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SANITY

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 1998 to June 2000.

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1.0 INTRODUCTION

The essence of family law practice is professional and personal self-preservation while, concomitantly, (i) understanding clients and their legal dilemmas, (ii) affording dispute prevention and resolution services that benefit clients and provide practitioners with satisfaction and compensation, and (iii) engendering societal respect for legal life.

"During the last two decades," writes Steven Keeva in *Transforming Practices: Finding Joy and Satisfaction in the Legal Life* (Chicago: American Bar Association, 1999), "the legal profession has placed an increasingly heavy emphasis on efficiency, on working 'smarter,' quicker, and faster. It makes demands not only on your outer life - in constant deadlines, billable-hour quotas, pressure to keep up with a rapidly growing body of new law - but also on your inner life."

"The problem," Mr. Keeva explains, "is that most lawyers have never developed the resources to cope with those demands, let alone find in them the kind of meaning that can make their work more rewarding. They hear only the blare of the trumpet and miss the sonority of an orchestra that can provide resonance and depth."

Moreover, despite the "vast array of tasks [the legal profession performs] that are essential to an orderly, productive, and free society", the profession "is not held in high regard"; a circumstance for which "[t]he profession has itself to blame" contends Paul G. Haskell in *Why Lawyers Behave As They Do* (Boulder, Colo.: Westview Press, A Division of HarperCollins, 1998). Mr. Haskell, of the faculty of University of North Carolina Law School, holds to the view that the "disrepute has to do with how lawyers go about their tasks" (at p. 105). Referring to the "hired gun" or "sporting" theory or standard of representation - being "a contest with its own rules devoid of moral meaning"- Mr. Haskell concludes that "the competitiveness and acquisitiveness of contemporary practice have caused lawyers to embrace this standard of behavior to a greater degree than in the past" (at p. 105).

What may help to ameliorate public disrepute of the legal profession - while better assuring effective, fulfilling client service - counsels Steven Keeva, is

> find[ing] real pleasure in the legal life, [for which purpose] you need to open yourself to all your sources of potential meaning. You will discover that understanding a client beyond her present legal problem does not detract from the technical job at hand; it gives the technical job deeper meaning by placing it in the context of a life. Contracts, after all, are about human relationships; briefs are about disappointment, wanting to be heard, needing to heal. Seeing these deeper meanings is not a threat to good work; it enriches the experience of doing the work, engages the lawyer's heart, and makes the end product more likely to be compelling.

Heightened understanding of the client, moreover, prepares the lawyer more adequately to foresee difficulties in the solicitor-client relationship and expeditiously and prudently deal with them; lest they lead to procedural civil or summary proceedings regards conflict of interest, legal

costs or standing before court as counsel; disciplinary complaints; substantive civil proceedings in tort, contract and/or trust, and public depreciation of professional reputation.

Such consequences, and suggestions to avoid or minimize them, are reflected in this compilation of summaries of and excerpts from decisions, authors, legislation, and reports from Canada (primarily) and the United States; published principally from June 1998 to May 2000. The material is organized within a framework similar to that employed in three previous renderings on professional and legal responsibility for the National Family Law Program: "Scruples" (1990), 2 C.F.L.Q. 151-197, addressing the period from the date of legal memory to May 1994; "Scrutiny", covering, primarily, the period from June 1994 to May 1996; and "Security", covering, mainly, the period from June 1996 to May 1998. (Except where noted to be "text", content consists of the writer's commentaries or summaries.)

Priorities

***The Los Angeles Times*, 01 June 1998**

[text]

In California, more than 600 soon-to-be-lawyers were taking the State Bar exam in the Pasadena Convention Center when a 50-year-old man taking the test suffered a heart attack. Only two of the 600 test takers, John Leslie and Eunice Morgan, stopped to help the man. They administered CPR until paramedics arrived, then resumed taking the exam. Citing policy, the test supervisor refused to allow the two students additional time to make up the 40 minutes they spent helping the victim. Jerome Braun, the state Bar's senior executive for admissions, backed the decision, stating "if these two want to be lawyers, they should learn a lesson about priorities."

"When Lawyers Become Prey"

Rose, Jennifer J. in: (1998), 5 *Solo* (No. 3) (Chicago: General Practice, Solo And Small Firm Section, American Bar Association).

[text]

Last fall [1997] a survey of ABA Family Law Section members revealed that 60 percent of the respondents had been threatened by adverse parties and 17 percent by their very own client. "Divorce clients are always crazy," you say, vowing to eliminate one segment of your practice.

. . . .

… [A lawyer], packing a piece and parking the staff behind bulletproof glass might be extreme measures, defeating that friendly approachability dictated by law practice marketing mavens. Motions and writs [against the threatening persons] not only consume billable hours but are of dubious efficacy. And professional bodyguards are beyond most solo and small firm practitioners' budgets. A few lawyers keep guns, big sticks, golf clubs, pepper spray, and even menacing dogs in the office, but these solutions aren't acceptable or even practical for everyone.

Current emphasis upon courtroom security is a nodding acknowledgement that the blindfolded Lady Justice is not going [to] protect you in the parking lot, on your way to the courthouse, in your office, or even at home. Only a quarter of the lawyers surveyed took any special precautions to ensure their safety. Protecting yourself, your staff, and your family, is your responsibility.

"Man's harassment of his former wife's lawyers ends up with him winning a free trip to jail"

The Canadian Press. *National Post* (Toronto: 25 February 2000), at p. A11.

[text]

A man pleaded guilty Wednesday to two counts of criminal harassment for waging a one-year campaign against his former wife's lawyers. Wayne Woodhouse, 45, began harassing Port Colborne, Ont. lawyers Margaret Opatovsky and Chris Wilson in December, 1998, and continued until last month. Woodhouse sat outside their office and stared at them, tore up court documents on their sidewalk and picketed outside the law firm with signs suggesting they were out to get him, assistant Crown attorney Toni Skarica said. He also spray-painted graffiti in front of the law firm, and attempted to have ads run in local newspapers suggesting the firm was corrupt. He also tacked up posters at a college advertising a free trip and giving out the number of the law firm. Woodhouse was sentenced to one day in jail, in addition to the 41 days he had already spent in custody.

