasons given, the motion is dismissed.

29. The husband was required to pay Mr. Dedinsky to hire counsel and oppose this motion. He is entitled to his costs, which I award in the amount requested: $750 plus GST.

30. Perhaps I should add that, had I allowed the motion, I would have required the wife to pay to the husband his costs thrown away (associated with the inevitable adjournment of the trial and the briefing of replacement counsel) together with the costs of the motion, all payable before the new trial date and on the solicitor-client scale.

B.H. (Next friend of) v. Alberta (Director of Child Welfare),

[2002] A.J. No. 518 (QL) (Alta. Q.B.), C.A. Kent, J.,
paras. 8-10

[**Note:** B.H., 16 years old, appealed from apprehension and treatment orders made by a Provincial Court Judge under Alberta's *Child Welfare Act*. The treatment order authorized administration of blood transfusions. B.H., a Jehovah Witness, opposed blood transfusions, in her choice of medical care, on religious grounds. B.H.'s mother supported her daughter's position. B.H.'s father did

not. On the appeal, B.H.'s father applied to strike from the record the law firm representing B.H. (who, although a "child" under the statutory definition of "child" in the *Child Welfare Act*, was treated as a party to the appeal).]

8. …. The first application was made by counsel for the father to have the firm of W. Glen How & Associates removed as counsel for B.H. There were two arms to the argument. First, it was argued that the firm is in a conflict of interest having previously acted for B.H.'s father who is now supporting medical treatment involving blood transfusions and, therefore, is in opposition to the appeal … . The evidence is not sufficiently clear to find that the firm had acted for the father. Even if the firm had acted for the father, the father did not provide confidential information that is now being used to his detriment.

9. The second arm of the argument was that the particular lawyers who are members of the firm [of W. Glen How & Associates] are not only lawyers for B.H. but also lawyers for the Watch Tower Society who act only in cases involving Jehovah's Witnesses, are elders in the Jehovah's Witness congregation, and, by definition, are Jehovah's Witnesses themselves. The argument was that, for those reasons, the lawyers are unable to give objective advice to B.H. with respect to the matters in issue in this case. It was alleged that information given by them to B.H. about her treatment is wrong (for example, that the treatment being undertaken at the hospital is experimental or for research purposes), that they recommended that she start physically resisting the transfusions and that they informed her that she would be honoured by the Church if she refused transfusions. In the end result, the lawyers are unable to differentiate their roles as counsel for B.H., as counsel for the Church and as members of the Church themselves. Provisions of the Alberta Code of Professional Conduct and the Canadian Bar Association's Code of Professional Conduct were cited in support. Counsel who appeared on behalf of the W. Glen How firm argued, in opposition, that the provisions of the Codes of Professional Conduct which provide that lawyers are to be objective are a guide for lawyers and not intended to be used as a sword to have lawyers removed from a file. Neither side was able to provide me with any case authority with respect to this issue.

10. I accept the proposition that to remove counsel from a case should only be done in the clearest of circumstances: Alberta (Treasury Branches) v. Leahy (1998), 223 A.R. 113 (C.A.). I also accept the proposition that there should be a presumption that a lawyer will carry out his or her duties in accordance with the Oath of Office and the Codes of Professional Conduct. There have been a great number of allegations made throughout this litigation. I am not prepared at this stage to lose track of the primary focus--the care and treatment of B.H.--to embark on a long investigation to determine if that presumption should be overturned. The application to remove counsel is denied.

[**Notes:** (1) The father's factual position overlooked the fact that associated with W. Glen How & Associates for purposes of North America litigation, including this appeal, is a member of the Newfoundland Bar who is a practicing member of the United Church of Canada. (2) A similar application by B.H.'s father was unsuccessful on 17 June 2002, on hearing of another issue in this matter.]

3.3 Relationships With Clients - Rendering Services

3.3.1 Generally

Independent Legal Advice

Tjaden, Ted. *The Law of Independent Legal Advice*
(Scarborough: Thompson Canada Ltd., 2000),
pp. 1-4; 7; 8-9; 11; 16-18; 111; 112; 118-120; 161-162

INDEPENDENT LEGAL ADVICE

The law of independent legal advice is a relatively narrow area of law. Its concern is whether clients in particular situations have received legal advice from a lawyer that is independent and free of any bias or interest that the lawyer or the lawyer's other clients may have. In Canada, independent legal advice is a concept familiar to many lawyers by its acronym - ILA ….

. . . .

In a typical lawyer/client relationship, the risk of bias or conflict of interest does not usually arise. The lawyer is able to effectively and resolutely represent the interests of his or her client in transactions that are adversarial in nature, without the need for independent legal advice, since the client's interest is clear and the lawyer is able to advance the client's interest in the matter. Take, for example, a lawyer who represents a client selling his or her dental practice. If the opposite party - the purchaser of the dental practice - is represented by his or her own lawyer (as would be typical), each party to the transaction is independently represented and each lawyer can fulfill his or her duties by representing the interests of their respective clients (vendor or purchaser). In these types of situations, which consist of the bulk of lawyer/client relationships, the client does not need legal advice independent from that of his or her lawyer since the client's lawyer is able to focus his or her skills on representing the client without risk of bias or conflict of interest.

CATEGORIES OF CASES WHERE INDEPENDENT LEGAL ADVICE IS REQUIRED

In certain other cases. however, a client requires legal advice independently from that which his or her purported lawyer may give. The situations in which independent legal advice is required fall within (but are not necessarily limited to) several basic categories:

[**Note:** The author here lists the basic categories of cases as follows: (i) transactions with unrepresented parties; (ii) lawyer-client transactions; (iii) guarantees; (iv) family law domestic contracts; (v) employment law contract; (vi) corporate law – minority shareholders; (vii) insurance contracts/releases.]

. . . .

… Family law domestic contracts: [A] … situation where independent legal advice is often required is in family law. The need for independent legal advice can arise in a number of family law-related circumstances, particularly involving the negotiation and execution of domestic contracts. In the case of domestic contracts such as a separation agreement, especially where a lawyer acting for both parties has prepared the document in question, it is essential to help ensure the enforceability of the agreement that both parties each be independently advised by their own lawyer regarding the consequences of executing of the agreement. ….

A common thread running through the foregoing situations, where independent legal advice is warranted, is the need to protect the client from transactions which may have important legal consequences to ensure that the decisions made by the client are understood and are free from any possible improper influence from the other contracting parties (or their lawyers).

. . . .

INTRODUCTION

. . . .

There are four main categories of provisions within the C.B.A. Code of Professional Conduct and its provincial counterparts that are integral to the law of independent advice:

(i) The standard of care for providing independent legal advice;

(ii) The duty to avoid conflicts of interest;

(iii) The duty to unrepresented persons; and

(iv) The duty to clients with whom the lawyer has a business relationship.

. . . .

STANDARD OF CARE FOR INDEPENDENT LEGAL ADVICE

The C.B,A. Code of Professional Conduct explicitly discusses the standard of care required when a lawyer provides independent legal advice. Rule 3, which requires that "the lawyer must be both honest and candid when advising clients", states in Commentary 12-1 that the standard of care for giving independent legal advice is no different than the standard of care for other legal advice:

> Where the lawyer is asked to provide independent legal advice or independent representation to another lawyer's client in a situation where a conflict exists, the provision of such advice or representation *is an undertaking to be taken seriously and not lightly assumed or perfunctorily discharged*. It involves a duty to the client for whom the independent advice or representation is provided *that is the same as in any other lawyer and client relationship* and ordinarily extended to the nature and result of the transaction, [emphasis added]

Similar wording is provided in the provincial codes for Saskatchewan and Nova Scotia. Two important practice points arise from the C.B.A. commentary regarding the standard of care for the lawyer: that independent legal advice is to be taken seriously and that the duty to the client receiving independent legal advice is the same duty that would apply to "ordinary" clients.

The commentary to Rule 12 of Chapter 9 of the Alberta *Code of Professional Conduct* elaborates on the standard of care for a lawyer providing independent legal advice by suggesting the lawyer may be under a duty to make further inquiries where the lawyer believes the client may be taken advantage of:

> .... While the normal obligation of independent counsel is to ensure the voluntariness of a transaction and the client's understanding of it, factors such as the relationship between the parties, an apparent inequality of bargaining position or an agreement that appears heavily weighted in favour of one party *may require the lawyer to make further inquiries*. Under no circumstances may an offhand or cursory approach be taken to completion of a certificate of independent advice. *Consultation with independent counsel is frequently the client's only opportunity to consider objectively a transaction that may be primarily for the benefit of some other party while exposing the client to the risk of significant liability or prejudice*. [emphasis added]

The provision in Alberta, by suggesting a duty to make further inquiries in certain situations, is more explicit than the C.B.A. Code provisions by outlining those situations where the client may be in need of protection. What is explicit in the Alberta provision, however, is implicit in the C.B.A. provision since, in treating the client as one would an "ordinary" client and taking this role seriously (as required by the C.B.A. provisions), the lawyer should make further inquiries where indicated by the particular aspects of the transaction, even though the duty to do so is not expressly laid out. In other words, the duty to make further inquiries can arise with any client, not just a client to whom one is providing independent legal advice. The extent to which a lawyer should make further inquiries will depend on the particular aspects of the transaction under consideration. What is important in those situations is that the lawyer clearly communicate the terms of the retainer with the client receiving independent legal advice if further inquiries are warranted. If the client refuses to pursue further inquiries, and if doubt remains about whether the client understands the transaction or is free of undue influence, the lawyer should obviously not provide a certificate of independent legal advice stating otherwise.

. . . .

... the standard of care for providing independent legal advice … turns out to be no different than the standard of care applied to regular clients, with all that such a standard entails: a duty to take one's role seriously, a duty to give a competent opinion based on the facts, and a duty to keep abreast of the law. …

. . . .

THE DUTY TO UNREPRESENTED PERSONS

Special rules have been developed regarding transactions where one party to the transaction is not represented by a lawyer. In these situations, the lawyer representing a party to the transaction is under a duty to recommend that the unrepresented person obtain independent legal advice. Rule 19 of the C.B.A. *Code of Professional Conduct* which admonishes lawyers to avoid questionable conduct, specifically suggests in Commentary 8 to that Rule that a lawyer recommend independent legal advice for unrepresented persons:

> The lawyer [for another person] should not undertake to advise an unrepresented person, but should urge such a person to obtain independent legal advice and, if the unrepresented person does not do so, the lawyer must take care to see that such person is not proceeding under the impression that the lawyer is protecting such person's interests. If the unrepresented person requests the lawyer to advise or act in the matter the lawyer should be governed by the considerations outlined in the Rule relating to impartiality and conflict of interest between clients. The lawyer may have an obligation to a person whom the lawyer does not represent, whether or not such person is represented by a lawyer.

In practice many of the negligence claims brought against lawyers for failing to recommend independent legal advice are commenced by unrepresented persons who either were not clearly urged to seek independent legal advice or who believed their interests were being protected by the lawyer [for another person] involved on the transaction. Therefore, it is critical in such transactions involving more than one party, where not all parties have their own lawyer, that any unrepresented persons be urged, in writing, that (i) the lawyer acts for the other party; (ii) the lawyer is not protecting the interests of the unrepresented party; and (iii) the unrepresented party should seek independent legal advice regarding the completion of the transaction. In these situations, particularly where the unrepresented party may lack business sophistication, it is often a good idea for the lawyer recommending independent legal advice to provide the unrepresented person with information, in writing, on lawyer referral services available, as may be offered through the applicable provincial law society, as means of reducing the chance of the unrepresented person later arguing that he or she did not have the opportunity to act on the recommendation for independent legal advice.

In Alberta, the duty to an unrepresented party is expressed in the context of negotiations involving unrepresented parties [Chapter 11, Rule 5]:

> When negotiating with an opposing party who is not represented by counsel, a lawyer must:
>
> (a) advise the party that the lawyer is acting only for the lawyer's client and is not representing that party; and
>
> (b) advise the party to retain independent counsel.

Commentary 5 to this Rule discusses how far this duty extends:

> The lengths to which a lawyer must go in ensuring a party's understanding of the matters referred to in Rule 5 will depend on all relevant factors, including the party's

> sophistication and relationship to the lawyer's client and the nature of the agreement in question. Assuming compliance with Rule 5, a lawyer may thereafter represent the client in the same manner as though the other party were represented by counsel.

British Columbia sets out in paragraph 8 of Appendix 3 of the *Professional Conduct Handbook* special rules regarding unrepresented persons involved in real estate transactions:

> If one party to a real property conveyancing transaction does not want or refuses to obtain independent legal representation, the lawyer acting for the other party may allow the unrepresented party to execute the necessary conveyancing documents in the lawyer's presence as a witness if the lawyer advises that party in writing that:
>
> (a) the party should obtain independent legal representation but has chosen not to do so.
>
> (b) the lawyer does not act for or represent the party with respect to the conveyancing transaction, and
>
> (c) the lawyer has not advised that party with respect to the conveyancing transaction but has only attended to the execution and attestation of the conveyancing documents.

If a lawyer so acts by only attending to the execution and attestation of conveyancing documents, it is critical that the lawyer confirms in writing the foregoing limitations to the unrepresented party.

To a certain extent, there is some cross-over in the case law between cases involving conflicts of interest and duties to unrepresented persons. The cross-over occurs where the lawyer fails to make clear to an unrepresented party the lawyer's role in the transaction and the unrepresented party later takes the position that he or she thought the lawyer was protecting his or her interest in the transaction.

. . . .

INDEPENDENT LEGAL ADVICE AND FAMILY LAW

1. INTRODUCTION

The law of independent legal advice plays an important role in family law in a number of ways. Family law often consists of transactions among husband and wife - such as separation or pre-nuptial agreements - that involve the negotiation and settlement of important legal rights. Many of these transactions occur in an atmosphere of highly charged emotional tension. Independent legal advice can therefore provide much needed objective assistance from a neutral party to ensure that the family member has understood the transaction and has not been subject to undue influence or other improper pressures.

. . . .

2. THE HISTORICAL VIEW OF THE “WIFE” AS BEING NEEDY OF PROTECTION

. . . .

… To speak of "wives" as needing protection is of course sexist and unnecessary. Not every "wife" is vulnerable or needs independent legal advice. The law of independent legal advice is meant to ensure that vulnerable parties - regardless of gender or family status - be fully informed as to their contractual rights and obligations free of undue influence or other improper compulsion. The principles and rules governing the law of independent legal advice, therefore, should ordinarily apply equally to both men and women. But this, in fact, raises a question … - to what extent in family law is the insistence of independent legal advice for the vulnerable spouse a tool of the more powerful party to prevent the vulnerable party from later resiling from what may turn out to be an unbalanced agreement in favour of the more powerful party that does not amount to being legally unconscionable? To the extent that independent legal advice is used as a tool to create an estoppel, it may be that the effect of independent legal advice is not as gender-neutral as might be theorized if in the majority of transactions it is women who are the more vulnerable party in a family law domestic contract negotiation pressured into receiving independent legal advice *that is not effective* in righting an imbalance in the agreement but in only later preventing them from resiling from the agreement. [Emphasis added.]

Imagine the following scenario: a young couple separates due to irreconcilable differences they have had over Phil's drinking and gambling and his parsimonious control over family spending. Judy had stayed at home to raise the couple's children, while Phil worked outside of the home. Phil has shown violent tendencies toward Judy in the past, especially when he drinks. As the fighting got worse, he threatened Judy on several occasions and repeatedly said he would make sure Judy got nothing if they separated and that he would do everything he could to deny her custody. Through his work, Phil had dealt with lawyers and in fact had his lawyer prepare a separation agreement that was one sided in his favour regarding the division of property including business assets and his pension. He presented her with the separation agreement on a "take-it-or-leave it" basis. Judy may have little or no money to afford her own independent legal advice. If she did, the lawyer would presumably advise her to not sign the agreement because it was too one-sided. When the lawyer asks Judy if she has been threatened to sign the agreement or under duress, Judy may be too ashamed or uncomfortable to reveal the true situation to this relative stranger. Judy cannot likely afford the cost or emotion of protracted negotiations or litigation; she may also have irrational reasons for wanting to sign the agreement (fear of being denied access to the children, fear of being able to support herself, and so on). Judy then signs the agreement in the presence of the lawyer, along with the ILA certificate. In these circumstances, if the agreement is not unconscionable in the legal sense but only one-sided or improvident, Judy would likely have a hard time later setting the agreement aside. Her chances of setting the agreement aside would have been better if she had no legal representation when she signed the agreement.

If this scenario is realistic - and some of the cases … seem to suggest it is in some situations - it is clear that independent legal advice did not work and not necessarily because of anything the independent lawyer did incorrectly. The fact is that spouses entering into domestic contracts are not always in a position to rationally assess their different options and select the most rational choice among their various alternative courses of action. The position of the independent legal advice lawyer representing the potentially vulnerable spouse who is "presented" with a take-it-or-leave-it domestic contract is difficult, especially if the vulnerable spouse is unwilling or unable to negotiate a more balanced agreement. Arguably, the independent lawyer still has a valuable role to play and the difficulties imposed by the foregoing scenario are discussed below in section … 4

dealing with practical tips for family law lawyers providing independent legal advice in family law transactions.

Thus, although we have come a long way in Canada in ensuring effective equal legal rights for both men and women, and although the law of independent legal advice can and should be expressed in gender-neutral language, it is important for family law lawyers to be sensitive to the difficulties experienced by vulnerable parties in need of effective independent legal representation.

3. DOMESTIC CONTRACTS AND INDEPENDENT LEGAL ADVICE

… cases involving independent legal advice and family law domestic contracts comprise a large number of the cases involving independent legal advice. This is not too surprising given the emotion with which some domestic lawsuits are unfortunately litigated. Most family law practitioners, however, should already be relatively familiar with the need for independent legal advice since it has become a routine part of certain family law transactions, as discussed below.

. . . .

4. PRACTICAL TIPS ON … [INDEPENDENT LEGAL ADVICE] FOR FAMILY LAW TRANSACTIONS

Practicing family law can be very challenging due to the real-life problems that clients have. Added to this are the emotions that clients experience whenever undergoing disputes with spouses or other family members. Most family law lawyers will already be familiar with the need for independent legal advice in family law transactions. … . This section of the book sets out some factors for family law lawyers to consider when providing independent legal advice:

- Ensure spouse has a copy of the agreement: When drafting domestic contracts, it is imperative that the other spouse be given a copy of the documentation with sufficient time to review the documentation

- Recommend ILA to unrepresented spouse: …, a lawyer has a duty to an unrepresented party to recommend that the party seek their own legal advice. In the family law context, this is particularly important. Such advice should be documented in writing. Where the other spouse may be particularly vulnerable due to their physical or emotional state, it may be in your client's best interests to insist that the other spouse seek independent legal advice.

- Avoid "take it or leave it" agreements: Although aggressive negotiation tactics are commendable in commercial settings, courts in the family law context do not look favourably on "take it or leave it" agreements.

- Clarify terms of retainer: If approached by a spouse seeking independent legal advice, clarify the scope of your retainer with the client in writing: are you merely explaining the agreement or are you being hired to negotiate the contents of the agreement?

- Take good notes: Since separation agreements and other domestic contracts are often forward-looking, involving ongoing obligations such as spousal support, if the parties litigate the enforceability of clauses in the agreement, such litigation may not take place for many years after the execution of the agreement. If you have not taken good notes regarding the advice you gave and the scope of your retainer, you may be subjecting yourself to possible malpractice claims … or doing a disservice to your client by not being able to recall the advice you gave and the circumstances of the negotiations. Take advantage of various available checklists … [see a form entitled "Independent Legal Advice Checklist" which is Appendix B to this paper].

- Only provide family law ILA if competent: If you have not kept current with family law for your jurisdiction, it can be dangerous to dabble in providing advice on domestic contracts regarding the potential financial impact of spousal support and pensions.

Gurney v. Gurney

[2002[B.C.J. No. 13 (QL) (B.C.S.C. (Vancouver Registry)), Pitfield J., at paras. 20-31

. . . .

¶ 20 The petitioner claims that the separation agreement was unfair. She claims that the matrimonial home should have been reapportioned in her favour on a 60/40 basis and the Paradise Lake property should have been divided equally. She does not dispute the fairness of the remainder of the agreement as it relates to the division of property. She attributes the unfairness to the circumstances surrounding the negotiations, her distraught state of mind resulting from the marriage breakdown, and the lack of independent legal advice.

¶ 21 To the contrary, the respondent contends that the terms of the agreement were settled with the assistance of mediators and each side had the benefit of independent legal advice.

¶ 22 In fact the parties did have the assistance of Douglas Chalke & Associates, mediators experienced in matrimonial matters, throughout the negotiations. The parties met with the mediators for approximately two hours on two occasions. Neither party met separately with the mediators.

¶ 23 There is insufficient evidence before me regarding the extent to which the mediators outlined the parties' rights under the [Family Relations] Act or the Divorce Act. There is insufficient evidence of the actual course of the negotiations. There is evidence that the respondent insisted on receiving $45,000 from the sale of the Paradise Lake property as repayment of the portion of his inheritance applied to his purchase. There is no evidence of bargaining as opposed to the making of a demand in this regard.

¶ 24 The parties were advised by the mediators to obtain independent legal advice before executing the agreement. There is no evidence that the respondent did so or that he considered it necessary to do so.

¶ 25 The petitioner did seek legal advice from a solicitor, Dino Milos, who is now deceased. In a letter to the solicitor enclosing a draft of the agreement, the petitioner wrote the agreement "appears to be a fair settlement, however I would appreciate it if you would review this document". She did not seek legal advice from anyone in the law firm where she was then employed as a receptionist.

¶ 26 Mr. Milos did not prepare any memorandum of the advice he gave the petitioner. There are no file notes describing the advice. There is no correspondence from him to the petitioner except for the purpose of rendering a modest account of $175 and the account is uninformative. It describes the services rendered in the following terms:

> All professional services rendered, in connection with the above matter, including interview, instructions, advising; to perusing proposal [sic] Agreement and advising thereon, to reviewing portions of Agreement with client and attending upon execution of same; top [sic] all telephone conferences; to all correspondence.

¶ 27 The petitioner deposes that:

> I met with Dino Milos twice. Our first meeting, at the end of August 1996, was no more than forty-five minutes. During that meeting, we really just chatted. I felt he was trying to gather a thumbnail sketch of the situation. At our second meeting, which lasted no more than a half hour, he had reviewed the Agreement. We did not go through it point by point. He said he had looked at it and it looked fair to him. That is what I wanted to hear. I asked about the fact that the Respondent would keep a larger share of the Cabin because of his inheritance and Mr. Milos told me only that it was a grey area. Mr. Milos also talked about how I seemed to be a nice person, with a nice personality, and that I would meet someone and I would be okay.
> Mr. Milos did not discuss any of the following concepts with me: reapportionment of assets, compensatory support, tax implications of support. He did not tell me that it was possible for me to make a claim for a greater share of family assets based on the fact that I had been out of the workforce for 18 years and had lower income-earning capacity than the Respondent. He did not advise me how much I would actually net from the spousal and child support paid to me. He did not tell me it was possible to make a claim to stay in the House until the children finished high school.

¶ 28 I find that the summary advice from the solicitor did not amount to independent legal advice from which the petitioner was able to make an informed decision on the question of whether she should accept the terms of the draft agreement.

¶ 29 In the family law context, providing independent legal advice must mean more than being satisfied that a party understands the nature and contents of the agreement and consents to its

terms. The solicitor should make inquiries of the party so as to be fully apprised of the circumstances surrounding the agreement. The party should be advised of his or her legal rights and obligations in relation to the subject matter of the agreement and advised of the consequences associated with a refusal to sign. The solicitor should offer his or her opinion on the question of whether it is appropriate for the party to sign the agreement in all of the circumstances. It is only with that kind of advice that the party can make an informed decision about the advisability of entering into the agreement as opposed to pursuing some other course. In this regard, the cases of Turyk v. Derby, [1980] B.C.J. No. 773 (B.C.S.C.), Inche Noriah v. Shaik Allie Bin Omar, [1929] A.C. 127 (H.L.) and Brosseau v. Brosseau (1989), 63 D.L.R. (4th) 111 (Alta. C.A.) are of assistance.

¶ 30 However, the lack of independent legal advice in this case is not fatal and the agreement should not be set aside because of its absence. On the evidence before me I cannot conclude that the respondent exercised undue influence over the petitioner in order to persuade her to execute the agreement. Nor did the petitioner agree to sign under duress. Her emotional state was that which one would expect to be associated with a marriage breakdown. None of her emotional state, duress or undue influence vitiated her consent to the agreement.

¶ 31 The pattern of the negotiations, the character of the legal advice received by the petitioner and the circumstances surrounding the execution of the agreement do not infuse it with a prima facie appearance of fairness. That being the case, the question is whether the agreement, particularly as it relates to the matrimonial home and the recreational property, is fair in its operation regardless of the circumstances in which it was prepared and executed.

[**Note:** The Court, in the result, varied one asset-sharing provision of the settlement agreement and, otherwise, upheld the agreement.]

"Guidelines on Ethics and the New Technology"

American Bar Association Centre for Professional Responsibility (Standing Committee on Professionalism). (2001), 13 *the Professional Lawyer* (Fall 2001) 23

The [American Bar Association] Centre for Professional Responsibility recently formed a Working Group on Ethics and Technology, which met during the 2001 ABA Midyear and Annual Meetings. The group is currently reviewing the Guidelines for Ethics and the New Technology that have been adopted by the Law Societies of Alberta, British Columbia, Nova Scotia, Ontario, Quebec … and the Yukon Territory. The following are excerpts from those guidelines (which are posted in their entirety at http://www.lawsocietyalberta.com / pubs policies reports/ethicsguideline.asp).

Part I

TECHNOLOGY AND THE DUTY OF COMPETENCE

The *Code of Professional Conduct* of the Law Society of Alberta deals with Competence in Chapter 2. Chapter 2 Rule 1 provides:

> A lawyer must maintain a state of competence on a continuing basis in all areas in which the lawyer practises.

Commentary G.1 (page 12) of Chapter 2 contains a list of characteristics encompassed by the term "competence". List item (h) reads:

> maintenance and improvement of knowledge and skills[.]

With the ever-increasing impact of technology on the practice of law, a lawyer using technology must either have reasonable understanding of the technology used in the lawyer's practice, or access to someone who has such understanding. As well, certain endeavours in the practice of law may require a lawyer to be technologically proficient. For example, it might be impossible to competently handle a complex child/spousal support case without recourse to support calculation software; similarly, it might be impossible to competently handle a complex litigation matter involving a large number of documents without litigation support software.

Part II

LAW ON THE INTERNET

1. Upholding the law of other jurisdictions

Chapter 1 of the [Alberta] *Code of Professional Conduct* deals with The Relationship of the Lawyer to Society and the Justice System. Rule 1 reads:

> A lawyer must respect and uphold the law in personal conduct and in rendering advice and assistance to others.

The Commentary on this Rule states, on page 3:

> "The law" for the purposes of Rule #1 is to be broadly interpreted and includes common law, such as tort law, in addition to criminal and quasi-criminal statutes."

An Alberta lawyer who practises law in another jurisdiction by providing legal services through the Internet must respect and uphold the law of the other jurisdiction, and must not engage in unauthorized practice in that jurisdiction.

2. Privileged communications

Chapter 4 of the [Alberta] *Code*, Relationship of the Lawyer to other Lawyers, Rule 8 reads:

> A lawyer who comes into possession of a privileged written communication of an opposing party through the lawyer’s own impropriety, or with knowledge that the communication is not intended to be read by the lawyer, must not use the

> communication nor the information contained therein in any respect and must immediately return the communication to opposing counsel, or if received electronically, purge the communication from the system.

Chapter 4, Rule 8 includes communications received through e-mail.

3. Conflict of Interest

Chapter 6 of the [Alberta] *Code* deals with Conflict of Interest. To ensure that there is no breach of the obligations to avoid conflict of interest when delivering legal services using the Internet or e-mail, a lawyer must determine the actual identity of parties with whom the lawyer is dealing.

4. Capacity in which Lawyer is Acting

Chapter 15 of the [Alberta] *Code*, The Lawyer in Activities Other than the Practice of Law, Rule 1 states:

> Where there may be confusion as to the capacity in which a lawyer is acting, the lawyer must ensure that such capacity is made as clear as possible to anyone with whom the lawyer deals.

A lawyer who communicates with others in chat rooms, discussion groups or otherwise through electronic media such as the Internet must advise others participating in the communication when the lawyer does not intend to provide legal services.

Part III

CONFIDENTIALITY AND THE INTERNET

Chapter 7 of the [Alberta] *Code*, Confidentiality, contains a statement of principle as follows:

> A lawyer has a duty to keep confidential all information concerning a client's business, interests and affairs acquired in the course of a professional relationship.

The relevant Rules in this section of the *Code* are as follows:

> 1. A lawyer must not disclose any confidential information regardless of its source and whether or not it is a matter of public record.
>
> 2. A lawyer must not disclose the identity of a client nor the fact of the lawyer's representation.
>
> 4. A lawyer must take reasonable steps to ensure the maintenance of confidentiality by all persons engaged or employed by the lawyer.

The Commentary section of Chapter 7 does not specifically deal with the use by a lawyer of e-mail, whether via the Internet, internal e-mail or otherwise, or the use of cellular telephones or fax

machines to transmit confidential client information. However, a lawyer using electronic means of communication must ensure that communications with or about a client reflect the same care and concern for matters of privilege and confidentiality normally expected of a lawyer using any other form of communication.

First, both the lawyer and the client can choose to use an electronic means of communication, including the Internet, cellular telephones and fax machines, as a means of communication in the solicitor-client relationship. The use on the part of the client or the lawyer may be said to be an implied invitation to use or respond via the same electronic means.

Second, while initially there seems to have been much debate on this topic, the better view today is that there is no basis to conclude that Internet communications are any less private than those using traditional land-line telephones. There does not seem to be a ready and apparent danger that e-mail is less confidential than fax machines or cellular telephones, so anyone using the Internet to communicate has a reasonable and justified expectation of privacy, and it cannot be said as a simple rule that a lawyer must encrypt anything that the lawyer believes the client would not want to read in the local newspaper.

Third, lawyers communicating on the Internet without encrypting their transmissions do not violate the principle of confidentiality. While encryption makes theft or interception more difficult, even strong encryption can be technically defeated. The vulnerability to theft and interception therefore remains. However, in ordinary circumstances, a lawyer is not [to] be expected to anticipate the criminal activity of theft of solicitor-client communications on the Internet any more than mail theft.

The use of e-mail and other electronic media presents opportunities for inadvertent discovery or disclosure of messages, given the manner in which information:

> (a) is transmitted within the network systems of an Internet;
>
> (b) is kept as a permanent record if conscious efforts are not made to delete those messages and thereby destroy the prospect of discovery or inadvertent disclosure.

A lawyer using such technologies must develop and maintain a reasonable awareness of the risks of interception or inadvertent disclosure of confidential messages and how they can be minimized.

Encryption software is available and must be used, if electronic means of communication are used, for those confidences that may be so valuable or sensitive that it is in the client's interest to take the extraordinary step of encrypting to protect them. The challenge, as in so many ethical areas, is to recognize those extraordinary situations and exercise sound judgment in relation to them.

When using electronic means to communicate in confidence with clients or to transmit confidential messages regarding a client, a lawyer must:

> (a) develop and maintain an awareness of how technically best to minimize the risks of such communications being disclosed, discovered or intercepted;

(b) use reasonably appropriate technical means to minimize such risks;

(c) when the information is of extraordinary sensitivity, advise clients to use encryption software to communicate with their lawyer, and use such software;

(d) develop and maintain such law office management practices as offer reasonable protection against inadvertent discovery or disclosure of electronically transmitted confidential messages.

Part IV

SOFTWARE PIRACY

Software piracy is unethical. The [Alberta] *Code* contains several relevant provisions. Lawyers must respect and uphold the law pursuant to Chapter 1, Rule 1. They must refrain from discreditable conduct, both as a lawyer and in other capacities, pursuant to Chapter 3, Rule 1.

Lawyers must maintain a standard of competence in their practice and ensure that those they employ or train act in a competent fashion pursuant to Chapter 2, Rules 1 and 4. They must therefore ensure that support staff and students-at-law are aware of applicable licensing provisions. The management and organization of and compliance with licence agreements for all software used by a firm must not be left entirely in the hands of an office manager or support staff.

A lawyer can guard against accidental software piracy by carefully reviewing the provisions of the software licensing agreements for software used in the office. Where strict compliance with the licensing agreement may work a hardship, exemption must be sought from the licensor.

. . . .

Part V

ADVERTISING

1. Applicability of Code to Electronic Media

Advertising by lawyers in various forms of electronic media, including web sites, network bulletin boards, and direct e-mail, are governed by the Alberta *Code of Professional Conduct*. Chapter 5, Accessibility and Advertisement of Legal Services, Commentary G.1 (p. 42) reads:

> General -- Meaning of "advertisement": In this chapter, "advertisement" means any statement, oral, written, or electronic, made by a lawyer or firm to the public in general or to one or more individuals and having as a substantial purpose the promotion of the lawyer or firm.

The present *Code* contains restrictions on advertising content which are directly applicable to electronic advertising. Restrictions prohibiting false, inaccurate or misleading statements (Chapter 5, Rule 2) and the assertion that a lawyer is a specialist or expert (Chapter 5, Rule 3) govern

advertising initiated through new technology. Similarly, a lawyer must retain a copy of every advertisement published or distributed on the lawyer's behalf for a minimum period of one year after the date of its last publication or distribution (Chapter 5, Rule 5).

2. Identification of Lawyer in Internet Communications

Electronic media are different from more traditional methods of communication because distribution of the advertisement is not limited geographically, nor is access to it always restricted or focused to a particular group of users. In these circumstances, there is an enhanced potential that a viewer of a network bulletin or web site might view an advertisement and be confused as to a lawyer's identity, location, or qualifications.

A lawyer making representations in generally accessible electronic media must include the name, law firm, mailing address, licensed jurisdiction of practice, and e-mail address of at least one lawyer responsible for the communication's content in the communication.

3. Multi-jurisdictional Advertising

Where a lawyer is entitled to practice in more than one jurisdiction, and these jurisdictions are identified in representations on electronic media, that lawyer must ensure that the advertisement complies with the advertising rules governing legal advertising in each of those jurisdictions.

4. Restrictions on Indiscriminate Distribution

Some forms of direct solicitation via electronic media can produce widespread and unwanted communication. The existing *Code* permits direct solicitation of potential clients, with limits on contacts with potential clients who are recovering or are vulnerable as a result of a traumatic experience, and may be hospitalized or in custody (Chapter 5, Commentary G.2, p. 43).

The Sub-committee considers that the following provisions are examples of interactions with the public which are not compatible with the best interests of the profession, the administration of justice and society generally:

> 1. advertisement of professional services using electronic media where the advertisement is directly and indiscriminately distributed to a substantial number of newsgroups or electronic mail addresses.
>
> 2. posting of electronic messages to newsgroups, listservs or bulletin boards whose topic scope does not include the proposed advertisement.
>
> 3. advertisement of professional services using electronic media where the advertisement substantially interferes with another's use of the media or invades the privacy of other users.

[**Note:** An “electronic message” includes e-mail. A “newsgroup” is an Internet venue for discussion about specific topics. Newsgroups are comparable to electronic bulletin boards, where users post messages to a common site (i.e., a newsgroup), and read and answer the posted messages

to the extent they are of interest to the user. A "listserv" is a mailing list management software program, sometimes referred to as a "remailing program". The term is often also used to refer to mailing lists. An example of a mailing list directed at practicing lawyers is provided by the Trial Lawyer's Association in Ontario and in British Columbia; both of which operate mailing lists for Association members. The mailing list provides a venue for association members to research problems and network with one another.]

A lawyer's advertising activity is further governed by the provisions of Chapter 8 of the *Code*, "The Lawyer and The Business Aspects of Practice", which directs that "a lawyer in conducting the business aspects of the practice of law must adhere to the highest business standards of the community". Where indiscriminate electronic distribution of advertising information is unacceptable in the general business community that makes use of technology, the largely unwritten business practices governing conduct will apply to the advertising lawyer.

Part VI

General

When interpreting these guidelines, the lawyer should have reference to the [Alberta] *Code* [or its equivalent in her (his) jurisdiction(s)]. Like the *Code*, these guidelines should be understood and followed in their spirit as well as in the letter.

The details of the fact situations in which the *Code* and these guidelines apply will change as technology changes, but the principles of ethical professional conduct will not.

. . . .

Opinion Number 00-4, 2000:

"Online Lawyering"

Florida State Bar Association Professional Ethics,
2000 WL 1505453 (Fla. St. Bar Assn.)
(Summary)

This Florida ethics opinion discusses the propriety of on-line lawyering by a Florida lawyer desiring to provide on-line services to Florida residents on matters not requiring office visits or court appearances. The attorney proposes services concerning simple wills, incorporation papers, real estate contracts, residential leases and marital agreements in uncontested matters. The documents being generated at the client's option would be reviewed by a lawyer authorized to provide legal services in Florida and the client would pay via credit card on a secure service at the time of the service. The opinion discusses the application of the Rules of Professional Conduct to the proposed services and concludes that on-line lawyering by a Florida lawyer to Florida citizens is permissible so long as the service is rendered through a law firm. The services are not permitted

if performed by a lawyer through a corporate entity other than a professional service company authorized to perform legal services.

Formal Opinion 01-422

"Electronic Recordings by Lawyers Without The Knowledge of All Participants"

American Bar Association (Standing Committee on Ethics and Professional Responsibility), **24 June 2001**

A lawyer who electronically records a conversation without the knowledge of the other party or parties to the conversation does not necessarily violate the Model Rules. Formal Opinion 337 (1974) accordingly is withdrawn. A lawyer may not, however, record conversations in violation of the law in a jurisdiction that forbids such conduct without the consent of all parties, nor falsely represent that a conversation is not being recorded The Committee is divided as to whether a lawyer may record a client-lawyer conversation without the knowledge of the client, but agrees that it is inadvisable to do so.