2.0 SOURCES AND STANDARDS OF RESPONSIBILITY

2.1 Professional Responsibility

In Canada the original *Canons of Legal Ethics* were 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* which, in turn, in August 1987, was substantially revised and was, in August 1995, amended by addition of Chapter XX (dealing with non-discrimination).

The Barreau du Quebec relies to a significant extent on the 1974 Code.

Law Societies of Prince Edward Island, the Northwest Territories, and Yukon have adopted the 1987 C.B.A. Code with minor, if any, revisions. Law Societies of Saskatchewan, Manitoba, Ontario, and Nova Scotia have used both the 1974 C.B.A. Canons and 1987 C.B.A. Code as the basis for their rules of professional conduct; with significant modifications and additions.

Newfoundland's Law Society has adopted the 1987 C.B.A. Code; with some modifications and additions in revising its professional conduct rules; in force from 04 June 1999.

Law Societies of British Columbia, New Brunswick, and Alberta have adopted professional conduct rules which bear only slight resemblance to the C.B.A. Canons and C.B.A. Code. Alberta's rules are substantially similar to the Model Rules of the American Bar Association.

In the United States, the original Canons of Professional Ethics were adopted by the American Bar Association on 27 August 1908; replaced on 12 August 1969 by the *Model Code of Professional Responsibility* which, in turn, on 02 August 1983, was replaced by the *Model Rules of Professional Responsibility*. About two-thirds of United States jurisdictions have, to date, approved of professional standards based on the *Model Rules.* Remaining jurisdictions continue to found their professional standards on the *Model Code*.

The Standing Committee on Ethics and Professional Responsibility of the American Bar Association publishes opinions based on the *Model Code* (1969) and the *Model Rules* (1983); including the current loose-leaf service, *Recent Ethics Opinions* (available from the A.B.A. Center for Professional Responsibility, 541 North Fairbanks Court, Chicago, Illinois, 6061-3314, telephone 1-312-988-5308 or telecopy 1 312 988 5491). The Association also publishes, from the same address, *The Professional Lawyer* magazine (U.S. $20 annually for members of the Center and U.S. $25 annually for non-members). Membership in the Centre is U.S. $100 annually.

2.2 Legal Responsibility

2.2.1 Generally

"Fiduciary Obligations "

Ball, Stacey Reginald. *Canadian Employment Law* (Aurora: Canada Law Book Inc., 1998), at p. 13-2

[text]

Numerous attempts have been made to establish the constituent elements of fiduciary status. One writer has described a fiduciary relationship as existing "whenever any person receives a power of any type on condition that he also receive it with a duty to utilise that power in the best interests of another, and the recipient of the power uses that power." It has been suggested that the essence of a fiduciary relationship is that one's legal position is at the mercy of another's discretion. In *Guerin v. Canada* [(1984), 13 D.L.R. (4th) 321 (S.C.C.), at p. 341], Dickson C.J.C. considered a quote of Professor Weinrib and described the fiduciary relationship as follows:

> "I make no comment upon whether this description is broad enough to embrace all fiduciary obligations. I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct."

It is now clear that the finding of a fiduciary relationship does not depend on an existing category of relationships.

[**Note:** *Footnotes omitted*.]

Fiduciary Obligations

Rotman, Leonard I. "Balancing the "Scales of Justice": Fiduciary Obligations and *Stewart v. CBC"* (1999), 78 Can. Bar Rev. 445, at pp. 484-485; 455; 454.

[text]

…. In the … British Columbia Court of Appeal decision in *C.A. v. Critchley*, [[1998] B.C.J. No. 2587 (QL)] McEachern C.J.B.C. gave the following appraisal of the status of fiduciary law in Canada:

> Our Supreme Court of Canada has led the way in the common law in extending fiduciary responsibilities and remedies but it has not provided as much guidance as it usually does in emerging areas of law. The law in this respect has been extended by our highest court not predictably or incrementally but in quantum leaps so that

> judges, lawyers and citizens alike are often unable to know whether a given situation is governed by the usual laws of contract, negligence or other torts, or by fiduciary obligations whose limits are difficult to discern. Many lawyers plead cases in the alternative not knowing where the line should be drawn.

He then stated, referring to the case of *Girardet v. Crease & Co.*, [(1987), 11 B.C.L.R. (2d) 361 (S.C.)] that "cases in the Supreme Court of Canada before and after *Girardet* have failed to make the law as clear as it should be." [*C.A. v. Critchley*, [1998] B.C.J. No. 2587 (QL), para. 79.] The Chief Justice also referred to comments made by Sir Anthony Mason, Chief Justice of the Australian High Court, who once said that Canadian fiduciary jurisprudence is divided into three parts: "Those who owe fiduciary duties, those to whom fiduciary duties are owed and judges who keep creating new fiduciary duties.[Quoted at para. 74 of *C.A. v. Critchley*, [1998] B.C.J. No. 2587 (QL).]"

. . . .

…. [E]ven though … [a] retainer … [may give a solicitor] unfettered discretion to act in whatever manner he … [sees] fit, it … [does] not *prohibit* the existence of fiduciary obligations owed by …[the solicitor to the client]. The courts' equitable jurisdiction enables it to impose fiduciary obligations, where appropriate, on parties to contractual relationships, even in situations where one party appears to possess complete discretion over the other's interests with the latter's consent" [referring to the decision of Macdonald J. in *Stewart v. Canadian Broadcasting Corporation* (1997), 150 D.L.R. (4^{th}) 24 (Ont. Gen. Div.)].

. . . .