. . . .

Conclusion

In summary, our conclusions are as follows:

1. Where nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation.

2. Where nonconsensual recording of private conversations is prohibited by law in a particular jurisdiction, a lawyer who engages in such conduct in violation of that law may violate Model Rule 8.4, and if the purpose of the recording is to obtain evidence, also may violate Model Rule 4.4.

3. A lawyer who records a conversation without the consent of a party to that conversation may not represent that the conversation is not being recorded.

4. Although the Committee is divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client concerning the subject matter of the representation without the client's knowledge, such conduct is, at the least, inadvisable.

[**Note:** Model Rule 8.4: a lawyer who records a conversation in the practice of law in violation of a statute constituting the criminal offence of recording a conversation without consent, has also likely violated Model Rule 8.4(b) or 8.4(c) or both. Model Rule 8.4(b) states: "It is professional misconduct for a lawyer to: …. commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects …". Model Rule 8.4(c) states: "It is professional misconduct for a lawyer to: …. engage in conduct involving dishonesty,

fraud, deceit or misrepresentation …". Model Rule 4.4 proscribes, *inter alia*, using "methods of obtaining evidence that violate the legal rights of a [third] person".]

Decision making authority in client-lawyer relationship

Proulx, Michel and Layton, David.
***Ethics And Canadian Criminal Law* (Toronto: Irwin Law, 2001),**
pp. 115-117

Many Canadian rules of professional conduct contain no direct reference to the general locus of decision making authority in the client-lawyer relationship, Specifically, the CBA Code makes no mention of this subject, and hence those governing bodies that follow the CBA's ethical guidelines show a similar lacuna. Yet there are some governing bodies that address this important topic. The British Columbia rules seem to suggest, though without great clarity, that a lawyer is generally required to carry out the client's instructions. In New Brunswick, the situation is substantially clearer, for a lawyer has an express duty to follow the instructions of the client, the Professional Conduct Handbook stating that: "[i]t is a lawyer's duty to advise and give his client the best judgment and the lawyer must seek and follow the client's instructions – unless the instructions are illegal or improper. For example, the lawyer must obtain instructions from his client before rejecting an offer of settlement." It might be argued, however, that the reference to "improper" instructions is sufficiently vague that the New Brunswick standard is rendered ambiguous. Do "improper" instructions encompass only those directions that [are illegal or improper or] would involve breaching the rules of ethical conduct? Or does this term include any instruction to conduct the case in a manner that the lawyer reasonably deems to be tactically or strategically inadvisable?

In Alberta, the Code of Professional Conduct contains significantly more detail and commentary pertaining to decision making. Lawyers in Alberta are directed to "obtain instructions from the client on all matters not falling within the express or implied authority of the lawyer." The underlying principle, states the commentary to the applicable rules, is that the lawyer must follow the client's instructions. There are, however, exceptions. The lawyer "must not implement instructions of a client that are contrary to professional ethics and must withdraw if the client persists in such instructions." The Alberta rules also stress that the lawyer must competently advise the client, based upon all known facts and law, prior to obtaining the client's instructions.

In the United States, the major ethical codes devote more attention to the issue of decision making authority and offer several different approaches to the division of powers and responsibilities. The ABA Model Code tends to leave the main decision making powers with the client, subject to the lawyer having a certain amount of autonomy in areas "not affecting the merits of the cause or substantially prejudicing the rights of the client." The ABA Model Rules flesh out the issue a little more fully. The Rules state that a normal client-lawyer relationship is based upon the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. In this vein, the Model Rules give the client pre-eminence in making

decisions concerning the objectives of the representation, provided that the lawyer is not required to commit an illegal or unethical act. …. Yet, crucially, the Rules do not necessarily require that the lawyer abide by the client's wishes when it comes to the means taken to achieve the desired objectives of the representation. In short, the ABA Model Rules adopt a loose distinction between objectives and means, according to which decision making power is allocated, respectively, to the client and the lawyer.

Witness Preparation

Rosenfeld, Arnold R. in papers presented to ABA 27th National Conference On Professional Responsibility, 31 May-02 June 2001, Miami (Chicago: American Bar Association, 2001)

What is impermissible insofar as witness [instead of client] preparation is concerned is … [among the murkier problems in trial preparation]. The limits as to how far a lawyer can go in "coaching" a witness with regard to the witness's testimony are, for the most part, interpretive.

Certainly, no one would claim that lawyers are not expected to prepare witnesses by taking such steps as reviewing the process with the witness, recommending what to wear, anticipating the questions that may be asked and doing a dry run of the testimony.

Nor would anyone suggest that these sessions may not result in further advice, such as refreshing a recollection through documents or prior statements, discussing other witness's testimony, and emphasizing the importance of speaking clearly and distinctly, not answering a question that is not understood, being relentlessly polite and even suggesting words that might be used to make the witness's meaning more clear.

On the other hand, it is equally apparent that a lawyer should not refresh a recollection before probing the witness's memory, should not admonish a witness not to answer and, in fact, evade, unobjectionable questions, and should not tell a witness to testify to facts about which the witness does not have personal knowledge.

When a witness asks a lawyer whether or not the witness should speak with an investigator or another lawyer asking about the case, the lawyer should be careful not to advise the witness to refrain from voluntarily giving information, … .
Nevertheless, without violating this rule, a lawyer may advise a witness of the fact that by making a statement or signing an affidavit, the witness is increasing the possibility that any other statements or any testimony ultimately provided [by the witness] in the case may be impeached by whatever [additional] statement [or affidavit] the witness voluntarily makes.

Witnesses -- particularly those who do not wish to testify in a matter either because of their relationship with one of the parties or because of the inconvenience -- sometimes ask whether they must honor a subpoena.

A lawyer asked this question must advise the witness to honor the subpoena. Nevertheless, the lawyer also may advise the witness of the legal consequences of the witness's failure to do so.

Since the famous scene in the classic movie, "Anatomy of a Murder," in which James Stewart gave his client the so-called "lecture" before hearing his story of what had occurred, the question frequently arises about the propriety of explaining the law on a case to one's client or a witness, particularly before knowing the witness's version of the facts.

The obvious risk a lawyer runs in giving a legal "lecture" before learning the witness's story is that the witness may alter the facts recounted into an untrue or inaccurate version in order to tailor his or her testimony to what the witness thinks the lawyer wants to hear.

In addition to the ethical dangers involved in this approach, there are practical problems as well, because a witness may well omit certain important facts that could be important to the lawyer and the client's case.

Another murky ethical area in witness preparation involves refreshing the recollection of a witness. Is it proper to show a witness documents, photographs and statements to jog the witness's memory?

Yes, so long as the lawyer thoughtfully considers the evidence being provided and the questions being asked so that the witness is reconstructing his or her memory rather than creating new testimony. The distinction often is difficult to discern and relies most heavily on the lawyer's own integrity of preparation.

During the course of witness preparation, it is not unusual for a lawyer to suggest that a witness utilize different words in the witness's actual testimony or in an affidavit. The test in such situations is whether the lawyer is suggesting language that affects only the clarity and accuracy of the testimony as opposed to the truthfulness and meaning of the testimony.

Thus, a lawyer who interviews a witness in preparation for testifying in a sexual harassment case where the witness refers [in a statement] to the co-worker as "a real hunk," and suggests instead that the witness use the term "attractive person," is … suggesting a different meaning from the statement.

Witness rehearsal also raises significant potential ethical problems.

When used for the purpose of allowing the witness to become less apprehensive for his or her upcoming appearance in a deposition or trial and be prepared for examination or cross-examination, rehearsal is not only appropriate, but is necessary to fulfill competency obligations.

On the other hand, repeated rehearsal of witnesses is fraught with the danger of suggestiveness on the part of a lawyer and raises issues of unethical conduct if it is used to script witness answers.

Thus, with certain exceptions that have been delineated above, the rules do not provide clear direction to lawyers on what is ethically permissible in advising witnesses.

Lawyers who are cautious in their preparation of witnesses may still utilize the above-referenced techniques and remain within the realm of ethical conduct.

In advising witnesses, lawyers should keep in mind what more than one commentator has noted: "If you have to ask whether you are crossing the line, then you are probably standing too close to it."

Client Perjury

Proulx, Michel and Layton, David.
***Ethics And Canadian Criminal Law* (Toronto: Irwin Law, 2001),**
pp. 404-408
(and references in this excerpt to other pages of the same publication)

Client perjury, whether anticipated or completed, presents a lawyer with the daunting challenge of reconciling the competing duties of loyalty to the client and fidelity to the truth-finding function of the … justice system. The potential options available to counsel are varied and complicated, and commentators often disagree as to the propriety of any given course of action. Our recommendations for the lawyer who is confronted by client perjury are as follows:

Anticipated Client Perjury

1. Counsel must first determine that the client intends to mislead the court through the presentation of false testimony. A lawyer is fixed with such knowledge where he or she reasonably draws an irresistible conclusion of falsity from available information … [pp. 369-371].

2. Once counsel comes to the firm conclusion that a client intends to commit perjury, the immediate reaction should be to attempt to dissuade the client from pursuing such a course. The client should be informed of the serious adverse consequences that can flow from perjurious testimony, including the remedial responses available to counsel …. [pp. 371-375].

3. After the client has been admonished, counsel must assess whether the threat of perjury has been alleviated. A lawyer can ordinarily assume that the client will heed the advice to avoid perjury. Remedial measures should be taken only where circumstances show this assumption to be unwarranted … [pp. 375-376].

4. There are a number of possible remedial measures open to counsel whose client insists upon committing perjury despite admonitions. However, continuing with the retainer as if nothing untoward has happened, in accord with the views of Professor Monroe Freedman [*Understanding Lawyers' Ethics* (New York: Matthew Bender, 1990), at p. 121], is not a viable response in Canada in light of the applicable rules of professional conduct … [pp. 388-389].

5. Other options for dealing with the client who refuses to abandon a plan to commit perjury include:

   (a) withdrawal: Withdrawal can be an acceptable response to planned perjury, especially where the application to get off the record can be brought well before trial and no confidences are breached. But where the trial is imminent or has already commenced, withdrawal may involve severe prejudice to the client and perhaps lead to the inescapable inference that perjury is going to occur. In such a case, counsel may legitimately decide not to apply to withdraw (though the CBA Code suggests that a withdrawal application is mandatory). Finally, where counsel successfully withdraws from a case owing to anticipated perjury, disclosure to the accused's new counsel may be a valid course of action … [pp. 376-382].

   (b) refusal to call the client as a witness: Refusing to call the client as a witness is generally an unsatisfactory response in light of the client's constitutional right to testify [in criminal law and in light of the client's right to a hearing under the common law rules of natural justice] and associated practical problems … [pp. 382-385].

   (c) free or open narrative: Under the free- or open-narrative approach, counsel merely asks the client whether he or she wishes to make a statement concerning the case to the trier of fact. No follow-up questions are asked, and counsel does not rely on any false testimony in making closing submissions. This approach has some appeal as a compromise but is subject to valid criticism based upon prejudice to the client and damage to the truth-finding function of the system … [pp. 385-388].

   (d) permitting the client to offer only non-perjurious testimony: In theory, a good response to the problem of anticipated perjury would be to permit the client to offer only evidence not known to be false. However, in practise this approach would be subject to sabotage by the client (knowingly) or … [opposing counsel] (unknowingly, in cross-examination) … [pp. 389-390].

   (e) disclosure: Disclosure of anticipated perjury may be possible under some Canadian rules of professional conduct, in particular pursuant to the discretion afforded lawyers to disclose confidential information in order to prevent future-harm [under the common law future harm exception to the common law duty of confidentiality]. Given our view that counsel can permissibly disclose *completed* client perjury [see item 9(b), below], and the difficulty in ascertaining whether the client will really act to implement the perjurious plan, we believe that any available discretion to make pre-emptory disclosure should generally not be exercised … [pp. 390-397].

Completed Client Perjury

6. As in the case of anticipated perjury, counsel must begin by determining that the client has misled the court through the presentation of false testimony. A lawyer is fixed with such knowledge where he or she reasonably draws an irresistible conclusion of falsity from available information … [pp. 397-398].

7. Once counsel comes to the firm conclusion that a client has committed perjury, the immediate reaction should be to attempt to persuade the client to correct the falsehood. Counselling the client on this point should include canvassing the serious adverse consequences that can flow from perjurious testimony, as well as counsel's possible remedial responses if the client refuses to correct the falsehood … [pp. 398-399].

8. It may be difficult to remonstrate with the client without stopping proceedings or otherwise alerting the court and … [the opposite party] that something is amiss regarding the client's testimony. The lawyer should make reasonable attempts not to call attention to the problem, but should not go so far as to elicit further false testimony in a misguided effort to protect the client … [pp. 398-399].

9. Where the client refuses to correct the perjury, counsel must take remedial measures and cannot proceed in the normal fashion, as though nothing is wrong. The available remedial options include:

   (a) withdrawal: The problems potentially associated with withdrawal come to the fore where the client is in the middle of testifying. Attempting to extract oneself from the retainer will likely alert the court and … [the opposite party] to the perjury and cause substantial harm to the … [client]. Moreover, the court may well refuse to permit withdrawal. Although several Canadian jurisdictions impose an obligation to attempt withdrawal, other remedial measures may be preferable … [p. 400].

   (b) disclosure: In our view, disclosure is mandated where the perjury has occurred and the client refuses to correct the falsehood. However, some Canadian governing bodies arguably forbid disclosure absent the client's consent or are at least unclear on the point … [pp. 400-402].

   (c) limited closing submissions: It has been suggested that counsel can continue with the case in the normal … [manner], except that the perjurious testimony cannot be relied upon in closing submissions. There are other variations on this approach, some of which involve fairly implicit disclosure of the falsehood to the court [e.g., inform the Court expressly that the affected evidence not be relied upon] … [p. 402].

10. Where the client tells the truth during examination-in-chief, but commits perjury during cross-examination, counsel's response should be no different … [pp. 271-272].

11. In Canada, the remedial duty concerning completed client perjury contains no clear endpoint and appears to continue even after the case has concluded … [pp. 278-280].

Other Matters

12. The rules of professional responsibility in Canada do not distinguish between material and non-material falsehoods in setting out prohibitions against counsel knowingly misleading a court and requiring remedial action where counsel learns that the court has already been misled. However, where counsel is otherwise afforded some discretion in responding to an

anticipated or completed falsehood, lack of materiality may be an appropriate factor to consider … . [At p. 272: "… if a false statement involves a truly immaterial or trivial matter, and there is no possibility that the court will be mislead regarding relevant issues of fact, the impetus to take remedial action is less strong."]

13. It is advisable to make clear to the client, at the outset of the relationship, a lawyer's role and responsibilities. As long as counsel approaches the matter in a sensitive, non-accusatory way, it makes sense to give the client accurate information as to what a … lawyer can and cannot do in representing … [her or him] … [p. 403].

14. In the United States, many rules of professional responsibility contain a discretion to refuse to offer evidence that the lawyer reasonably believes to be false. There may be sound tactical reasons for not offering such evidence, but given the client's constitutional right to testify [in criminal law, and, in civil law, the right to a hearing under the common law rules of natural justice] we are against recognizing such a discretion in Canada … [pp. 403-404].

15. Counsel has a duty to prevent misleading evidence from being presented in court even where the client does not believe that the evidence is inaccurate. The focus is upon counsel's knowledge regarding the falsity of the information, regardless of the fact that the client may be acting in good faith … [p. 270].

3.3 Relationships With Clients - Rendering Services

3.3.2 Confidentiality and Privilege

Ethical confidentiality and legal-professional privilege

Proulx, Michel and Layton, David.
***Ethics And Canadian Criminal Law* (Toronto: Irwin Law, 2001),**
pp. 171-172; 170-171; 175; 172-173

[**Note:** The following excerpts summarize a lawyer's (i) ethical duty of confidentiality and (ii) common law and equitable duties of confidentiality, to a client, and a client's (iii) legal-professional privilege; together with the relationship among these three concepts.]

All Canadian rules of professional conduct strongly assert the lawyer's duty of confidentiality. The CBA Code's applicable rule states:

> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this Code. [Ch. IV, Rule.]

. . . .

The standard justification for imposing a duty of confidentiality upon lawyers is that the client who is assured of complete secrecy is more likely to reveal to his or her counsel all information pertaining to the case. The lawyer who is in possession of all relevant information is better able to advise the client and hence provide competent service. The client's legal rights are furthered, as is the truth-finding function of the adversarial system. Additionally, the obligation to maintain confidentiality fosters the autonomy and dignity of the client by protecting his or her privacy. Finally, the duty of confidentiality is closely connected to the overarching duty of loyalty owed by a lawyer to the client. The obligation to be loyal would be compromised if a lawyer could use information so as to cause adverse impact to the client. A complete bar on the unauthorized use of confidential information by counsel, even where no adverse impact is possible, accordingly serves a prophylactic function that helps to ensure undivided loyalty.

In promoting effective legal advice, the duty of confidentiality not only benefits the individual client but also serves a broader societal interest. As already noted, a client who is able to rely upon the assurance of confidentiality is more likely to receive sound legal counsel. As a result, he or she is more likely to obey the law … . It is in the public interest that both ends be encouraged, and the duty of confidentiality thus advances fundamental systemic goals.

. . . .

The [common] law of agency … enforces client-lawyer confidences, the lawyer taking on numerous duties as agent, including the duty of confidentiality. One can also find robust protection of a client's right to confidentiality in the [equitable] law of fiduciaries more generally and in the willingness of equity to enjoin a breach of confidence. …. These … [common law] and equitable manifestations of confidentiality bear close resemblance to the ethical obligations imposed by rules of professional conduct.

. . . .

The similarities and differences between [i] the ethical[,] … [common law and equitable rules] of confidentiality and [ii] legal-professional privilege [sometimes characterized as an evidentiary rule] are important, and are at least ostensibly recognized in our rules of professional conduct. Legal-professional privilege is a class privilege that attaches to certain confidential communications that either pass between the lawyer and client as part of the professional relationship or pass between the lawyer or client and third parties for the dominant purpose of litigation. The [ethical] concept of confidentiality is accordingly central to the [legal-professional] privilege.

Despite this important similarity, crucial distinctions exist between [i] a lawyer's ethical … [, common law and equitable duties] of confidentiality and [ii] legal-professional privilege. First, the privilege applies only in proceedings where the lawyer may be a witness or otherwise compelled to produce evidence relating to the client. The ethical rule of confidentiality is not so restricted, operating even where there is no question of any attempt to compel disclosure by legal process. Second, legal-professional privilege encompasses only matters communicated in confidence by the client, or by a third party for the dominant purpose of litigation. Once again, the [ethical] rule of confidentiality is broader, covering all information acquired by counsel whatever its source. Third, the privilege applies to the communication itself, does not bar the adduction of evidence pertaining to the facts communicated if gleaned from another source, and is often lost where other parties are present during the communication. In contrast, the [ethical] rule of confidentiality usually persists despite the fact that third parties know the information in question or the communication was made in the presence of others.

The subtle and complicated interplay between confidentiality and privilege is relevant to many ethical questions … . Unfortunately, discussion of these concepts in the case law is sometimes muddled or, if taken out of context, confusing. To provide but one example, courts will sometimes hold that a communication is not privileged because it was not intended to be "confidential," yet this same communication may well be considered confidential within the meaning of the ethical rules. In other words, the term "confidential" can be used in different ways at different times. …. For the moment, it may be helpful to provide a few preliminary examples.

[**Note:** The authors offer an example, at p. 174, which illustrates the tension between legal-professional privilege and ethical confidentiality. A client consults a lawyer respecting the law about electronic surveillance. The lawyer eventually concludes that the client is attempting to obtain information that will assist him to avoid detection by police in his efforts to determine whether his spouse is behaving unfaithfully. The lawyer sternly tells the husband not to break the law. The lawyer makes detailed notes of the meeting in case the propriety of the advice is ever challenged by the client or police. Later, police visit the lawyer, asking him to reveal voluntarily the contents of the interview and provide them with any resulting notes. The communications

between the lawyer and client come within the crime-fraud exception to the legal-professional privilege, and will probably not be protected if the lawyer is subpoenaed to testify or subjected to a search warrant. However, the lawyer's ethical duty of confidentiality arguably prevents him from otherwise disclosing the communications or notes to a court or to police.]

Legal Professional Privilege: The "Public-Safety" Exception

Fogl, Rachel. "Sex, Laws & Videotape: The Ambit Of Solicitor-Client Privilege In Canadian … Law …" (2001), 50 U.N.B.L.J. 187, at pp. 218-219

… [T]he Supreme Court's decision in *Smith v. Jones* [[1999] 1 S.C.R. 455] … set out the parameters of a public safety exception to solicitor-client confidentiality. Briefly, the Supreme Court held that solicitor-client privilege may be set aside when there is a clear and imminent risk of serious bodily harm or death to an to an identifiable person or group of persons. This strange case arose in Vancouver where a "Mr. Jones" was arrested for aggravated assault in an attack on a prostitute. The lawyer for Mr. Jones sent his client for an evaluation by "Dr. Smith" in order to prepare for a defence. Mr. Jones bared his soul, one might say, to Dr. Smith, revealing his intentions to abduct and kill other prostitutes. [Dr. Smith reported this to the accused's lawyer.] Dr. Smith went to court seeking a declaration allowing disclosure of this information, despite having been retained by the accused's lawyer [who apparently had decided not to disclose to the Crown or Court, or otherwise act on, what the doctor reported to him]. (… [Because] Dr. Smith was acting as an agent of the accused's lawyer … [he] was therefore covered by solicitor-client privilege.)

The decision wavers back and forth between the language of duty and the language of discretion: that is, the old difference between "must" and "may". The distinction is critical for it determines whether a lawyer faced with a situation that meets the public-safety exception is required to disclose information to the appropriate authorities or whether that lawyer simply has the discretion to do so but may choose to stay silent.

A careful review of the decision leads me to conclude that the Court does not create a duty to disclose but merely recognizes the discretion to do so. First, while recognizing that the linguistic evidence supports both views, the language used by both the majority and the minority in their conclusions point to a discretion rather than a duty. Second, elsewhere in the case, both the majority and the minority distance themselves from the jurisprudence of duty regarding a doctor's duty to disclose confidential information. Finally, the procedural posture and background of the case leads to the conclusion that the Court is not establishing a duty. In the original application, the trial judge holds that Dr. Smith not only had the discretion to disclose the privileged information but indeed had a duty to do so. The Court of Appeal expressly disavows such a duty. In dismissing the appeal, the Supreme Court therefore rejects a duty and finds only a discretion.

The Lawyer In Civil Pre-Trial: Settlement Considerations

Smith, Beverley G. *Professional Conduct For Lawyers And Judges*. 2nd ed. (Fredericton: Maritime Law Book Ltd., 2002), chap 6, paras. 17-26

Settlement - settlement conduct for the lawyer

[17] The high priority given to the matter of settlement is evident. Of what particular conduct elements should a lawyer be aware and what elements should the lawyer observe in a settlement situation in order to avoid a successful charge of negligence in the prosecution of it? The case of *Karpenko v. Paroian, Courey, Cohen & Houston* [(1980), 117 D.L.R. (3d) 383 (Ont. H.C.J.)] is helpful in outlining what a lawyer should be doing in a settlement matter. The case is also valuable for the emphasis placed by the Court upon settlement being beneficial for reasons of public policy.

[18] In *Karpenko* Anderson, J., accepted the general rule as to the standard of care expected of a solicitor, to the effect that in an action for negligence it is not enough to say that the lawyer has made an error of judgment or shown ignorance of some particular part of the law. It is only if the error or ignorance was such that an ordinarily competent solicitor would not have made or shown it that the lawyer will be liable in damages. Dealing with the settlement arranged in the case the Court continued: [at pp. 387, 397-398]

> "... what is involved is an exercise of judgment in the conduct of the case."
>
> . . . .
>
> "To the decision to settle a lawyer brings all his talents and experience both recollected and existing somewhere below the level of the conscious mind, all his knowledge of the law and its processes. Not least he brings to it his hard-earned knowledge that the trial of a lawsuit is costly, time-consuming and taxing for everyone involved and attended by a host of contingencies, foreseen and unforeseen. Upon all of this he must decide whether he should take what is available by way of settlement, or press on. I can think of few areas where the difficult question of what constitutes negligence, which gives rise to liability, and what constitutes at worst an error in judgment, which does not, is harder to answer. *In my view it would be only in the case of some egregious error ... that negligence would be found*." (Emphasis added)

The Court found the defendant law firm not guilty of negligence in the circumstances of the case.

[19] The later case of *Maillet and Pothier v. Haliburton and Comeau* [(1983), 55 N.S.R. (2d) 311 (S.C.T.D.)] is similarly instructive. The female plaintiff was awarded $75,000 in a jury-tried motor vehicle case. The judgment was appealed. The defendant Haliburton, the lawyer acting for the female plaintiff, advised settlement of $40,000 prior to the appeal being heard. He feared that the Court of Appeal would drastically reduce the original award. The female plaintiff acceded to Mr. Haliburton's settlement advice. She later brought an action against the defendant law firm, alleging negligence on the part of Mr. Haliburton for having offered the settlement recommendation he had. She failed. The Court held that Mr. Haliburton had acted as a reasonably competent solicitor would have. He had

- advised his client in considerable detail on awards in similar cases;

- advised her of the consequences in terms of her net recovery if there was any reduction on the appeal;

- taken into account the existing financial embarrassment of the female plaintiff;

- discussed with her the prospective delay and the costs involved in the appeal.

Burchell, J., for the Court stated [at p. 316] also that "there was a real risk, and perhaps a likelihood, that the award of the jury would be reduced. Against the same background, I am of the opinion that the settlement was reasonable and in the best interests of the [female] plaintiff." The Court went on to adopt the views on the conduct of lawyers in settlement matters generally as had been expressed by the Court in the *Karpenko* case [see above paras. 17 and 18].

[20] Because of their nature, family disputes involving maintenance, custody, access and property matters lend themselves to the compromise settlement approach advocated by the C.B.A. Code and other Canadian conduct codes. This is so even though that approach may break down in some instances and the parties resort to litigation to resolve their differences. The many domestic agreements reached without recourse to a court is heartening evidence that at least in this sector of the law the parties, who may be initially in a position of dispute, commence their dealings through negotiation dialogue. One aspect of family dispute settlement that is briefly noted is the authority of solicitors to make settlement arrangements on behalf of their respective clients. This matter was raised in *Taylor v. Taylor* [(1984), 61 N.B.R. (2d) 116 (Q.B. Fam. Div.)] where the applicant wife refused to execute a domestic contract agreed to between the applicant's lawyer and the respondent husband's lawyer. The agreement had been executed by the respondent husband. Justice Logan found that both the applicant and the respondent had authorized their respective lawyers to negotiate the contract In the absence of mistake, duress, misrepresentation, unconscionability or the like, the Court ordered that the respondent be at liberty to file the domestic contract with the Court, and that its terms would be the settlement effected by the parties.

Settlement - authority to settle

[21] On the broader aspect of a lawyer's authority to settle in any civil dispute - be it pre-trial or later - a degree of inconsistency appears to exist. It has been said: [Orkin, Mark M. *Legal Ethics* (Toronto: Cartwright & Sons. Ltd., 1957), at p. 96] "It is within the apparent authority of counsel to compromise an action and he may effectively do so, it seems, even without the consent of the client ...". Several cases are cited in support of the proposition.

[22] On the other hand, there are the directions of the *C.B.A. Code* … . They are to the effect that "failure to inform the client of proposals of settlement, or to explain them properly" constitute unacceptable professional conduct. [Chap. II, "Competence And Quality Of Service", Commentary 7 (j).] At least one other Canadian conduct code [*N.B.T.C.H.*, Part C, Rule 7] requires the lawyer to obtain instructions from a client before rejecting an offer of settlement. Which approach constitutes good professional conduct?

[23] The answer may lie in the actual authority given to the lawyer by the client in relation to the matter of settlement. Depending upon its terms, express or implied, it may not be necessary to strictly comply with the portions of the codes to which reference is made. A case in point is *Hawitt v. Campbell*? [[1983] 5 W.W.R. 760 (B.C.C.A.)]. The solicitor for the plaintiff in this personal injury action made an offer of settlement to the defendant's lawyer without receiving express instructions from the plaintiff to do so. The solicitor's general retainer contained no restrictions regarding settlement. The defendant through his counsel accepted the settlement offer and tendered a cheque in payment. The plaintiff refused to accept the settlement. He also gave to his lawyer further relevant and substantial evidence concerning the nature and extent of his injuries. They were more severe than his lawyer had been aware when the settlement offer had been made. The plaintiff's lawyer then refused to complete the settlement. With respect only to the matter of the authority of the plaintiff's lawyer to make an offer of settlement without first consulting and receiving instructions to do so, the Court held that there had been no limitation placed upon the lawyer respecting effecting of a settlement. Macfarlane, J., quoted Selbie, L.J.S.C., who was quoting from *Scherer v. Paletta* [[1966] 2 O.R. 524 (C.A.), at p. 526] when he stated: [*Hawitt v. Campbell*, [1983] 5 W.W.R. 760 (B.C.C.A.), at p. 763]

> *"'"*The authority of a solicitor to compromise may be implied from a retainer to conduct litigation unless a limitation of authority is communicated to the opposite party. A client, having retained a solicitor in a particular matter, holds that solicitor out as his agent to conduct the matter in which the solicitor is retained. In general, the solicitor is the client's authorized agent in all matters that may reasonably be expected to arise for decision in the particular proceedings in which he has been retained. *Where a principal gives an agent general authority to conduct any business on his behalf he is bound as regards third persons by every act done by the agent which is incidental to the apparent scope of the agent's authority."'"*

[24] In the circumstances of the case, however, it was held that it would be unfair to the plaintiff to force upon him the settlement that had been offered under a misapprehension by his lawyer as to the true extent of the plaintiff's injuries.

Settlement - summary on settlement - authority

[25] Insofar as professional conduct is concerned a lawyer's authority to settle a disputed matter appears therefore to be based upon a composite of case law, codes and practicality:

- the retainer of a lawyer by a client in a matter in dispute includes an implied authority to settle the dispute, unless a limitation of such an authority is communicated to the opposite party;

- on principles of agency, a settlement offered by a client's lawyer will bind the client even though the client was unaware of it, unless the lawyer has made the offer of settlement under a misapprehension, in which case the court will refuse to "lend its authority to compel observance of an agreement arrived at through a mistake."

- while conduct codes may themselves place some apparent restrictions upon the lawyer's conduct in settlement matters, the authority of the lawyer's retainer ought to govern; but for the better professional treatment of the client and such of the client's affairs as are involved in the dispute, the lawyer is well advised to heed the directions of the jurisdiction's conduct code or codes respecting settlement if for no other reason than to maintain completely open lines of communication with the client.

[26] A final note: It is not a counsel of perfection to recommend that a lawyer have the client execute minutes of a settlement finally negotiated.

Family Law Agreements: Lawyer's Role - Professional Responsibility

The Continuing Legal Education Society of British Columbia. *Family Law Agreements [:] Annotated Precedents*. Anderson, Thomas G., ed. (Vancouver: The Continuing Legal Education Society of British Columbia, 2001), paras. 1.18, 1.19, 3.2, 5.2, 16.34

Completing Transactions [§ 1.18]

Two copies of the agreement should be executed: one for each party. Each solicitor should retain a photocopy of the executed agreement on file (the Law Society Practice Advisor recommends that counsel refrain from holding original documents on file since problems can arise in many situations, such as when a practice is closed). If the agreement is to be filed under s. 121 or 122 of the … [*Family Relations Act*], an additional copy should be executed for filing with the appropriate court… .

Spouses often assume, wrongly, that making a family law agreement resolves all matters in dispute and that nothing more is required. For example, spouses often agree that property will be transferred, that testamentary provisions and insurance designations will be made, and that a pension will be dealt with in a particular way. The parties may believe that setting these things out in the agreement means that they have, in fact, happened.

The family law agreement should include a clause requiring the parties to do what is necessary to give full effect to the agreement … . The client should be given a checklist of the matters that must be attended to in order to give effect to the agreement. The client may wish the lawyer to handle some of these matters, in which case the lawyer must obtain instructions and ensure that it is clearly understood which responsibilities remain for the client to deal with. If possible, all of

these matters should be dealt with before, or at the same time as, the family law agreement is concluded.

. . . .

THE LAWYER AS WITNESS [§1.19]

If a family law agreement, or the circumstances surrounding its making, are reviewed by the court, the lawyers who negotiated the agreement may be called as witnesses, raising questions of privilege. Even apart from the issue of privilege, a lawyer who has kept few notes and rarely confirmed matters in writing will find it difficult to answer questions about what happened, the client's instructions, legal advice given, or dealings with other counsel. The inability to answer these questions may have serious consequences for both client and lawyer.

It is good practice to keep complete records, and not to strip or destroy files when matters are concluded. For more information about client file retention, see the British Columbia Family Practice Manual, chapter 1, or Managing Your Law Firm, chapter 17, both published by Continuing Legal Education.

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MINUTES OF SETTLEMENT [§3.2]

Minutes of settlement record a settlement of legal proceedings. Because minutes of settlement will form the basis of a court order, they are typically less comprehensive and, for that reason, quicker to put together than a separation agreement. Some counsel use them extensively. Other counsel do not unless they are truly unavoidable (such as, for example, where the agreement is hammered out on the courthouse steps). Concepts that might be acceptable in formal agreements are sometimes challenged by judges when found in minutes of settlement. (In one case, for example, the judge rejected a clause in minutes of settlement that provided a father would have access for a "significant period of time during" the child's birthday. Counsel had to change the wording to provide that the husband was entitled to "at least two hours' access" on the child's birthday.)

If proceedings are ongoing, using minutes of settlement instead of a separation agreement may be efficient because less time is spent arguing over details. Time saved initially, however, can be lost later, in argument over the wording of the order, or even on proceedings to enforce the settlement.

As a matter of good practice, minutes of settlement should

- deal with each claim made in the proceedings,
- be drafted bearing in mind that the result of the compromise will be a court order, not an agreement,
- have appended to them the terms of the draft order, and

- although usually signed by counsel, also be signed by the parties to avoid future litigation. (It is not uncommon for parties to a family law action to assert lack of authority in an effort to circumvent a settlement.)

See the *British Columbia Family Practice Manual* for sample minutes of settlement and sample orders.

. . . .

THE ROLE OF THE TAX SPECIALIST [§5.2]

Even the simplest family law settlement has tax implications. The family lawyer must be able to recognize tax issues and know when expert advice is needed. For example, the involvement of a tax advisor is important when any transfer of shares or corporate assets, or any payment by a corporation, is part of the settlement. The information in this chapter is rudimentary and provides only a general idea of the issues that must be addressed.

The tax advisor may be a lawyer or an accountant. If tax advice is to be obtained from an accountant, the advice is not protected by solicitor-client privilege unless the accountant is clearly retained by the family law lawyer as agent for the purpose of the lawyer giving the client legal advice.

The tax advisor:

- should be asked to estimate the tax consequences to both parties, and to advise about any hazards involved in the settlement, including any proposed transfers of property;

- should attend at least one meeting at which all the professionals are present to set out a timetable for documentation and to establish responsibilities for preparing tax returns and other documents; and

- should advise on the final draft of any agreement or court order before it is submitted for signature.

Dangers may be involved in delaying a fragile agreement, and it may be desirable to use minutes of settlement (see chapter 3 (Alternatives to Agreements)) or an interim agreement to ensure that the agreement does not fall apart while a specialist is consulted.

In most cases, get the tax advisor's opinion in writing. Pay careful attention to the disclaimers and the factual assumptions. It is not always evident from the opinion itself which factual assumptions are critical.

If there is a tax opinion on which both parties intend to rely, ensure that both parties have seen the tax opinion and acknowledge in writing having seen it. A tax opinion given to only one party should not be disclosed to the other without careful attention to solicitor-client privilege.

Written tax opinions add significantly to costs and may not be necessary in every case. For example, a written opinion would probably not be necessary if the only substantial property is the family residence that will be transferred on a rollover basis. However, a written opinion is necessary any time business assets are involved.

. . . .

CONCLUDING CLAUSES OF AGREEMENT- CONTRA PROFERENTEM [§16.34]

> "For the purposes of interpretation, neither party drafted this Agreement and its words are the words of both parties."

One rule of interpreting legal agreements is that ambiguous provisions will be interpreted in favour of the party who did not draft the agreement (see, for example, *Fonseca v. Fonseca* (1999), [2000] Civ. L.D. 53 (B.C.S.C.)). The principle is that a person who prepares an agreement should not be able to take advantage of any provision that is obscure. Where the family law agreement is carefully negotiated, and each spouse has legal representation, this principle of construction can be replaced by a clause such as 16.34.

Even if the parties have been instrumental in drafting various parts of the agreement (insisting on particular language, for example), this clause, suitably revised, should probably be used with the object of avoiding contra proferentem interpretation.

***Boon v. Boon*,**

[2000] N.S.J. No. 290 (QL) (N.S.S.C. [Fam. Div.]), Williams J., at paras. 20-36

. . . .

¶ 20 Domestic contracts are subject to the same requirements as other contracts (Hatfield v. Hatfield (1996), 30 B.C.L.R. (3d) 131 (S.C.); Mamo, A. and MacLeod J.; Annual Review of Family Law: 1999, Carswell, at p. 400). One must to be able to identify when an offer and acceptance occur. I cannot do so here.