… It is a fundamental premise of fiduciary law that fiduciaries are under a strict duty to act in the best interests of their beneficiaries. While acting in their fiduciary capacities, fiduciaries have an obligation to determine what actions are consistent with their beneficiaries' best interests and to act accordingly. Although fiduciaries possess the initial discretion to make decisions on behalf of their beneficiaries, the fiduciaries' actions remain subject to judicial review to ascertain whether they are consistent with fiduciary precepts. This latter determination is made by the courts in light of the general principles of fiduciary doctrine and the particular requirements of the relationship in question.

Fiduciary Obligations Versus Negligence Allegations

Marshall, Nancy J. in: American Bar Association, 1998 Symposium Issue Of The Professional Lawyer (Chicago, 1999), p. 133.

[text]

A fiduciary breach involves a breach of a standard of conduct, whereas negligence involves the breach of a standard of care. Even gross negligence does not constitute a breach of a fiduciary duty, unless it is coupled with fraud, breach of trust, or other ill acts.

A lawyer, of course, can be held liable for an error of judgment, which a lawyer of reasonable skill and diligence would not have made. A negligent act is different from a breach of fiduciary obligations. Thus, for example, a disclosure of confidential information is not necessarily negligent, but is a breach of a fiduciary obligation. Representing a client whose interests are adverse to a former client is a breach of fiduciary obligation, not negligence (unless there was negligence in failing to determine that a conflict existed).

2.2 Legal Responsibility

2.2.2 Duty of care: To whom

Disclosure Obligations of Lawyer Who Discovers Client Has Violated Court Order During Litigation

American Bar Association (Standing Committee on Ethics and Professional Responsibility) ***Formal Opinion No. 98-412*** **(Chicago: 09 September 1998).**

[text]

A lawyer who discovers that a client has violated a court order prohibiting or limiting transfer of assets must reveal that fact to the court if necessary to avoid or correct an affirmative misrepresentation by the lawyer to the court. A lawyer also must disclose [to the court] the client's conduct [underlying the violation] or, in the alternative, withdraw from continued representation of the client in the litigation if necessary to avoid assisting the client in a fraud on the court. Continued representation of the client in the litigation may constitute assistance in a fraud on the court where the client's conduct destroys the court's ability to award effective relief to the opposing party. Upon withdrawing from the representation, the lawyer must make a disclosure sufficient to avoid continued reliance by the court on prior representations of the lawyer that now are known to be untrue but, absent such a necessity, the lawyer may not disclose the client's misconduct to the court or successor counsel without the client's consent.

Winchester v. Little

No. WL 929636 (Tenn. Ct. App., 31 December 1998)

An attorney who was appointed by a court to serve as a child's guardian *ad litem* during a parenting dispute did not owe a duty to the child's parents.

DeAngelis v. Rose

727 A.2d 61 (N.J. Super. Ct. App. Div. 1999)

A law firm and its attorneys are not liable for legal negligence to a client's father who guaranteed payment of the client's legal fees.

2.2 Legal Responsibility

2.2.3 Duty of care: Nature

"Avoiding Legal Malpractice In Family Law Cases: The Dangers of Not Engaging in Financial Discovery"

Grossman, Andrew S. in: (1999), 33 Fam. L.Q. 361, at pp. 368-376

[text]

The elements of the legal malpractice action remain the same, irrespective of the type of law practised. The only significant variation is seen in defining the standard of care of an attorney who is declared to be a specialist in a particular area of the law. The inquiry here is two-fold: First, what is a specialist? Second, how does being a specialist alter the standard of care to which an attorney will be held?

While there are many ways an attorney could be deemed to be a specialist, all that is really required is that the attorney has held himself out as a specialist. The rationale is that where an attorney holds himself out as a specialist, a client will rely on the attorney's claimed status of a specialist. The attorney is representing that he has superior skill, knowledge, experience, or expertise in his particular field than the attorney-generalist, and as such, is suggesting that the client can expect to receive better representation from the specialist. Thus, for purposes of a legal malpractice claim, an attorney who holds himself out as a specialist will be deemed a specialist, regardless of whether he actually possesses superior skill, knowledge, experience, or expertise than an attorney-generalist in the field of law in question.

Amazingly, it has been held that a general practitioner may be held to the standard of a specialist, even absent a holding-out to that effect. In *Home v. Peckham* [158 Cal. Rptr. 714 (1979)], a client sued for legal malpractice when his attorney, a general practitioner, failed to correctly draft a trust for his client causing the client to incur tax liabilities. In upholding the trial court's jury instruction, the court of appeals held that a general practitioner has a duty to refer his client to a specialist "if, under the circumstances a reasonably careful and skilful practitioner would do so." Thus, a general practitioner who attempts to perform such professional services without the aid of a specialist may be held to the standard of a specialist.

Once it has been established that an attorney is a specialist, the duty of care required of him is the degree of skill and knowledge ordinarily possessed by attorneys who practice in the same speciality. The court in *Procanik v. Cillo*, in analogizing the duty of an attorney-specialist to that of a physician practising in a speciality, held that "[a] specialist has a multi-tier standard of duty. It not only includes the duty generally applicable to those attorneys in the general practice of law, but also a duty of counsel and advice in the speciality involved." [502 A.2 at 94, 103.] The California Court of Appeal addressed the issue of the duty of a specialist in 1975:

> One who holds himself out as a legal specialist performs in similar circumstances to other specialists but not to general practitioners of the law. We thus conclude that a lawyer holding himself out to the public and to the profession as specialising in an area of the law must exercise a skill, prudence and diligence exercised by other specialists of ordinary skill and capacity specialising in the same field. [*Wright v. Williams*, 121 Cal. Rptr. 194 (1975).]

While the standard for a specialist is a heightened form of the duty of an attorney-generalist, it has been noted that this heightened duty does not contain elements of hindsight or prescience, nor does it require that the specialist be a clairvoyant. [*Procanik*, 502 A.2d at 103.] In other words, not even a specialist will be [implicitly] held to be the guarantor of a specific result.

. . . .