¶ 21 Although not fully articulated in argument there is law supporting the view that:

> Settlements of pending litigation between counsel acting within the scope of their retainer usually will be upheld in order to maintain the integrity of the settlement process regardless of whether the agreement meets the formal requirements under the local domestic contract legislation. (MacLeod and Mamo, at p. 403)

¶ 22 As stated in Lee-Chin v. Lee-Chin (1993) 1 R.F.L. (4th) 351 (Beckett J., Ont. U.F.C.) at p. 355:

> This situation was addressed by the Court of Appeal in Geropoulos v. Geropoulos (1982) 26 R.F.L. (2d) 225, where it was held that settlement agreements concluded by solicitors resolving outstanding claims in pending litigation are not subject to the requirements of section … [54(1)]; that is, that such settlement agreements need not fulfill the conditions, such as being in writing, signed by the parties, and witnessed. Therefore, where an oral settlement agreement has been concluded, that agreement is enforceable, as in any form of litigation

¶ 23 MacLeod and Mamo (at pp. 403 and 409) go on to make two points which I would adopt:

1. The onus is on the party alleging that a settlement has occurred to prove that litigation was pending (which it was, here) and that settlement on all substantial issues was reached between counsel (which I conclude was not done). See: Lynch v. Lynch (1994) 8 R.F.L. (4th) 48 (Ont. Prov. Ct.) appeal dismissed June 17, 1996, Walsh J. (Ont. Gen. Div.).

2. In the absence of clear evidence that the offer and acceptance settled all the basic terms of a contract, a court may find a contract void for uncertainty. See Lynch v. Lynch. Here I conclude, as was done in Lynch that the arrangements, such as they

were between counsel were simply too imprecise to be regarded as or amount to an agreement.

¶ 24 Also, even if there appeared to be an agreement (which I do not conclude to be the case) between counsel:

> There are a number of principles which have been established by the courts which are of application to this case: Where a settlement is entered into between solicitors, a stay of proceeding may be refused if: 1) there was a limitation on the solicitor's instructions known to the opposite party; 2) the solicitor misapprehended his client's instructions or the facts and this misapprehension would result in injustice or make it unreasonable or unfair to enforce the settlement; 3) there was fraud or collusion; 4) there was an issue to be tried as to whether there was such a limitation, misapprehension, fraud or collusion in relation to the settlement (Hawitt v. Campbell (1983), 46 B.C.L.R. 260 (B.C.C.A.) at p. 265.

¶ 25 (Pavlis v. Pavlis (1998) 39 R.F.L. (4th) 75 (B.C.S.C.) per Melnich J. at p. 78.)

¶ 26 Here, Mr. Balcom [solicitor for Mr. Boon] repeatedly stated that the draft Minutes of Settlement were "subject to review with Mr. Boon", or "subject to review of the final draft agreement". I am uncertain how he could have been clearer. I do not accept Ms. Gillis' suggestion that this merely applied to the "form" of the agreement. The exchanges here were oral and by e-mail that was less than specific. Phrases or a list of eight to ten items were expanded by Ms. Gillis into an agreement more than ten pages long.

¶ 27 Ms. Gillis' seeming suggestion that if a clause was not complained about following the first draft, it was assumed agreed to is, not, in my view, tenable. The suggestion that the series of imprecise, conditional e-mails crystallized an agreement is less tenable. It amounts to the view that a separation agreement or Minutes of Settlement can be reduced to bullets, that the wording of whole paragraphs (such as that dealing with spousal maintenance) is unimportant. Wording is important. It affects rights.

¶ 28 Mr. Balcom states that the Minutes of Settlement which he had not seen were subject to review with his client. This is not an unreasonable position.

¶ 29 Finally, there is no suggestion that specific parts of these Minutes of Settlement were unconditionally agreed to, that anything other or less than a comprehensive agreement was sought or is being sought to be enforced.

¶ 30 The words of Nathanson J. in Thibodeau v. Thibodeau (1984) 65 N.S.R. (2d) 442 (N.S.S.C.) at p. 444-445, are applicable here:

> ...the exchange of correspondence as a whole does not show that the parties or their solicitors were in total agreement. Changes in the documentation were still being made.... There was no proof that Mr. Thibodeau had agreed to all terms and conditions in the agreement and minutes. Indeed, a comparison of the contents of that document with the contents of the various letters, including the letter of

> February 10, reveals many provisions in the document that are not even dealt with in the letters. Moreover, even if Mr. Thibodeau had agreed to all the terms and conditions, the letters seem to anticipate the eventual execution of a document embodying the final agreement between the parties. Before the final agreement was to be executed, all intermediate arrangements could only be tentative.
>
> ...An agreement should be scrutinized with great care to ensure that it is explicit, complete, final and binding. The agreement alleged to be reflected in the correspondence in this case falls short of that standard

¶ 31 This is not a case where agreement was reached and only the paperwork remained to be resolved (as in Begg v. East Hants Municipality and NS. Director of Assessment (1986) 75 N.S.R. (2d) 431 (C.A.)). Nor is it a case where counsel entered a settlement within the apparent scope of his authority, unconditionally (as referred to in Pineo v. Pineo (1981) 45 N.S.R. (2d) 576 (T.D.)). Nor is it a case where the differences between the solicitors are ones of "semantics, not substance" (as in Ruggles v. Ruggles (1992) 112 N.S.R. (2d) 384 (F.C.)). Nor, finally, is it a situation where:

> ...the negotiations (were)...finalized, that the negotiations were clear, that the terms of the settlement were known not only to the solicitors but to the clients, and the settlement represented an unconditional consensus at the time of acceptance...

as found by Goodfellow J. in Chapman v. Chapman [1996] N.S.J. No. 394 (S.C.) at paragraph 17.

¶ 32 The brief filed for Ms. Boon seeks an order for:

1. Enforcement of the terms of the Minutes of Settlement forwarded June 14, 2000 as agreed between the parties and confirmed by their solicitors with respect to all matrimonial issues.
2. Costs

¶ 33 The application before the Court seeks:

> The enforcement of the terms of Minutes of Settlement reached by agreement as confirmed by solicitors for the parties

¶ 34 Neither party, nor solicitor signed either draft Minutes of Settlement. There is no evidence that Mr. Boon agreed to the Minutes. There is no evidence Mr. Balcom "confirmed" the Minutes. There is no evidence that the Minutes of Settlement sought to be enforced were reviewed by Ms. Boon, though when asked about this during submission, Ms. Gillis indicated:

> THE COURT Can you show me anywhere in your client's affidavit that says she has reviewed the final draft, Ms. Gillis? She hasn't signed it, I take it?
> MS. GILLIS No, it was reviewed before it went down but that's -- whether it's in her affidavit or not -- just 24 and 25 just refer to the forwarding of it. I mean, it -- but I mean it -- You know, the practice is that the client reviews everything before it's sent.

THE COURT Or agreed to?
MS. GILLIS Pardon?
THE COURT Or agreed to?
MS. GILLIS Absolutely.

¶ 35 Mr. Balcom's position is the same - his client needed to review the document produced by Ms. Gillis before it could be agreed to.

¶ 36 There is no agreement apparent on the evidence before me. There were no Minutes of Settlement agreed to. The application is dismissed.

. . . .

"Sexual Conduct With Clients"

Smith, Beverley G. *Professional Conduct For Lawyers And Judges.* 2nd ed. (Fredericton: Maritime Law Book Ltd. 2002), chap. 2, paras. 50-58

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[50] Writing in the English journal *Family Law*, Justice Thorpe of the High Court, Family Division, urged proscription in professional codes of legal conduct of lawyers' sexual liaisons with clients. His Lordship referred especially to the temptations open to family lawyers when he stated: "Those who specialize in family law are most exposed to the risks and temptations of entanglement. Those who undergo both marital breakdown and contested litigation in its wake are generally, if transiently, emotionally and psychologically disturbed. Being unstable they are vulnerable. A great deal of hope and faith is invested in their chosen advocate who becomes for a short phase in their lives protector and champion. The opportunity for the lawyer to abuse that dependent trust is obvious."

[51] The Solicitors Complaints Bureau of England has stated that complaints of legal professionals' sexual conduct fall into three basic categories. The first is where a third party - such as an estranged husband - complains that a legal professional has been taking sexual advantage of a client – for example, the complainant's estranged wife. The second is where the solicitor begins to blur his or her obligations to the client, say in the matter of billing. The third is what is described as "the plain obscene." An instance of this category would be where a legal aid application sent by a legal professional to a client might have appended to it written details of the professional's sexual prowess.

[52] As evidenced in situations of a similar nature that have surfaced in North America, it is not only family law lawyers who may fall victim to complaints by clients of sexual misconduct on the part of their respective lawyers. The lodging of complaints in the United States of America has resulted in the incorporation in conduct codes of the prohibition of sexual conduct with clients by lawyers in at least some of the States. In Canada the topic has been made the subject of growing recognition and discussion.

[53] The problem of permitting a lawyer-client sexual relationship lies at the heart of the professional relationship: the duty of the lawyer to objectively - read, with no conflicts of interest - provide legal services to and for the client with whom the lawyer has a fiduciary relationship. It is submitted that there is an inherent conflict of interest existing in virtually any lawyer-client association that includes a sexual relationship as well, be it consensual or not. The English solicitors' professional conduct guide refers to this concept when it states: "A solicitor who becomes involved in a sexual relationship with a client should consider whether this may place his or her interests in conflict with those of the client or otherwise impair the solicitor's ability to act in the best interests of the client."

. . . .

[54] The matter of a sexual relationship between lawyer and client is referred to in a number of Canadian codes of professional conduct. The references are accomplished in a variety of ways, the most basic categories being by direct and indirect reference.

[55] One example of a direct code reference is that found in Nova Scotia's *Legal Ethics and Professional Conduct* Handbook. Commentary 7.5 of Chapter 7 states:

> "Rule 7(a) [relating to conflict of interest] is intended to prohibit, *inter alia*, sexual exploitation by a lawyer in the course of a professional representation. Often, based upon the nature of the underlying representation, a client exhibits vulnerability. The lawyer must not take advantage of that vulnerability. The solicitor-client relationship frequently creates an imbalance of power in favour of the lawyer where a client exhibits dependence upon the lawyer. A lawyer owes the utmost duty of good faith to the client. The relationship between a lawyer and client is a fiduciary relationship of the very highest character and all dealings between a lawyer and client that are beneficial to the lawyer will be closely scrutinized with the utmost strictness. Where lawyers exercise undue influence over clients to take unfair advantage of clients, discipline is appropriate. In all matters, a member is advised to keep clients' interests paramount in the course of the member's representation."

Rule 7(a) referred to above indicates, *inter alia*, that a lawyer has a duty not to act for a client when the interests of the client and the personal interests of the lawyer are in conflict.

[56] Another example of a direct reference is that found in Ontario's *Rules of Professional Conduct*. Entitled **Prohibition on Sexual Harassment** rule 5.03(2) states: "A lawyer shall not sexually harass a colleague, a staff member, a client, or any other person." Rule 5.03(1) reads in part: "(1) In this rule, sexual harassment is one incident or a series of incidents involving unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature (a) when such conduct might reasonably be expected to cause insecurity, discomfort, offence, or humiliation to the recipient(s) of the conduct, (b) when submission to such conduct is made implicitly or explicitly a condition for the provision of professional services, ...". A variety of circumstances referred to in Commentary within the rule indicate the broad nature of prohibited sexual relationships by a lawyer with clients and others.

[57] Premising the accuracy of the thesis that any lawyer-client sexual relationship involves a conflict of interest on the part of the lawyer, the indirect type of reference to that relationship is found in several codes. The C.B.A. Code addresses the matter in Chapter VI that deals with conflict of interest between lawyer and client. In less direct but nonetheless appropriate fashion the matter may be said to be covered in the same Code's Chapter XIX entitled "Avoiding Questionable Conduct." Commentary 1 thereof states: "Public confidence in the administration of justice and the legal profession may be eroded by irresponsible conduct on the part of the individual lawyer. For that reason, even the appearance of impropriety should be avoided." Some other Canadian codes similarly provide.

[58] Reported case law in Canada is relatively scant on the matter of lawyer-client sexual relationships and their effect upon the professional relationship to be expected of the lawyer and by the client. Accordingly the views of Canadian courts on the topic are not yet fully clarified. However, it may be premised safely from the steps already taken by a number of the law societies in Canada to speak to the matter that a sexual relationship between lawyer and client is one fraught

with problems of a professional conduct nature. From a basic thesis that there is a conflict of interest situation arising in that relationship to more broadly expressed prohibitions a direction as to appropriate professional conduct of lawyers has been at least partially spelled out for Canadian lawyers: do not form a sexual liaison with a client.

"Ethics In Mediation: Which Rules? Whose Rules?"

Hughes, Patricia. (2001), 50 U.N.B.L.J. 251,
at pp. 251; 253; 254-256; 258-259; 260-261

Increasingly, …, lawyers are engaged in the less traditional setting of mediation, both as representatives of clients and as mediators. This development has raised fresh issues about ethics in the mediation context. Should the ethical standards governing lawyers engaged in mediation on behalf of their clients, in their conduct with respect to their own clients, to the mediator and to the other parties, differ from those which apply in the traditional adversarial context and if so, how? should mediators be governed by a code of ethics and if so, promulgated by whom? what ethical standards govern the mediator? to whom are the obligations owed? And does it matter whether the mediator is a lawyer?

. . . .

While some commentators resist the articulation of standards for mediators out of concern that codes of conduct will restrict the kind of approach mediation may take, it seems clear that the outcome of this debate has been decided: standards are being developed, albeit on an ad hoc basis for the most part in Canada. Nevertheless, if there must be codes there remains the opportunity to ensure that they are not restrictive of style or approach and that, therefore, the choice of governing authority reflects a recognition of diverse mediator styles.

. . . .

…. Traditionally, mediators, often non-lawyers, but increasingly lawyers, have used a variety of approaches to assist the parties to resolve their disputes, including a style called "muscle mediation." "Muscle mediators" were and are aggressive, generally have a good idea about what the "right" outcome is, are not shy about giving their opinion about what a judge might decide and are not hesitant about pushing the parties to reach a pre-determined outcome. In fact, muscle mediators have always been considered a good choice in cases where lawyers could not convince their clients to be "reasonable." In that sense, then, some might think that this approach helps lawyers, not clients. Yet it must be said, sometimes what clients want - or refuse to accept - is simply not reasonable. Better to settle the matter, even with a little bullying, this argument goes, than go to court and have one recalcitrant client vindicated at the expense of another recalcitrant client.

"Muscle" mediation or something like it called "evaluative" mediation today lies at the heart of the debate about the governance of mediators, as well as who should be permitted to mediate. Evaluative mediators, it is said, "give advice, assess arguments, and express their own opinions about the disputing parties' claims;" they "assist disputants in reaching agreements by

making predictions about likely court outcomes and proposing equitable resolutions to the issues in dispute." [Schwartz, J.R. “Laymen cannot Lawyer, but is Mediation the Practice of Law?” (May-July 1999) 20: 5-6 Cardozo L.R. 1715, at pp. 1733-1734.] The facilitative mediator, on the other hand, "neither doles out legal advice nor voices a personal opinion regarding the parties' opposing arguments" [Schwartz, J.R., at p. 1731] and does not counsel the parties individually, although he or she may provide legal information [Schwartz, J.R., at p. 1737] and may ask properly framed questions designed to persuade the parties to find out how the law might apply to them. Thus the facilitative mediator might "advise" the parties that certain legal guidelines might apply to their dispute (that is, the mediator would give the parties this legal information), but "would not provide an opinion regarding a disputed issue involving interpretation of such guidelines." Although it is popular today to treat so-called "evaluative" mediation as an aberration and facilitative mediation as the genuine article, I disagree that the current debate over these approaches "has no precedent" and that "mediation was viewed as a wholly facilitative process separate and distinct from adjudication."'. In my experience, these have always been two of the several styles employed by mediators, sometimes in the same mediation. Furthermore, an aggressive mediator using her or his opinions to press the parties towards agreement is not transformed into an adjudicator.

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The lawyer acting as a mediator is not engaged as an advocate for a particular client. Rather the mediator works together with the parties in a common endeavour, with the objective of benefitting all participants, even though this may be accomplished by pointing out the strengths and weaknesses of the individual parties' cases. The following questions help illuminate the mediator's role:

> Where is the representative relationship? Where is the duty of loyalty? What is the fiduciary duty owed by whom and to whom? Where is the understanding of a party that the mediator is protecting that party's interests? How can the mediator receive confidential information from two parties with adverse interests and be practicing [*sic*] law with respect to either of them - or both of them? How can a mediator accept a service fee from two people with adverse interests, yet be practicing law with respect to both of them? [Cooley, J.W. “Shifting Paradigms: The Unauthorized Practice of Law or the Authorized Practice of Mediation” (August-October 2000) Disp. Res. J. 72, at p. 73.]

Answering these questions helps to identify the distinct nature of the mediator’s relationship with the parties and to clarify both the nature of the mediator's ethical obligations and to whom they are owed. The mediator is not answerable or responsible to one party, but to all the parties (and I add here, without further, that the obligation of a mediator in a mandatory mediation program should be to the parties rather than to the body which establishes mandatory mediation). The agreement he or she facilitates or even promotes (because he or she has assessed that it is one to which both parties will agree) is meant to be in the interests of all the parties, not one party. The mediator has no interest in the substantive outcome, and I say this even of so-called evaluative mediators, except to the extent that a particular outcome might attract the agreement of all the parties. These aspects of mediation separate the mediator from the lawyers representing clients in the mediation who, regardless of their shift in mind set to address the problem as a mutual activity, nevertheless are still - and should be - representing their clients' interests.

This is not to say that mediators do not have ethical obligations to the parties. They do, in my view, have such obligations both to the parties and to the integrity of the mediation process. For example, a mediator's readiness to make substantive suggestions or assess the parties' proposals should be guided by the extent of the mediator's substantive knowledge or understanding of the dispute. Among other responsibilities, mediators must ensure that they are not in a conflict of interest, that they treat the parties with respect and that the parties treat each other with respect.

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Mediation ethics must be based on the distinct dynamic which characterizes mediation as a practice based on diverse styles and techniques which have implications for both the lawyer, who serves as a party's advocate, and for the mediator, including the lawyer-mediator. On the one hand, while lawyers as advocates are properly governed by law society rules, it may be time to consider whether these rules need to be adapted to the mediation context. On the other hand, given the increase in mediation and the development of mandatory mediation, lawyers who act as mediators are engaged in a distinct practice which may well require regulation since they have ethical obligations to both the parties and the process. The distinct nature of mediation, however, suggests that the law societies are not the appropriate body to govern mediation ethics. Those concerned with ensuring that the full benefits of mediation are realized need to address these questions before they are answered by default.

Independent Legal Advice [:] Mediators

Tjaden, Ted. *The Law of Independent Legal Advice*
(Scarborough: Thompson Canada Ltd., 2000),
p. 15

Commentaries 1 and 2 of Rule 25 of the Ontario Professional Conduct Handbook, which discuss the duty of lawyers who act as mediators, have special rules requiring the recommendation of independent legal advice to parties to a mediation:

1. The lawyer-mediator should suggest and encourage the parties to seek the advice of separate counsel before and during the mediation process if they have not already done so.

2. Where in the mediation process the lawyer-mediator prepares a draft contract for the consideration of the respective parties the lawyer-mediator should expressly advise and encourage them to seek separate independent legal advice concerning the draft contract.

Since the incidences of mediation appear to be increasing, and since many mediators are lawyers who are not acting in a normal adversarial capacity, the foregoing rule seeks to ensure that the parties to the mediation understand that the mediator is not acting as their lawyer and that they should each seek independent legal advice if they have not already done so.

Collaborative Lawyering

Couglan, Stephen (Faculty of Law, Dalhousie University, Halifax) and Canadian Bar Association (Legal and Governmental Affairs Department).
EPIIgram **(Ottawa: EPII at cba.org, May 2001)**

"Collaborative Lawyering" has generated much interest at recent family law conferences in Canada and seems likely to become more common. Proponents of collaborative lawyering, which combines aspects of litigation and mediation, say it offers better results for clients combined with greater job satisfaction for lawyers. Although it could theoretically apply in a number of areas of law, to date it has been almost exclusively practiced by family lawyers.

Collaborative lawyering starts from the simple premise that most litigation cases settle. Collaborative lawyers say it therefore makes more sense to have "reaching a settlement" be the explicit goal from the very beginning. Negotiations are not carried on in the shadow of litigation. Instead, a settlement is always the end in itself. The lawyers involved are retained only to try to reach a settlement. If this does not happen, then both lawyers withdraw from the case, and the clients hire new lawyers to pursue the matter in court. The fact that the lawyers will be disqualified if the matter goes to court is explicit in the retainer agreement between the lawyer and client and can actually be part of an agreement signed by all the parties to the litigation and their lawyers. In other words, the collaborative lawyers and their clients try to ensure the threat of court cannot be used as a negotiating tactic.

Collaborative lawyering originated in 1990 in Minnesota. Since that time, it has spread to various cities throughout the United States, and more recently has come to Canada. A group exists in British Columbia, and collaborative law groups are being created in Toronto, Calgary and other cities.

The slow growth of collaborative law is due in part to the "group" nature of the exercise. A lawyer cannot simply decide "from now on I will practice law collaboratively". Instead, there must be a group of lawyers in the same area all committed to approaching cases in the same way. Practising collaboratively means more than signing an agreement not to litigate even as a last resort. The lawyers involved must also trust one another and have a good working relationship. Those practicing collaborative law disagree about whether both lawyers must be part of a collaborative law group, or at least willing to approach an individual case in that way (see the discussion below). However, there at least needs to be a "critical mass" of lawyers practising in a collaborative way to get the idea started. An individual cannot do it alone.

Collaborative lawyering is said to offer advantages both to lawyers and clients. The primary advantage for lawyers is increased quality of life. Any litigation practice can become stressful and tense, but family lawyers are often thought to have a particularly stressful practice because they deal with clients who have a great deal invested emotionally in the dispute. Highly personal and important issues such as custody and access can be at stake. But in dealing with these issues in a

collaborative fashion, the dynamic changes for the lawyer. Counsel no longer focus on getting the most "out of" the other side for one's own client. Instead, they work together to find the solution that best suits the situation. Dealing with the issues in this more constructive way could easily offer more job satisfaction to the lawyer.

For the client, there are several reported benefits. One significant advantage is that the negotiations are not conducted in the context of litigation. While most litigious disputes are settled, rather than actually proceeding to court, this does not mean that the nature of the negotiations is the same in the two situations. James C. MacDonald, a Toronto lawyer, argues that in a collaborative law setting:

> The participants are committed to employ all available skills to reach a reasonable settlement and no room is to be left to manoeuvre for litigation leverage. Half the mind cannot be preparing to cross examine the other party while only the other half is concentrating on reaching agreement. The attitude, which must show through to the clients, is that there will be no cross examination - not even a thought of it.

Similarly, Pauline Tesler, a lawyer practising in California, argues that:

> Most conventional family law matters settle figuratively, if not literally, "on the courthouse steps". By that time, a very great deal of money has been spent, and a great deal of emotional damage can have been caused. The settlements are reached under conditions of considerable tension and anxiety, and both "buyer's remorse" and "seller's remorse" are common. Moreover, the settlements are reached in the shadow of trial, and are generally shaped largely by what the lawyers believe the judge in the case is likely to do.

Tesler further argues that:

> Collaborative Law offers a greater potential for creative problem solving than does either mediation or litigation, in that only Collaborative Law puts two lawyers in the same room pulling in the same direction to solve the same list of problems. Lawyers excel at solving problems, but in conventional litigation they pull in opposite directions.

Negotiations as conducted by collaborative lawyers depart from normal settlement negotiations because the negotiations are conducted based on different fundamental assumptions. In some ways, these negotiations resemble mediation in part because they create a greater scope for looking at a broader range of options to solve the problem. To use a familiar analogy, a collaborative approach is more likely to find ways to make the pie bigger, rather than just decide how to divide up the existing pie.

Indeed, proponents argue that collaborative lawyering is superior to mediation. Mediation depends on one person, the mediator, to try to maintain a balance between the parties. This balance might not exist if one side has a more forceful personality, is unreasonable, or is overly emotional. These factors can prevent an agreement from being reached, or can lead one party to agree to a settlement that is not fair. "By contrast," Leonard Weiler argues, "in a collaborative law negotiation, each party is protected by having his or her own counsel involved throughout the process." This can provide greater protection for each party to the dispute. In addition, in a collaborative law

negotiation, it is the responsibility of the lawyer to make sure that his or her own client is behaving appropriately. MacDonald notes that:

> The four participants, with the parties themselves as the principal negotiators, work cooperatively to reach a mutually acceptable resolution of the issues. In order to carry out their role, the parties usually require a crash course in communication skills and the rudiments of interest based negotiations. Only so much of this can be instilled across the desk in the office, and is better learned by observing the lawyers at work in the actual negotiation sessions. Collaborative practice makes this fact the key to its method. The lawyers, through their own communication and their assistance in the negotiations, demonstrate how conflicts are resolved and agreement is reached. Knowing that they are modelling techniques being studied by their clients, they are careful to act in the way they want the clients to act.

This task of "setting the tone" is noted by Stuart Webb as one of the distinguishing features of collaborative law.

Other potential advantages for clients have been noted as well. In some cases, collaborative law groups consist not only of lawyers, but of other experts who are brought in to advise on the issues generally, rather than as experts for one side or the other. For example, Collaborative Divorce BC, includes lawyers, financial specialists, child specialists and divorce coaches. This can produce qualitatively better results.

Collaborative law is seen to create more durable agreements. The Collaborative Divorce Lawyers Association of Connecticut argues that:

> Collaborative resolutions are reached through a process in which clients have more control and settlements have been designed to meet each party's needs. These agreements are designed to be more sustainable over longer periods of time. Like the agreements reached in mediation, there is less post judgment litigation in divorces resolved by collaborative methods. The non combative atmosphere diminishes hostilities, allows the parties to preserve and enhance that which remains of their relationship, and allows them to learn to work cooperatively during and after the divorce, managing finances and co- parenting children.

In many cases, an agreement reached on a collaborative basis will also be less expensive for clients because the settlement would be obtained sooner than if the parties had adopted a more traditional route. This also benefits lawyers. Verner and Brumley argue that it frees lawyers from the stereotype "that the case is not settling because the attorneys are sabotaging the settlement efforts in their own self interest of earning larger fees at trial."

It should be noted, though, that there is no guarantee that collaborative lawyering will be less expensive for clients. Indeed, there is a risk of greater expense if the negotiations are unsuccessful because there will be additional cost involved in retaining new lawyers and acquainting them with all the facts. The potential for increased expense should be clearly explained to clients.

Collaborative law still raises unanswered questions and possible difficulties. Robert W. Rack of the Cincinnati Collaborative Law Center lists a number of these, including whether a lawyer's duty of zealous advocacy can be reconciled with the collaborative approach, how to deal with impasses, what kind of fee arrangements would need to be made, the possibility of abuse of the process, and so on.

A particular question of interest is whether it is essential that both lawyers representing the parties be members of a collaborative law group. At the moment, most collaborative lawyers are members of a group, and both parties hire members from that group. This is part of the benefit of the approach: the lawyers already know and trust one another, and their good working relationship is intended to carry benefits.

Nevertheless, Rack suggests that this need not be an essential feature:

> It is not clear, however, that one side skillfully approaching the other on a collaborative law basis could not also be effective. If the non signing party [i.e., a party who has not signed on to a formal Collaborative Law process] knows that the reasonable lawyer on the other side [who has signed on to the process] will have to withdraw and be replaced by a litigator if they cannot settle, there may be a strong incentive to remain at the negotiating table.

Tesler, in contrast, argues against this approach:

> Trust between the attorneys is essential for the Collaborative Law process to work. Unless the lawyers can rely on one another's representations about full disclosure, for example, there can be insufficient protection against dishonesty by a party. Unless I have confidence that the other lawyer will withdraw from representing a dishonest client, I would not sign on to a formal Collaborative Law process (involving disqualification of the lawyers from representation in court if the Collaborative Law process fails).
>
> Similarly, Collaborative Law demands special skills from the lawyers [;] skills in guiding negotiations, and in managing conflict. These are not the skills a conventional lawyer learns. Without them, a lawyer would have a hard time working effectively in a Collaborative Law negotiation. And some lawyers even collude with their clients to misuse the Collaborative Law process, for delay, or to get an unfair edge in negotiations. For these reasons, I would not sign on to a formal Collaborative Law representation with a lawyer inexperienced in this model. That doesn't mean I could not work cordially or cooperatively with that lawyer, but I wouldn't sign the formal agreements that are the heart of Collaborative Law until I had a track record of mutual trust with the lawyer.

Guidelines for those wishing to engage in the collaborative practice of law were published in 1998 [at the] Annual Conference of the Academy of Family Mediators, and can be found at this location. For further information, visit the websites of collaborative law associations in Canada and the United States.

[**Note:** On inquiry by the writer to him, R. Bradley Hunter, partner in Hunter Miller, Regina and a senior Canadian family law practitioner, reported on 20 March 2002: "I first heard about

Collaborative Law at the St. John's National Family Law … [Program in 2000] and became interested in it about a year ago. I talked to a number of Calgary and Edmonton lawyers about it but the key contact for me was Janice Pritchard, a lawyer in Medicine Hat, Alberta. … [She] started a Collaborative Law group in August 2000 and by March 2001 Collaborative Law had taken over the way family law was practised in Medicine Hat [;] displacing the old litigation model in only six or seven months. Litigation still takes place but at a much reduced rate. After that, I started meeting with my colleagues and we had our first group of lawyers in the Regina area trained by October 1, 2001. Our training consisted of a two and one half day training program on interest based negotiation and two days of Collaborative Law training with David Carter and Janice Pritchard from Medicine Hat." Mr. Hunter is president of the Collaborative Law Group in Regina.]

"Divorce lawyer, divorce lawyer, make me a match"

Grice, Samantha. *National Post*, 12 March 2002, pp. B1-B2

After reading a recent New York Times story about two people who married after being set up by their divorce lawyer, family law lawyer Rosaline Zukerman picked up the phone to congratulate the matchmaker/lawyer Nancy Dunaetz on her good work. "Because I always try to think of that too when I'm splitting somebody not right for their spouse," says Zukerman on her way to court in Los Angeles. "I think of who they would be better with and make an introduction. I've just always done it. By nature I tend to get people together. It's funny that I'm a divorce lawyer."

In her 21 years of law practice, Zukerman has brought quite a few people together. (She also has a high reconciliation rate for her divorce clients.) While she hasn't yet had the opportunity to set clients up with each other, she has set up clients with friends -- two lawyers who now have twin boys, and a gay couple. She even introduced an elderly grandchildless couple to two grandparentless children.

"The last client was this stunning young woman, and I gave her name to two or three different guys. It didn't work out and she found someone on her own, but I thought she was just too good to waste."

Nancy Dunaetz, the Los Angeles lawyer/matchmaker mentioned in the Times article, says, "Not only do I divorce people, I get them married, too."

Makes sense, doesn't it? Who has a better line on the singles market than divorce lawyers? Friends of divorce lawyer Stacy D. Phillips, also of Los Angeles, accuse her of having a "great stable of potential" sitting in her office waiting room. Some family law lawyers see matchmaking as a side hobby, a happy perk in their sometimes depressing profession.

But not all divorce lawyers see it that way. Raoul Felder, a high-profile divorce lawyer in Manhattan, describes the lobby of his office as a "temple of broken hearts" and not a place to meet the next caring, gentle, loving person.

"I got a lot of calls after that article ran from people joking about, 'Why don't you run a dating service on the side?' Or 'How come you've never introduced me to anyone?' but you run into enough trouble running a law business, you don't want to run a dating business," he says.

Perhaps the matchmaking lawyer phenomenon is an L.A. thing, because Felder's sentiments are echoed by most lawyers outside of la-la land. "I can't believe anyone would do that," says family law lawyer Joel Miller of Toronto. "I really doubt a responsible family law lawyer would go about introducing clients."

For the most part, Montreal divorce lawyer Anne-France Goldwater agrees with Miller, but it happened that the day before our interview she had just given one of her clients the phone number of another, thinking the two had a lot in common. Both of their divorce cases had turned into messy, drawn-out and highly litigious affairs, both have custody of similarly aged children, the exes are both well out of the picture and, according to Goldwater, they both have "kind and gentle" dispositions. When the man's case finally wrapped up a few weeks ago Goldwater said to the woman, " 'Well, so and so's situation is over now, can I give him your phone number?' She blushed and got all shy but said yes and so I called him last night," she recalls. "Nothing may come of it, but the dust had settled and I thought they might hit it off."

An update revealed that he had in fact made the call and they had had quite a nice conversation followed by a visit to the boutique where she works. "Maybe I'll be invited to a wedding one day," says Goldwater. "It would be nice to be at a wedding rather than a divorce -- it recharges your emotional batteries."

But this was an extraordinary situation for Goldwater, and not something she normally endorses. "Rare is the case when you know a client long enough that they're healed enough to be in the next relationship. And remember, you're not supposed to be friends with a client."

But Stacy Phillips believes getting to know a client comes with the territory. "You get to know people really intimately if you do your job well," she says.

Even though she is a divorce lawyer, Phillips says she is a romantic at heart. "In my life I've set people up and I've [matched] clients with other friends, but not with each other. And they have to be separated for a year because people aren't able to have a relationship unless they've been separated for a year. I set up one of my clients with one of my closest friends because I could tell their personalities, their concerns and their backgrounds and ages were what each [of them] were looking for."

Zukerman also sees a close lawyer-to-client relationship as part and parcel of the job. "It's one of the most intimate professional relationships you can have with a client, next to your gynecologist or proctologist. You get the down and dirty," she laughs.

Miller, though, questions a lawyer's ability to really get a handle on a client's story. "Have you ever had an argument with a boyfriend or a sibling and have you gone to a thoughtful, friendly third person and you described the argument and heard yourself describe the situation better for you than might be the case? As a result of that, how should a lawyer assume the version of events they come to know about a client is the only version?"

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"Helping Clients with Living Expenses: 'No Good Deed Goes Unpunished' "

Sahl, John. (2002), 13 *the Professional Lawyer* 1, 4-5, 6-7 (Winter 2002)

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Under Roman and early English law, advocates arguing before courts could not be compensated for their services but could receive donations. Later at common law when lawyers were entitled to compensation, champerty laws in England prohibited them and any non-party from financially supporting a suit in return for a share of the party's recovery. The laws of maintenance and barratry also prohibited lawyers from financially supporting a party's suit. The reasons for the prohibitions were to prevent wealthy non-parties from oppressing the poor and, by speculation and meddling, obstructing the administration of justice.

For the same reasons advanced in England, many states in America enacted statutes, while others relied on the common law, to prohibit champerty, maintenance and barratry. Although the laws were initially created to protect the poor in litigation, they later became an impediment to the poor who often needed financial assistance to pursue claims against powerful manufacturers and transportation companies. Contingent fees and the advancement of expenses became increasingly necessary so that impecunious citizens might have their day in court.

Recognizing the need to provide the poor with access to the courts, some American judges permitted lawyers to advance money to clients for their living, medical, and other expenses on two conditions. First, the lawyer could not promise such assistance before the client-lawyer relationship was formed; and second, the client had to remain liable for repaying the advance. Some of these judges commended lawyers for providing financial assistance during litigation, describing the practice as "common" and "honorable." The assistance did not violate laws against champerty because the client remained responsible for repayment of the expense. These judges still found lawyers guilty of champerty when they assumed sole and full responsibility for litigation expenses or tied their repayment to the outcome of the case.

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In 1969, the ABA adopted the Model Code of Professional Responsibility (the Code). Reflecting long-standing concerns about champerty and lawyer independence, DR 5-101 (A) prohibited lawyers from acquiring a proprietary interest in a cause of action or the subject matter of litigation except that a lawyer could obtain a lien for his fees and expenses or accept a reasonable contingency fee in a civil case . …

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In 1983, the ABA replaced the Code with the Model Rules of Professional Conduct (hereinafter Rules). The Rules continue the proscription on lawyers acquiring a proprietary

interest in a cause of action or the subject matter of litigation with certain exceptions. In addition, Rule 1.8 (e) of the Rules reflected the … rule in language that implicitly prohibited lawyers from paying a client's living expenses. ….

In 1997 the ABA decided to review the Rules and created the Commission on the Evaluation of the Rules of Professional Conduct, known as the Ethics 2000 Commission … [which] has proposed to continue the ban on lawyers advancing living expenses to their clients. The Ethics 2000 position is consistent with the American Law Institute's position prohibiting loans from lawyers to clients for purposes other than financing litigation.

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A principal justification for prohibiting a lawyer from advancing living expenses to clients is the concern that the lawyer is placed in the "conflicting role of a creditor and [that this] could induce the lawyer to conduct the litigation so as to protect the lawyer's interests rather than the client's." The ABA and all states currently permit lawyers to advance the cost of their time or labor and the cost of litigation to provide clients with access to the courts. Whenever a lawyer agrees to a contingent fee or advances litigation expenses, the lawyer acquires an interest in the client's litigation and assumes the conflicting role as the client's creditor. This conflict may be especially acute in the contingency fee situation where a lawyer is confronted with the dilemma of advising a client about a settlement offer or seeking a larger award with a trial. The settlement provides the lawyer with a certain and reasonable return on his investment of time and expenses in the case, while losing the case at trial means no compensation for the lawyer. In addition to losing his fee, the lawyer might also forfeit the litigation expenses he advanced to the client because clients commonly refuse to reimburse their lawyers for such expenses upon losing a case.

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Some practitioners fear a competitive disadvantage in the marketplace for legal services if the profession permits lawyers to advance living expenses because only more established or affluent lawyers will offer such assistance. This fear may be unwarranted for several reasons. First, some lawyers in a position to advance living expenses may avoid the practice to minimize the law firm's capital investment in cases and to limit their financial involvement with clients. These lawyers may prefer instead to help clients obtain third-party lenders to provide the cost of living expenses, a practice that has attracted recent attention. Other lawyers may simply reject the policy as unseemly and instead help clients obtain public assistance, disability payments, unemployment coverage, or new employment.

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The … rule's restriction on lawyers advancing living expenses is also concerned with lawyers using financial assistance to solicit clients. There is a fear that a lawyer's offer to pay living expenses will unfairly induce a client to select a lawyer for financial reasons rather than competency and experience.

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Lawyers who violate the … rule's ban on advancing living expenses face the risk of discipline, including suspension or disbarment. Nevertheless, some lawyers are not deterred by the rule and continue to advance living expenses. In part, this may be because some courts have imposed minimal punishment for violations and have expressed some doubts about the ban.

For example, the Ohio Supreme Court has customarily imposed public reprimands - its least onerous sanction - for lawyers who only violate the ban against advancing living expenses. In a recent case, *Cleveland Bar Association v. Nusbaum*, a lawyer advanced approximately $26,000 in living expenses to a client who was severely injured in a motorcycle accident. In publicly reprimanding the lawyer, Nusbaum, the Ohio Supreme Court cited several mitigating factors. They included the absence of any previous disciplinary actions filed against him in his 29 years of practice, the fact that his client was helped and not harmed by the loans, and the fact that Nusbaum's ex-wife filed the grievance. The court also acknowledged its receipt of several letters attesting to Nusbaum's good character, including one from his client. The client reported that he had had twenty operations since the accident, that he was unable to work, and that he could not have survived without Nusbaums's advances for life's basic necessities. He considered Nusbaum to be his friend and thought that without the help he would have been forced to settle the case for less money.

In *Attorney Grievance Commission of Maryland v. Kandel*, the lawyer advanced living expenses generally in increments of $100 on nine different occasions for the same client who was involved in two separate automobile accidents. The advances funded medical treatment, transportation for medical care, and also car repairs. Kandel, a sole practitioner, had represented numerous clients in [a] variety of cases over a thirty-five year period and had never been disciplined. The Maryland Court of Appeals noted that he was not motivated by personal gain to make the advances, that his client needed the money "due to his financial position and because of the necessity of continuing medical treatment," and that the client was not harmed by the living expense advances. Although the court reaffirmed its policy against advancing living expenses, it rejected bar counsel's recommendation of a ninety-day suspension and instead ordered a public reprimand.

Courts have occasionally suggested that their bar associations ought to reexamine the rule banning living expense advances. *Oklahoma Bar Association v. Smolen* involved a lawyer who violated the state's ban on advancing living expenses to clients during pending litigation by lending $79,304 to 161 different clients during an 18-month period. The non-interest-bearing loans were to destitute clients without the means and resources to obtain "sustenance." Recognizing that Smolen might be deserving of total exoneration based on the dissent's criticisms of the rule, the [majority of the] court nevertheless publicly censured him. The court urged the "Bench, the practicing Bar [and] . . . the academic legal community to consider changing the rule." Although it is unclear whether such an examination was undertaken, the Oklahoma Supreme Court recently rejected a humanitarian exception for living expenses in another case involving Smolen.

In 1995, the Mississippi Supreme Court urged the state bar to review its rule prohibiting advances for living expenses in *The Mississippi Bar v. Attorney HH*. In response to that request, the bar established an ad hoc committee to consider possible changes to the rule. The bar ultimately adopted the committee's recommendation to permit lawyers to advance living expenses and reasonable and necessary medical expenses under certain conditions. Today, Mississippi is one of the few states that allow lawyers to advance clients' living expenses.

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Two state supreme courts permit living expense advances on humanitarian grounds notwithstanding ethical rules to the contrary. At least eight states have ethical rules that expressly permit lawyers to either advance or guarantee loans for living expenses to clients. Most of these states impose significant limitations on the advances. For example, lawyers may not promise to pay living expenses to obtain or maintain employment [i.e., clients], and clients must remain liable for repayment of an advance.

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In 1976 in *Louisiana State Bar Association v. Edwins*, the state supreme court held that lawyers were permitted to advance "minimal living expenses" to clients under four conditions, even though a state ethical rule prohibited the practice. These conditions are: (1) lawyers must not promise advances to induce employment and they must not make advances until after being retained; (2) the advances must be reasonable based on the facts, (3) clients must remain ultimately liable for repayment of advances; and (4) lawyers must not promote public knowledge of such advances for purposes of securing future employment [i.e., clients]. The court viewed the living expenses advanced in Edwins as akin to litigation expenses that, along with contingency fees, were ethically sanctioned methods of facilitating access to the courts. The court believed that a humanitarian exception to the state's ban on advancements of living expenses promoted access to the courts and prevented impecunious clients from being forced to accept inadequate settlements in protracted litigation.

In a case of first impression, the Florida Supreme Court followed Louisiana's example in *Florida Bar v. Taylor*. The court determined that the prohibition against advances for living expenses was designed to prevent lawyers from obtaining or maintaining employment by promising clients living expenses. The lawyer in the case had issued a single check for $200 to an indigent client and her child for basic necessities. He had also provided used clothing for the child. The Florida Supreme Court held that the lawyer's conduct was not improper because it was not intended to maintain employment but rather was "essentially an act of humanitarianism" with no expectation of repayment.

"A Practising Lawyer's Field Guide to the Self-Represented"

Thompson, D.A. Rollie and Reierson, Lynn. (2002), 19 C.F.L.Q. 529, at pp. 529-531; 533-534; 535-536; 536-541; 546

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Our focus here is on the family law lawyer's interaction with the unrepresented or self-represented litigant. In this context, what *must* the lawyer do, what must the lawyer *not* do, and what *should* the lawyer do? ….

1. A FIELD GUIDE TO LAWYERLESS LITIGANTS

Not all lawyerless litigants are alike. Like a Peterson field guide to the birds, what we offer are a quick sketch, a few prominent identifying marks, some suggestions of their familiar habitat and range, and their distinctive songs. As in the wild, some species run into each other and it's not always easy to tell one from another, especially at a distance. Our categories are based on our field experience and anecdotal knowledge, occasionally backed up with empirical data from the United States and Australia.

The world of litigants without lawyers can be divided into two broad categories, the unrepresented ["URLs"] and the self-represented ["SRLs"]. The "unrepresented" would like to have a lawyer, but can't afford one. The "self-represented" can afford a lawyer, but don't want one or can't keep one.

Admittedly, there is some small overlap at the margin.

What are the relative proportions of these two groups? A leading study in Phoenix, Arizona found that 72 per cent of those without lawyers could afford a lawyer, but chose not to hire one. Similar results were found in two Australian studies, 15 per cent in one study or slightly under 25 per cent in another. What data we've been able to find supports our anecdotal sense that financial issues are more common for the unrepresented, while custody and access issues predominate for self-represents. There are more men amongst those without lawyers, and, in our experience significantly more men within the group we've called "self-represents". ….

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2. FAR FROM THE COURTHOUSE: TO DEAL OR NOT TO DEAL?

How should a lawyer representing one party deal with an unrepresented or self-represented litigant on the other side? In our view, much turns on the initial categorization. Negotiating with unrepresenteds is still a risky business, even if the risks are much lower [than negotiating with self-

representeds]. …. But, however the other party is categorized and whatever the practical concerns, there are ethical strictures that must be recognized, every time a lawyer approaches a party without a lawyer.

(a) What the Codes Tell Us

Negotiating with an unrepresented party raises particular ethical issues, only some that are identified in the Canadian Bar Association's Code of Professional Conduct. On the one hand, a lawyer is directed generally to "encourage settlement" and to treat the unrepresented litigant with "the same courtesy and good faith" as a lawyer. On the other hand, a lawyer representing one party must not "advise an unrepresented person" and must not leave "the impression that the lawyer is protecting" the other party's interests.

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(b) Negotiating with the Unrepresented

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(i) *Put it in writing*

The lawyer must be content with putting a written proposal to the unrepresented litigant, couched in careful, neutral language, that cannot on any reading be perceived as "coercive". Less effective, yes, but safer. Any written correspondence must be read and edited with the knowledge that it might wind up being quoted to a judge, or read by a judge or, even worse, read by a discipline committee. The language must not be legalistic, but plain words and simply stated, far more demanding to write than a letter to another lawyer. The tone in the correspondence will serve as objective evidence of non-coercive tactics, whether or not you decide to supplement with oral discussions, but especially when you do engage in such discussions.

(ii) *Forget settlement privilege*

Unrepresented litigants do not understand the privilege for settlement negotiations. Whatever you write or say to URLs will be referred to at some point in the courtroom, even if you do object. Once any hint of coercion or misunderstanding is raised, in our experience, judges do not hesitate to muck into the content of the negotiations, even when there isn't an allegation of a concluded agreement.

So long as all communications are in writing, then it is easier for the lawyer to respond in argument, without "giving evidence". If there were oral discussions, then counsel will inevitably be drawn into responding as to "what really happened". You can refuse to respond, properly claiming privilege, but then you are left wondering whether the judge has consciously, or even subconsciously, accepted the unrepresented's version, however confused. Does the lawyer's client in this case suffer by silence? Does the lawyer's personal reputation in general suffer by silence?

(iii) *Recognize the risks of oral negotiations*

Below we will argue for no oral negotiations with the "self -represented", a hard line. With reservations, we think this is too hard a line for the "unrepresented". But we don't like doing it and we know there are serious risks, which must be carefully calibrated each time a lawyer speaks to an unrepresented person.

Most of the "unrepresented" don't work well in writing, often because of limited literacy, mostly because it's time-consuming and formal. If anything is to be accomplished, it will have to be in oral discussions. In our view, there should be no oral discussions until after the lawyer has written a clear letter about his or her advocacy role for one party and the other party's need for legal advice. There should be no oral "negotiations" in the absence of a written proposal from the lawyer first, including a reiteration of the "I'm-not-your-lawyer-and-you-should-get-your-own-lawyer" mantra.

Oral negotiations over procedural matters with the unrepresented are less risky than substantive matters. For example, the contents and timing of disclosure, or a referral to mediation, or the hiring of a single property appraiser, or the terms of engagement for a parenting assessment. The same can be said for negotiations over interim matters, as opposed to final settlements. Further, the trust built up between counsel and the unrepresented on procedural and interim matters can assist negotiations over "final" matters.

(iv) *Don't get too friendly*

The unrepresented are a sympathetic collection of individuals. Inevitably, a lawyer will wind up on a first-name basis with them, creating a false sense of security for them, no matter how scrupulous the lawyer is. The unrepresented want to have their own lawyer - unlike the self-represented - and are quite prepared to have any lawyer offer them advice, including you. Even if you don't offer advice, the unrepresented party will assume that you won't take advantage of him or her, even if you are representing the "other side". A certain conscious distancing is likely necessary, even if it won't dramatically change the perspective of the unrepresented party.

(v) *Obtaining "good enough" disclosure*

By definition, most of the unrepresented don't have much money, which makes financial disclosure a less critical matter. Less than perfect disclosure or delayed disclosure will not be as critical to the conduct of the negotiations. Custody itself is less frequently an issue, just matters of access, which narrows the scope of disclosure required in parenting matters.

As with the self-represented, any problems of disclosure require counsel to obtain the assistance of the court, as there is no opposing counsel to explain and reinforce and police the affirmative obligation to disclose. Equally, there is no opposing counsel to explain the implied obligations of confidentiality, for material disclosed to the unrepresented party, a topic dealt with below in the more critical context of the self-represented.

(c) Negotiating with the "Self-Represented"

In our view, a different approach is required for all categories of the "self-represented". The self-represented want to be treated like lawyers, but not be subject to any of the lawyer's complex obligations within the adversary system. If anything, most self-reps have a distorted view

of the lawyer's role, adopting all the adversarial tactics of the courtroom, unaware of all the ethical norms and professional culture that inform and restrain such tactics. As a result, outside the courtroom setting, dealing with self-represented litigants is a dicey business.

(i) *Only communicate in writing*

Lawyers should not deal with the self-represented, except in writing or, later, on the record in court. We take this view for many of the reasons set out above, in dealing with the unrepresented. With the self-represented, the risks increase and the benefits reduce. Most self-reps are adversarial, more intent on making their point than settling their cases.

This means no meetings, no oral negotiations, not even telephone calls. No discussions in the courthouse hallway. A drastic approach, but one that leaves no room for misunderstanding or mischaracterization, or outright reconstruction. Paranoid perhaps, but safer in our experience.

(ii) *Disclosure by the book*

With a lawyer on the other side, it is possible to make voluntary disclosure arrangements, as both counsel understand their clients' legal obligations and both appreciate the cost-effectiveness of informal agreements. The "unrepresented" may drag their feet in disclosing, but the "self-represented" are more likely to obfuscate, to disclose selectively, even to mislead. A classic ploy is the self-represented that shuffled bank and investment account statements, and then copied them all doublesided.

The only response for the lawyer has to be to require disclosure by the book, using the rules and following them to the letter, unrelentingly. In financial matters, most rules require the production of reasonably detailed financial statements. But the more frequent topic of litigation by this group is custody and access matters, sometimes linked to child and spousal support issues. We have found interrogatories an effective device for disclosure, with their short time limits, their detachment from personal contact with the other party, and their ease of enforcement. Oral examination for discovery is a last resort in these cases, as discovery permits the self-represented party to indulge their desire to be a lawyer and to use questioning as a means of prolonging the dispute and harassing the other party. When the SRL discovers the other party, the lawyer ought to take the necessary objections on grounds of relevance and privilege, same as would be the case with a lawyer on the other side. Objections should be clearly stated, as well as the self-rep's option of going to court to require answers. Much as the bounds of relevance are quite broad on discovery, self-represented parties often seek to go beyond even those limits.

(iii) *Compliance with the implied undertaking of confidentiality*

Information obtained by compulsion in the discovery process is subject to an implied undertaking of confidentiality, that it will not be used or disclosed for any purposes other than the proceeding in which the information was obtained. With the self-represented, any disclosure should only take place in the context of a court proceeding, under the umbrella of the implied undertaking.

As its title says, it is an "implied" or automatic obligation of confidentiality, of which most lawyers are aware. In his seminal article on the subject, John Laskin recommended that clients

should be advised in writing of their obligations under this rule, at the beginning and the end of a proceeding, and, further, that counsel should confirm the undertaking with opposing counsel in writing, including confirmation that opposing counsel has made the client aware of the obligations involved.

[**Note:** The leading case is *Goodman v. Rossi* 125 D.L.R. (4th) 613, 37 C.P.C. (3d) 181, 1995 CarswellOnt 146 (Ont. C.A.), but the implied undertaking has become the norm throughout the common-law provinces in Canada and has now been read in to the Quebec *Code of Civil Procedure* by the Supreme Court of Canada in *Lac d'Amiante du Québec ltee v. 2858-0702 Québec inc.*, [2001] S.C.J. No. 49, 2001 SCC 51, 2001 CarswellQue 1864, 2001 CarswellQue 1865 (S.C.C.) In Ontario, Rule 30.1 of the *Rules of Civil Procedure* codifies and modifies the common-law rule, after *Goodman*.]

Self-represented parties are likely not even aware of such obligations. The opposing lawyer must therefore, at a minimum, write a clear and comprehensive letter to the SRL, detailing the content of the implied undertaking rule and the sanctions for its breach. The letter should go at the beginning of the proceeding and again at the end. It has been held, in Ontario, that financial statements in family law matters, if required to be filed in a public court office, are not subject to the implied undertaking, but other material and information obtained on discovery must be kept confidential.

But is this enough when disclosing material to self-representeds? Especially in critical cases, it may be wise to prepare a court order confirming the scope and effect of the undertaking in the particular case, preferably by consent, but if necessary on motion, likely made at some point in the pre-trial stage. Critical cases that come to mind are those where sensitive information is being disclosed or where the party receiving the information has already demonstrated little regard for confidentiality.

3. INSIDE THE COURTHOUSE

Whether a case involves an "unrepresented" or a "self-represented" litigant, it is more likely that the case will end up in the courthouse, before the court, whether as a contested or an uncontested case. It has been our experience, and the case law confirms this, that the truly "unrepresented" are treated differently by judges than the "self-represented". The "unrepresented" are more likely to be given every procedural break by most judges, while the "self-represented" will be held more often to the stricter standards of lawyer conduct. Once in court, the lawyer again faces difficult dilemmas in dealing with those without counsel.

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[**Notes:** (1) Regards the "unrepresented" party – (i) lawyer for the represented party will be required to do more; (ii) expanded use will be made of pre-trial conferences and hearings. (2) Regards the "self-represented" party – (i) 'ignore' the self-represented; (ii) demand that self-representeds comply with the rules; (iii) be prepared to deal with control and gender issues that a "distinct sub-group of men" among self-representatives may raise; and (iv) consider security concerns in the court room.]

It's not that hard to distinguish the "unrepresented" from the "self-represented", or the various species of each we've set out above. A brief acquaintance in the field, close up on a case, is often all that's required. No binoculars necessary. Often their songs alone are enough to identify them. The lawyer then should move quietly and carefully, maintaining a reasonable distance and always keeping the subject under observation. We've offered some pocket-sized advice for the practising lawyer's behaviour in the field, after the initial identification. The more detailed, subtle and refined study of the interaction between lawyers, unrepresenteds, self-representeds and their environment, we leave to others more scientifically inclined. Ours is not a textbook, just a field guide.

3.10 Relationships With Other Lawyers

Sappier v. Tobique Indian Band,

[2001] N.B.J. No. 396 (QL) (N.B.C.A.),
Turnbull, Larlee (for the Court) and Robertson JJ.A.,
at para. 19

. . . .

19. …. Lawyers are bound by the Code of Professional Conduct, Canadian Bar Association (Ottawa, 1996), and share in the responsibility for the error here. At page 69 of the Code the rule states: "a lawyer's conduct toward other lawyers should be characterized by courtesy and good faith". More importantly, for the purpose of this case, in the guiding principles listed on the same page of the Code it states: "The lawyer who knows that another lawyer has been consulted in a matter should not proceed by default in the matter without enquiry and warning."

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Mentoring 1001

Clark, David. (2002), 1 *LPIC news LawPRO 3* (April 2002), p. 3

Lawyers read the same books and refer to the same body of law. So why is one lawyer more successful than another - financially, personally and professionally?

Ability and drive provide only part of the answer. What often sets these lawyers apart is that they have acquired the ***skills and wisdom*** to more effectively apply the information and knowledge that all lawyers share. Some acquire it through "the school of hard knocks." Others have been guided by a more experienced lawyer – either inside or outside their firm – and often have become more successful more quickly.

They have benefited from mentoring: the process of passing on skills and wisdom.

What is a mentor?

Mentors can be friends, colleagues, teachers or complete strangers, who typically have more experience in a relevant area. The mentoring relationship can be "formal," with set roles, responsibilities and expectations, such as those found in the associate mentoring programs of larger law firms. More often than not, the relationship is informal, with the mentor acting as a sounding

board for the less experienced practitioner. Mentors typically play four complementary, overlapping roles:

• Coach – show how to carry out a task or activity;
• Facilitator – create opportunities for learners to use newly acquired skills;
• Counsellor – help mentees explore the consequences of potential decisions;
• Networker – refer mentees to others when their own experience is insufficient.

For example, a mentor can help the mentee learn a new way to tackle a problem by challenging the mentee's working assumptions, and encouraging the exploration of new solutions – often with the assistance of other senior counsel.

Why do we need mentoring?

Mentees gain very personal, highly effective, real-world legal training that comes with the added benefit of the experience of the mentor. Networking opportunities enhance the mentee's professional and personal growth. They interact with more senior members of the bar from whom they otherwise might be isolated. This breaking down of barriers means junior counsel get more diversity in their experience and more opportunity to present their abilities directly to those who could affect their career path.

Mentors also benefit – and not only through the personal satisfaction that comes with giving back to the profession or "repaying a debt" if they themselves were once mentored. For the senior lawyer, mentoring is another way of networking. Today's new lawyer could one day be a junior partner whose skills you may need to rely on for a future file. Firms mentor to groom juniors and evaluate their abilities, with an eye to making them a partner some day.

But equally important are the very practical, risk management aspects of mentoring.

In today's practice climate, the risks of being sued are very real. And the reality of claims is that it is a breakdown of the lawyer-client relationship – not actual errors or a lack of knowledge of law – that is the single largest cause of claims. How do juniors learn about non-technical aspects of lawyering – about necessities such as proper file management, client communication, and situation handling, none of which can be found in a book or article? These skills and wisdom are only available from a mentor.

Incivility in the profession is another concern – and an underlying cause of claims. Helping juniors appreciate the potential consequences of a sharply worded letter, coaching juniors on how to conduct themselves in a civil manner in court or in meetings, fostering respect for the professionalism of the opponent: These are the "skills" that a mentor can best teach – for the benefit of the mentee and the profession as a whole.

Mentors also say that mentoring sharpens their own risk management skills. By helping others to manage the risks of practicing law and determine the procedures and tools to use, mentors discover that mentoring is often a refresher in law, strategies and attitudes.

Mentoring is a win-win situation. The mentees gain new skills and wisdom. Mentors gain insight into their own abilities and get the satisfaction that comes from a sense of giving back to the

profession. Mentoring can help reduce claims, which benefits both the individual and the profession, and it contributes to a better practice climate.

Larabie v. Canada,

[2000] T.C.J. No. 456 (QL), Bowman T.C.J.,
at paras. 13-16

. . . .

¶ 13 I cannot leave this case without commenting on the conduct of the solicitors for Mr. Larabie, Lanthier & Lehoux. The document which I take to be a notice of appeal, if that is what it can be called, consisted of a letter dated June 28, 1999 addressed to Revenue Canada, Tax Court of Canada, 200 Kent Street, Ottawa, Ontario, K1A 0M1. It states that his client wishes to file "a formal objection" for the 1997 taxation year. It was signed not by David Lanthier but on his behalf by someone with the initial nr. It bears the remarkably insolent notation "Dictated but not read". That sort of arrogance is unacceptable in ordinary correspondence. In a document purporting to originate an action in this or any court or in any communication with a court it borders on contemptuous.

¶ 14 On April 20, 2000 Mr. Lanthier wrote to the Tax Court of Canada asking for a response to his letter of August 20, 1999 and enclosing a copy. That letter is a letter to the Appeals Division of Revenue Canada in Shawinigan-Sud, Quebec. The letter is unsigned but again bears the offensive notation "Dictated but not read". Evidently the official in the Department of National Revenue to whom the letter was addressed, Ms. Chauvette, decided that if Mr. Lanthier did not consider it worth his time to read his letter, neither did she.

¶ 15 What is obvious is that Mr. Lanthier was wholly unaware of the fact that this court has nothing to do with the Department of National Revenue and believed that a letter to the Department is a communication with this court. This confusion occurs occasionally with unrepresented appellants. In the case of a member of the bar it is inexcusable. When a taxpayer retains a member of the bar to prosecute an appeal in this court he or she is entitled to expect a modicum of competence and familiarity with the rules of the court. The letter addressed to Revenue Canada of June 28, 1999 does not state that the taxpayer elects the informal procedure although the registry of the court must have assumed that the informal procedure was requested because the letter enclosed the $100 filing fee. Mr. Lanthier's failure to make the election could have put his client in danger of having costs assessed against him.

¶ 16 The saga continues. On the day of trial Mr. Lanthier did not appear. It seems he had sent the file to a Sudbury law firm, Weaver, Simmons. He did not communicate with the court or take any steps to have himself removed as solicitor of record. On the morning of trial a law student, Mr. Krys, two weeks out of law school, appeared. He had never appeared in any court before and evidently had received no instruction from anyone. He had tried without success to contact Mr. Lanthier. He had no idea what to expect and seems to have been unaware that this was a proceeding in court. I gave him all the assistance I could, as I would have done with any unrepresented

appellant. The provisions of the Income Tax Act involved in this appeal are extraordinarily complicated and I feel great sympathy for Mr. Krys who was thrown unprepared into the breach. I do not criticize him in any way. He struggled valiantly to meet the responsibility that had so unfairly been put on his shoulders. I do however criticize his principals who sent him into court. Mr. Lanthier and Weaver, Simmons have in effect abandoned Mr. Larabie. Lawyers who agree to represent a client in court owe a responsibility to the client and to the court. The conduct here was irresponsible and reprehensible. It falls far short of the minimum level of professional responsibility that one can reasonably expect from members of the bar. This court has been treated contemptuously and Mr. Larabie has been thrown to the wolves. I considered summoning Mr. Lanthier to show cause why he should not be held in contempt. It is however more appropriate that the matter be dealt with by the Law Society of Upper Canada. I shall defer referring the matter to the Law Society for two weeks to permit the lawyers to provide an explanation to the court of their conduct and to provide reasons why the matter should not be referred to the Law Society.

Brandt v. Brandt

(2000), 9 R.F.L. (5th) 9 (Man. C.A.),
Huband, Croft, and Steel (for the Court) JJ.A.
(Summary)

Facts: The applicant husband and respondent wife were granted judgments for divorce and for division of marital property. The Court deemed the husband's insurance commission payments to constitute marital property and, therefore, subjected them to an equalization payment order. The husband did not immediately make the equalization payment. The wife obtained a garnishment order to recover the amount of the equalization (which reflected division of the husband's insurance commission payments). Manitoba Queen's Bench dismissed the husband's application to stay the garnishment proceeding. The husband appealed. The husband contended that the garnishment proceeding was premature. He argued [*inter alia*]: "he had never consented to immediate payment of the equalization payment, …".

Decision: Appeal dismissed. The Court of Appeal stated (*inter alia*) that "[i]t is not helpful for counsel to … argue in this Court that the client did not intend to consent to the order. Unless there is evidence to the contrary [not here present], lawyers are presumed to act on behalf of their clients. Unless there is evidence to the contrary, a lawyer's approval as to consent of the contents of an order indicates a consent to the provisions of the order."

"Mandatory Child Abuse Reporting and Confidentiality in the Lawyer-Client Relationship"

McCallum, Dr. Margaret. (2001), 50 U.N.B.L.J. 263, at pp. 263-264; 265-268

All of the Canadian common law provinces and territories have legislation that provides for state or quasi-statal agencies to remove children from the care of their parents or guardians if they are in need of protection, as defined in the legislation. To increase the likelihood that children at risk will receive the appropriate attention, in all jurisdictions except the Yukon, the legislation generally requires individuals to report to child welfare authorities, any information indicating that a child is or might be in need of protection. People who acquire this information in the course of a confidential professional relationship are not exempt from this requirement. In three jurisdictions, the professional who fails to report information supporting a reasonable suspicion of child abuse may be subject to disciplinary action by his or her professional organization as well as prosecution for an offense under the child welfare legislation. Most of the statutes, however, provide that reporting requirements do not abrogate any privilege that may exist between a solicitor and the solicitor's client. Neither Newfoundland nor Nova Scotia make special provision for protecting the confidentiality of the lawyer and client relationship; in Newfoundland solicitors have the same responsibility for reporting suspected child abuse as do all other professionals.

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The codes of professional conduct, enforced by the law societies in the various Canadian jurisdictions, address the question of when a lawyer may or must disclose confidential information obtained during the solicitor-client relationship, but the provided answers are somewhat delphic. The Canadian Bar Association Code of Professional Conduct, 1987, sets out a two-part rule. Lawyers may disclose confidential information obtained in the course of the lawyer-client relationship if they have reasonable grounds for believing that a crime will likely be committed, and they must disclose the information (to whom is not specified) if the anticipated crime is one of violence. The majority of Canadian law societies include this CBA rule in their codes of professional conduct. Nova Scotia and New Brunswick require disclosure to prevent a crime of violence or a serious crime respectively, but there is no permissive component to the rule. Ontario and British Columbia have no mandatory component: disclosure is justified only to prevent death or serious harm to any person.

The formulation of this rule in the Code of Professional Conduct, adopted in June 2000 by the Law Society of Upper Canada, reflects the decision of the Supreme Court of Canada in *Smith v. Jones*. In that case, a client accused of aggravated sexual assault was referred by his lawyer for a psychiatric assessment prior to trial. When the client decided to plead guilty, the psychiatrist wanted to inform the Crown Attorney of the client's well-developed plan to abduct and murder female prostitutes in the city where he lived. The client spoke of this plan during his

interview with the psychiatrist; the lawyer had assured the client, quite correctly, that solicitor-client privilege protected the client's communications with the psychiatrist as if they were communications with the lawyer. When the lawyer refused to inform the Crown Attorney of the psychiatrist's concerns the psychiatrist applied for a court order allowing disclosure. The … [Supreme Court of Canada] referred to the rule permitting disclosure to prevent a crime adopted by the Law Society of British Columbia, and held that disclosure of communications, otherwise protected by solicitor-client privilege, was justified under a public safety exception. On the facts as presented to the court, the psychiatrist was permitted to disclose as much of the client's communication as necessary to warn of the risk. The Supreme Court was not asked, and did not determine, whether the psychiatrist had an obligation to disclose the information.

Taken together, the Supreme Court's decision in *Smith v. Jones* and the various codes of professional conduct governing the lawyer's responsibilities provide justification and permission for any lawyer who decides to breach confidentiality and report concerns about possible child abuse. Despite statements contained in child welfare legislation regarding solicitor-client privilege, in all jurisdictions except two, the lawyer has an obligation under the applicable code of professional conduct to disclose confidential information necessary to prevent a crime of violence or a serious crime. The lawyer who fails to disclose information that might protect a child from abuse may be liable to disciplinary action or damages in a tort action brought by or on behalf of a child whose abuse might have been prevented. Given the support found in the legal profession's codes of conduct for breaching the confidentiality of the lawyer-client relationship where necessary to protect members of the public, lawyers who discover that a child may be at serious risk from continued contact with a client cannot assume that their professional responsibility to maintain their client's confidences prevents them from taking steps to warn of the risk.

In this area as in many others, provincial legislation and codes of professional conduct provide no easy answers for lawyers struggling to understand how to reconcile their duties to their clients with their duties to the public and duties to themselves. Reporting concerns that a child is at risk of abuse will not expose most lawyers to sanctions, either by way of disciplinary action by their governing body or through an action by the client for damages for breach of confidence. Nonetheless, if the client objects to the lawyer's choice to report suspected child abuse, a decision from a disciplinary body or court confirming the correctness of the lawyer's choice cannot undo the devastation flowing from the process of responding to the objections. With privilege comes responsibility; for the conscientious, just and public-spirited lawyer, faced with difficult choices between competing interests, it may not always be clear which responsibilities matter most.

Federation of Law Societies of Canada v. Canada (Attorney General),

[2002] N.S.J. No. 199 (QL) (N.S.S.C. (Halifax)), Kennedy C.J.S.C. (orally), at paras. 1-35; 80 - 86

¶ 1 . . . . The Federation of Law Societies of Canada and the Nova Scotia Barristers' Society, the applicants, are challenging the constitutionality of the application of the Proceeds of Crime, (Money Laundering) and Terrorist Financing Act [S.C. 2000 c. 17 as amended by] S.C. 2001 c. 41 [espy. Part 4] to legal counsel under s. 5 of the Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations SOR/2001-317, those regulations made pursuant to that Act.

¶ 2 This application seeks, on behalf of Nova Scotia lawyers, an order exempting legal counsel from the operation of the legislation pending the ultimate determination of the constitutional issue.

¶ 3 The Act has received Royal Assent and is being implemented progressively. Certain sections of the Act are already in force. By virtue of an Order in Council dated August 28, 2001, ss. 5, 7, 8, 10 and 11 of the Act came into force on October 28, 2001.

¶ 4 Section 5(i), 5(j) and 73 of the Act [S.C. 2000 c. 17 as amended] authorize the Governor in Council to enact regulations subjecting certain classes of persons and entities to the provisions of the Act.

¶ 5 The Proceeds of Crime (Money Laundering) Suspicious Transaction Reporting Regulations ("Regulations"), came into force on November 8, 2001. Section 5 of the Regulations provides that every legal counsel is subject to Part 1 of the Act [S.C. 2000 c. 17 as amended]. Part 1 of the Act includes ss. 5, 7, 8, 10 and 11. Every legal counsel is subject to Part 1 of the Act when they engage in any of the following activities on behalf of any person or entity,

"(a) receiving or paying funds, other than those received or paid in respect of professional fees, disbursements, expenses of bail;
(b) purchasing or selling securities, real property or business assets or entities; and
(c) transferring funds or securities by any means."

¶ 6 "Legal counsel" is defined in s. 2 of the Act [S.C. 2000 c. 17 as amended] as "in the Province of Quebec, an advocate or a notary and, in any other province, a barrister or solicitor".

¶ 7 One of the applicants' principal concerns relates to s. 7 of the Act [S.C. 2000 c. 17 as amended], which came into force on October 28, 2001 by the Order in Council, and was made applicable to legal counsel as of November 8, 2001, by s. 5 of the Regulations.

¶ 8 Section 7 of the Act [S.C. 2000 c. 17 as amended] requires the reporting of "suspicious transactions":

> "...every person or entity shall report to the [Financial Transactions and Reports Analysis] Centre, in the prescribed form and manner, every financial transaction that occurs in the course of their activities and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a money laundering offence."

¶ 9 The "prescribed form and manner" is set out in the Regulations. Section 10 of the Regulations provides that the person shall send a report to the Centre within 30 days after first detecting a fact that constitutes reasonable grounds to suspect that a transaction is related to the commission of a money laundering offence.

¶ 10 Section 9 of the Regulations provides that, the information required to be reported to the Centre is set out in the Schedule to the Regulations as the "Suspicious Transaction Report". A Suspicious Transaction Report must include the following information:

(a) the type of reporting person or entity;
(b) the identification number of the place of business where the transaction occurred;
(c) the full name of the reporting person or entity;
(d) the full address of the business where the transaction occurred;
(e) the name and telephone number of contact person;
(f) the date and time of the transaction, including the posting date if different;
(g) the purpose and details of the transaction, including the type and amount of funds and other institutions or accounts that are involved;
(h) the method of the transaction;
(i) the identification number of the individual who first detected a fact respecting a suspicious transaction;
(j) complete account details, including account and branch number, type of account, full name of each account holder, date account opened and closed, and current status of account;
(k) full information on individual conducting transaction, including name, address, country of residence, personal telephone number, government identification (e.g. passport number), date of birth, occupation, employer, business telephone number and address;
(l) a detailed description of the grounds to suspect that the transaction is related to the commission of a money laundering offence; and
(m) any other action taken as a result of suspicion.

¶ 11 Section 8 of the Act [S.C. 2000 c. 17 as amended] prohibits legal counsel from disclosing to their clients that they have made this Suspicious Transaction Report, or disclosing the contents of such a report with the intent to prejudice a criminal investigation, whether or not such an investigation has begun.

¶ 12 Under the Act a breach of s. 7 [S.C. 2000 c. 17 as amended] is punishable on indictment by a fine of up to $2,000,000 and imprisonment for up to five years. A breach of s. 8 of the Act is punishable on indictment with imprisonment of up to two years.

¶ 13 The requirements specific to lawyers are qualified by s. 11 [S.C. 2000 c. 17 as amended] which states that nothing in Part I "requires a legal counsel to disclose any communication that is subject to solicitor-client privilege". The scope of this privilege is not defined and I can say, that it has been my experience that, the extent of solicitor-client privilege is commonly subject to debate.

¶ 14 The applicant has argued that there is a constitutional right to protect communications between a lawyer and a client that is not covered by privilege and would not be covered by the privilege exemption.

¶ 15 The Government of Canada has been of assistance to those lawyers who might be confused as to their obligation under the Act, by the publication of "Suspicious Transaction Guidelines" which sets out indicators of money laundering. These include, to give two examples, both the obvious, (i.e. client admits or makes statements about involvement in criminal activities) and the not so obvious (i.e. "client insists that a transaction be done quickly").

¶ 16 This is not the first such application brought by Canadian lawyers in response to this legislation. Similar applications seeking interim relief have been brought, in British Columbia, Alberta and Ontario.

¶ 17 On November 20, 2001, Law Society of British Columbia v. Canada (Attorney General) [2001] B.C.J. No. 2420, Justice Marion Allan, of the British Columbia Supreme Court, issued an order exempting legal counsel in that Province from the application of the Act, pending final determination of the constitutional issue. An appeal by the Attorney General of Canada against that order was dismissed by the British Columbia Court of Appeal decision dated January 29, 2002, [2002] B.C.J. No. 130.

¶ 18 On December 6, 2001, Federation of Law Societies of Canada v. Canada (Attorney General) [2001] A.J. No. 1697, Justice Watson of the Alberta Supreme Court also granted an order that provided interim relief to legal counsel in Alberta, but which was different in form, in that Justice Watson directed that, while Alberta lawyers would be required to complete the reports required by the Act, these reports would be sent to the Alberta Law Society to be held by that Society under seal, pending the determination of the constitutional challenge.

¶ 19 On January 9, 2002, Federation of Law Societies of Canada v. Canada (Attorney General) [2002] O.J. No. 17, Justice Maurice Cullity of the Ontario Superior Court of Justice exempted lawyers in Ontario from the operation of the Act, until the final determination of the constitutional issues, using an order similar to that which was issued by Justice Allan of the British Columbia Court.

¶ 20 I am now informed that, as recently as March 13, 2002, the Attorney General of Canada's application for leave to file an interlocutory appeal from the decision of Justice Cullity was dismissed.

¶ 21 The Attorney General of Canada does not intend to extend the exemptions issued by those courts in those three provinces … to the other provinces of Canada, and so we have this application seeking interim relief for the lawyers of Nova Scotia.

¶ 22 Before visiting the balancing process that this application requires, I think that it may be useful to consider some of the evidence by way of affidavit put forward by both sides in this application, in order to get an overall sense of what is at stake here.

¶ 23 The Attorney General of Canada asks this Court to give thought to the significance of this legislation. He has produced the affidavit of Richard Lalonde dated 6 February, 2002.

¶ 24 Mr. Lalonde is Chief of Financial Crimes with the Federal Department of Finance.

¶ 25 He speaks of "money laundering" in Canada as a matter of both national and international concern. He says that the activity seeks to conceal the criminal origin of money, which is most effectively done by using the financial and legal systems of more than one country, and consequently efforts to combat this activity require international cooperation. As a result, Canada is a party to a number of international agreements aimed at the suppression of "money laundering".

¶ 26 Initially this "dirty" money, so-called, involved money that was primarily derived from drug trafficking, however, particularly since the events of September 11, 2001, there is increased awareness of "money laundering" as a means of facilitating terrorist financing.