Family law is an area of practice in which many practitioners are now specialising whereas, in the past, many attorney-generalists handled the typical divorce. Over the years, as the laws in the area have become more complex, many practitioners have recognised that far greater expertise is needed to handle a divorce than before.

> The practice of family law has gained recognition as a speciality because of the need to possess special skills and knowledge. In addition to mastering the law concerning the respective rights and liabilities of the members of the family, the attorney must also be knowledgeable of principles governing property rights and taxation. [Mallen, Ronald E. and Smith, Jeffrey M. *Legal Malpractice* (3d. ed. 1989), at 329.]

As in other fields of specialization, there are many ways for a lawyer who handles divorce cases to be deemed a specialist. First, some states, such as Florida, allow practitioners to become certified as a specialist in family law. An attorney who becomes certified will always be held to the heightened standard of care of a specialist in the field. This may be a concern for attorneys who become certified as a specialist in more than one area of practice. Some states require attorneys to devote only 25 percent of their practice to an area before becoming certified as a specialist. This effectively means an attorney can be certified as a "specialist" in four separate (and maybe totally unrelated) areas of law. While such attorneys would become "specialists" to attract clients, they may also be opening the possibility to being held to a higher standard when it comes to defending a legal malpractice action.

Second, an attorney may be labeled a specialist by virtue of membership in a particularized membership organisation. For example, in order to belong to the American Academy of Matrimonial Lawyers, a private lawyer membership organization that does not claim to provide speciality certification, a lawyer must meet criteria that include passing a written examination and providing letters from judges recognizing the lawyer as a specialist in the field. This would not be the same for general membership organizations, such as the family law sections of state bar associations, which are open to any attorney.

Third, an attorney's general professional involvements may result in her or him being identified as a specialist. A primary example of this is participation in continuing legal education programs as a lecturer. An attorney who speaks on matrimonial law issues to attorneys who

practice in the field is being held out to the profession as a specialist. Whether or not clients know of the lawyer's lecturer alter-ego will not have any bearing on the issue of the standard of care the attorney owes to them. Similarly, participation on the public lecture circuit can also create the labeling.

Finally, an attorney may hold himself out to his clients directly as a specialist. Whether this comes in the form of an advertisement or whether the attorney simply tells clients of the expertise is purely academic. Where an attorney lets it be known to clients that he or she claims to be a specialist, the lawyer will be held to the heightened standard of care of a specialist.

. . . .

What is an attorney's duty of care in handling a divorce case? As discussed, the generalist must use the knowledge and skill common to members of the profession, while the specialist must exercise the skill, prudence, and diligence that other specialists practicing in the field would exercise. Most divorce practitioners will be labeled as specialists based on the fact that most concentrate their practices on family matters and do have to have competence in numerous specialized issues, including such areas as taxes, pension divisions, and the psychological issues in custody litigation.

The determination of whether an attorney has breached his duty of care must be made "in light of all the facts and circumstances of the case." This takes on a special meaning in the context of a divorce case. "The highly charged emotional environment present in family law cases, as well as the requirement of expertise in other complex areas of the law, such as property and taxation, contributes to the high incidence of family law malpractice claims." While it seems obvious that emotions play a role in a divorce case, this is a factor that gives rise to the imposition of several of the attorney's duties. The Supreme Court of Connecticut noted the following:

> It may well be time to reconsider the role that lawyers and judges play in the matrimonial cases that appear in ever-increasing numbers before the courts. Analogies drawn from commercial litigation fail to respond adequately to the situation of emotional trauma commonly associated with the irretrievable breakdown of a marriage.
>
> Furthermore, other courts have held that the fiduciary responsibility of a lawyer to his client, particularly in matrimonial settlements, requires reasonable inquiry into the wishes as well as the objective best interests of the client.
>
> We should recognize, therefore, that lawyers who represent clients in matrimonial dissolutions have a special responsibility for full and fair disclosure, for a searching dialogue, about all of the facts that materially affect the client's rights and interests.
>
> Because of the emotionally-laden circumstances under which negotiations about marital dissolutions necessarily take place, reasonable inquiries should be made to ensure, as far as possible, that reasonable settlements have been knowingly agreed upon. [*Monroe v. Monroe*, 413 A. 2d 819 (1979).]

Most cases brought against attorneys for legal malpractice in the area of family law arise out of divorce or dissolution proceedings. Although claims may be brought for mishandling child custody or child support aspects of a case, most claims relate to the mishandling of the property division aspects. Whether this reflects the fact that it is harder for lawyers to deal with the wide range of financial issues, or simply that it is the one aspect of the divorce case in which damages can be proven, are issues outside the purview of this article; however, the fact of the frequency makes an examination of the elements governing the standard of care regarding financial issues important. The most common claim in a malpractice action concerning property settlement is that the attorney was negligent in causing the client to receive less than a fair share of the marital property or less spousal support than otherwise would have been received.

What is the extent of a lawyer's obligation to investigate the value of the marital assets [?]. Clearly a lawyer must "utilise pre-trial discovery to its fullest in even the simplest dissolution proceedings, to acquire as much information as is possible before embarking upon settlement negotiations." Several recent cases have allowed malpractice actions for a lawyer allowing a client to settle with inadequate disclosure of assets [e.g., failure to obtain disclosure of, or to requisition, a valuation of a marital business; failure to discover opposite spouse].

There are many sources of information that an attorney will need to employ in a divorce case, and counsel must be certain to seek out each one of them to ensure that the duty to do discovery is satisfied. Soon-to-be-ex-spouses are often very creative in the methods by which they conceal assets. The initial steps in the discovery will lead to any "red flags".

A well-organized and specific initial interview is the logical starting point in the discovery phase of a divorce case. "The client interview is the most important discovery tool an attorney has … Even the client who appears to know little about items like household records, a spouse's income, etc., can usually provide enough clues to enable [an attorney] to determine what further information [is] need[ed]." Combined with the use of a comprehensive client intake form, the initial interview gives the attorney many important leads. For example, the attorney will discovery the employment history of both parties, the length of the marriage, the bank accounts, retirement accounts, credit card accounts, and investments of both parties, lists of personal and real property, mortgages, lines of credit, and other debts, to name a few. Additionally, the attorney must inquire as to the history of the money and property the couple owns, in order to determine what portion, if any, of their assets are separate, as opposed to marital, property.