¶ 27 The successful efforts of law enforcement agencies focused on the use of banks and other financial institutions have, says Mr. Lalonde, now resulted in criminals increasingly using professionals, such as lawyers and accountants, in their "money laundering" schemes that involve increasingly more complex transactions.

¶ 28 Law enforcement officials have sought and obtained changes in international agreements and domestic legislation to adapt to this change in the manner of the criminal activity.

¶ 29 Mr. Lalonde says that "money laundering" serves to corrupt and undermine the financial and legal systems of the countries in which it is allowed to take place.

¶ 30 Those jurisdictions that do not have effective anti-money laundering laws will become magnets for illegal funds derived from other countries where such legislation exists and is strictly enforced.

¶ 31 And finally, because of the importance of lawyers as "gate keepers" to the financial system, any anti-money laundering legislation that exempts lawyers from its operation will be ineffective, says Mr. Lalonde and will attract a flood of illegal money to transactions handled by Canadian lawyers.

¶ 32 The applicants have produced evidence in support of the temporary exemption sought.

¶ 33 Clayton Ruby, a lawyer of national reputation, points out in his affidavit, produced by the applicants, dated January 15, 2002, that the Act creates a major dilemma for lawyers, placing them in a conflict between professional duty to a client's loyalty and confidentiality, and their legal duty to report suspicious activities to the authorities on the threat of penal sanction.

¶ 34 Clayton Ruby suggests that the effect will be that both lawyers and their clients will have their constitutionally protected rights violated, pending the hearing of these constitutional issues, and that those violations will take place in a manner that he says cannot be remedied. There will be no reasonable remedy.

¶ 35 So I repeat, that the issue that is before this Court is, should this Court grant an interlocutory injunction exempting Nova Scotia lawyers from s. 5 of the Regulations, pending the determination of the constitutional challenge?

. . . .

¶ 80 I find that on balance, the temporary exemption from the operation of s. 5 of the Regulations under the Act, the section that applies to lawyers only, …, … although … [it] will perhaps compromise the legislation, … will be preferable to allowing even for a limited period, the significant constitutional harm that will result from requiring lawyers to secretly report on their clients' activities, requiring lawyers to become informers, requiring lawyers to become secret government agents.

¶ 81 I … cite Justice Allan finalizing this matter, at p. 16, paras 107-108:

> "para 107 While the Government's goal of deterring and prosecuting money laundering offences is laudatory, the fundamental values of the Constitution must be protected. As McLachlin J. stated in the context of a s. 1 analysis in RJR - MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 at p. 329:
>
> > 'The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.'"

¶ 82 Remember please, that that was a section 1 analyses but there is significance to be taken from it. Allan, J. goes on to say:

> "para 108 The proclamation of s. 5 of the Regulations authorizes an unprecedented intrusion into the traditional solicitor-client relationship. The constitutional issues raised deserve careful consideration by the Court."

¶ 83 I find, as did the judges before me who have heard these applications, that the applicants have satisfied the tripartite test. [Law Society of British Columbia v. Canada (Attorney General), [2001] B.C.J. No. 2420 at paras. 55-56].

¶ 84 This is one of those unusual "clear cases" contemplated by Harper, …, [[2002] 2 S.C.R. 764] (at p. 771) that justifies a finding that the public interest in enforcing Parliament's law is outweighed by the harm inflicted by the law on the applicant.

¶ 85 I have considered the remedy granted by the Alberta Court of Queens Bench, however I am concerned, in light of what I have found with the obligation on lawyers to file secret, albeit sealed, reports and so I prefer the remedy granted by the British Columbia and Ontario Courts.

¶ 86 I allow the application and grant an order exempting legal counsel in this Province, practising in Nova Scotia, from the application of s. 5 of the Proceeds of Crime (Money Laundering) Suspicious Transactions Regulations, until the final decision of this Court, or any appeal therefrom, on the merits of the constitutional challenge.

[**Note:** Section 62(1) of the Act, S.C. 2000 c. 17 as amended, authorizes entry by a compliance officer of any work premises "at any reasonable time", without a search warrant, to seek out information pertaining to whether it is being compliant with Part I (the reporting and recording obligations) of the Act. A search warrant is required only if the work premises is in a dwelling house. Such a warrantless search will likely give rise to a constitutional challenge of s. 62 under s. 8 of the *Canadian Charter of the Rights and Freedoms*. The same section dictates that in the course of a compliance search, persons conducting such a search have to be given:

- full use and access to the data on any computer or data processing system in the premises;
- the right to examine and reproduce any data in printout or other electronic form;
- the right to remove records or data from premises for examination or copying; and
- the right to use any copying equipment to make any required copies.

In addition, pursuant to s.62(2), the owner or person in charge of the premises and every person found in it must give the authorized compliance person all reasonable assistance to enable that person to carry out her(his) responsibilities, including assisting her(him) in accessing computer systems.

Further, you "must furnish them with any information with respect to the administration of Part 1 [of the Act] or the Regulations under it that they may reasonably require".

A failure to assist a compliance officer in her(his) efforts could, upon conviction, lead to up to five years imprisonment and/or a fine of $500,000 (s.74).

Instead of assuming privilege and requiring the state to seek an order from the Court permitting a review of seized information, as is the case in the s. 488.1 *Criminal Code* law firm search and seizure provisions, the Act places the onus upon a lawyer to establish privilege in a two-step process. First, at the time of a compliance search, a lawyer must formally assert a claim of privilege, and second, must then bring an application for a determination of this issue. Otherwise, s. 62 of the Act is very similar to s. 488.1 of the *Criminal Code*.]

[**Note:** Following is text of media release dated 15 May 2002, from the Federation of Law Societies of Canada, entitled: "Lawyers and federal government agree to have test case on money laundering laws".]

The Federation of Law Societies of Canada and the Attorney General of Canada have reached an agreement for a test case in the B.C. Supreme Court to resolve the constitutionality of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*.

"The Federation of Law Societies of Canada is very pleased with this agreement," Federation President Maurice Laprairie, Q.C., a lawyer with Regina's MacPherson Leslie and Tyerman, said. "The spirit of cooperation between the Federation and Attorney General Martin Cauchon that is evidenced by this agreement will streamline the constitutional challenge and will put an end to costly litigation in other provinces and territories."

The Federation launched the constitutional challenge last year because the … Act will prevent Canadians from obtaining confidential legal advice from their lawyers.

"The legislation has nothing to do with money laundering or terrorist financing – it has to do with compromising the rights of any Canadian in need of a lawyer," Mr. Laprairie said. "The legislation requires lawyers to submit details of their clients' confidential financial affairs to the federal government, contrary to our profession's ethical rules and contrary to the basic rights of all Canadians. Lawyers cannot be secret agents for the government."

Prior to signing the May 14th agreement, the Federation was forced to file a constitutional challenge in each province and territory. The Federation along with the Law Society of British Columbia launched the first constitutional challenge in the B.C. Supreme Court last year and obtained a temporary injunction from Madam Justice Marion Allan on Nov. 20, 2001 exempting lawyers from the … Act until the case could be heard by the court. Courts in several other provinces adopted Madam Justice Allan's decision. Courts in Alberta, Ontario, Nova Scotia and Saskatchewan granted similar injunctions. At the time of the agreement lawsuits had also been commenced in Quebec, New Brunswick and Newfoundland and Labrador.

The new agreement gives national recognition to Madam Justice Allan's decision which will remain in effect across Canada until the constitutional challenge is resolved by the Supreme Court of Canada if necessary. Laprairie said: "The new agreement brings certainty to all Canadians and ensures that all Canadians regardless of where they live will enjoy the same degree of protection of their confidential information with their lawyer pending the final decision in the test case."

The Federation/Law Society of B.C. constitutional challenge was scheduled to be heard in the B.C. Supreme Court on June 24, 2002 but … [has been] adjourned to allow the parties to prepare to argue the case as a national test case. A date for hearing has not been set.]

4.0 PROCEEDINGS DERIVING FROM BREACHES OF STANDARDS OF RESPONSIBILITY

4.1 Administrative: Disciplinary

Law Society of New Brunswick v. Ryan,

[2001] N.B.J. No. 117 (QL) (N.B.C.A.),
Rideout, Glennie, and B. Robichaud JJ. (*ad hoc*),
at paras. 1-3; 5-7; 14-15; 21; 33-35

¶ 1 THE COURT:— In order to pursue their wrongful dismissal claims, Ronald Stewart and Grant Trider retained the Appellant, Michael A.A. Ryan, a lawyer. The Appellant did nothing in pursuit of their claim but he did design a large cloak of deceit to cover-up his inactivity. Eventually the Appellant confessed his wrongdoing, which included fictitious decisions of the Court of Queen's Bench and the Court of Appeal, the latter having been reduced to writing. The matter was ultimately referred to the Discipline Committee of the Respondent, Law Society of New Brunswick. The only issue before the Discipline Committee was the issue of sanction and the Committee concluded that Mr. Ryan should be disbarred.

¶ 2 Following the decision of the Discipline Committee, the Appellant appealed and at the same time made a motion to adduce medical evidence which would show that he was under a mental disability which contributed to his improper conduct. This Court permitted the reopening of the Appellant's case for the limited purpose of adducing this medical evidence. The Respondent's Discipline Committee was also permitted to adduce contrary medical evidence if it so wished.

¶ 3 After hearing this additional medical evidence, the Discipline Committee reaffirmed its decision to disbar the Appellant who now appeals this decision [requesting that his disbarment be set aside and a lesser penalty substituted].

. . . .

¶ 5 …. It is helpful to reproduce the Committee's findings which are at pages 4 to 12 of its decision:

> "Evidence Before the Discipline Committee

Evidence was led both by counsel for the Law Society and counsel for the respondent. Testifying on behalf of the Law Society were Marc L. Richard, Registrar of Complaints, and Ronald Stewart and Grant Trider, the two complainants. The respondent testified on his own behalf and called no other witnesses.

The evidence established the following facts and the panel so finds.

The respondent was retained by the complainants in February 1993 as a consequence of their dismissal from their respective employment with Unipress Ltd. Although the respondent was retained by both Mr. Trider and Mr. Stewart, virtually all of his communications were with Mr. Stewart. Mr. Trider recalled meeting with Mr. Ryan on three occasions early on in the process. Mr. Trider recalled making only one phone call to Mr. Ryan. Otherwise all of his information came from Mr. Stewart.

Ronald Stewart testified that he received the respondent's name from a friend, that Mr. Ryan was not known to him or Mr. Trider, that at the first meeting with Mr. Ryan they provided him with a copy of the Collective Agreement and asked if they had a case. Mr. Ryan subsequently advised them that they had a 'strong civil case'. The evidence was conflicting as to whether that opinion was rendered during a telephone discussion or at a meeting. There was no dispute over the fact that the opinion was given in those terms. As a consequence, Mr. Ryan was instructed by Messrs. Stewart and Trider to go ahead. Mr. Ryan's testimony was that this was the first wrongful dismissal case he had undertaken, that he did accept the retainer and that he took a cash retainer of either $120.00 or $65.00 from each of Mr. Stewart and Mr. Trider. Mr. Ryan then did nothing. For the first six months of the retainer, there was no communication from either the complainants or from Mr. Ryan. Mr. Ryan was unequivocal in acknowledging that Mr. Stewart would certainly have understood that an action on his and Mr. Trider's behalf had been started.

The testimony established that over the remaining five and a half years, the respondent misled the complainants and misrepresented his conduct and the status of the proceeding as follows:

1. Mr. Ryan lied to the complainants about 'at least four discoveries'. On one occasion Mr. Ryan advised the complainants that there was a discovery scheduled to be held at the Sheraton. Mr. Ryan met the complainants at the Sheraton and advised them at that time that the discovery had been cancelled because of the failure of the other side to attend. On that occasion the complainants were given money by Mr. Ryan. Mr. Ryan’s recollection was that it was approximately $50.00. Mr. Ryan did not return to his office that

day but arranged for the complainants to go to the office to pick up the money;

2. Mr. Ryan informed the complainants that he had filed a motion to have Unipress' defence struck. Mr. Ryan informed the complainants that Unipress was represented by Charles Sargeant, Q.C. The complainants were advised by Mr. Ryan that the motion was heard in Fredericton by Mr. Justice David Russell, who granted the motion, struck the defence and awarded damages to each of the complainants. The complainants were informed that 'everything took place in the Judge's Chambers'. They were further informed that they had to wait for the appeal period to expire before their damages could be collected;

3. The complainants were subsequently informed by Mr. Ryan that Unipress had filed an appeal of Mr. Justice Russell's decision but that there would be delays in the hearing of the appeal due, for example, to the fact that the Court of Appeal does not sit during the summer months. At some point, the complainants were informed by Mr. Ryan that Unipress's appeal had been heard. Sixteen to eighteen months passed before the complainants were provided with a decision which Mr. Ryan represented to be a decision of the Court of Appeal;

4. Although Mr. Justice Russell's fictitious decision was not put into a written form by Mr. Ryan, the decision from the Court of Appeal was and a copy of same was marked as Exhibit D-2 at the hearing. This decision of the Court of Appeal was only provided to Mr. Stewart in response to repeated and insistent requests from him that he be provided with a copy of the decision which Mr. Ryan had informed him had been rendered. The phone messages from the respondent's file illustrate the persistence with which Mr. Stewart attempted to obtain this, and other information, with respect to his case;

5. The complainants were informed by Mr. Ryan that as a consequence of the Court of Appeal's decision, they had to 'start the case from scratch';

6. Following their receipt of the fictitious appellate court decision, the complainants were informed by Mr. Ryan that Mr. Justice Jean-Claude Angers was going to hear a contempt motion filed by Mr. Ryan in response to Unipress's failures to attend for discovery;

7. According to Mr. Ryan, Mr. Justice Angers was scheduled to hear the motion on December 3, 1998 but set the motion over for hearing to December 4. Mr. Ryan informed the complainants that Mr. Justice Angers had heard the motion and had found Unipress in contempt. The complainants were further informed that the 'damages hearing' was scheduled for January 1999. Mr. Justice Angers' fictitious decision on the contempt motion was not reduced to writing by the respondent;

8. Mr. Ryan informed the complainants that at the damages hearing in January 1999, damages were awarded in their favour, $19,000.00 for Mr. Stewart and $18,000.00 for Mr. Trider. Following the damages hearing, the complainants were informed by Mr. Ryan that another appeal period had to expire before their damages could be recovered;

9. The complainants were subsequently informed by Mr. Ryan that Unipress had appealed, that its appeal had been unsuccessful and that the Court of Appeal had upheld Mr. Justice Angers' decision. This second fictitious Court of Appeal decision was not reduced to writing;

10. The complainants were subsequently advised by Mr. Ryan that before their damages could be recovered they would have to wait for the appeal period to the Supreme Court of Canada to expire;

11. The complainants were informed by Mr. Ryan that the Judgment had been sent by him to the Sheriffs Department and that there was a requirement it remain there for 21 days before enforcement steps could be taken;

12. On March 24, 1999, Mr. Stewart was informed by Mr. Ryan during a telephone call initiated by Mr. Ryan that the 'whole thing was a lie'.

This enumeration is not exhaustive of all of the misrepresentations to which the respondent admitted.

The respondent was forthright in his admission of guilt and minced few words during his testimony about his conduct. He was apologetic and contrite.

. . . .

¶ 6 The medical evidence introduced at the second hearing of the Discipline Committee established that the Appellant suffered from a substance abuse problem involving drugs and alcohol which dominated his life from the time he was a teenager. The Appellant also sought to prove that he was suffering from a familial depressive illness. Both these problems the Appellant submitted led to his mishandling of the files at issue due in large part to overwhelming dread and anxiety exacerbated by alcohol abuse. The Respondent did not agree with this position and introduced medical evidence to establish that a familial depressive illness was not a contributing factor.

¶ 7 The Discipline Committee considered all of this new medical evidence and concluded at pages 17 and 18 of its second decision dated November 9, 2000:

"The evidence presented to this panel confirmed that apart from alcohol abuse, with its related anxiety features, Mr. Ryan did not, and does not, suffer from any other psychiatric illness that can be diagnosed so long as he continues to use alcohol. In addition, Mr. Ryan's continued use of alcohol, even to the limited extent to which it presently occurs, precludes the carrying out of any reliable

psychological assessment and the point at which such an inquiry might productively be made is impossible to determine. The availability and timing of the recommended course of psychological inquiry and assessment lie solely and exclusively within Mr. Ryan's control.

In this latter regard, the evidence demonstrated Mr. Ryan's reluctance to dedicate himself to the course of action recommended by Dr. Cook in January 2000 [Dr. Cook being one of the doctors Mr. Ryan consulted after the Law Society became involved], even in the face of what Mr. Ryan knew by then to be the very serious consequence of his misconduct and his abuse of alcohol. Mr. Ryan did not cease drinking. His periodic abstinence coincided with his motion to the Court of Appeal to have new evidence heard. Mr. Ryan has not joined AA. His application to Homewood was only completed in August, some six months following his initial appointment with Dr. Cook and notwithstanding his sworn affidavit evidence in February that 'I am now aware of the seriousness of my problem, and I have ceased drinking alcoholic beverages and have agreed to cooperate in the recommended referral to Homewood Mental Health Facility.' Mr. Ryan aligns himself with a contemporary view apparently adopted by some of the AA membership that total abstinence from alcohol is no longer the standard required.

Mr. Ryan's tentative and sporadic pursuit of any course of action designed to treat his illness and the consequences of his illness highlighted for the panel the futility of attempting to prescribe meaningful conditions to any period of suspension.

After considering the new evidence and the submissions made by counsel, the panel has concluded that the sanction previously imposed was the appropriate one in the circumstances. For the reasons expressed in our previous decision of November 26, 1999, we confirm the sanction."

. . . .

¶ 14 The Appellant is not challenging the jurisdiction of the Discipline Committee nor its power to impose sanctions. However, the Appellant is of the view that the Committee did not give sufficient weight to the medical evidence adduced and it failed to give due consideration to earlier discipline decisions. In addition, the Appellant is saying that the Discipline Committee did not give sufficient weight to the mitigating factors in favour of a lesser sanction and gave undue weight to aggravating factors.

¶ 15 What must be said at the outset is that what Mr. Ryan did was both reprehensible and incomprehensible. His actions reflect badly upon all members of the Law Society. His forgery of a judgement of the Court of Appeal, while not intended to be acted upon to anyone's detriment, attacks the foundation of our judicial system. Albeit Mr. Ryan did not stand to make any personal gain by his actions, his conduct is certainly deserving of severe sanction. The question before the Court is can and should this Court interfere with Mr. Ryan's disbarment?

. . . .

¶ 21 After a review of the authorities, we are of the opinion that the standard of review in this particular case is "reasonableness" but on the spectrum this standard is closer to correctness than patently unreasonable. This is particularly so, as here, when you have the most serious of sanctions being considered.

. . . .

¶ 33 In addition, it is well accepted that disbarment carries with it a stigma far greater than that of suspension. Consequently, it is a more severe penalty than an indefinite suspension with conditions for reinstatement. In our view, it is incumbent upon the Discipline Committee to make comparisons with other cases and to indicate why this case is such an anomalous case as to warrant such a clear disparity in sanction. We are of the opinion that the sanction imposed in this case was not similar to sanctions imposed by the Respondent for similar offenses committed in similar circumstances. We are also of the view that insufficient weight was given to the Appellant's medical problems. Applying the standard of reasonableness to this case, we are of the opinion that the decision of the Discipline Committee was unreasonable and therefore requiring modification by this Court pursuant to section 68 of the Law Society Act supra.

DISPOSITION

¶ 34 The appeal is allowed. The decision of the Discipline Committee of the Law Society of New Brunswick is set aside and substituted by the following:

¶ 35 It is the order of this Court that:

(1) Michael A.A. Ryan is suspended indefinitely from the practice of law;
(2) If Mr. Ryan wishes to have the suspension lifted he must submit to the Registrar a request in writing for reinstatement as a practicing member;
(3) The request of Mr. Ryan to the Registrar for reinstatement shall operate as a referral by the Discipline Committee to the Competence Committee under section 46 of the Law Society Act supra and the Registrar shall forward a copy of all decisions of this Court and the Discipline Committee (including the exhibits referred to in the different records) to the Competence Committee for its consideration. It goes without saying that Mr. Ryan must first establish, through medical experts approved by the Competence Committee, that he is mentally and medically fit to resume the practice of law;
(4) The suspension of Mr. Ryan shall be lifted only after the Competence Committee is satisfied that it is in the public interest that Mr. Ryan's right to practice be reinstated, and then only on such terms and conditions as may be determined by the Competence Committee.

. . . .

[**Note:** Respondent's Application for Leave to Appeal to the Supreme Court of Canada on 4th June 2001 (S.C.C. File No. 28639) was granted 06 September 2001. The appeal had not been argued up to 25 June 2002.]

Merchant v. Law Society of Saskatchewan,

[2002] S.J. No. 228 (QL), 10 May 2002 (Sask. C.A.),
Bayda C.J.S. (dissenting); Lane and Jackson JJ.A.,
at paras. 2; 64-65; 119; 126-127

LANE and JACKSON JJ.A.:—

. . . .

¶ 2 . . . . In brief, we conclude that the appropriate standard of review for the hearing committee's decision regarding the charge of conduct unbecoming is a standard of reasonableness . . . . .

. . . .

¶ 64 . . . the fact that the Courts are composed of former lawyers cannot change the standard of review of the decisions of this discipline body from reasonableness to correctness.

¶ 65 We come to this view for three reasons. First, we are considering the decisions of a group composed of lawyers created to determine whether one of their peers has been guilty of conduct unbecoming. Their training and work give them the same legal knowledge as the Court with the added expertise as benchers charged with responsibility under the Act. Given that the nature of the questions involve the weighing of such factors as the image of the profession, such questions are best left to them at a standard which demonstrates deference. Secondly, these are not jurisdiction granting or limiting questions. They are the questions that the tribunal has been asked to answer. Thirdly, the principle question "was this marketing activity reasonably capable of misleading the intended recipient" contains within it an interpretation of reasonableness. The application of a correctness test to such a question would mean that there could be one answer only.

. . . .

¶ 119 The discipline committee's decision is as follows:

> In coming to our sentence, we had in mind our fundamental responsibility and need to maintain the public's confidence in the profession and the integrity of the profession. We also took into account that this was the fourth sanction of a professional person by his professional governing body.

> The sentence of the committee in respect to this matter is that the member is severely reprimanded and is ordered to pay a $5,000 fine and $10,000 in costs.
>
> . . . .

¶ 126 …. In light of all the circumstances the committee's approach is reasonable.

¶ 127 In the result, the appeal is dismissed. The Law Society shall have its costs in this Court in the usual way …. .

"Bar reprimands lawyer for loaning client funds"

Borden, Sherri. *The Mail-Star* (Halifax: 18 October 2001), p. A7

The Nova Scotia Barristers' Society has reprimanded a well-known Halifax lawyer for loaning money to a client out of his own pocket.

... [S] signed a consent to reprimand form with the barristers society on Aug. 1, according to documents filed at Nova Scotia Supreme Court in Halifax last month.

According to an agreed statement of facts, a woman retained Mr. ... [S] in April 1999 to represent her on a contingency basis in a personal injury case.

Mr. ... [S] began an action on Jan. 6, 2000.

During a meeting with Mr. ... [S], the woman, identified in court documents by her initials, D.M., asked Mr. ... [S] if she could borrow money from him as an advance against her claim.

She told him she would like to have half of the anticipated $15,000 settlement.

About a week later, the statement of facts says, D.M. came to Mr. ... [S]'s office and he advanced her $7,000 in cash without having received any funds from the third-party defendant.

"Mr. ... [S] did not suggest that D.M. obtain independent legal advice with respect to the funds and D.M. did not obtain independent legal advice," the statement of facts says.

"Mr. ... [S] states that he did not prepare any documentation with regard to the $7,000 advance to D.M."

D.M. recalled that she was asked to sign an acknowledgment that she had received an advance on her settlement and also recalled that Mr. ... [S] told her "that he was really not supposed to do this."

When contacted Wednesday, Mr. ... [S] called his action a "technical breach" but did not wish to comment further.

"There was nothing to it, that's just why there was a reprimand," he said.

He later clarified that the loan was interest-free.

On Jan. 10. 2000, D.M. filed a complaint with the barristers society about several matters relating to Mr. ... [S].

During the society's investigation into D.M.'s complaints, Mr. ... [S] indicated that he'd [originally] told D.M. that he could not advance money to her and that the third party defendant was denying liability.

He admitted that he'd advanced the money from his personal funds.

A discipline committee of the society concluded that the evidence could support a finding of professional misconduct.

Mr. ... [S], a member of the Nova Scotia Bar since 1973, also admitted that he breached a regulation in the society's Legal Ethics and Professional Conduct Handbook barring lawyers from advancing funds to a client and that he did not refer D.M. for independent legal advice.

Darrel Pink, executive director of the barristers society, explained that the reprimand is the penalty. He said he couldn't comment further because he is not permitted to elaborate on disciplinary matters.

Columbus Bar Association v. Magana,

88 Ohio St.3d 150, 724 N.E.2d 398 (2000)
(Summary)

From October 1994 through March 1996 respondent represented Tincher-Khalil in a paternity case and in a personal injury matter. In December 1995 Tincher-Khalil moved into a rental property owned by respondent He did not charge her rent, but in May 1996 he filed a complaint to evict her for non-payment of rent. Sometime after May 1996 and during July to September 1996 respondent had sexual encounters with Tincher-Khalil, then his former client. Respondent's conduct amounted to improper advancement of financial assistance to a client and adversely reflected on his fitness to practice law. Respondent also illegally acquired food stamps, for which he was fined, put on probation and required to perform community service. An indefinite suspension was ordered.

Nebraska State Bar Association v. Denton,

258 Neb. 600, 604 N.W.2d 832 (Neb. 2000)
(Summary)

In 1997 K.J. filed a complaint against Denton asserting that she and Denton had engaged in sexual relations during the time of their attorney-client relationship in 1994 and 1995. Denton had represented K.J. in a child-custody dispute. Throughout the disciplinary proceeding Denton denied that he had engaged in a sexual relationship with K.J. In 1996 K.J. had secretly recorded a conversation with Denton to get corroborative evidence of her sexual relationship with Denton. The referee concluded that Denton had engaged in an improper sexual relationship with K.J. The referee also concluded that Denton's failure to call two witnesses in the custody case was an effort to hide his sexual relationship with K.J. The witnesses, a psychiatrist and one of K.J.'s long time friends, purportedly knew of Denton's relationship with K.J. Denton claimed he did not call them as witnesses because he did not want K.J.' s mental state to be an issue in the custody case. Denton was disbarred for exploiting his client's emotional vulnerability and for placing his own self-interest above that of his client.

In re Gore,

752 So.2d 853 (La. 2000)
(Summary)

Respondent began representing Brenda Sanders on business matters in 1990. Sometime thereafter, he and Sanders began a consensual sexual relationship. In late 1991 he represented Sanders in her divorce case. He admittedly failed to advise Sanders that their sexual relationship created a potential conflict of interest. Sanders, however, did not make a complaint about respondent until after their relationship had ended more than two years after the allegedly wrongful conduct. Respondent cooperated fully with the disciplinary investigation. There were no allegations that respondent attempted to use his position as an attorney to coerce sex or that the sexual relationship impacted the legal services being rendered. Nonetheless, in light of his role in representing Sanders in her divorce, the consensual sexual relationship had the potential to create a conflict of interest. On consent, respondent was suspended for six months, followed by two years of supervised probation.

Nebraska State Bar Association v. Freese,

259 Neb. 530, 611 N.W.2d 80 (Neb. 2000)
(Summary)

Respondent was retained by husband and wife in January 1997 to represent them in a personal injury claim arising from husband's motorcycle accident. Respondent also represented husband on three traffic citations arising from the same accident. That matter was concluded in August 1997. In April of that year, the wife asked respondent to represent her in a divorce. The husband signed a handwritten note agreeing to let respondent represent his wife in the divorce. Respondent never advised the husband of the possible effect of such a representation and the consequences of his consent. A decree of dissolution was entered in July. Two months earlier, in May, respondent commenced a sexual relationship with the wife. Ten days after that, the husband was arrested on various motor-vehicle-related charges and respondent represented him until husband found out about the sexual relationship. At some point thereafter, husband was arrested for threats made to respondent and his family. Husband filed a disciplinary complaint in January 1998. In imposing an 18-month suspension, the court noted that there was no evidence of psychological harm to the wife or that her divorce settlement was adversely impacted by her relationship with respondent. In addition, respondent admitted his relationship and cooperated in the disciplinary proceedings.

Lawyer Disciplinary Board v. Artimez,

540 S.E.2d 156 (W. Va. 2000)
(Summary)

A respondent engaged in an intimate relationship with his client's wife. The client was a personal injury plaintiff and he had separated from his wife at about the same time that respondent and the client's wife commenced their sexual relationship. Respondent asked the client if he could transfer the case to his partner because of a heavy workload. The actual basis for doing so, that was not communicated, was his rising discomfort in representing the client while he was sexually involved with the client's wife. When the client discovered respondent's ongoing relationship with his wife several months later, he threatened to sue respondent. Through the client's wife, respondent proposed a settlement of $5,000. The client countered that for $12,000, a waiver of all fees on the personal injury claim and respondent's agreement to testify at the client's divorce trial, the client would release respondent from liability and agree not to bring a disciplinary complaint. Respondent and client signed the release reflecting the terms of the client's counter-proposal. The client later reported respondent to the disciplinary board. This opinion discusses the framework for analyzing whether sexual relations with a client's wife is a violation of the West Virginia Rules in the absence of a specific rule prohibiting such conduct. This case pronounces that engaging in a sexual relationship with a client's wife is prohibited. However, since no Rule or case in West Virginia had previously prohibited a lawyer from engaging in sex with a client's wife, respondent is not disciplined for doing so. The Court did reprimand him for entering into an agreement with his client that attempted to absolve respondent from the consequences of a potential violation of the ethics rules.

Cuyahoga County Bar Association v. Muttalib,

740 N.E.2d 246 (Ohio 2001)
(Summary)

Charges were brought against respondent for neglecting three client matters. Then things got worse. Respondent's wife informed the Board that respondent had abandoned her and their four children and had married another woman while still married to her, his first wife. An indefinite suspension was ordered. According to the three dissenting judges, the only mitigation was the absence of prior discipline. They would have disbarred respondent.

4.2 Judicial: Penal

Invasion of Privacy

Criminal Code, R.S.C. 1985, c. C-46, ss. 191-193.1 (in part), as amended

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184. (1) Every one who, by means of any electro-magnetic, acoustic, mechanical or other devise, wilfully intercepts a private communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) Subsection (1) does not apply to

(a) a person who has the consent to intercept, express or implied, of the originator of the private communication or of the person intended by the originator thereof to receive it;

(b) ….

(c) ….

(d) ….

. . . .

184.2 (1) A person may intercept, by means of any electro-magnetic, acoustic, mechanical or other device, a private communication where either the originator of the private communication or the person intended by the originator to receive it has consented to the interception and an authorization has been obtained pursuant to subsection (3) [from a Judge to whom an application for an authorization has been made].

(2) ….

(3) ….

(4) ….

. . . .

191. (1) Every one who possesses, sells or purchases any electromagnetic, acoustic, mechanical or other device or any component thereof knowing that the design thereof renders it primarily useful for surreptitious interception of private communications is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Subsection (1) does not apply to ….

192. (1) Where a person is convicted of an offence under section … 191, any electro-magnetic, acoustic, mechanical or other device by means of which the offence was committed or the possession of which constituted the offence, on the conviction, in addition to any punishment that is imposed, may be ordered forfeited to Her Majesty whereupon it may be disposed of as the Attorney General directs.

(2) ….

(3) ….

193. (1) Where a private communication has been intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator thereof or of the person intended by the originator thereof to receive it, every one who, without the express consent of the originator thereof or of the person intended by the originator thereof to receive it, wilfully

(a) uses or discloses such private communication or any part thereof or the substance, meaning or purport thereof or of any part thereof, or

(b) discloses the existence thereof,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Subsection (1) does not apply to ….

(3) ….

193.1 Every person who wilfully uses or discloses a radio-based telephone communication or who wilfully discloses the existence of such a communication is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years, if

(a) the originator of the communication or the person intended by the originator of the communication to receive it was in Canada when the communication was made;

(b) the communication was intercepted by means of an electromagnetic, acoustic, mechanical or other device without the consent, express or implied, of the originator of the communication or of the person intended by the originator to receive the communication; and

(c) the person does not have the express or implied consent of the originator of the communication or of the person intended by the originator to receive the communication.

(2) ….

[**Note:** The term "electro-magnetic, acoustic, mechanical or other device" is defined in *Criminal Code* s. 183 as meaning "any device or apparatus that is used or is capable of being used to intercept a private communication, but does not include a hearing aid used to correct subnormal hearing of the user to not better than normal hearing". Further, the term "telecommunication" is defined by the *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35, as "any transmission, emission or reception of signs, signals, writing, images or sounds or intelligence of any nature by wire, radio, visual or other electro-magnetic system". The term "radio", employed in the definition of "telecommunication", is also defined by the *Interpretation Act*, s. 35. A telephone is included within these definitions.]

Firemaster Oilfield Services Ltd. v. Safety Boss (Canada) (1993) Ltd.,

[2000] A.J. No. 1466 (QL) (Alta. Q.B. (Edmonton)), Marceau J., at paras. 1; 3-23; 28; 38-45

[**Note**: A wife and husband separated. They settled resulting marital litigation. Some of the documents generated prior to or during the litigation related to the corporate value of the Plaintiff, of which the husband was, and is, the principal ("the marital litigation documents"). A provision of an agreement, incorporating settlement of the marital litigation, provided that the marital litigation documents "shall remain confidential". In this subsequent proceeding, unrelated to the marital litigation, solicitors for the Defendant came into possession of the marital litigation documents. The Plaintiff objected to use of the documents.]

¶ 1. … [a] motion filed by Firemaster [the Plaintiff] sought relief, the most significant of which was:

(a) A declaration holding the Defendants and their solicitors Mr. Trawick and Mr. Tupper [from the law firm of Blake, Cassels & Graydon] in civil contempt or liable for positive misconduct;
(b) An order removing the law firm [Blake, Cassels & Graydon] as solicitors of record for the Defendants.
(c) A declaration that three confidential documents cannot be used or referred to at the trial of this action;
(d) Solicitor-client costs against the Defendants and Mr. Trawick and Mr. Tupper [lawyers from Blake, Cassels & Graydon] jointly and severally; and
(e) A fine against the solicitors personally.

. . . .

¶ 3 The domestic litigation was settled on April 15, 1994. On that date an agreement was entered into between Mr. and Mrs. Campbell which contained the following confidentiality provision:

> (10.4) The information provided by the husband to the wife, including financial documents regarding the operation, valuation and finances of Firemaster shall not be disclosed to third parties and shall remain confidential, and the wife shall use her best efforts to retrieve such information given to parties other than Foster's law office [Mrs. Campbell's solicitors].

¶ 4 At some point before March 12, 1999, Mr. Tupper who was assisting Mr. Trawick, spoke to Mrs. Campbell. Mr. Tupper was informed by Mrs. Campbell that the value of the corporate Plaintiff was a fundamental issue in the divorce action and as a result of information provided by Mrs. Campbell, Mr. Tupper conducted a search at the Red Deer courthouse and discovered that certain expert reports had been filed [in the marital litigation]. Mr. Tupper had the procedure card and had he looked under the column indicating which law firm had filed the expert reports, he would have discovered that the expert reports were only filed by Ms. Campbell's solicitors, none at all by Mr. Campbell's solicitor. On March 16, 2000, Mr. Tupper wrote to Mr. Foster [who had been a lawyer for Mrs. Campbell in the marital litigation]. Mr. Tupper did not mention that he had already spoken to Mrs. Campbell. In his letter to Mr. Foster, Mr. Tupper made the following request:

> ....to attend at your offices to review copies of the expert reports filed in the Campbell v. Campbell matter. *I note that those reports have been publicly disclosed on the court file*. [emphasis supplied]. We have been advised by the clerks, however, that they are voluminous and would cost us approximately $1000.00 to copy.

¶ 5 On March 23, 1999 Mr. Tupper wrote Mr. Foster confirming a telephone conversation in which, anticipating Mrs. Campbell's approval, Mr. Foster had agreed to have the matrimonial property file brought back from off site. Again, Mr. Tupper confirmed:

> As indicated in my letter and telephone conversations, we are interested in obtaining copies of expert reports produced in your litigation. *I note that these reports have been filed and are a matter of public record* [our italics].

¶ 6 On March 26, 1999, Mr. Tupper met with Mrs. Campbell. Mr. Tupper had drafted a consent for Mrs. Campbell to sign. The pre-printed portion of that consent reads as follows:

> I, Brenda Campbell, of the City of Calgary, in the Province of Alberta, give permission to Ron Foster, my attorney in legal proceedings under the style of cause Campbell versus Campbell to release to David Tupper, and to allow David Tupper to review, the expert reports exchanged between myself and my husband, Ken Campbell in the Campbell versus Campbell litigation.

¶ 7 It is clear that at this time Mr. Tupper was clearly advised by Mrs. Campbell that she was subject to a confidentiality agreement and she did not want to disclose any secret information. She did not want to get into trouble.

¶ 8 At her insistence, the following was added immediately following the word "litigation":

> And which expert reports have previously been filed in the courts of Alberta and are a matter of public record.

¶ 9 The document in that form was then signed by Mrs. Campbell and witnessed by Mr. Tupper. On the same day, March 26th, Mr. Tupper sent a letter to Mr. Foster enclosing the consent form. Again, Mr. Tupper set out a clear understanding of what he understood he was to receive:

> As requested, please find attached a consent signed by Brenda Campbell, authorizing you to release to us the expert reports and filed on the public record. We would appreciate it if you would have your assistant telephone me at his convenience so that I might arrange a time to attend at your offices and review these reports.

¶ 10 Mrs. Campbell's solicitor, Mr. Foster, was away when Mr. Tupper attended [apparently on 03 May 1999]. Mr. Tupper dealt with a legal assistant. The legal assistant testified that Mr. Foster had placed the boxes of files relating to the Campbell divorce in their boardroom for the sole purpose of allowing Mr. Tupper to look at and obtain copies of the publicly filed … documents. In fact, the whole file was open for Mr. Tupper's inspection. Mr. Tupper testified that he thought he was entitled to obtain copies of "all publicly filed documents", … . He also testified he did not have the procedure card with him. He also said that he thought discovery transcripts were publicly filed documents.

¶ 11 Mr. Tupper tagged 363 pages to be copied [and they were copied and received by Mr. Tupper]. He also summarized … [those pages] which included copies of the transcripts of the examinations of Mr. and Mrs. Campbell as well as the affidavit of Mr. Campbell, the expert opinion of Mr. Campbell and the expert opinion of Mr. Maxwell, an accountant [apparently arranged by Mr. Campbell]. None of these [three expert opinion] documents [relating to the value of Mr. Campbell's company] had been filed at the Red Deer Courthouse [in the marital litigation] and that would have been obvious to anyone reading the procedure card.

¶ 12 Although Mr. Tupper testified he had only skimmed the files, it is absolutely clear that he read sufficient of the two examinations for discovery and the other three confidential documents to summarize the … essential points [of Mr. Tupper's client, the defendant] insofar as Firemaster was concerned [in this litigation].

¶ 13 That summary [by Mr. Tupper] was dated May 3, 1999 and it appears it was seen by Mr. Trawick shortly thereafter.

¶ 14 Mr. Tupper's explanation for taking copies of the three documents which had never been filed at the Red Deer courthouse was that he did not have the procedure card with him when he attended at Foster's law office and he never bothered to check the procedure card after that. He also erroneously thought that examinations for discovery [in the marital litigation] are filed [documents].

¶ 15 It is argued that Mr. Tupper's conduct can be explained by his lack of experience. Mr. Tupper at that time had been a solicitor for four years. He had obviously taken the bar admission courses which stress ethics and the care required of a solicitor. His focus in his four years at the bar had been in civil litigation although he had never conducted an entire Court of Queen's Bench trial. Because I have not had the benefit of viva voce evidence from Mr. Tupper, I am not prepared to make a finding that he either mislead senior counsel, Mr. Trawick or mislead the Court in his evidence either in his affidavit or cross-examination on affidavit. I give Mr. Tupper the benefit of the doubt and describe his wholesale gathering of information from the divorce files as due to his negligence. However, even at this stage, given that none of the documents he had copied bore any stamp from the courthouse indicating they had been filed, and the express addition made to the consent form by Mrs. Campbell, his lack of care is so extreme that it can be characterized properly as positive misconduct as distinct from any mere inadvertence.

¶ 16 Mr. Trawick advised Mr. Tupper that transcripts of examinations for discovery are not filed documents and the copies they had obtained of examinations for discovery were [for the most part] destroyed. Although the Plaintiff insists there was something nefarious about destroying these transcripts instead of sending them back to Mr. Foster's law office, I think it was acceptable to destroy those documents and to destroy the copies of the transcripts although the proper thing to do would have been to return them to Mr. Foster with an apology for taking copies of documents to which they were not entitled. The problem remains … that the May 3, 1999 memo, Tupper to file, which summarizes the three impugned documents[,] as well as [those documents themselves and] portions of the examinations for discovery of both Mr. and Mrs. Campbell, is … in the possession of the Defendants [although the documents were eventually returned to Mrs. Campbell's solicitor, Mr. Foster] ….

¶ 17 It is clear that by the end of June 1999, Mr. Trawick and Mr. Tupper were aware that they had obtained unfiled documents. It seems clear that both Mr. Tupper and Mr. Trawick knew they had no right under the consent form from Mrs. Campbell to possession of these documents. Mr. Tupper testified he spoke to Mrs. Campbell at the end of June 1999 to tell her that they were in possession of unfiled documents. He asked for permission to obtain a copy of the confidentiality provisions from the matrimonial property file. At this point in time I can only conclude that Mr. Tupper and Mr. Trawick were only concerned that they find some way to hold onto the documents they had in their possession. As Mr. Willis pointed out for the Plaintiff, a person in their position should have had the following concerns:

1. They knew about the confidentiality provisions and that Mrs. Campbell was very concerned that she not act illegally, yet they did not, in a formal written way, set out exactly what documents they had obtained and that they had done so by exceeding the authority Mrs. Campbell had given them.

2. They should have been concerned that their conduct in obtaining copies of the documents could cause legal problems for Mr. Foster who had not ensured Mr. Tupper get only the documents he had asked for

[Whether solicitors committed positive misconduct?]

¶ 18 What was the obligation on Messrs. Trawick and Tupper at this point?

¶ 19 Madam Justice Romaine considered a situation analogous to this in Anderson Exploration Ltd. v. Pan-Alberta Gas (1998), 61 Alta. L.R. (3d) 38.

¶ 20 In that case Nova Corporation inadvertently delivered a binder of highly confidential documents to a law firm that represented parties adverse in interest to a Nova subsidiary in litigation. The documents were ordered returned to Nova. If ever it was thought to be the law of Alberta that some doctrine of "finders - keepers" applies to negligently or mistakenly lost confidential documents, that case made the contrary clear. The documents should not have been looked at and should have been returned. While it may be that the documents obtained by Mr. Tupper were not privileged in the hands of Mr. Campbell's solicitors, they were obtained from

Mrs. Campbell (a) by going beyond the consent signed by Mrs. Campbell and (b) in breach of the confidentiality agreement Mrs. Campbell had signed.

¶ 21 In Miller v. Miller, [2000] A.J. No. 34, Action No. 4803-114297, released on January 7, 2000, Madam Justice Veit dealt with a case where a lawyer was in possession of a document stolen from the adverse party's solicitor-client file. After concluding that the draft letter from a psychiatrist, while it may at one time have been privileged, was no longer privileged, Veit, J. went on to say at pp. 11-12:

> 5. Was Ms. Miller entitled to use the stolen draft letter even if it was not privileged?
>
> Mr. Miller contends that Ms. Miller, and her lawyer, were not entitled to use a stolen document.
>
> He relies on Chapter 4 of the Law Society of Alberta's Code of Conduct entitled Relationship of the Lawyer to other Lawyers. The Statement of Principle in that chapter is: A lawyer has a duty to deal with all other lawyers honourably and with integrity. In particular, Mr. Miller relies on Rule 8.
>
> > A lawyer who comes into possession of a privileged written communication of an opposing party through the lawyer's own impropriety, or with knowledge that the communication is not intended to be read by the lawyer, must not use it nor the information contained therein in any respect and must immediately return the communication to opposing counsel, or if received electronically, purge the communication from the system
>
> The Code's Commentary on Rule 8 adds the following:
>
> If a written communication has been obtained by a lawyer through deceit, fraud or other impropriety, it must be returned to opposing counsel, or purged if received electronically, without copies having been made. The lawyer is prohibited from using in any manner information acquired from the communication.
>
> It may be evident to a lawyer immediately upon receiving a privileged communication that it has been provided in error, in which case the lawyer may not read the communication and must return it to opposing counsel, or purge it, without copies having been made. Knowledge that a communication is not intended for the lawyer receiving it will be imputed if, under the circumstances, it would have been unreasonable for the lawyer to come to any other conclusion.
>
> A lawyer who innocently reads all or a portion of a privileged communication before becoming aware of its nature must advise opposing counsel of the lawyer's possession of the communication. The issue of whether or to what extent the communication may be copied or its contents disclosed or used must then be resolved by agreement or by the court. In the meantime, it is improper to use the communication or disclose its contents in any manner.

> Arguably even the first of commentaries cited is a comment on Rule 8 relating to privileged communications and does not apply generally to written communications obtained by a lawyer through impropriety. Assuming this to be so, the commentaries all refer to privileged documents, and do not, therefore, have any direct application in this particular case.

And later on in the judgment:

> But the issue of admissibility into the proceedings is only one of the issues raised in this motion. More immediately, issues arise about the process for determining privilege and the obligation of a lawyer who comes into possession of stolen property.
>
> On the issue of process, by analogy to the provisions in the Code of Conduct cited above, I have concluded that when Ms. Miller's lawyer came into possession of what was clearly a stolen document, taking into account the nature of the document and the unlikelihood that the client would have come by the document honestly, she should have alerted Mr. Miller's lawyer to her possession of the document, and requested that the character of the document be determined by the court. In this case, Ms. Miller's lawyer has made the determination that a document, which on its face is privileged, has lost that characterization. In doing so, she has arrogated to herself the role of the court.

¶ 22 Even though it is arguable that there is privilege attached to the documents obtained, I agree with Veit, J. that even if the Statement of Principle in the Code of Conduct relates to "privileged communications", the obligation to deal with other lawyers honourably and with integrity can only lead one to the conclusion by analogy, particularly in light of the Code's commentary, that there is no right to retain improperly obtained documents. It was argued that Miller v. Miller (supra) was not known in 1999 when these events occurred, so Messrs. Trawick and Tupper did not realize the document should have been submitted to the Court for its decision.

¶ 23 Simply put, it does not require reference to the Code of Conduct to realize that to keep wrongly obtained documents and try to find a legal way to do so was improper conduct. It was positive misconduct.

. . . .

¶ 28 In Tilley v. Hails (1993), 12 O.R. (3d) 306 (Ont.Gen.Div.), Mr. Justice Chapnik was dealing with a privileged document. He set out the following principles at p. 310:

> 1. A person who has obtained confidential information is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication;
>
> 2. Where such communications are disclosed either inadvertently or through improper conduct by a party, that party's solicitors are not entitled to make use of the documents in the litigation;

3. It is clear that mere loss of physical custody does not terminate the privilege, subject to certain exceptions such as communications received for the purpose of obtaining advice for the commission of a crime.

. . . .

[Use of impugned marital litigation documents?]

¶ 38 I conclude that the proper remedy is to permit the Defendants to use the documents at the trial as a shield but not as a sword. The result is that those documents and the transcript of the examination for discovery may not be referred to by the Defendants or cross-examined upon unless, at his examination-in-chief, Mr. Campbell squarely puts that matter in issue. Of course, matters of privilege and relevance and, further, a review of this order, are all matters that can be dealt with by the trial judge.

[Whether Defendant's solicitors in contempt?]

¶ 39 I will deal now with the application to cite Messrs. Trawick and Tupper in contempt. Mr. Tupper attached three documents to … [an] affidavit; [documents] which had been ordered sealed and kept confidential apart from the [Red Deer] Court record. I am satisfied this was done in a hurry, and was negligent on Mr. Tupper's part, but I accept the evidence of Mr. Tupper that the acts were merely negligent, not at all intended as an affront to the Court. It was not deliberate disobedience of a Court order. That application is dismissed.

[Whether Defendant's solicitors should be removed from the record?]

¶ 40 The difficult question is whether in light of my finding of positive misconduct I should remove the Defendant's solicitors of record.

¶ 41 I consider the following:

1. The remedy should be used sparingly. As McClung, J.A. said in Alberta Treasury Branches ["ATB"] v. Leahy (1998), 223 A.R. 113 (C.A.) at 114:

   The right to counsel of choice in civil matters is well and properly protected in our law. It is only when some real and identifiable public interest intervenes that such a relationship must yield under an impropriety or "appearance of impropriety" concern. Allowing the ATB a veto over its antagonists' choice of counsel, especially where concerns swirl about the possible misuse of public funds, cannot be allowed. If permitted here, there will be no end to it.

2. This litigation has been ongoing for six years. To require the Defendants to brief another firm would [be] a very costly penalty. It would also, in my opinion, force an adjournment of this five-week trial which is set peremptorily because it did not go in May 1999. It is set for trial March 27, 2000.

3. The information from the Campbell divorce action could perhaps have been discovered and discovery ordered on the examination of Mr. Campbell. At the very

least it might have been producible at trial if the issues dealt with in the documents and at discovery were relevant to Mr. Campbell's evidence at trial.

4. The documents were returned to Mr. Foster before this matter was heard.

¶ 42 Having regard to these considerations and mindful that at this stage the parties know that a major application [has] centered upon these documents, I doubt that any other counsel engaged would not be aware that there are documents of "interest" in Mr. Campbell's divorce litigation. I conclude that the extreme remedy of removal from the record of Blake, Cassels & Graydon is not necessary or useful in seeing that this bitter litigation be resolved.

[Costs?]

¶ 43 Finally, there is the matter of costs. A great deal of time was spent by both parties on these issues before me. There were applications, affidavits, examinations on affidavits, written arguments, and about two full Court days were spent over four applications to the Court. The Plaintiff claimed it incurred solicitor-client fees in excess of $100,000.00.

¶ 44 I asked the Plaintiff to indicate approximately the amount of party and party costs for these applications. I was advised that, including $5,000.00 for each brief of law supplied to the Court, the fees would be about $60,000.00. The parties in this case are litigious.

¶ 45 I thought it best to eliminate costly appearances to settle the matter of costs for this application. Although the conduct of the Defendant's counsel might arguably warrant an award of indemnity costs in some instances, the present Rules allow close to that much as party and party costs, depending on the circumstances. I order that Messrs Trawick and Tupper and the Defendants jointly and severally pay costs to the Plaintiff relating to these issues in the sum of $50,000.00 plus disbursements in any event of the cause. Same to be payable on April 30, 2000.

[**Note:** An appeal and cross-appeal were unanimously dismissed: [2001] A.J. No. 1317 (QL) (Alta. C.A.); McClung, Cote (for the Court) and Russell JJ.A.]

In re Vaughan,

772 So.2d 87 (La. 2000)
(Summary)

Respondent charged a flat-fee of $500 to attempt to resolve a child support and community property matter in 1996. He provided some services, but the matter could not be resolved. According to respondent, he then ceased representing his client when she failed to provide additional funds needed to file a partition petition. Thereafter, respondent joined the Marines and

closed his office without prior notice to his client. When she could not reach him, she filed a discipline complaint in August 1998. At the time of the complaint, respondent was stationed in Quantico, Virginia. The Louisiana Supreme Court ruled that respondent's failure to communicate with his client and his abandonment of his practice warranted suspension for one year and one day.

In the Matter of Blake,

539 S.E.2d (S.C. App. 2000)
(Summary)

Respondent failed to calender a court hearing and did not discover his error until the day prior to the hearing. He then filed a motion in which he misrepresented that he was ill and could not attend the hearing. When the trial judge called respondent's office on the day the hearing was scheduled, a staff person told the judge, without direction from respondent, that respondent was in a different county on a client matter. (In actuality, respondent was attending a CLE course on the day of the hearing.) As a result, respondent's motion was denied and the opposite party to the proceeding in which Respondent omitted to appear was awarded temporary custody of the child in issue in that proceeding. Respondent was suspended for 4 months.

In re Taylor,

2000 WL 1901712 (Vt. 2000)
(Summary)

Respondent moved to the Virgin Islands in 1992 and placed his Vermont license on inactive status in 1993. In 1994 a Vermont family court ordered him to pay spousal and maintenance support. Judgment was entered against him in 1996 in the amount of $13,699.80. As a result of a second enforcement action, an additional judgment of $23,518.60 was entered against him. Vermont suspended respondent for 6 months.

In the Matter of Klagsbrun,

717 N.Y.S.2d 297 (N.Y. App. Div. 2000)
(Summary)

Respondent's divorce has become very expensive. He was ordered to pay $1,872,758.75 to his former wife and $296,075 to her lawyers. Respondent refused and was held in contempt. He was also disbarred for disregarding the divorce court's orders.

Columbus Bar Association v. Battisti,

739 N.E.2d 344 (Ohio 2000)
(Summary)

In connection with a child custody matter, lawyer caused client to sign two blank affidavits, which were then notarized by a paralegal. Respondent later added the factual material to the affidavits - some of which were false, and then transmitted one of the affidavits to the client for review. Both affidavits were filed in the trial court. He was publically reprimanded, with the Court finding that his conduct was prejudicial to the administration of justice.

"7 Years for Jailed Pauper. Or Is It Millionaire Schemer?"

Clines, Francis X. *The New York Times*, 24 March 2002

THORNTON, Pa. – Julia Child cheers up the inmate, so he hunts for her cooking shows on his cellblock television set.

"I take very extensive notes so when I get out of here I can put together my own little book of ideas and sauces," said H. Beatty Chadwick, 65, a lean, patrician-sounding prisoner who seems the model of the Philadelphia lawyer he once was.

Ramrod erect as he talks, Mr. Chadwick is stoically completing his seventh year in prison, not as a criminal but on an order of civil contempt of court. This is unusually long for civil jail time and is an open-ended judgment rooted in a standoff over a bare-knuckle alimony fight.

"I can almost taste it," Mr. Chadwick, once a millionaire in the world of corporate law, said of the freedom he envisions in even greater detail than a well-whisked beurre blanc.

Mr. Chadwick's is one of the longest civil imprisonments on record, a face-off of time versus money, in effect, that began in 1992 with a court order to produce $2.5 million in potential alimony assets.

Mr. Chadwick said he lost control of large sums of money years ago in an overseas investment that went bad. Although the courts have sided against him time and again in this contention, he depicted himself as living a Dickensian nightmare in a modern-day debtor's prison.

Through her lawyers, Barbara Jean Crowther Chadwick said her former husband had stashed his wealth in a maze of overseas accounts, and was holding out in prison in a scheme to reap assets that might already be worth $6 million.

Law experts note that domestic-relations bouts can be among the most visceral for parties stubbornly digging in Mr. Chadwick has set the Pennsylvania record for civil jail time served. Ten years is the national record. But 18 months or less is far more typical for civil contempt.

Mr. Chadwick thought his freedom was secured in January when Judge Norman L. Shapiro of Federal District Court ordered his release on a habeas corpus petition. She ruled that the original 1994 contempt order was valid, but that Mr. Chadwick's refusal to comply across 80 months and counting "renders unreasonable the belief that continued incarceration will have a coercive effect," as intended under civil law.

But the order was stayed before Mr. Chadwick's cell door opened. The United States Court of Appeals for the Third Circuit, in Philadelphia, granted Mrs. Chadwick's motion to keep her former husband behind bars while the court considered the appeal of Judge Shapiro's order.

Otherwise, he would flee, Mrs. Chadwick's lawyers contended, even as Mr. Chadwick insisted otherwise.

"I would have thought debtors' prison was abolished long ago," Mr. Chadwick said in an interview here at Delaware County Prison. He begins his eighth year behind bars April 5.

"He's a very stubborn man," said Kevin C. McCullough, a lawyer representing the former Mrs. Chadwick, an artist who filed for divorce in 1992 after 15 years of marriage.

As he sits in prison working on habeas corpus writs and reading Bon Appetit magazine, Mr. Chadwick seems not at all amused by the accusation that he is trading off his dwindling lifetime against the promise of hidden money.

"I miss being able to have friends of my own choosing and being with them", said Mr. Chadwick, taking a break from his job in the prison law library. "I keep fighting all the way".

Do not be fooled by appeals to pity, his former wife's lawyers warn. "His motive is clearly still there: he wants the money," Mr. McCullough said.

Mr. Chadwick said that the original contempt order was issued before the divorce case and alimony payment were settled, so that he could not technically appeal it under state law. His only resort, he said, was habeas corpus.

"The power of contempt I think, is a vestige of the old king," said Mr. Chadwick of one lesson he has learned. "They never have been able to establish that I have the money stashed away."

But Mr. McCullough noted that the courts apparently saw enough evidence presented by Mrs. Chadwick's private investigators, who traced the money to Panamanian and Swiss accounts, then lost the trail.

. . . .

Madden v. Aldrich,

58 S.W.3d 342 (Ark. S.C., 2001)

Corbin, Donald L., Associate Justice [for the majority]:

This is a tort suit brought against two attorneys for conduct that arose out of an adoption scam. In early October 1996, attorney Gordon Humphrey advised attorney Ed Webb that he represented a birth mother who wished to place her baby for adoption. Humphrey was employed by the Madden Law Firm at the time. Webb initially tried to place the baby with a Connecticut couple, but that did not work out. Soon thereafter, Appellees Jon and Debbie Aldrich contacted Webb's office regarding information about adopting a child. Webb advised them that he knew of an expected child who was available, but that they needed to take action immediately for fear that the child would be placed elsewhere. Upon Webb's advice, the Aldriches wrote two checks to Webb, totaling $7,500, for the birth mother's medical expenses and Webb's legal fee. Webb subsequently confirmed with Humphrey that he had a couple interested in adopting the baby, and he wrote Humphrey a check for $5,000. In January 1997, it was revealed that there was no birth mother or baby and there never had been. Humphrey later pled guilty to a federal criminal charge for his actions and was sentenced to two years' imprisonment.

As a result of the incident, the Aldriches brought suit against Humphrey and Appellant Jean Madden in the Saline County Circuit Court. The claim against Madden was that she, as … [Humphrey's] employer, had been negligent in the hiring, retention, or supervision of Humphrey. The jury returned unanimous verdicts against Humphrey and Madden and assessed compensatory damages of $100,000, which were apportioned between Humphrey (seventy-five percent), Madden (twenty-four percent), and Webb (one percent). Additionally, the jury awarded punitive damages of $1,000,000 against Humphrey. Madden appeals from that judgment and from the trial court's denial of her post-trial motions. She raises numerous points for reversal, one of which involves our construction of Ark. Code Ann. [ss] 16-22-310 (Repl. 1999) and 16-114-303 (Supp. 1999). Our jurisdiction is thus pursuant to Ark. Sup. Ct. R. 1-2(b)(6). We affirm.

I. Immunity

The first issue that we must address is Madden's assertion that the trial court erred in finding that she was not entitled to immunity under section 16- 22-310 and its counterpart, section 16-114-303. Madden asserts that she is immune from the Aldriches' negligence claim because they were not her clients or Humphrey's. Thus, she argues that there was no privity of contract, as required under sections 16-22-310 and 16-114-303. The trial court found that there was direct privity through an agency relationship, namely that Webb was an agent of the Aldriches who contracted with Humphrey, who was Madden's agent, for the purpose of arranging an adoption. We agree with Madden that the trial court's finding of direct privity was in error. Nonetheless, we affirm the trial court's ruling that Madden was not entitled to immunity because she was not being sued in connection with the performance of professional services.

. . . .

II. Negligent Supervision

For her second point for reversal, Madden argues that there was not substantial evidence to support the jury's verdict that she was negligent in her supervision of Humphrey. She argues further that there was not substantial evidence that Humphrey was her employee. The jury's verdict reflects the finding that Madden was negligent in the hiring, retention, or supervision of Humphrey. We limit our review to the sufficiency of the evidence to support a finding of negligent supervision, as we believe that issue is dispositive. To affirm, we need only determine that there was substantial evidence to support the verdict, viewing the evidence and all reasonable inferences arising therefrom in a light most favorable to the appellee. Ethyl Corp. v. Johnson, 345 Ark. 476, 49 S.W.3d 644 (2001). Substantial evidence is that which goes beyond suspicion or conjecture and is sufficient to compel a conclusion one way or the other. Id.

Liability for negligent supervision is based upon the unique relationship between employer and employee. Regions Bank & Trust v. Stone County Skilled Nursing Facil., Inc., 345 Ark. 555, 49 S.W.3d 107 (2001) (citing Niece v. Elmview Group Home, 131 Wash. 2d 39, 929 P.2d 420 (Wash. 1997)). Under this theory, employers are subject to direct liability for the negligent supervision of employees when third parties are injured as a result of the tortious acts of employees. Id.; American Auto. Auction, Inc. v. Titsworth, 292 Ark. 452, 730 S.W. 2d 499 (1987); Sparks Reg'l Med. Ctr. v. Smith, 63 Ark. App. 131, 976 S.W.2d 396 (1998). The employer's liability rests upon proof that the employer knew or, through the exercise of ordinary care, should have known that the employee's conduct would subject third parties to an unreasonable risk of harm. Regions Bank, 345 Ark. 555, 49 S.W.3d 107. This theory is separate and distinct from the respondent superior theory of vicarious liability, as a claim of negligent supervision does not preclude recovery where the acts committed by the employee are intentional and outside the scope of employment. Titsworth, 292 Ark. 452, 730 S.W.2d 499. In other words, a claim of negligent supervision "provides a remedy to third parties who otherwise would not be able to recover under respondent superior because of the scope of employment requirements." Sparks, 63 Ark. App. at 135, 976 S.W.2d at 399 (quoting 27 AM. JUR. 2d Employment Relationship [s] 472 (1996) (footnote omitted)). As with any other negligence claim, to prove negligent supervision, a plaintiff must show that the employer's conduct was a proximate cause of the injury and that the harm to third parties was foreseeable. Id. It is not necessary that the employer foresee the particular injury that occurred, only that he or she reasonably foresee an appreciable risk of harm to others. See Ethyl Corp., 345 Ark. 476, 49 S.W.3d 644; Wallace v. Broyles, 331 Ark. 58, 961 S.W.2d 712 (1998). We turn now to the evidence presented on this issue.

The jury heard testimony on this issue from Janie Pelkey, Stan Batten, Ed Webb, Humphrey, and Madden. Pelkey testified that she had worked for the law firm from the middle of 1994 to June or July of 1996, and that she had been Humphrey's personal secretary. Pelkey characterized Madden's relationship to Humphrey as one of supervisor-employee. During her tenure, Pelkey became aware of several occurrences involving accusations against Humphrey for taking money from clients and not doing what he was hired to do. On one of those occasions, she received a telephone call from a man who said that he had given Humphrey $1,000 to file suit on his behalf, and that he wanted to know why the suit had not been filed. Pelkey reported this to Madden, and Madden told her she would take it up with Humphrey. On another occasion, Pelkey and Madden were seated adjacent to each other when Madden received a telephone call. Madden told Pelkey that the caller said that she had sent in money to be invested by Humphrey and she wanted to know the status of her

investment. Again, Madden told Pelkey that she would ask Humphrey about the matter. As time went on, more complaints surfaced about Humphrey's work. The last occurrence that Pelkey recalled was when a client telephoned Madden and inquired about $4,000 that the client had wired to Humphrey regarding an adoption. When Madden asked her about the money, Pelkey told her that she was not aware of any money being sent for an adoption. Pelkey also testified to some unusual behavior by Humphrey. Particularly, she stated that a woman named Kim would come to the law firm once a week, and that Humphrey always talked to her in his office with the door shut. Pelkey stated that the woman would always leave with a check, and that she assumed that Humphrey was paying her off because he had not taken care of a legal matter for her.

Pelkey stated that as a result of the telephone calls from clients, the office sat down as a group, minus Humphrey, to determine whether the complaints against Humphrey were true. Pelkey stated that she and Madden discovered ledger sheets that did not match with what clients said that they had paid Humphrey. According to Pelkey, Madden told her that she was considering withholding money from Humphrey's paycheck to cover the missing amounts. At one point, Madden told Pelkey that she was going to fire Humphrey, and that she would send Stan Batten, the firm's paralegal, to retrieve the firm's belongings from Humphrey's house. All of these actions took place prior to June or July 1996, when Pelkey left the firm, and well in advance of the date that Humphrey took $5,000 from the Aldriches.

Batten testified, via videotaped deposition, that he had worked as a paralegal for the Madden Law Firm from late 1995 through May 1997. Batten initially corroborated Pelkey's testimony in a letter that he wrote to the Aldriches' attorney. He later wrote a second letter, however, stating that the first letter had been written under duress, due to the stress of his mother's recent death and the alleged harassment that he had received from the Aldriches' attorney. During the deposition, counsel for the Aldriches attempted to impeach Batten's credibility with his inconsistent statements. Batten maintained that he had no information that would be material to this case. He revealed, however, that Madden was currently representing him in his bankruptcy case.

Ed Webb testified that he wrote a check to Humphrey for $5,000 based on his [Humphrey's] representation to Webb that his cousin was pregnant and wanted to place her baby for adoption. Webb stated that he and his office staff had repeatedly telephoned the Madden Law Firm during the month of October 1996, in an attempt to get in touch with Humphrey. He stated that he became aware of the fact that Humphrey had left the Madden Law Firm sometime during November 1996. Subsequently, Webb learned from another attorney that Humphrey had lied about the baby in the Aldriches' case and a couple of other cases. Webb finally confronted Humphrey about the situation in February 1997. Webb also testified that in dealing with Humphrey, he relied on the fact that Humphrey was working for Madden's firm at the time. He explained that he respected the Madden Law Firm's name and reputation and the firm's decision to hire Humphrey.

Humphrey testified that he worked for Madden as an independent contractor, and that his salary was based on a percentage of the gross amount of fees that he generated. He stated that he handled his own cases in the manner he wanted to handle them, and that Madden had no control over his cases. He admitted, however, that when he left the firm, his files, and presumably his clients, remained with Madden. He testified that during the middle part of 1996, while he was still working at Madden's firm, his "mental state had kind of turned to mush." He confirmed Pelkey's testimony concerning the incident in late 1995 involving the client who had complained that he had given Humphrey $1,000 or $1,500 to take his case and nothing had been done. Humphrey downplayed the incident, stating that he had taken the fee from the client on a Friday afternoon, and that he had

cashed the check that afternoon and took the money home with him, since Madden had already left for the day. Regarding his misrepresentations to the Aldriches, Humphrey claimed that there was a baby available when he initially took their $5,000. He admitted, however, that he kept their money even after he became aware that there would be no baby for them to adopt.

Madden testified that Humphrey had worked for her law firm from 1992 through October 1996. She initially paid him an hourly wage, but later paid him on commission, giving him forty percent of the fees that he produced. She stated that he controlled his own cases, and that she only looked for the results. She admitted, however, that she had routine meetings with Humphrey wherein she would check on the status of his cases. She also admitted that there were situations where clients had called with complaints about Humphrey, and that she took it upon herself to check into them. She acknowledged the incident that occurred in late 1995, of which Pelkey and Humphrey testified. She concluded that there was nothing to this complaint and that the client was overly anxious about his case. She admitted that she was aware at the time she hired Humphrey that his law license had been suspended for one year for co-mingling client funds. She stated that the only knowledge she had of the reasons his license was suspended came from Humphrey himself, and that she had done nothing independently to verify his statements. She further admitted that she had Humphrey's office telephone tapped sometime around August or September, 1996, but she denied that she had any reason to think that he was taking money from clients and not reporting it. She also admitted that on one occasion, she had asked Batten to follow Humphrey when he left the office. Perhaps more significantly, Madden admitted that she had received telephone calls from a woman and her aunt stating that they were having trouble getting in touch with Humphrey regarding his representation of a woman who was going to let them adopt her baby.

Excerpts from Madden's depositions, which were read to the jury, revealed that her office practices toward Humphrey changed after the 1995 incident involving the $1,000 or $1,500 fee taken by Humphrey. She stated that she became very observant of Humphrey after that happened. She paid attention to who called him, she watched his mail, and she tapped his office telephone. Her deposition also revealed that the reason she did not fire Humphrey was because she was being sued and needed his favorable testimony for that trial. Finally, when asked whether she had developed a suspicion that Humphrey may have been taking money from clients and not reporting it to her, Madden stated: "I knew something was wrong but I didn't necessarily think that was it."

The foregoing testimony constitutes substantial evidence that Madden was negligent in supervising Humphrey, and that her negligence was a proximate cause of the Aldriches' damages. The evidence demonstrated that Madden knew or, in the exercise of ordinary care, should have known that Humphrey would act in a way that would subject third parties to an unreasonable risk of harm. It is of no consequence that she had no personal knowledge about Humphrey's misrepresentations to the Aldriches. She was certainly put on notice by the prior complaints that Humphrey was not performing his duties according to the rules of professional conduct. At a minimum, she knew that Humphrey had taken money from clients for specific purposes and had not used the funds accordingly. She knew that ledgers kept by his secretary were not matching up with what clients were telling her they had paid Humphrey. Moreover, there was evidence that she knew that Humphrey had taken $4,000 from a woman for purposes of arranging an adoption, and that the woman was having difficulty getting in touch with Humphrey about the matter. There was thus substantial evidence that Madden was negligent in supervising Humphrey.

There was also substantial evidence demonstrating that Humphrey was Madden's employee. In Blankenship v. Overholt, 301 Ark. 476, 786 S.W.2d 814 (1990), this court set out ten factors to be

considered in determining whether one is an employee or an independent contractor. The principle and most significant factor is the extent of control which the master may exercise over the details of the work. Arkansas Transit Homes, Inc. v. Aetna Life & Cas., 341 Ark. 317, 16 S.W.3d 545 (2000). It is the right to control, not the actual control, that is determinative. Id. Other factors include whether the one employed is engaged in a distinct occupation or business; whether the employer furnishes the tools and workplace for the job; the length of time the person is employed; and whether the work is part of the regular business of the employer. Id. Generally, the question of employment status is a question of fact for the jury to resolve. See National Bank of Commerce v. HCA Health Servs. of Midwest, Inc., 304 Ark. 55, 800 S.W.2d 694 (1990); Johnson Timber Corp. v. Sturdivant, 295 Ark. 622, 752 S.W.2d 241 (1988).

Here, the evidence showed that Humphrey worked for Madden for over four years. Madden supplied the workplace and the tools to enable Humphrey to practice law out of her office. Humphrey was clearly engaged in the same business as Madden, even though they may have had separate areas of specialty. More importantly, Madden had the right to control Humphrey's work. She had access to his case files, and she routinely reviewed them to determine the status of the cases. She further had control over his workplace, as she admitted that she had bugged his office and tapped his telephone. Finally, her testimony evidenced her belief that she had the ultimate right of control over him, as she indicated that she could have fired him and had thought about doing so. Thus, there was substantial evidence to support the jury's finding that Humphrey was Madden's employee. It is of no avail that Humphrey may have initially been an independent contractor. This court has held that "when an employer goes beyond certain limits in directing, supervising, or controlling the performance of the work, the relationship changes from employer and independent contractor to master and servant." Blankenship , 301 Ark. at 478, 786 S.W.2d at 815 (citing Meyer v. Moore, 195 Ark. 1114, 115 S.W.2d 1087 (1938)). The evidence clearly demonstrates that the relationship changed around the time that complaints about Humphrey were being brought to Madden's attention.

Lastly, we are not persuaded by Madden's argument that proximate cause is lacking because Humphrey could have made the false representations about the baby regardless of whether he was working for her or was self-employed. This is pure speculation on Madden's part. The fact is, Humphrey was employed by Madden at the time that he made the fraudulent representations about the baby to the Aldriches' attorney. Moreover, this argument overlooks Webb's testimony that in trusting Humphrey's representations about the baby, he relied on the fact that Humphrey was employed by the Madden Law Firm. Proximate cause is defined as "that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury, and without which the result would not have occurred. " City of Caddo Valley v. George, 340 Ark. 203, 213, 9 S.W.3d 481, 487 (2000) … (quoting Union Pac. R.R. Co. v. Sharp , 330 Ark. 174, 181, 952 S.W.2d 658, 662 (1997)). When there is evidence to establish a causal connection between the negligence of the defendant and the damage, it is proper for the case to go to the jury. Id.; Dodson v. Charter Behav. Health Sys., Inc, 335 Ark. 96, 983 S.W.2d 98 (1998). Under the circumstances, we cannot say that it was error for the jury to conclude that Madden's negligence in failing to properly supervise Humphrey was a proximate cause of the Aldriches' injuries.

. . . .

In sum, we affirm the trial court's ruling that Madden was not immune from civil damages, under sections 16-22-310 and 16-114-303, for her negligence in failing to supervise her employee, Humphrey. We also conclude that there is substantial evidence to support the jury's verdict against

Madden for negligent supervision. We further find no merit to any of the allegations of error raised by Madden on appeal. We thus affirm the judgment against Madden. ….

5.0 FEES AND COSTS

5.1 Fees

Fees and Disbursements

Proulx, Michel and Layton, David.
***Ethics And Canadian Criminal Law* (Toronto: Irwin Law, 2001),**
pp. 582-586
(and references in this excerpt to other pages in the same publication)

Our summary and recommendations regarding fees and disbursements are as follows:

1. The reality of the legal profession is that lawyers usually provide services in return for payment and hence operate businesses that require revenue for survival. However, the receipt of fees by the lawyer, who acts in a fiduciary capacity towards the client, represents an inherent conflict of interest vis-à-vis the client. The goal of most ethical rules in respect of legal fees is thus to alleviate the resulting potential for danger to the client … [pp. 531-533]. [At p. 532-533: "The reality is that lawyers receive fees for their services in most cases, and the prospect of financial gain is an important facet of a lawyer's work. Yet this element of self-interest has the potential to clash with the lawyer's duties to the client and the administration of justice. It is to the advantage of the lawyer to receive the largest possible payment, while the client will often prefer exactly the opposite result (without, of course, detracting from the quality of services provided). The dangers are accentuated by the fact that clients are often in a poor position to evaluate the quality and cost-effectiveness of a lawyer's services. Moreover, clients may be in a vulnerable state, … . Lawyers, skilled in a complex field and holding a monopoly over the provision of most legal services, are in a position of power over the client. The potentially divergent interests of the lawyer and client on the matter of payment, and the vulnerability of many clients, taken together with the fiduciary duties owed a client by the lawyer, justify ethical standards that regulate the lawyer's actions in setting and collecting fees. …. Perhaps the most important component of the Canadian rules is the stipulation that fees be fair and reasonable."]

2. All fees charged to the client must be fair and reasonable … [pp. 533-535].

3. The retainer agreement and any related financial arrangements with a client must be preceded by full and timely disclosure by the lawyer. Disclosure obligations are not obviated simply because payment of legal expenses is made by a legal aid plan or other third-party, although third-party involvement may raise special disclosure issues … [pp. 535-540]. [At p. 539: "… Canadian rules of professional conduct often impose a limited-disclosure obligation. All together apart from any obligations imposed by the professional

governing bodies, prudent counsel will keep the third-party payor informed concerning the fees and disbursements to be paid under the retainer. At the same time, however, counsel must never release confidential information to the third-party absent the client's consent. Also, where a third-party is paying any portion of legal costs, special concerns can arise regarding conflict of interest. These concerns must be discussed with the client and should also be mentioned to the third-party. Finally, a lawyer must not approach a third-party for payment of fees without obtaining the prior permission of the client. The client may quite reasonably view the lawyer's unilateral action as a betrayal or an improper revelation of confidential information, and conclude that the lawyer can no longer be trusted."]