After reviewing the information gathered from the initial interview, an attorney must determine what information is still needed and request that it be produced by opposing counsel. "Without doubt, there are instances when it is professionally acceptable to rely on informal discovery rather than to institute formal discovery." Which of these will prove to be the most effective depends entirely upon the extent to which the other side wishes to cooperate.

After the information is gathered, the attorney must evaluate it and determine whether any further steps must be taken to obtain a full and exact picture of the net worth of the parties. Further steps may include the issuing of a *subpoena duces tecum* to compel discovery that was not responded to fully, the taking of depositions, the hiring of business valuation experts, appraisers, accountants, and other financial experts. Whether these additional steps are taken or not will often depend upon the results of a cost-benefit analysis of each step. Ascertaining whether the potential benefit is worth the expense of hiring experts and the like may prove to be the attorney's most difficult task.

. . . .

Implicit in the duty to do discovery is the requirement that the lawyer knows the state of the law regarding marital property. Without this knowledge, the attorney takes a risk: either that he will conduct costly discovery concerning property that has been declared separate property under the law, or that he will neglect to conduct discovery with respect to property which he mistakenly believes to be separate property. With respect to the latter mistake, there is a long line of cases which held attorneys liable for failing to adequately research the law concerning spouses' pension plans, even though the law was uncertain. "Even as to doubtful matters, an attorney is expected to perform sufficient research to enable him to make an informed and intellectual judgment on behalf of his client". Accordingly, the adequacy of the discovery an attorney performs will necessarily depend upon his or her familiarity with the law and the application of the law to the facts of the case.

[**Note:** *Some footnotes omitted*.]

3.0 APPLICATIONS OF STANDARDS OF RESPONSIBILITY

3.1 Retainer And Authority

"Beware the Cocktail Party Client"

Bresnahan, Pamela A. in: A.B.A. Journal (Chicago: American Bar Association, September 1999), at p. 80

[text]

Casual advice given by a lay person has no legal ramifications. However, the same advice given by a lawyer may give rise to the first element necessary to establish a claim for legal malpractice – an attorney-client relationship.

Riskier Business

Although there are no statistics on the subject that this author could find, anecdotal evidence seems to suggest that advice given informally leads to more malpractice claims than advice that is given after an engagement agreement is signed.

Putting the terms of the representation in writing gives you more time to reflect about whether to represent the client and, if so, what specific tasks you are competent and prepared to undertake for him.

What criteria should you have in mind in assessing whether to give informal advice to your cocktail party friend? What do courts look at in determining whether a lawyer has turned into a particular person's lawyer?

Most cases and commentaries analyzing the attorney-client relationship state that there must be some understanding between lawyer and client that the lawyer is going to give legal advice.

As one case stated, "Whether a contract employing an attorney is expressed or implied, some indication that the advice and assistance of the attorney was sought and received is integral to the creation of the attorney-client relationship". *Carstensen v. Chrisland Corp.*, 442 S.W. 2d 660 (1994), citing *Nicholson v. Shockey*, 64 S.E. 2d 813 (1951).

Further, it is equally clear that the relationship can be created even if the client does not sign a written agreement and does not pay a fee. These activities, of course, are indications that there is an attorney-client relationship. Also, just like in any other contractual situation, the intent of the parties is a relevant inquiry.

Generally, courts have found no attorney-client relationship in situations where contacts with the "wannabe client" are brief and fleeting. For instance, in *Farmer v. Mount Vernon Realty Inc.*, 983 F.2d 298 (1993), one of the plaintiffs alleged she had visited the defendant law firm and an unidentified attorney told her the firm would represent her. The trial court granted summary judgment for the law firm, and the District of Columbia Circuit U.S. Court of Appeals affirmed.

In a New Jersey case, a law firm that had no contact with the plaintiffs didn't win the malpractice suit against it until appeal. The plaintiffs had gone to a lawyer, who went to the defendant … firm for advice on a … cause of action.

On appeal, the New Jersey appellate court found no attorney-client relationship. The court stated that the attorney had not asked for an expert consultation but instead had inquired, whether the firm was interested in taking the case. *Pocanik v. Cillo*, 543 A. 2d 987 (N.J. Super. Ct. App. Div. 1988).

There are some situations in which no attorney-client relationship has attached but the information learned from your friend is privileged. Therefore, you are duty bound not to disclose that confidence, even if you decide not to represent that person.

Clearly, as a lawyer, you have to be more careful than a non-lawyer in dispensing legal advice. In particular, if you are a transactional lawyer, don't give litigation advice. If you try cases, don't give tax advice. Instead of answering your friend's questions, you may want to refer him to someone who has expertise.

Don't let your sympathy for an acquaintance with little money to pay for a lawyer make you more prone to offer off-the-cuff advice. There is no "Good Samaritan" rule for lawyers. If you volunteer negligent advice, you are liable for it. And in this particular area of potential liability, be assured there are no points for helping out.

As one of my colleagues stated in a risk management seminar: Please do not do involuntary pro bono work. Make a conscious choice as to whom you will be representing and what you will be doing in the course of that representation.

3.2 Relationships With Clients - Conflicts Of Duty

3.2.1 Conflict found

Sanders v. Rosenberg

930 P.2d 1144 (N.M. 1997)

An attorney cannot represent his wife in parenting and financial support proceedings against her former husband.