4. It is unethical for a lawyer to misrepresent any matter to the client in connection with fee and disbursement arrangements … [pp. 540-541].

5. It is highly advisable to set out the retainer agreement in writing, the better to avoid later controversy and ensure full disclosure to the client … [pp. 541-542].

6. There are many methods of calculating a fair and reasonable fee, including flat fees, hourly rates, and graduated payments. A broad range of compensatory arrangements is acceptable, provided that the overall fee is fair and reasonable and full disclosure is made to the client … [pp. 542-543].

7. …. counsel should take special care to ascertain the ethical and legal ramifications in his or her jurisdiction before entering into a contingency agreement with a client … [pp. 544-547].

8. It is common for … lawyers to require an advance payment from clients. Such a requirement is ethically permissible and often represents sound business practice. However, the lawyer cannot bill the client in respect of advance payments unless services have been provided under the retainer agreement and an account has been rendered, and as always, any fees charged against the advance payment must be fair and reasonable … [pp, 547-548].

9. Non-refundable fees are generally to be avoided. In our view, a lawyer may legitimately charge a client for guaranteeing availability to take on a case or for the lost opportunity to accept other retainers. To this extent, the fee can perhaps be seen as earned without the lawyer providing any concrete services. But any such arrangement requires the client's consent following full disclosure. Moreover, the arrangement cannot serve to impede unduly the client's right to discharge counsel at any time … [pp. 548-550].

10. A contract for limited representation is permissible … . The lawyer who accepts a limited retainer must ensure that the client fully understands the resulting restrictions on the representation. There may also be an obligation to inform the court and … [opposite] counsel of any such restrictions … [pp. 550-551].
11. As a client-lawyer relationship progresses, the lawyer must keep the client informed as to any developments that have an impact on the financial arrangements. If the lawyer wishes to modify the original retainer agreement, it is imperative that no undue pressure be applied to the client. In particular, a lawyer should not use the fact of an imminent or ongoing trial to pry extra funds from a vulnerable client … [pp. 551-553].

12. …, a client may have an opportunity to recover legal costs … . Counsel has a duty to inform the client whenever a cost award is a reasonable possibility, so that the client can determine whether to bring an application for recovery … [pp. 553-554].

13. Referral fees paid to other lawyers are ethically permissible in Ontario and British Columbia, provided that certain preconditions are met. In other Canadian jurisdictions, such fees are generally prohibited. By contrast, referral fees paid to non-lawyers are forbidden in every Canadian jurisdiction. Finally, even where no fee is paid in connection with a referral, a lawyer must refrain from accepting the referred matter if insurmountable conflict-of-interest concerns arise … [pp. 554-556].

14. A lawyer who does work that simultaneously benefits two or more clients must apportion the related fees equitably among the clients, absent the agreement of all affected clients to the contrary … [p. 558].

15. Lawyers are encouraged by the rules of professional conduct to provide legal services for free, or at a reduced rate, in order to ensure that deserving individuals and causes receive access to justice. As for wealthy clients who have no difficulty paying for legal services, some governing bodies expressly forbid charging a higher fee (Alberta, British Columbia, and New Brunswick). However, in practice, wealthy clients end up subsidizing legal services provided to clients who cannot afford to pay the lawyer's ordinary fee rate. We see nothing wrong with this outcome, provided that no client is misled or charged an otherwise unreasonable or unfair fee … [pp. 558-560].

16. Disbursement expenditures must be fully explained to the client and require the client's consent. The principles of fairness, reasonableness and full disclosure that apply to fees are equally applicable to disbursements … [pp. 560-561].

17. All financial arrangements between client and lawyer are confidential. However, legal-professional privilege may not apply with respect to every such arrangement, especially acts that cannot easily be classified as "communications." In particular, it appears that bare trust transfers are generally not protected by privilege … [pp. 561-570]. [**Note:** "Bare trust transfers" are a lawyer's trust account transactions.]

18. Canadian lawyers are subject to reporting requirements set out in the *Proceeds of Crime (Money Laundering) Act*, mandating that specified information be provided to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). These reporting requirements are in the process of being revamped and hold the potential to necessitate the disclosure of at least some information that would otherwise be confidential (though not privileged). Counsel must carefully review the Act and its accompanying regulations, as well as the law regarding legal-professional privilege, in ascertaining whether any information must be provided to FINTRAC. In addition, the client must be warned in advance of any potentially applicable reporting obligations … [pp. 561-570]. [**Note:** Some provisions of the Act summarized in this item are currently subject to constitutional challenges; in most of which the application of involved provisions of the Act to members of provincial and territorial law societies have been stayed pending final determination of the challenges.]

19. Subject to the statutory exception set out in section 462.34 of the *Criminal Code*, …, counsel cannot knowingly accept proceeds of crime in payment of legal expenses. Contravening this cardinal rule risks prosecution and conviction for possession of proceeds of crime and/or laundering, not to mention disciplinary action by the governing body and loss of the fees in question. We believe that counsel should take reasonable steps to dispel any real suspicion that legal expenses are being paid using proceeds of crime … [pp. 570-576].

20. The one instance where counsel can accept payment in the form of property that may be proceeds of crime is set out in section 462.34 of the *Criminal Code*. This provision permits a client to use seized or restrained assets for the payment of reasonable legal expenses, provided that a court order to this effect is obtained … [pp. 561-570].

21. Proceeds of crime may be subject to forfeiture to the government. The client can be fined or imprisoned if assets determined to be proceeds are no longer available for forfeiture. It is also possible that the court will void an assignment of seized or restrained assets. Consequently, counsel must take care not to accept potentially forfeitable assets as payment for legal expenses, even pursuant to a section 462.34 court order, absent proper precautions relating to conflict of interest [regards potential competing claims of lawyer and client to the same assets] … [pp. 576-578].

22. Where counsel is discharged or withdraws, and is owed money by the client, a retaining lien can arise over the file. However, it is improper to enforce such a lien where the result would be material prejudice to the former client's case. …. [pp. 578-579].

23. The potential for an unacceptable conflict of interest is inherent in many fee arrangements. Counsel must be attuned to the dangers in this regard and take appropriate precautionary steps where necessary … [pp. 579-580]. [**Note:** At pp. 579-580: "Some of the more common conflict-of-interest problems that can arise in the context of legal fees …, … include payment of all or a portion of a fee by a third-party, the assignment of media or publication rights to counsel by the client, contingency fees, [and] referrals, … . Example: a client owes his lawyer $20,000.00 for services rendered in … [divorce and marital property division proceedings]. He wishes to pay the lawyer by transferring title to a piece of land. Assuming that the lawyer's account is reasonable, conflict-of-interest problems must be addressed. In particular, the client and lawyer have potentially divergent interests regarding the valuation of the property to be transferred. The lawyer should therefore inquire into the possibility of the client selling or mortgaging the property in order to pay the fees. If this option is not acceptable, it is imperative that the client receives independent legal advice before transferring the property to counsel."]

24. Withdrawal for non-payment of fees is frequently permissible but is usually precluded once the trial commences or is imminent … [pp. 580-581].

25. A client who is dissatisfied with the financial aspect of a retainer can seek redress through a number of channels. A common option is to assess [sometimes described as "tax"] the lawyer's account. Where a disagreement arises concerning legal expenses, the lawyer has a duty to inform the client of the availability of the assessment procedure … [pp. 581-582].

"How much does using a lawyer's services cost?"

Canadian Bar Association and Canadian Bar Insurance Association.
***Great Expectations* [:] *A lawyer-client handbook* (Ottawa: 2002), pp. 17-18**

The cost of handling your legal issue or problem is something to discuss with your lawyer at your first meeting. People often find the subject of money awkward, but the best way to avoid misunderstandings or disputes about your lawyer's bill is to talk about cost right away.

Ask your lawyer to estimate the total fees for the legal services you require. How much is it likely to cost? What could affect the total cost? What is your lawyer's fee? What are the fees of other people, legal assistants or articling students, for example, who may do some work on your case? How often will you be billed? What are the cost implications of other options for solving the problem?

The fee your lawyer charges depends on several factors, including:

- the lawyer's skills, expertise and experience;
- the difficulty, complexity and distinctiveness of the case, all of which have an impact on the time and effort that the case will require;
- the area of law involved.

Lawyers generally charge for their services in one of these ways:

Fixed fees - A fixed fee is a set amount for a specific task, such as writing a will or power of attorney, settling an uncontested divorce, or handling a straightforward real estate transaction. Lawyers are most likely to agree to a fixed fee when they know exactly what work needs to be done in advance and when they can predict the amount of time and effort required to complete the work. A terms of engagement letter must set out precisely the scope of services covered by the fixed fee.

Hourly rate - In more complex and unpredictable cases, lawyers are likely to charge fees based on an hourly rate - $X per hour multiplied by the number of hours the lawyer spends on your file.

Percentage fee - The lawyer's fee is a set percentage of the value of the property involved. For example, a lawyer would charge a percentage of the value of the estate when settling the estate and handling related matters after someone has died.

Results-based fee - The lawyer's fee is set at the beginning, depending on the results of the case. If the case is settled the way you wanted within the specified time frame, the lawyer receives a fee you both agreed to. If there is a different outcome, the lawyer receives a different fee, a reduced fee or no fee.

In some provinces, lawyers are allowed to charge contingency fees. The lawyer receives a percentage of the settlement you receive, through negotiations or as a result of a court decision. If you do not receive a settlement, you only pay the lawyer disbursements and other costs, but no fees.

Ask your lawyer to estimate the expected costs for disbursements in your case and check if there is any way to keep disbursement costs down.

"Billing, Our Profession's Not So Hidden Shame"

Greer, Alan G. (2002), 13 *the Professional Lawyer* 19, 23 (Winter 2002)

Every year lawyers and law firms all across America repeat the same ritual. We take brand new law graduates and teach them what they never learned in law school. In doing so, we set the tone for the rest of their legal careers.

One of the very first of these lessons is the importance of time keeping so that their work can be billed to our clients. We tell these new lawyers that the principal commodity they have to sell is their time. And, by the way, if they expect to be successful attorneys in this firm they had better bill those clients at least, say 2000, or 2300, or even 2500 hours each and every year of their future law practices. As the icing on the cake, we add that if they exceed these requirements there will be a nice bonus in it for them as well.

As a result, we preordain the outcome. Instead of these young lawyers faithfully recording the actual time they have worked on client matters - be it a total 1500 or even 1800 hours in their first year of trying to learn the craft of lawyering - they will almost inevitably write down on their time sheets the requisite 2000 to 2500 hours.

Why do they stretch their billable hours? Because we have, in not so subtle ways, let them know that if they don't, they and their high paid associate positions are gone. We have confronted them with a moral and ethical dilemma in their young lives most of them can only solve by buckling under our pressure.

As their very first lesson in the practice of law, we, their mentors and teachers-in-the-law, have taught them how to cheat the same clients whom we have taken an oath to faithfully serve. By doing so we set in motion a process of diminishing ethical and moral values in our new lawyers that appears to have no end.

Our new associates perceive that we have condoned the practice of cutting comers and padding time in order to meet our own self-created financial needs. Thus begins a downward spiral of declining professionalism that allows more and more lawyers to mentally justify to themselves less and less ethical conduct in the name of their own personal wants - be they financial or emotional.

As you read this I can just imagine many of you grinding your teeth and muttering, "but they can put in that many hours. It only takes 50 hours a week 50 weeks a year to do it. That's just 8.33 billable hours a day six days a week. No sweat. Besides, everyone bills this way so why shouldn't we."

That, however, is the thinking of a snowflake. No snowflake feels responsible when the avalanche it is riding wipes out everything in its path. Well, for us lawyers, what is in our paths are our clients and what we are wiping out through padded billing is their confidence in us, in our professionalism and in the justice system itself.

So let's go back to those 50-hour weeks with their 8.33 billable hour days. If we are honest with ourselves and our young associates we have to admit that it is almost impossible to do that each and every day, six days a week, 50 weeks a year. People have to eat lunch, go to the bathroom, deal with staff problems, read inner-office memos, answer non-billable phone calls, get their teeth fixed and their hair cut plus do a thousand other things that cut into that time week in and week out, not to mention the needs of their family lives.

And what's worse is that by predetermining how much time has to be used up to meet their billing requirements we teach our lawyers to expand the work they do on any given project so that those 8.33 hours are filled and billed. We don't seem to care that the same job could be more efficiently done in less time if the lawyers were not focused on their time sheet totals.

No matter you respond. The clients will take our word on how much time was needed for each task. Because for them it's like shooting craps over the phone when we hold the dice. If we say double sixes turned up on the roll when it was really snake eyes how are they to know.

But we know the truth and so do our young lawyers. The recorded hours become like gas in a vacuum. They expand to fill the allotted volume of time. And whether we admit it or not, each time we pad those numbers it diminishes us in our own minds and hearts. We give up little bits of our professional pride and honor until they all but disappear leaving only a hollow shell of professionalism we hide behind like a mask.

What we have done is to intentionally set out to dull our associates' consciences in the same way ours have become dulled. Because, you see, when the money is rolling in and everything else feels great the only thing that hurts is our conscience.

A friend of mine I will call Sarah recently recounted a story to me with a shake of her head. She was co-counseling a case with a much larger firm from out of town. The client had decided to equally divide the casework between the two firms. About six months into the matter she got a call from her lead co-counsel who, after hemming and hawing said, "Sarah, I've seen your bills to our client. You have got to bring them up. You're making us look bad."

There were no questions regarding how Sarah's firm could do the same amount of work so much more efficiently. Instead there was just the conscience dulling suggestion to bill more hours so the lead firm wouldn't have to reduce theirs.

This little tale seems to define one of the central ethical dilemmas of the modern practice of law. When professionalism comes up against profit, it is profit that wins more often than not.

Let us not put our young associates and ourselves in the ethical position of Watergate defendant, Jeb Magruder, himself a relatively young lawyer, when he said, "I know what I have done, and Your Honor knows what I have done. Somewhere between my ambition and my ideals, I lost my ethical compass."

Instead we should heed the thoughts of Mark Twain. "Morals (and ethics) are an acquirement like music, like a foreign language, like piety, poker or paralysis. No one is born with them."

So let's try harder to teach our young lawyers positive lessons. Our need for wealth should not be their first priority. Instead of teaching them how to predetermine billing outcomes to the financial detriment of our clients, let's focus both them and ourselves on doing each task as efficiently as possible. Let the total amount of the time consumed be judged by that standard.

Let's also forsake the practice of setting associate bonuses based on the amount of gross time they have charged our clients. Instead, we should predicate them on how much they have accomplished as lawyers without respect to the billable hours involved.

There is an old saying that each of us has to live with ourselves so we should see to it that we always have good company. Let's try to keep our own consciences sharp and alive. In doing so, keep in mind that it is far easier to prevent bad habits than to break those already acquired. Let's not force our young lawyers into the same bad habits we older lawyers struggle against.

And don't forget the words of Oscar Wilde, "No man (or woman) is rich enough to buy back their past.".

Formal Opinion 00-419

"Use of Credit Cards for Payment of Legal Fees"

American Bar Association (Standing Committee on Ethics and Professional Responsibility),

07 July 2000

The Committee has learned that inquiry frequently is made of the Association's ETHICSearch Research Service regarding the propriety of lawyers permitting or encouraging clients or potential clients to use credit cards to pay their legal fees and/or expenses.

. . . .

… because the Model Rules … do not require any advance approval by a Bar Association for a lawyer's participation in a credit-card plan, the committee hereby withdraws each of the four opinions … [which proscribe the practice].

Legal Profession Act (British Columbia), Re

(2000), 7 R.F.L. (5th) 351 (B.C.S.C.), Meiklem J.

Facts: A client retained a solicitor to bring action for constructive trust relief against the client's former common-law spouse. Under the *Legal Profession Act,* s. 67(4), contingency fee agreements covering retainers for "matrimonial dispute[s]" are void as statute-barred, absent judicial approval under s. 67(5) of the Act. The solicitor and client executed a tentative contingency fee agreement. The solicitor then brought application for a declaration that a constructive trust action does not constitute a "matrimonial dispute" so as to attract the statutory bar or the need for judicial approval of the contingency fee agreement under s. 67(5) of the Act.

Decision: Application for declaration granted. The principals of statutory construction indicate that different statutory terms have different intended legislative meanings. The term "matrimonial dispute" is narrower than the term "family law proceedings" in Rules of Court and in the *Family Relations Act*. "Matrimonial dispute" is properly read as denoting only causes of action between married persons. Applying this statutory bar in the *Legal Profession Act*, s. 67(4), could block the client's access to justice, directly contrary to the expressed intent of the Act.

5.2 Costs

Hunter v. Hunter

(2000), 12 R.F.L. (5th) 113 (Man. C.A. [In Chambers]), Scott C.J.M.

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1. On November 9, 2000, the applicant's (the husband) application for leave to appeal out of time was dismissed. The matter was then put over to deal with the question of costs. Notice at that time was given to counsel for the husband, pursuant to the provisions of Rule 57.07 of the Queen's Bench Rules (the rules), that I was contemplating an order requiring the husband's counsel personally to pay the costs of the proceedings in this Court.

2. On November 21st, the matter was argued once again by the same counsel who appeared on November 9th. Two issues were addressed:

a) the measure or quantum of costs - whether costs should be assessed on a solicitor-and-client basis or, as is ordinarily the case, on a party-and-party basis; and
b) whether costs should be ordered against the husband's counsel personally.

3. It can safely be said that this is one of the most bitterly contested family proceedings that has come before me during my time on the bench, now exceeding 15 years. It is sufficient to say that on the substantive matter I concluded, based on the material and facts presented to me, that the husband's application for leave to appeal out of time was entirely without merit. I also determined that he had engaged throughout in a deliberate and perverse course of conduct calculated to frustrate the respondent's (the wife) legal entitlement pursuant to the summary judgment of December 2, 1999.

4. Dealing firstly with the award of costs itself, I have no difficulty in deciding that they should be on a solicitor-and-client basis. *McMurachy et al. v. Red River Valley Mutual Insurance Co.* (1994), 92 Man.R. (2d) 225 (C.A.), confirms that costs on a solicitor-and-client basis should clearly be the exception rather than the rule and reserved for the most extreme cases. This is such a case. The conduct of the husband and the total lack of merit in his application for leave to appeal lead inevitably to this conclusion. The application lacked merit and the Court's time was needlessly taken up with it.

5. The far more difficult question concerns the position of the husband's lawyer with respect to the costs in this Court. Two matters in particular are of concern:

a) on October 19th Steel J.A., in chambers, struck out numerous paragraphs in the affidavit filed by the husband in support of his application for leave to appeal; in particular para. 13 was expunged on the basis that it made allegations that were scandalous, vexatious and irrelevant to the issue before the court. The remaining issues, including the husband's motion to appeal

out of time, was put over to November 9th. On November 3rd the husband filed a further affidavit in which he repeated verbatim all of the scandalous and irrelevant allegations that only two weeks before had been expunged. No application was made to reintroduce this evidence, nor was anything done to direct attention to the fact that it was being reintroduced;

b) para. 3 of the same affidavit by the husband of November 3rd states as follows:

> In reply to paragraph 2 of the respondent's affidavit, I deny her allegation that I withdrew all of my funds from Manitoba which is confirmed by the fact that the respondent has received $65,880.01 under the terms of the Honourable Mr. Justice Goodman's December 2, 1999 order for summary judgment.

This assertion, while superficially correct, is misleading in the message that it attempts to convey, namely, that the $65,880.01 received by the wife was in some fashion or another voluntarily paid; in fact, the moneys were attached in Ontario pursuant to a court order. It represents the last remaining funds that the husband was in the process of extracting from Canada to frustrate the settlement he had just accepted.

6. All counsel agree that the following statement by McLachlin J. (as she then was) in *Young v. Young*, [1993] 4 S.C.R. 3, sets forth the competing considerations for the court in deciding whether costs should be awarded personally against counsel (at para. 66):

> The basic principle on which costs are awarded is as compensation for the successful party, not in order to punish a barrister. Any member of the legal profession might be subject to a compensatory order for costs if it is shown that repetitive and irrelevant material, and excessive motions and applications, characterized the proceedings in which they were involved, and that the lawyer acted in bad faith in encouraging this abuse and delay. It is clear that the courts possess jurisdiction to make such an award, often under statute and, in any event, as part of their inherent jurisdiction to control abuse of process and contempt of court. But the fault that might give rise to a costs award against Mr. How [W. Glen How Q.C., a Jehovah's Witnesses, representing another Jehovah's Witness] does not characterize these proceedings, despite their great length and acrimonious progress. Moreover, courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard confidentiality of instructions and to bring forward with courage even unpopular causes. A lawyer should not be placed in a situation where his or her fear of an adverse order of costs may conflict with these fundamental duties of his or her calling.

7. In *R. v. Smith* (1999), 133 Man.R. (2d) 89 (Q.B.), MacInnes J. ordered costs against a lawyer where his conduct was "woefully inadequate in fulfilling his retainer to his client and his obligations to the court" (at para. 58). He relied upon the following comments from *Myers v. Elman*, [1940] A.C. 282 (H.L.) (at para. 41):

> A mere mistake or error of judgment is not generally sufficient, but a gross neglect or inaccuracy in a matter which it is a solicitor's duty to ascertain with accuracy may suffice. ... It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction. It need not involve personal obliquity. The term professional misconduct has often been used to describe the ground on which the court acts. It would perhaps be more accurate to describe it as conduct which involves a failure on the part of a solicitor to fulfill his duty to the court and to realize his duty to aid in promoting in his own sphere the cause of justice. ... The jurisdiction is not merely punitive but compensatory. ...

See as well Mark M. Orkin, *The Law of Costs* (2nd ed. Canada Law Book 2000) (at p. 2-201):

> 220. Costs Payable by Solicitor ... The court's jurisdiction to order a payment of costs by solicitors personally was historically part of its jurisdiction to control and discipline its officers. It has been said that the jurisdiction was both punitive and compensatory, although the latter retains a disciplinary element. As a result, in order to impose liability the court must find something more than mistake, error of judgment or mere negligence by the solicitor.

8. In *Cadotte v. Cadotte* (1994), 92 Man.R. (2d) 242, this Court awarded costs personally against a lawyer who caused costs to be incurred without reasonable cause.

9. The conduct of the lawyer representing the husband in these proceedings is troubling to say the least.

10. Concerning the reinclusion of the expunged scandalous allegations, counsel for the husband initially attempted to justify what had been done on the basis that it was required to answer allegations contained in the wife's affidavit of October 17th. This is not so. Counsel for the husband seems to have entirely missed the point. The purpose of the extensive material provided by the wife was to demonstrate, successfully as it turned out, that there was no merit to the husband's application to extend the time to appeal - in particular that his course of conduct throughout was contemptuous and that it was not in the interests of justice to grant the relief requested. Scandalous allegations of alleged personal misbehaviour on the part of the wife were entirely irrelevant. The husband's counsel also seemed to be of the view that he had an obligation as counsel to put the client's case before the Court. This is a misstatement of counsel's obligation as an officer of the court. Counsel's duty in such circumstances is summarized at chapter 9 of the Law Society of Manitoba's *Code of Professional Conduct* (at p. 28):

> Guiding Principles
> 1. The advocate's duty to the client "fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case" and to endeavour "to obtain for his client the benefit of any and every remedy and defence which is authorized by law" must always be discharged by fair and honourable means, without illegality and in a manner consistent with the lawyer's duty to treat the court with candour, fairness, courtesy and respect.

[underlining added]

11. Eventually, counsel for the husband conceded that it might have been better if the material had not been reintroduced, and expressed regret.

12. The misleading wording in para. 3 of the November 3rd affidavit, which is less egregious than the reinclusion of expunged facts, is nonetheless of serious concern. The husband's counsel attempted to explain this allegation on the basis that it was true, relying on matters other than the justification found in para. 3 itself. This is entirely unconvincing. Officers of the court have an obligation not to assist a client in presenting evidence to the court that they know is capable of misleading, or that could well leave an entirely false impression.

13. Particularly worrisome was the failure of the husband's counsel, a lawyer with many years' experience in family litigation matters, until the end of argument to acknowledge that what had transpired "might" fall below what is expected of an officer of the court. His bottom line seems to simply be that his client instructed him to do it, that it was and is a hard fought case, and that was that. He is mistaken. The overriding duty of an officer of the court, as just noted, is to represent the client "honourably."

14. In all of the circumstances, I have come to the conclusion that this is one of the regrettable and exceptional cases where it is in the interests of justice that an award of costs on a solicitor-and-client basis be made personally against the husband's lawyer. The integrity of the litigation process will suffer if behaviour such as has transpired in this case is not condemned. It is important that members of the bar - those very few who may on rare occasions be similarly tempted - understand that such conduct will not be tolerated.

15. In the result, the costs of the three motions to date in the Court of Appeal are to be paid personally, on a solicitor-and-client basis, by the husband's lawyer.

Chandra v. Chandra,

[2002] N.J. No. 95 (QL) (Nfld. S.C. [U.F.C.]), L. Andrews, Taxing Master, at paras. 1-29

¶ 1 This is a taxation of the solicitor and client and party and party Bills of Costs of David C. Day, Q.C. (“D.C.D., Q.C.”), solicitor for the Plaintiff/Petitioner, Shakti Chandra. as against the Defendant/Respondent, Ranjit Kumar Chandra, pursuant to a Judgment of Hickman, C.J., delivered on January 19, 2000 with further reasons for Judgment filed on February 4, 2000.

¶ 2 In paragraph 24 on page 18 of the further reasons for Judgment, Chief Justice Hickman states:

> It is ordered that the within application is dismissed with costs to the Respondent, D.C.D., Q.C. on both a party and party and solicitor and client basis.

¶ 3 The Defendant/Respondent subsequently made application to the Court of Appeal for leave to appeal the decision of Chief Justice Hickman. By a decision made orally on March 22, 2000 the Court of Appeal dismissed the leave application and granted D.C.D., Q.C. costs on a party and party basis.

¶ 4 I have been asked to tax these three Bills of Costs.

¶ 5 During argument by Counsel before me and by way of written material, the main issue in dispute related to the number of hours claimed in the solicitor and client Bill of Costs, particularly given that Gerald F. O'Brien, Q.C., solicitor for D.C.D., Q.C., did not maintain detailed time records and also given that the Bills of Costs relate to a total period of one to one and one half days in court.

¶ 6 Before proceeding further with these taxations, it would be useful to briefly outline the nature of the Application filed on behalf of the Defendant/Respondent and to set forth the conclusions reached by Chief Justice Hickman in this matter. Paragraph 3 of the Interlocutory Application (Inter Partes) reads as follows:

> 3. During the course of his representation of the Respondent, D.C.D., Q.C. provided incorrect information to the Applicant, his solicitors and the Court such as to constitute improper conduct on his part to the degree that the Applicant and any fair minded and reasonably informed member of the public would conclude that the proper administration of justice would be brought into disrepute.

¶ 7 After setting forth a number of allegations of improper conduct, paragraph 5 of the Interlocutory Application states:

> 5. The Applicant therefore requests an Order from this Honourable Court:
>
> (a) removing D.C.D., Q.C. as solicitor for the Respondent; and
> (b) directing the Respondent to obtain other counsel prior to the re-commencement of trial on the substantive issues; and
> (c) in the alternative, party and party costs;
> (d) such further and other relief as this Honorable Court shall deem meet and just.

¶ 8 In the further reasons for Judgment Chief Justice Hickman in paragraph 10 states:

> [10] I conclude from listening to counsel, reading the affidavits and hearing the viva voce evidence of the respondent that there is nothing in the conduct or representations allegedly made to this Court by the respondent that would come close to being categorized as grounds to warrant his removal, at this time, as solicitor and counsel for Shakti Chandra.

¶ 9 Chief Justice Hickman also indicates this was the first application of its kind to be brought before the Supreme Court of Newfoundland Trial Division.

¶ 10 In paragraph 22 Chief Justice Hickman states:

> [22] I am satisfied there are absolutely no grounds upon which this Court could conceivably conclude that the respondent, D.C.D., Q.C., should be removed as solicitor or counsel for his client, Shakti Chandra.

¶ 11 In paragraph 23 Chief Justice Hickman further states:

> [23] Applications of this kind which are without precedent in this Court should be instituted only under the most compelling circumstances and where the conduct of a solicitor has been so reprehensible visa vis or her obligations to the court that the trial could no longer be properly conducted. I conclude that there were no grounds upon which the applicant could reasonably have pursued the within application and I find same to be vexatious in the extreme. The respondent should not have been put to the expense of having to prepare for and face this type of application. The respondent is entitled to recover from the applicant both party and party and solicitor and client costs.

¶ 12 It is in the context of the above that I now proceed with the taxation of these Bills of Costs. Rule 55.15.(1) of the Rules of the Supreme Court, 1986 under the heading "SOLICITOR AND CLIENT COSTS: GENERAL" sets forth the factors to be considered in determining a solicitor's entitlement to costs on a solicitor and client basis. Rule 55.15.(1) under the heading "Costs to be reasonable" provides:

> 55.15.(1) A solicitor is entitled to such compensation from a client, who is a party, as is reasonable for the services performed, having regard to
>
> (a) the nature, importance and urgency of the matters involved;
> (b) the circumstances and interest of the person by whom the costs are payable;
> (c) the fund out of which they are payable;
> (d) that general conduct and costs of the proceeding;
> (e) the skill, labor and responsibility involved; and
> (f) all other circumstances, including, to the extent hereinafter authorized, the contingencies involved.

¶ 13 While enumerating basically the same factors, Mark M. Orkin, Q.C., in his text The Law of Costs, Second Edition sets forth the factors which may be considered in the following order:

> para 311. Factors on the Assessment
>
> 1. The time expended by the solicitor.
> 2. The legal complexity of the matters dealt with.
> 3. The degree of responsibility assumed by the solicitor.
> 4. The monetary value of the matters in issue.
> 5. The importance of the matters to the client.
> 6. The degree of skill and competence demonstrated by the solicitor.

7. The results achieved.
8. The ability of the client to pay.
9. The reasonable expectation of the client as to the amount of the fee.

¶ 14 I prefer the listing by Orkin, Q.C, in relation to this matter and I will therefore deal with each of the factors outlined by him in turn, subject only to dealing with factor number one last.

THE LEGAL COMPLEXITY OF THE MATTERS DEALT WITH

¶ 15 Chief Justice Hickman in his further reasons for Judgment at paragraph 14 states this is the first application of its kind to be brought before the Supreme Court of Newfoundland Trial Division. Chief Justice Hickman further states he was able to find only one case dealing with a similar application, that being Zawadzki v. Matthews Group Ltd. [1998] O.J. No. 43. In these circumstances I find that this matter had a high degree of complexity.

THE DEGREE OF RESPONSIBILITY ASSUMED BY THE SOLICITOR

¶ 16 The material provided to me indicates Gerald F. O'Brien, Q.C. was retained by D.C.D., Q.C. on January 13, 2000, the same day that the Interlocutory Application was filed with the Court. The Interlocutory Application was heard by the Court on January 19, 2000. It is clear this was a matter of an urgent nature and that O'Brien, Q,C. assumed full responsibility in preparing for and appearing at the hearing of the Interlocutory Application. I find there was a high degree of responsibility on the part of O'Brien , Q.C. concerning this matter.

THE MONETARY VALUE OF THE MATTERS IN ISSUE

¶ 17 I do not consider the monetary value of the matters in issue to be a significant factor in terms of my taxation of these Bills of Costs since the real issue before the Court was the professional conduct of the solicitor representing one of the parties in a matrimonial dispute.

THE IMPORTANCE OF THE MATTERS TO THE CLIENT

¶ 18 O'Brien, Q.C. in a written presentation in support of his Bills of Costs states the allegations made against D.C.D., Q.C. in the removal application are among the most serious that could possibly be alleged against an officer of the Supreme Court of Newfoundland and a member of the Law Society of Newfoundland. O'Brien, Q.C. states that in essence they amounted to allegations of obstruction of justice, including making false statements to the Court and suborning perjury. I accept these comments and find without the need of further explanation that this matter was of the utmost importance to D.C.D., Q.C., client of O'Brien. Q.C.

THE DEGREE OF SKILL AND COMPETENCE DEMONSTRATED BY THE SOLICITOR

¶ 19 O'Brien, Q.C., over a period of six days, reviewed material, prepared for and attended at the hearing of the Interlocutory Application which was dismissed and Day, Q.C. was permitted to continue his representation of the Plaintiff/Applicant, Shakti Chandra. This was important as the Plaintiff/Application would have been required to incur substantial costs were it necessary to retain new counsel at that late stage of her matrimonial dispute. In finding that O'Brien, Q.C.

demonstrated a high level of skill and competence in representing Day, Q.C. in this matter I also find that O'Brien, Q.C., is entitled to solicitor and client costs based upon a hourly rate of $250.00 per hour. In my view this rate is quite reasonable for a solicitor of the experience and seniority of O'Brien, Q.C. I also find this rate is quite reasonable given the important nature of the matter before the Court.

THE RESULTS ACHIEVED

¶ 20 As indicated above. O'Brien, Q.C. was completely successful in having the Interlocutory Application dismissed with solicitor and client costs to Day. Q.C. I find that the result achieved is further support for my finding that O'Brien, Q.C. is entitled to costs at the hourly rate of $250.00.

THE ABILITY OF THE CLIENT TO PAY

¶ 21 I do not believe this is a relevant factor given this is not a taxation requested by Day, Q.C. of his own solicitor but rather involves taxation of the costs of the unsuccessful applicant on a solicitor and client basis.

THE REASONABLE EXPECTATION OF THE CLIENT AS TO THE AMOUNT OF THE FEE

¶ 22 I also find that this is not a relevant factor in relation to the taxation of these Bills of Costs.

THE TIME EXPENDED BY THE SOLICITOR

¶ 23 I now return to what is the most contentious and most difficult aspect of my consideration of the proposed Bills of Costs, in particular the Bill of Costs on a solicitor and client basis, namely the time expended by the solicitor, Gerald F. O'Brien, Q.C.

¶ 24 O'Brien, Q.C. claims entitlement to payment for 73.375 hours in representing D.C.D., Q.C. concerning this matter, 58.5 hours of which were spent over a five day period and involved the preparation and necessary revisions of the Affidavit of D.C.D., Q.C. together with an Affidavit Exhibit Book. The hours claimed involved at least 12 hours per day over a five day period, not including the meeting prior to and attendance at the hearing of the Interlocutory Application itself.

¶ 25 Counsel for the Defendant/Respondent argues that the amount of time claimed is not reasonable given the nature and length of the hearing of the Interlocutory Application. Counsel for the Defendant/Respondent further indicates it is the responsibility of the taxing master to achieve a balance between the rights of the two parties by assessing reasonable costs, avoiding exorbitant fees taxed while at the same time providing fair and reasonable compensation for the successful litigant's legal expense. Counsel for the Defendant/Respondent further indicates it is necessary to present evidence sufficient to prove on a balance of probabilities the costs which are claimed have in fact been incurred and that there has been insufficient evidence presented in this case.

¶ 26 The failure to maintain detailed records has caused me considerable difficulty with respect to these taxations. O'Brien, Q.C. takes the position that because of the extremely extenuating circumstances in which he found himself docket compliance was impossible, even if he had been in the habit of keeping dockets, O'Brien, Q.C. further states that the hours claimed in the solicitor and client Bill of Costs were spent by him personally and that each and every moment of the time

claimed was productively used. On the other hand, counsel for the Defendant/Respondent indicates the matter was not complicated and should not have required the number of hours being claimed.

¶ 27 Orkin, Q.C., on page 3-38 of his text indicates that the taxing master (assessment officer) is entitled to make a finding that a solicitor spent too much time on a matter, even though no evidence is lead to that effect, and reduce the bill accordingly. Examples include cases where the taxing master finds there was excessive time spent on the conduct of a case, or on preparation, or drafting documents, such as Affidavits. However, other cases also indicate the fee should not be reduced where the importance of the matter and the result achieved justified a very substantial expenditure of time.

¶ 28 It is not without considerable difficulty that I conclude that O'Brien, Q.C. is entitled to fees for the number of hours claimed in the Bill of Costs. I do so on the basis that O'Brien, Q.C. was involved in a unique and very important application which required the review of substantial material and which required completion of the work within a very short time frame. I accept the written assurance of O'Brien, Q.C. that the hours claimed were spent by him personally and that the time claimed was productively used. I would however comment that it would be very helpful to a taxing master and appropriate in such circumstances that dockets be maintained providing detailed descriptions of the services provided so that there would be as little guess work as possible in completing the taxation of a Bill of Costs, particularly when based on solicitor and client costs.

¶ 29 Before concluding, I wish to make brief comment concerning the two party and party Bills of Costs, in particular in relation to the amounts claimed for counsel fees. During argument before me, Counsel agreed that the hearing of the Interlocutory Application took approximately three to three and one half hours while the hearing in the Court of Appeal took approximately one hour. Given that in the solicitor and client Bill of Costs I allowed O'Brien, Q.C. full recovery in relation to his preparation for attendance at the hearing, including meeting with his client, D.C.D., Q.C., for one and one half hours on the morning of the hearing of the Interlocutory Application, it is my view that counsel fees of $2,500.00 for the hearing of the Interlocutory Application is appropriate. While the hearing in the Court of Appeal may have taken only one hour, I am aware of the preparation necessary in advance of the hearing and I therefore allow the sum of $2,500.00 as appropriate counsel fees in that regard.

. . . .