Innes v. Ayadi

[1998] N.S.J. No. 213 (N.S. Fam. Ct., Halifax) (QL), Sparks, Fam. Ct. J. , 24 April 1998

Facts and Issue ☐ The mother in a parenting proceeding applied to remove, as solicitor, the lawyer representing the father, on the ground of an alleged conflict of interest. ☐ The mother and father, unmarried, cohabitated from 1994 to 1997. One child was born of the relationship: in 1997. During cohabitation the mother and father had contacted solicitor A. to obtain legal advice in two matters. The first matter was a real estate transaction which resulted in purchase of the home where the mother and father had cohabited. The second matter was a personal injury claim resulting from injuries sustained by the father in an automobile accident. During that matter, the lawyer, A., asked the father about his sexual relations with the mother, his mood swings, and the state, generally, of his domestic relationship. The mother was present during these discussions to translate for the father, whose first language was not English. ☐ After the couple separated and a parenting issue arose, A. was retained by the father.

Decision and Reasons ☐ Application allowed; A. removed as father's solicitor. ☐ The real estate matter was far removed from the parenting litigation; there being no substantive connection between them. However, consultations pertaining to the personal injury matter had sufficient nexus to the parenting matter to warrant removal of the lawyer. The lawyer could have received confidential information, in the personal injury matter, from both the father and the mother which could have been used against the mother in the parenting proceeding. The fact there was a conflict between the mother and father as to what the father discussed with the solicitor, A., during the personal injury matter weighed in favour of A. being removed. ☐ In summary, the Court was convinced that a reasonably-informed member of the public would understand the discomfort of having A., as the father's solicitor, cross-examine the mother. Further, to allow A. to continue would diminish confidence in the administration of justice.

Orner v. Orner

[1998] O.J. No. 3525 (Ont. Ct. J. (Gen. Div.) (QL), Wein J., 10 August 1998

Facts and Issue ☐ A wife applied to remove her husband's solicitor, S, from the record on the ground of a potential conflict of interest. ☐ S. was retained by the husband on legal issues resulting from a marital dispute. The wife, several years previously, had consulted the solicitor S. about discord in her marriage. At that time the wife met with S. more than once and spoke with him by telephone a number of times; during which she told S. about the relationship between she and her husband. S. did not recall meeting the wife. A search of his records did not indicate any file ever having been opened on the wife. He did not bill her for time spent although she gave him a gift basket. The husband argued there was no solicitor-client relationship between S. and the wife and that, even if there had been casual discussions between them, no confidential relevant information was exchanged.

Decision and Reasons ☐ Application allowed. S. was removed as counsel of record. ☐ There had been a solicitor-client relationship between S. and the wife; notwithstanding the lack of any formality in the retention. The dispute then, as now, was a marital dispute between husband and wife. The wife met the test of showing that confidential information relevant to the matter at hand was received by S. Thus, there was a risk of prejudice to the wife.

Cumben v. Burbidge

(1998), 45 R.F.L. (4th) 214 (Nfld. Prov. Ct.), Handrigan, P.C.J.

Facts and Issue ☐ A father applied to have the mother's solicitor removed from the record on the ground of conflict of interest. ☐ The unwed parents of a child separated. They made an agreement which acknowledged paternity of the child and provided for limited contact between father and child. The agreement was drafted by the mother's solicitor and sent to the then-unrepresented father. The father consulted another solicitor. He then personally approached the mother's solicitor who, at the father's request, made a change to the draft agreement. The father then executed the agreement in the presence of the mother's solicitor who witnessed the father's signature. The father, and the mother's solicitor, disagreed on whether or not the mother's solicitor told him, before he executed the agreement, that the agreement was temporary only. In any event, the father subsequently applied for joint custody of the child.

Decision and Reasons ☐ Although the father never retained nor received any advice from the mother's solicitor, her solicitor was removed from the record. ☐ Handrigan J. wrote (in part, at paras. 16-18):

Rightly or wrongly, the … [father] believes that … [the association of the mother's solicitor] with him in respect of the execution of the … [agreement] places him in a conflict. He entertains this belief with such conviction that he has instructed his counsel to apply to me to direct him to withdraw from the matter. That belief will hang over the hearings of this matter like a pallor and if the … [father] is not satisfied of the outcome, no doubt it will stay with him as one of [the reasons], if not, the main reason why he did not "receive justice" from the court. I am not prepared to risk this happening. It will certainly do nothing for the repute of this court nor that of the administration of justice for this perception to exist.

But it is not simply the .. [father] or the court whose interests are at stake in this matter. There is in place an agreement of some kind between the parties as to the way in which at some point in the not too distant past they were prepared to settle the matters of custody and access with respect to the child. On its face it has been signed by both parties and is, at first blush, something that they both were prepared to accept. This was drafted at the instruction of the … [mother] by her counsel and signed by both parties in his presence. The matters of custody and access are all of what the … [proceedings] before me are about. It does not take much of a leap of imagination to think that the agreement will not have some relevance in these proceedings, whether for the … [father] who may want to distance himself from it or the … [mother] who may want to rely on it. In those circumstances, the *bona fides* of the agreement will be very relevant. The process of ferreting them out could easily touch upon the … [father's] relationship with .. [the solicitor]. It has even been suggested by counsel for the … [father] that … [the mother's solicitor] may have to be called as a witness on the hearing of … [this matter].

… the courtroom is a very unpredictable stage. There is no script and in the thrust and cut of examination and cross-examination, the evidence can lead down some very unexpected paths. This is as it should be. It is anathema to this process to be restricted by a concern about following one of those paths lest it lead to some place that the parties, or counsel, would prefer not to tread.

Granrude v. Granrude

[1998] S.J. No. 840 (Sask. Q.B.) (QL), Hrabinsky J., 15 December 1998

Facts and Issue ☐ A husband applied for an order removing the wife's solicitor from the record on the ground of conflict. ☐ The spouses separated. The husband consulted a solicitor for one and half hours and paid a fee of $250. The husband subsequently consulted two other solicitors.

Eventually he hired a fourth solicitor to represent him in separation-related issues. There was no evidence the husband had engaged in "tieing up" pre-eminent law firms. Meantime, the wife consulted two law firms before retaining a solicitor in a third firm. That solicitor was a partner of the solicitor whom the husband had consulted at a cost of $250.

Decision and Reasons ☐ The wife's solicitor was removed from the record. ☐ The solicitor affected had received confidential information from the husband attributable to the solicitor-client relationship which may pertain to the separation-related issues to be resolved between the husband and wife. Further, there was no evidence all reasonable measures were taken to ensure that no disclosure occurred between the affected solicitor consulted by the wife and that solicitor's partner who had earlier been consulted by the husband.

Harding v. Stevenson

[1998] O.J. No. 5400 (Ont. Ct. J. (Gen. Div.)) (QL), Beaulieu J., 23 December 1998

Facts and Issue ☐ A father applied to remove M as solicitor for the mother in a parenting proceeding. ☐ The mother and father were separated. The father was awarded interim custody of the child. "Permanent" custody of the child awaited trial. Solicitor M initially claimed to have been retained by the child. Thereafter, however, the solicitor began representing the father. The mother claimed that the solicitor could not represent the father due to conflict of interest.

Decision and Reasons ☐ Motion allowed. ☐ The previous retainer of solicitor M, under which the solicitor served as lawyer for the child, was connected to the current retainer with the father. The lawyer failed to rebut the presumption that confidential information was imparted in his meetings with the child under the earlier retention. The solicitor could have used confidential information obtained from the child, contrary to the child's best interests, in order to further the father's objectives.

3.2 Relationships With Clients - Conflicts Of Duty

3.2.2 Conflict not found

Prakash v. Jain

[1998] O.J. No. 412 (Ont. Ct. J. (Gen. Div.), Ottawa) (QL), Chadwick J., 29 January 1998

Facts and Issue ☐ A wife applied to remove from the record her husband's solicitor. ☐ The wife retained a solicitor in 1989 to represent her in proceedings before a Rent Control Board. During that retention, the solicitor may have learned some information relating to the cohabitation relationship between the wife and her husband. Many years later, the wife's solicitor in the proceedings before the Rent Control Board shared office space with a solicitor representing the wife's husband. The wife's former solicitor operated completely independently of the firm in which the husband's solicitor was practising.

Decision and Reasons ☐ Application dismissed. ☐ Although the wife's former solicitor may have learned some information relating to the cohabitation relationship between her and her husband, when he represented her before the Rent Control Board, cohabitation was only one factor in the determination of spousal support. Therefore, any information the wife's former solicitor might have obtained was unrelated to the current dispute between the parties.

"Opposing-Lawyer Spouses Not In Conflict: B.C. Court"

Daisley, Brad in: *The Lawyers Weekly* (Toronto: 28 April 2000), p. 1

[text]

[**Note:** *The applicant applied for an order to remove the solicitor acting for the parties who were suing the applicant. The ground for the application was that another member of the solicitor's firm was the husband of the applicant's solicitor.*]

Lawyers who find themselves opposite their spouses in litigation are not in a conflict of interest, B.C.'s appeal court says.

In a unanimous, three-judge decision, Justice Lance Finch refused to extend conflict of interest rules established by the Supreme Court of Canada in *Martin v. MacDonald Estate,* [1991] 1 W.W.R. 705, to married lawyers.

Law society rules prohibit a lawyer from disclosing confidential client information to anyone including a spouse, Justice Finch said, ruling that, in the absence of evidence to the contrary, it should not be presumed a lawyer will breach his or her professional duties.

"Where there is a clear rule against disclosure, and where the lawyer would run the risk of professional discipline for breach of confidentiality, I do not think any inference or presumption that a lawyer will share professional confidences with his or her spouse should arise."

3.3 Relationships With Clients - Personal

Sexual Relations With Clients

American Bar Association (Standing Committee On Ethics And Professional Responsibility) *Formal Opinion* "Sexual Relations With Clients" (Chicago: 06 July 1992)

A sexual relationship between lawyer and client may involve unfair exploitation of the lawyer's fiduciary position, and/or significantly impair a lawyer's ability to represent the client competently, … .

. . . .

Risks to the Attorney-Client Relationship that May Result from Sexual Relations.

The existence of a sexual relationship between lawyer and client may make it impossible for the attorney to provide the competent representation of the client that is ethically required. […] This may be so for several different reasons.

1. A Sexual Relationship May Deprive the Lawyer of Independent Judgment.

Emotional detachment is essential to the lawyer's ability to render competent legal services. One of the most important aspects of the attorney-client relationship is the attorney's duty to exercise independent professional judgment. […] Thus, Model Rule 2.1 [of the American Bar Association] states that when representing a client "a lawyer shall exercise independent professional judgment and render candid advice." […] The lawyer must evaluate the client's situation, objectively and reasonably, fairly considering all possible courses of action.

It can be difficult, however, to separate sound judgment from the emotion or bias that may result from a sexual relationship. A lawyer involved in a sexual and emotional relationship with a client may encounter particular difficulty in providing the "straightforward advice" which "often involves unpleasant facts and alternatives that a client may be disinclined to confront." Rule 2.1 comment. Because of a desire to preserve the relationship, the lawyer may "be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client." Id. Thus, a lawyer who engages in a sexual relationship with a client during the course of representation risks losing the objectivity and reasonableness that form the basis of the lawyer's independent professional judgment.

2. A Sexual Relationship Creates Risks that the Lawyer Will Be Subject to a Conflict of Interest.

One of the hallmarks of the legal profession is the obligation of a lawyer to exercise professional judgment solely on behalf of the client. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1482 (1982). A sexual relationship between the parties may hinder

the attorney's ability to meet this obligation. "It cannot be proper for a lawyer to represent a client when the lawyer's own interest may tempt him to temper his efforts to promote to the utmost his client's interest." ABA Comm. on Professional Ethics and Grievances, Formal Op. 132 (1935). Certainly the lawyer's interest in preserving the sexual relationship can rise to this level.