[**Note:** Costs allowed: (i) Solicitor And Client - $19,964.25; (ii) Party And Party [No. 01] - $3,282.40; (iii) Party And Party [No. 02] - $2,688.50; for a total of $25,935.15.]

6.0 APPENDICES

C. Modernizing the CBA Code of Professional Conduct – a Consultation Paper

APPENDIX A

Modernizing the CBA Code of Professional Conduct - A Consultation Paper

Canadian Bar Association. *EPIIgram* (Ottawa: cba.org, 2002).

Input from the Profession

Standards of professional ethics form the backdrop for everything lawyers do. In adhering to the codes of conduct set by our professional associations, we uphold the long-standing values of our profession and ensure protection of the public. Some rules, such as the duty to act with integrity, will never change. However, other rules need to be revised to reflect changes in our society and in the way lawyers work.

The CBA's Ethics and Professional Issues Committee is reviewing the *CBA's Code of Professional Conduct* (*CBA Code*) and making recommendations for its revision. We have worked throughout 2000-2001 to identify possible changes to the *CBA Code*. It is time to ask what you think about these issues. Your input is crucial in helping us to develop the recommendations for changes to submit to the CBA membership for a vote.

Please forward your responses … in the electronic response form [at the end of this document] or by fax, email or regular mail to:

Kathryn Berge, Q.C., Chair
Ethics and Professional Issues Committee
c/o Richard Ellis, Legal Policy Analyst
Canadian Bar Association
902-50 O'Connor Street
Ottawa, Ontario K1P 6L2

Fax: (613) 237-0185
E-mail: richarde@cba.org

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[**Note:** Omitted have been the Appendices: (i) *CBA Code*; (ii) Resolutions adopted by the CBA's National Council; (iii) Pertinent rules from the CBA Code and the Codes of Conduct of other law societies; and (iv) *Principles of Civility for Advocate*, Advocates Society of Ontario.]

Part 1 - BACKGROUND

I. Role of the *CBA Code*

The *CBA Code* plays an integral role in the Canadian legal profession. Some Canadian jurisdictions, including Newfoundland, Prince Edward Island, Northwest Territories, Nunavut and Yukon, have adopted the *CBA Code*, with occasional modifications, as their own. In other jurisdictions, law societies refer to the *CBA Code* when they interpret or amend their codes. Academics, law students and Canadian lawyers working outside Canada refer to the *CBA Code* when they need to know Canadian standards of conduct. In this era of globalized law practice and increased mobility between Canadian jurisdictions, it will become more important to have common conduct rules for all Canadian lawyers.

II. The Revision Process

Updating and revising the *CBA Code* is a lengthy and demanding process, with several distinct stages.

Phase 1 - now underway

1. Identify issues.
2. Prepare consultation document. Request input from CBA members.

Phase 2 - dependent upon funding being available

1. Assemble comments and decide changes to propose.
2. Draft changes to the *CBA Code*.
3. Consult members on proposed changes.
4. Modify changes to reflect feedback from the membership.
5. Present resolutions for membership to vote on at an annual meeting.

The CBA adopted its first Code of Professional Conduct in 1920. The *CBA Code* was last revised in 1987. Since then, several resolutions have been passed modifying the *CBA Code*. These resolutions will be integrated into the Committee's proposed revisions (Phase 2). In some cases, these resolutions may have been overtaken by the realities of present practice. They are included in the discussion in this paper, as they fit into a broader issue.

This consultation paper presents the issues that the Committee believes need to be debated and upon which the Committee seeks direction.

III. Format

The *CBA Code*, like most law society codes of conduct, consists of general rules, followed by specific commentaries on the application of the general rules. For example, Rule II in the *CBA Code* requires lawyers to protect the confidentiality of client information. The commentaries elaborate on the rule, discussing its application and exceptions. In this paper we refer on a number of occasions to the applicable rules and commentaries.

We have provided the text of the pertinent rules in Appendix 2. These include the *CBA Code* and the other codes from law societies across the country.

Part 2 - Issues

IV. Other Issues

I. Issues Relating to the Legal Profession

A. Exceptions to Solicitor-Client Confidentiality
Question 1

When is it permissible, or necessary, for a lawyer to disclose solicitor-client confidences?
a) when it is real evidence of a crime?
b) when a person is in imminent danger of harm?
c) when the information concerns the physical or sexual abuse of a child, an elderly, incompetent or otherwise vulnerable person?

Solicitor-Client Confidentiality - Current Rule

The *CBA Code* sets out the rule on solicitor-client confidentiality in *Chapter IV*. Lawyers have *discretion* to disclose solicitor-client confidences in certain exceptional circumstances. These include:

a) when disclosure is authorized by the client (*Commentary 9*);
b) when the lawyer's conduct is in issue (*Commentary 10*);
c) when a crime is likely to be committed (*Commentary 11*);
d) when there are reasonable grounds to believe that a dangerous situation is to occur in a court facility (*Commentary 12*); and
e) when required by law to disclose the information (*Commentary 13*).

Disclosing confidential information is *mandatory* when:

a) the lawyer has reasonable grounds to believe that a crime involving violence is likely to be committed (*Commentary 11*);
b) disclosure is required by law (*Commentary 11*); and
c) where the client specifically instructs that the information be disclosed.

(a) Real Evidence

(i) Background

Controversy over a lawyer's duty to disclose confidential client information arose during the prosecutions of Karla Homolka and Paul Bernardo. On the instructions of his client, Mr. Bernardo's lawyer retrieved videotapes of some of the alleged offences from his client's house. However, the lawyer did not immediately turn them over to the police. The lawyer was found not guilty of obstructing justice, in part because the Law Society of Upper Canada rules were not clear on the duties of a lawyer in this type of situation (*R.* v. *Murray* (2000), 144 C.C.C. (3d) 289 (Ont. S.C.)).

There are different approaches to the disclosure of real evidence in different parts of the country. For example, *Chapter 10, Rule 20* of the *Law Society of Alberta Code of Professional Conduct* requires a lawyer to turn over any real evidence of a crime to the appropriate authorities. In British Columbia, there is no specific rule. However, the Law Society of British Columbia

generally advises lawyers to notify the Crown of the evidence, claim solicitor-client privilege, and leave the courts to decide whether it should be disclosed. The Law Society of British Columbia is considering whether a rule is needed.

In light of the *Murray* case, the Law Society of Upper Canada's special committee on this issue has proposed a draft rule (*4.01(1)*) for discussion purposes. The draft rule would, among other things, prohibit lawyers from concealing the evidence or dealing with it in a way which would lead to an obstruction of justice.

In *R.* v. *McClure*, [2001] SCC 14, the Supreme Court of Canada examined the balance between solicitor-client privilege and an accused's right to make full answer and defence. The case involved a sexual assault complainant's communications with a lawyer concerning a civil action against the accused. Did the accused have a right to disclosure of the information? The Court recognized that solicitor-client privilege is fundamental to the administration of justice, but held that the privilege may be displaced if an accused's innocence is at stake and there is no other way for the accused to demonstrate reasonable doubt of guilt.

(ii) Questions for the Profession

What should the *CBA Code* say about the disclosure of real evidence? In what circumstances *may* a lawyer disclose real evidence? In what circumstances *must* a lawyer disclose real evidence? What effect will new rules have on the ability of lawyers to properly advise and represent their clients?

(b) Imminent Danger or Harm

(i) Background

In *Smith* v. *Jones*, [1999] 1 S.C.R. 455, the Supreme Court of Canada considered solicitor-client privilege in the context of a psychiatric report. Mr. Jones was convicted of aggravated assault. His lawyer retained Dr. Smith, a forensic psychiatrist, to provide a psychiatric assessment of Mr. Jones, which the lawyer hoped to use at the sentencing hearing. Dr. Smith concluded that Mr. Jones was dangerous and would likely commit other similar offences and kill someone unless he received treatment. When Dr. Smith learned that the lawyer was not going to present his report at the sentencing hearing, he asked the court if he could disclose the information given to him in confidence by Mr. Jones. Both the British Columbia Supreme Court and the Court of Appeal held that Dr. Smith could disclose the information because there is a public safety exception to the confidentiality rule. The Court of Appeal, however, found that court rules could not *require* Dr. Smith to disclose the information.

The Supreme Court of Canada ruled that the doctor's information concerning public safety could be disclosed. It held that the solicitor-client privilege can be set aside when there are serious issues of public safety. It found that there are three factors to be taken into account when deciding if public safety concerns outweigh solicitor-client privilege:

(1) Is there a clear risk to an identifiable person or group of persons?
(2) Is there a risk of serious bodily harm or death?
(3) Is the danger imminent?

Lawyers in all areas of practice, not just criminal law, face the challenge of balancing the prevention of future harm with their professional obligations. Family lawyers may hear about

potential spousal assault. Estate lawyers may be advised of a planned suicide, which arguably does not fit within the current rule because it is not a crime. Business lawyers may be consulted about a client's fraudulent activities, which may cause economic harm to others.

In some Canadian jurisdictions, law society rules say that a lawyer *may* disclose confidential client information when the disclosure is necessary to prevent a crime involving death or serious bodily harm (e.g. British Columbia (*Chapter 5, Rule 12*)). In Ontario, Rule 2.03(3) adopts the test in *Smith v. Jones*, *supra* as the only exception bearing on the prevention of harm. In other jurisdictions, a lawyer *must* disclose confidential information to prevent a crime which is likely to result in death or bodily harm (e.g. Alberta (*Chapter 7, Rule 8)*).

(ii) Questions for the Profession

The *CBA Code* says that a lawyer may disclose confidential client information to prevent a crime and that disclosure is "mandatory when the anticipated crime is one involving violence" (*Chapter IV, Commentary 11*). Should there be a more detailed commentary on when disclosure is permissible in situations of imminent harm? Is it acceptable, for example, for a lawyer to disclose information about a client's planned suicide, even though suicide is not a crime? Should the *CBA Code* define circumstances in which a lawyer must disclose confidential client information? (See the discussion in the next section on abuse of the vulnerable)

(c) Vulnerable Persons

(i) Background

CBA Resolution 91-05-A called on the CBA to draft guidelines for the legal profession concerning child abuse, including child sexual abuse. At this time, we do not have any guidelines in place.

Under the child welfare legislation of almost all Canadian jurisdictions, professionals who become aware of child abuse must bring the information to the attention of the police or the child welfare authorities. However, most of this legislation specifies that it does not abrogate solicitor-client privilege. This exempts solicitor-client communications from mandatory disclosure.

Although this issue tends to focus on abuse of children, there appears little reason to distinguish between child abuse and abuse of the vulnerable generally.

Arguably, current rules governing disclosure in cases of imminent harm (see previous section) apply to abuse of the vulnerable. In Ontario, for example, disclosure of solicitor- client confidences is permitted when there is a risk of death, serious bodily harm or serious psychological harm substantially interfering with health or well-being of any person (*Rule 2.03*).

(ii) Questions for the Profession

Should lawyers have an obligation to disclose abuse of the vulnerable in all situations? If not, does *Chapter IV* of the *CBA Code* need to outline more specifically when a lawyer *may* breach client confidentiality and disclose information concerning child abuse?

B. Alternate Dispute Resolution

Question 2

What rules, if any, should the *CBA Code* set out for lawyers who act as mediators, arbitrators, investigators or other alternative dispute resolution neutrals?

(i) Current Rule

The *CBA Code* does not discuss appropriate conduct for lawyers who act as mediators or as neutrals assisting with dispute resolution. *Chapter V, Impartiality and Conflict of Interest Between Clients*, does specify that conflict of interest rules do not prevent a lawyer from attempting to arbitrate or settle a dispute between clients (*Commentary 7*).

(ii) Background

The number of lawyers who work as mediators, arbitrators, investigators and other neutrals has grown exponentially over the last few years. Mediators who are members of a law society work in many fields, including labour law, construction law, family law, estates and medical malpractice. This includes Quebec notaries, whose professional responsibilities include representing two or more parties whose interests may differ.

When lawyers act as arbitrators, it is usually evident that they are not acting for any side in a dispute. Arbitrators' associations have developed principles to guide the conduct of people, including lawyers, who arbitrate disputes. There is, therefore, a less compelling case to develop separate conduct rules for arbitrators.

A lawyer who works as a mediator, investigator or other neutral does not, of course, act in the same capacity as a lawyer representing a client. Nevertheless, lawyers are expected to maintain high standards of ethics in any of their endeavours. The question is whether alternate rules of conduct should apply to lawyers when they work as these types of ADR neutrals.

Some law societies in Canada have grappled with this question. The Law Society of Alberta, for example, has chosen not to regulate this aspect of practice. In Ontario, lawyers are required to advise the parties in a mediation that they are not acting as counsel for the parties and that communications are not subject to solicitor-client privilege (*Rule 4.07*). They are not to provide legal advice only legal information.
Since 1984, the Law Society of British Columbia has regulated family mediation (see *Professional Conduct Handbook on Family Law Mediation, Appendix 2*). These rules stipulate, for example, that a lawyer who has been consulted by a party cannot mediate a family law dispute involving that party, if the subject of the consultation may reasonably be expected to become an issue during the mediation. As well, once a lawyer has acted as a mediator, he or she cannot act for one of the parties in the matter. British Columbia's *Appendix 2* is currently under review.

As some jurisdictions move towards mandatory mediation in judicial and quasi-judicial proceedings, more members of the profession will offer mediation services. Some have asked, however, whether a strict code of conduct for lawyer-mediators will put lawyers at a competitive disadvantage with non-lawyer mediators.

In Ontario, lawyers have a duty to *consider* ADR alternatives and, if appropriate, canvass those

options with their clients (*Rule 2.02(3)*). *CBA Resolution 99-05-A* goes further, requiring the *CBA Code* to incorporate "a positive, continuing obligation to canvass with each client, in a fully informed manner, all available dispute resolution processes". After January 2002, Quebec notaries have a similar obligation. This issue is addressed under "Other Issues", below (page 24).

(iii) Questions for the Profession

Should the *CBA Code* provide specific rules governing lawyers who act as mediators, investigators and other neutrals? If so, what should the rules be? Should they be a general expression of principles or a detailed codification of rules? What rules of confidentiality, if any, should apply to a lawyer working as a mediator or arbitrator? Must a lawyer acting as a mediator or arbitrator advise a participant of the need for independent legal advice? Can a lawyer work as a mediator in a dispute after having been consulted by one of the parties independently? Should lawyers be allowed to give legal advice to the parties in a mediation? Should the *CBA Code* provide that lawyers must obtain certain training standards to act as mediators?

C. New Communication Technologies

Question 3

Are the existing rules sufficient to govern the use of the internet and of wireless communication devices?

(i) Current Rule

The *CBA Code* does not have any specific rules addressing new technologies. However, other rules in the *CBA Code* would appear to cover a number of the potential ethical pitfalls of using new technologies. For example:

- *Chapter IV - Confidential Information* requires lawyers to hold client information in strict confidence;
- *Chapter V - Impartiality and Conflict of Interest Between Clients* prohibits lawyers from acting where there is a conflict of interest;
- *Chapter XVII - Practice by Unauthorized Persons* requires lawyers to help prevent the unauthorized practice of law. We deal with advertising as it relates to the internet under "Advertising", below:

(ii) Background

One doesn't have to go too far back to remember a time without e-mail, voice mail, the internet, CD ROM, video-conferencing, and wireless communications. Now, these technological tools are part of every day life in Canada and part of most law practices. Do we need to change the *CBA Code* as a result of these technological advancements?

In 1999, the National Ethics Group of the Federation of Law Societies circulated *Guidelines on Ethics and the New Technology*. In summary, the Federation *Guidelines* suggest the following rules of conduct:

(A) Technology and the Duty of Competence

- "A lawyer must maintain a state of competence on a continuing basis in all areas [in] which the lawyer practices." This includes being able to use appropriate technology, such

as child support calculation software, litigation support software and internet research tools.

(B) Practising Law on the Internet

- *Upholding the law of other jurisdictions* - "A lawyer who practises law in another jurisdiction by providing legal services through the internet must respect and uphold the law of the other jurisdiction, and must not engage in unauthorized practice in that jurisdiction."
- *Privileged communications* - "A lawyer who comes into possession of a privileged written communication of an opposing party ... [when] the communication is not intended to be read by the lawyer, must not use the communication nor the information contained therein in any respect and must immediately return the communication to opposing counsel, or if received electronically, purge the communication from the system."
- *Conflict of interest* - "To ensure that there is no breach of the obligations to avoid conflict of interest when delivering legal services using the internet or e-mail, a lawyer must determine the actual identity of parties with whom the lawyer is dealing."
- *Capacity in which lawyer is acting* - "Where there may be confusion as to the capacity in which a lawyer is acting, the lawyer must ensure that such capacity is made as clear as possible to anyone with whom the lawyer deals."

(C) Confidentiality and the Internet

- "A lawyer using electronic means of communication must ensure that communications with or about a client reflect the same care and concern for matters of privilege and confidentiality normally expected of a lawyer using any other form of communication. This would include e-mail, whether via the internet or otherwise, or the use of cellular telephones or fax machines to transmit confidential client information." Although internet communications are not considered less private than other communications methods, "a lawyer using such technologies must develop and maintain a reasonable awareness of the risk of interception or inadvertent disclosure of confidential messages and how they can be minimized." It may be necessary to use encryption software in some situations.

(D) Software Piracy

- "Software piracy is illegal and therefore unethical." Lawyers must ensure that they and the people they employ, including support staff, paralegals and articling students, respect software licensing rules.

(E) Advertising

- *Applicability of advertising policies* - The Federation Guidelines outline some restrictions on advertising through new technologies. "Advertising" is defined as "any statement, oral, written or electronic, made by a lawyer or firm to the public in general or to one or more individuals and having as a substantial purpose the promotion of the lawyer or firm".
- *Identification of the lawyer* - "A lawyer making representations in generally accessible electronic media must include the name, law firm, mailing address, licensed jurisdiction

of practice, and e-mail address of at least one lawyer responsible for the communication's content in the communication." This is because readers of electronic messages may be almost anywhere in the world and there is a greater potential for confusion about the lawyer's identity, location and qualifications.

- *Multi-jurisdictional advertising* - "Where a lawyer is entitled to practice in more than one jurisdiction, and these jurisdictions are identified in representations on electronic media, that lawyer must ensure that the advertisement complies with the advertising rules governing legal advertising in each jurisdictions [sic]."
- *Restrictions on indiscriminate distribution* - The Guidelines provide three examples of "interactions with the public which are not compatible with the best interests of the profession, the administration of justice and society generally". They are (1) advertising professional services directly and indiscriminately to a substantial number of newsgroups or electronic e-mail addresses; (2) posting advertising messages to newsgroups, listservs or bulletin boards whose topic scope does not include the proposed advertisement; and (3) advertising which substantially interferes with another's use of the media or invades the privacy of other users.

The *Guidelines*, along with an appendix on software piracy, can be found at the Federation of Law Societies of Canada web site.

(iii) Questions for the Profession

Should the *CBA Code* adopt provisions similar to the Federation of Law Societies' *Guidelines?* Are there any issues that are not covered by the Guidelines that the *CBA Code* should address?

D. Civility and Collegiality

Question 4

What changes to the *CBA Code* are needed to address concerns about reduced civility within the profession?

(i) Current Rule

Chapter IX - The Lawyer as Advocate requires lawyers to be courteous and civil to the court or tribunal and to those engaged on the other side. A consistent pattern of rude, provocative or disruptive conduct may merit disciplinary action (*Commentary 14*).

(ii) Background

Many believe that one of the most pressing problems facing the profession is decreased civility and courtesy between counsel. The perception is that lawyers are more aggressive and rude with their colleagues and others. Law society practice advisors receive frequent calls complaining about lawyers' discourteous behaviour. On the other hand, some believe there has actually been an increase in civility in recent years.

Decreased civility frequently hinders client interests by lessening the chances for settlement and thereby increasing legal costs. It also arguably tarnishes the profession's image. In the long term, declining professional courtesy makes the practice of law less enjoyable and has therefore been cited as a reason why lawyers appear to be leaving the profession in greater numbers.

Some law societies are hesitant to amend their current rules, believing that adding new code of conduct requirements will not solve the problem. The simple truth, they say, is that it's not as

kind and gentle a world as it was 10 years ago. If courts started naming and punishing discourteous lawyers, that would help to solve the problem. Some law societies try to deal with civility complaints by holding administrative "conduct reviews" with the lawyer in question.

In 2000, the Law Society of Upper Canada amended its rules to require lawyers to be courteous to "all persons with whom the lawyer has dealings in the course of his or her practice" (*Rule 6.03(1)*). The Rule used to require courtesy only to other lawyers.

The Barreau du Quebec's *Code of Ethics for Advocates* states that it is derogatory to the dignity of the profession to harass another person or to harm another person in a malicious manner (*Rule 4.02.01(a)*).

One potential approach is to change in the definition of "court" in the *CBA Code*. Currently,"court" is defined as including "conventional law courts and generally all judicial and quasi-judicial tribunals" (*page xi*). This could be amended to encompass legal processes that take place outside the courtroom for example, examinations for discovery and alternative dispute resolution processes. This would extend the *Chapter IX* civility obligation to all forums where a lawyer practices. This has been done in Ontario, where the word "tribunal" includes "courts, boards, arbitrators, mediators, administrative agencies, and bodies that resolve disputes, regardless of their function or the informality of their procedures" (*Rule 1.02*).

In summer 2001, the Advocates' Society in Ontario published a pamphlet entitled *Principles of Civility for Advocates*, which is intended as an educational tool to encourage civility in the justice system. It contains a list of over 75 principles, covering relations with opposing counsel, communications with others, trial conduct and counsel's relations with the judiciary.

(iii) Questions for the Profession

Should the *CBA Code* include more specific rules governing professional civility? Should the current rules be expanded to include civility outside judicial or quasi-judicial proceedings? Alternatively, should the *CBA Code* include Guidelines similar to those suggested by the Advocates' Society?

II. Issues Relating to the Business of Law

E. Multi-Disciplinary Practices (MDPs)

Question 5

What changes need to be made to the *CBA Code* to reflect the CBA position on MDPs?

(i) Current Rule

There are no specific rules in the *CBA Code* concerning MDPs. However, *Chapter XI - Fees* prohibits lawyers from sharing fees with non-lawyers (*Commentary 8*).

(ii) Background

During the last few years, the subject of MDPs has been hotly debated in the legal profession. The CBA's position on MDPs arises from *CBA Resolution 00-03-A*, as amended by *CBA Resolution 01-01-M*.

MDPs are business arrangements in which lawyers (including Quebec notaries) and non- lawyers practice together to provide a broad range of advice, including legal advice, to consumers, and which encompass a variety of forms, from highly integrated organizations with lawyers and non-lawyers working under one ownership structure to loose referral networks.

As outlined in the above resolutions, the CBA's position is that lawyers be permitted to share fees with non-lawyers in MDPs. However, lawyers must have "effective control" over the practice and business of the MDP. MDPs should be required to adhere to the core values, ethical obligations, standards and rules of professional conduct of the legal profession. Lawyers should not practice in an MDP that fails to comply with these requirements.

The core values of the legal profession include: respect for the confidentiality of client information; protection of solicitor-client privilege; avoidance of conflict of interest; independence of the legal professional; avoidance of the unauthorized practice of law; and the duty of loyalty to the client. Law societies are urged to develop rules to ensure that lawyers do not practice in MDPs with other service providers having conflicting ethical responsibilities. For instance, auditors are obliged to disclose a client's financial information, while lawyers are obliged to protect the confidentiality of client information. Having auditors and lawyers both provide services to an MDP client could be problematic.

In Ontario, lawyers may share fees with non-lawyers in an approved MDP (*Rule 2.08(10)*). However, under that rule, lawyers must, among other things, ensure that clients understand they are receiving legal services from the lawyer supplemented by services from a non-lawyer (*Commentary, Rule 2.01(1)*). Advice from the non-lawyer on other matters must be provided separate from the retainer for legal advice (*Commentary, Rule 2.01(1)*). Lawyers must ensure their non-lawyer partners comply with the Rules (*Rule 2.04(13)*).

(iii) Questions for the Profession

Aside from the current prohibition against fee sharing, what portions of the *CBA Code* need to be amended to ensure that lawyers can practice in MDPs in a way which respects the profession's core values and ethical standards?

F. Advertising

Question 6

Do changes in the law and how it is practised call for a change in the rules on advertising? If so, how?

(i) Current Rule

Chapter XIV - Advertising, Solicitation and Making Legal Services Available provides that lawyers should make legal services available in a manner which commands respect and confidence and which is compatible with the integrity and independence of the profession.

Advertising must not detract from the integrity of the profession and must not be misleading, undignified or in bad taste (*Note 3*).

(ii) Background

Increased competition in the legal marketplace, the advent of new communications technologies and freedom of expression considerations under section 2(b) of the *Canadian Charter of Rights and Freedoms* (see, e.g., *Rocket* v. *Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232) have prompted some law societies to revisit their rules concerning advertising. Attention has been focussed on rules addressing: use of the title "specialist"; limitations on firm names; limitations on product endorsements; the use of testimonials; publication of fees or fee comparisons; and the requirement of "good taste".

The Law Society of Alberta has decided against "good taste" requirement for advertising because of concerns about freedom of expression and the subjectivity of "good taste" (*Chapter 5, Rule 2*). The Barreau du Quebec also has no "good taste" requirement. The Law Society of Upper Canada, on the other hand, voted in 2000 to maintain the "good taste" requirement in advertising legal services. (*Rules 3.04 and 3.05*).

As discussed in the previous section on new communications technologies, the National Ethics Group of the Federation of Law Societies circulated *Guidelines on Ethics and the New Technology* in 1999. The Guidelines incorporate several advertising rules, requiring lawyers: to identify themselves in electronic mail messages; to comply with advertising rules in each jurisdiction in which they are entitled to practise; and to refrain from the indiscriminate distribution of advertising messages through the internet.

The general argument favouring the use of marketing devices such as testimonials, fee comparisons and non-traditional law firm names is that they promote competition and consumer choice. This arguably lowers the cost of legal fees and improves access to justice. On the other hand, such techniques can frequently mislead consumers. They also arguably promote the conception of legal services as a commodity rather than an essential public service.

(iii) Questions for the Profession

Should the *CBA Code* address issues such as fee comparisons with caveats, testimonials and other advertising techniques? If so, how? Does it need to be more specific about the appropriateness or taste of advertising? Should the *CBA Code* be revised to specifically address new technologies, such as e-mail distribution and the internet?

G. Soliciting clients

Question 7

Does the *CBA Code* need more precision in its rules regarding the solicitation of clients? If so, what is needed?

(i) Current Rule

Chapter XIV - Advertising, Solicitation and Making Legal Services Available provides that the general principles concerning advertising, also apply to solicitation (*Commentary 3*).

(ii) Background

Rules governing solicitation of clients generally distinguish between clients who are represented by a lawyer and those who are not. They also distinguish between general solicitation through, for example, a mailing or advertising campaign directed at a segment of society (for example, a brochure mailed to a group of high tech companies) and direct solicitation of a specific client.

For clients already represented by counsel, there is a distinction between trying to lure individual clients away from their current lawyers and offering legal services to a whole group of people, some of whom may already have legal representation. In Ontario, lawyers are not permitted to solicit individuals who have retained a lawyer for a particular matter to change lawyers for that matter (*Rule 3.06(2)(d)*). Wider marketing campaigns do not generally fall within this prohibition. The Barreau du Quebec prohibits lawyers from making pressing or repeated inducements to individuals to retain the lawyer's services (*Rule 4.02.01(i)*).

For clients not already represented by counsel, some law societies try to protect those who are vulnerable and therefore susceptible to exploitation. The Law Society of Alberta, for instance prohibits a lawyer from soliciting a person "who has suffered a traumatic experience and has not yet had a chance to recover" or from engaging in "other behaviour that takes advantage of a [potential] client's vulnerability" (*Chapter 5, Commentary G.2*).
The Law Society of Upper Canada rule on soliciting clients who are vulnerable or who have not yet recovered from a traumatic experience prohibits lawyers from using "unconscionable or exploitive means that bring the profession or the administration of justice into disrepute" (*Rule 3.06(2)*). Where an advertisement is likely to influence people who are vulnerable because of a specific event, the Barreau du Quebec requires that the advertisement be addressed only to the general public (*Rule 5.05*).

CBA Resolution 00-04-A, Guidelines for Lawyers Acting for Survivors of Aboriginal Residential Schools, urges law societies to adopt guidelines for lawyers acting for or seeking to act for survivors of Aboriginal residential schools. The first suggested guideline is "Lawyers should not initiate communications with individual survivors of Aboriginal residential schools to solicit them as clients or inquire as to whether they were sexually assaulted".

Law society rules generally prohibit any type of solicitation that amounts to coercion, duress or harassment, which derogates from the dignity of the profession or which brings the administration of justice into disrepute.

(iii) Questions for the Profession

Does the *CBA Code* need to specify more precisely the types of client solicitation that is and is not acceptable? Should the *CBA Code* reflect the concerns raised the CBA's resolution on Residential School Guidelines?

H. Referral Fees

Question 8

Should lawyers be allowed to earn and pay referral fees? If so, what further guidelines are needed?

(i) Current Rule

Chapter XI - Fees prohibits lawyers from sharing fees with non-lawyers who refer business to the lawyer. It prohibits lawyers from giving any financial or other reward to such persons for referring business (*Commentary 8*).

(ii) Background

Law society rules on referral fees vary across the country. In many jurisdictions, a lawyer can pay another lawyer a referral fee, as long as the client has given informed consent. However, a lawyer cannot pay a non-lawyer a fee, unless it is a token amount or is paid in recognition of referrals made over a period of time and is not linked to the referral of a specific client.

Proponents of referral fees argue that they:
1. encourage lawyers to pass on work to lawyers more capable of serving the client's needs;
2. eliminate a distinction in treatment between small or solo law firms and larger firms, in which lawyers can compensate each other for mutually referring clients; and
3. help clients by promoting the use of other professionals for their non-legal needs.

Opponents of referral fees argue that they:
1. create the possibility of shopping around for the best referral fee, rather than for the best person to whom to make the referral; and
2. encourage the brokerage of legal business, which will not necessarily operate to the benefit of clients ;
3. may promote unnecessary referrals to non-lawyer professionals to generate referral revenue.

(iii) Questions for the Profession

Should the *CBA Code* be changed to allow referral fees? Should there be limitations on how the referral fee is calculated? Is client consent essential when a referral fee is to be paid or received? Should the rules concerning referral fees differ between referrals to lawyers and non-lawyers?

III. Issues relating to employment in law

I. Discrimination and Harassment

Question 9

Should the anti-discrimination rules in the *CBA Code* be expanded? If so, how?

(i) Current Rule

Chapter XX - Non-Discrimination provides that lawyers must not discriminate on the grounds of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status or disability. *CBA Resolution 96-02-A* added "language" to the listed grounds.

CBA Resolution 00-01-M, Racial Equality in the Legal Profession, requires the CBA to "cooperate with the Federation of Law Societies to develop model employment guidelines regarding interviewing, hiring, and retention processes in law firms and legal departments, to be incorporated into Codes of Professional Conduct".

(ii) Background

In 1993, the CBA published the report of its Gender Equality Task Force, entitled *Touchstones for Change: Equality, Diversity and Accountability*. The report challenged the legal profession to confront discriminatory hiring and promotion practices, to address the inequalities that persisted within the profession and to remove the barriers that prevented equal access. Since then, the CBA has passed resolutions to put the Task Force recommendations into effect, including the addition of *Chapter XX - Non- Discrimination*. Law societies have also reviewed their rules to determine what changes might be necessary. The Law Society of Alberta, for example, recently added commentary on sexual harassment to reflect case law and the *Touchstones Report* (*Chapter 1, Rules 8 and 9*). Quebec's *Professional Code* prohibits discrimination and sexual harassment (*Rule 4.02.01*). (R.S.Q. 1973 c. C-26, ss. 57, 59, 59.1).

(iii) Questions for the Profession

Are amendments to the non-discrimination provisions of the *CBA Code* necessary? If so, what rules should be put in place and what commentary should be added?

IV. Other issues

The above are the major issues on which your input is needed. Other emerging professional conduct issues are either dealt with satisfactorily by the current *CBA Code* or have less widespread significance.

The other changes we propose to make are:

1. Integration of resolutions previously passed by the CBA membership. These resolutions, which included in the Resolutions attached as Appendix I, need to be integrated into the *CBA Code* when the revised draft is prepared:

- *CBA Resolution 99-05-A - Dispute Resolution Processes*, requiring lawyers to canvass with each client, in a fully informed manner, all available dispute resolution processes (see discussion of alternative dispute resolution, above, (page 11);

- *CBA Resolution 93-07-A - Conflict of Interest Task Force*, concerning the measures to be taken when lawyers transfer between law firms which represent parties adverse in interest (see *Martin* v. *Gray*, [1990] 3 S.C.R. 1235) (to be inserted as a Commentary);

- *CBA Resolution 93-15-A - Representation of Client Under a Disability*, concerning situations in which a lawyer believes that a client does not have the capacity to give instructions to the lawyer:

2. Annotation of advertising rules in different jurisdictions. The Committee believes it would be helpful to include an annotation which compares advertising rules in the various codes of conduct from across the country.

3. Disclosure of colleagues' misconduct. The Committee believes it would be useful to include a Commentary which deals with colleagues of lawyers who are suffering from substance abuse. In particular, the Commentary would suggest a process by which a colleague could address conduct concerns arising from such conditions. One question which has been raised is whether a colleague assisting a lawyer in a counselling capacity only should be exempted from the usual requirements to report misconduct.

4. Quebec notaries. Quebec notaries advise clients on a wide range of matters but do not engage in litigation or advocacy. Unlike lawyers in common-law jurisdictions, Quebec notaries advise and take instructions from two or more parties who are adverse in interest. The Committee believes that their unique method of practice should be recognized in the *CBA Code*.

Comments on these issues are welcome.

Part 3 NEXT STEPS

Please forward your responses by **May 31, 2002**, in the electronic form or by fax, email or regular mail to:

Kathryn Berge, Q.C., Chair
Ethics and Professional Issues Committee
c/o Richard Ellis, Legal Policy Analyst
Canadian Bar Association
902-50 O'Connor Street
Ottawa, Ontario K1P 6L2

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[**Note:** Canadian Bar Association informed the author of this paper on 11 June 2002 that the Association welcomes responses to Part IV of the Consultation Paper (which follows) beyond the 31 May 2002 deadline.]

Response Form

B. Independent Legal Advice Checklist

APPENDIX B

Independent Legal Advice Checklist

<table>
<tr><td colspan="5">This sample checklist is referred to in the “Practice Watch” column in the March, 1995 Bencher’s Bulletin, and is formatted as a precedent for your file.</td></tr>
<tr><td colspan="2">Client’s name</td><td>yr. | mo. | day</td><td>Start time</td><td>Finish time</td></tr>
<tr><td colspan="3">Client’s address</td><td colspan="2">Telephone</td></tr>
<tr><td colspan="3">Client’s spoken languages</td><td colspan="2">Written languages</td></tr>
<tr><td colspan="4">Family status</td><td>Age</td></tr>
<tr><td colspan="2">Referred by</td><td colspan="3">Reason for independent legal advice</td></tr>
<tr><td>Client’s net worth
$</td><td>Spouse’s net worth
$</td><td colspan="3">Security requested by lending institution</td></tr>
<tr><td colspan="2">The client has limited facility with English, so I obtained an interpreter whose name was:</td><td colspan="3">Also present during our meeting was:</td></tr>
<tr><td colspan="5">I reviewed the following documents:</td></tr>
<tr><td colspan="5">PART A – I EXPLAINED THE FOLLOWNG TO THE CLIENT</td></tr>
</table>

The nature and consequences of a mortgage
.....
The nature and consequences of a guarantee
.....
The effect of power and sale/judicial sale and foreclosure
.....
The effect of an action on the covenant and the liability for any insufficiency
.....
The consequences of his or her spouse's default
.....
The possible consequences of failure to honour the financial obligations
(loss of her or his house, business and all other property)
.....
The possibility of obtaining security for the financial obligations
.....
That an indemnity will be worthless if the spouse declares bankruptcy
.....
The risks to the client if there is a breakdown of the marriage
.....

PART B – THE CLIENT
I reviewed the current state of the client's marriage ..... ÍI reviewed the current state of the client's health ..... ÍI asked about domestic violence and was told _____ ÍThe client said that the reason for his or her consent to this transaction or agreement was _____ _____ ÍI satisfied myself that the client was not subject to duress or undue influence and that the client was signing relevant documents freely and voluntarily, without pressure from anyone ..... ÍI accepted payment from the client only, and not from anyone adverse in interest to the client ..... Í
PART C – IF THE INDEPENDENT LEGAL ADVICE RELATES TO A DOMESTIC CONTRACT

I obtained complete financial disclosure from both my client and the other side .....

I determined that the document was sufficiently well-drafted to accomplish my client's objectives .....

I ensured that the terms of the agreement were both certain and enforceable .....

I ensured that, if the agreement is to be filed against property or as an order of the Court, the statutory requirements for filing have been met .....

I explained the final nature of the agreement .....

I reviewed the risks and consequences of the agreement .....

I discussed the effect of the agreement upon the client if her or his spouse dies first .....

I carefully explained all the clauses of the agreement and the client indicated that he or she understood same .....

PART D – WHEN CLIENT SIGNS CONTRARY TO ADVICE

I advised the client against signing the documents, but the client wished to proceed contrary to my advice, so I explained my advice in the presence of a witness, whose name was _____

The client signed an acknowledgement, in the presence of this witness, that she or he was signing the documents against my advice .....

PART E – FILE MANAGEMENT
I opened a file ..... I placed this form, a copy of the document and my notes in the general independent legal advice file ..... I took notes of my meeting(s) with the client and retained these ..... I docketed the time spent advising the client ..... I sent a reporting letter outlining the terms of the agreement or obligation assumed, together with my account ..... My advice was verbal only and I sent no reporting letter .....
NOTES