[Model] Rule 1.7(b) [of the American Bar Association] states that a lawyer shall not represent a client if the representation of the client may be materially limited by the lawyer's own interests. . . . . If the lawyer's interests in the relationship interfere with decisions that must be made for the client, the representation will have been impaired.

While it may be argued that such a conflict only arises in the special situations presented, for example, by divorce proceedings, the fact is that these conflicting interests can arise even in seemingly benign settings. For instance, although it is generally thought that the ethical concerns raised by a sexual relationship are not present in the commercial corporate setting, a sexual relationship with a corporate client's representative can be just as problematic as in other contexts.

In the corporate setting the lawyer's client is the corporation, not any individual employee. Model Rule 1.13(a). …. A potential conflict of interest [nonetheless] arises if the lawyer, engaging in a sexual relationship with a corporate client's representative, learns information which may rebound to the detriment of the sexual partner, but which should be reported to a higher authority.

Lawyers recognize how difficult it is to deal with such a situation in a representation free from a sexual relationship. When the corporate employee shares information with the company's lawyer and asks the lawyer either not to pass it on or pass it on anonymously, the corporate lawyer is conflicted enough in reconciling the lawyer's duty to the corporate client with the trust the corporate employee has reposed. Such a conflict can only be compounded when a sexual relationship is also involved.

A related danger resulting from the blurring of relationships and one where the lover becomes a participant adverse to the client is presented in divorce cases where the attorney engaging in a sexual relationship with a client may risk becoming an adverse witness to the client on issues of adultery and child custody. […]

3. A Sexual Relationship May Risk Unwarranted Expectations Regarding the Preservation of Confidences and Related Dangers.

A sexual relationship between the parties may also have the potential to blur the contours of the attorney-client relationship. Client confidences are protected by privilege only when they are imparted in the context of the attorney-client relationship. The courts will not protect confidences given as part of a personal relationship; except for that of husband and wife, there is no privilege for lovers. […] A blurred line between any professional and personal relationship may make it difficult to predict to what extent client confidences will be protected. Expectations of confidences will be forced to rest on ever shifting sands.

Conclusion

It is apparent that a sexual relationship during the course of representation can seriously harm the client's interests. Therefore, the Committee concludes that because of the danger of

impairment to the lawyer's representation associated with a sexual relationship between lawyer and client, the lawyer would be well advised to refrain from such a relationship. If such a sexual relationship occurs and the impairment is not avoided, the lawyer will have violated ethical obligations to the client. […]

The client's consent to sexual relations alone will rarely be sufficient to eliminate this danger. In many cases, the client's ability to give meaningful consent is vitiated by the lawyer's potential undue influence and/or the emotional vulnerability of the client. The lawyer may, therefore, be called upon in a disciplinary or other proceeding to show that the client consented, that the consent was freely given based on full and reasonable disclosure of the risks involved, and that any ensuing sexual relationship did not in any way disadvantage the client in the representation; that is, the attorney's judgment remained independent, the representation proceeded free of conflicts, the privilege was not compromised and the other ethical obligations to the client were fulfilled.

[**Notes:** (i) *Footnotes omitted*. (ii) *Peter Geraghty, Director, Ethicsearch, ABA Centre for Professional Responsibility, in an e-mail to the writer on 16 June 2000, states that "[t]here are now 10 [United States] jurisdictions that have rules regulating lawyer-client sex. These are: California, Florida, Iowa, Minnesota, Oregon, New York, North Carolina, Utah,, West Virginia, and Wisconsin*.]

3.4 Relationships With Clients - Special Cases

3.4.1 With child

Clark v. Alexander
953 P.2d 145 (Wyo. 1998)

On an appeal from a parenting dispute decision, the appeal court considered duties and performance standards for attorneys appointed as guardian *ad litem* and counsel; noting that "the costs attendant the appointment of both an attorney and a guardian *ad litem* would often be prohibitive and would in every case conscript family resources better directed to children's needs outside the litigation process." (i) The guardian ad litem/attorney was not bound by the child's wishes; rather was to address the client's best interests. If the guardian *ad litem*/attorney finds them divergent, both must be known to the court. (ii) The guardian *ad litem*/attorney can divulge confidential communications to the court, if deemed necessary; with such disclosure being explained, where possible, to the child; (iii) The guardian *ad litem*/attorney is not to participate as a witness; focussing rather on performing as counsel; with any resulting recommendations being based on evidence adduced at trial by the parties. (iv) If the guardian *ad litem*/attorney chooses to prepare a report that offers a position on the parenting litigation, the report can be distributed to the parties and, only with their consent, filed with the court. Although, under these criteria, the trial court erred in permitting a guardian *ad litem*/attorney to file a report, without consent of the parties, and to testify, these errors did not taint the parenting decision, which was affirmed.

Betz v. Betz

575 N.W.2d 406 (Neb.1998)

[text]

The trial court sustained an objection to an attorney acting as guardian *ad litem* of a child in a parenting proceeding, giving an opinion about the appropriate custody arrangement, and filing the attorney's report written in support of the opinion. The guardian *ad litem* had participated in the trial by cross-examining witnesses of the parties. The court felt the attorney-client relationship between attorney and child would be undermined. The court offered the following views on the position of the guardian *ad litem*: (i) A guardian *ad litem* is not the same as an attorney for the child and thus should not, as such, participate (i.e., not file pleadings, present evidence, or examine witnesses). Any report of the guardian *ad litem* should account only for his (her) activities in that capacity. (ii) If the guardian *ad litem* feels counsel is required, s(he) should ask the court to appoint counsel. (iii) No one should serve both as guardian *ad litem* and counsel.

3.5 Relationships With Third Parties

3.5.1 Client's represented spouse

"Ethical Concerns Relating to Communications with Represented Parties"

Kleiman, Michael L. and Hofstein, David N. in: (1999), 33 Fam. L.Q. 349, at pp. 349, 350, 351, 354, 355, 356, 357, 360

[text]

While client to client contact is permitted, various commentaries, the case law, and ethics opinions disagree as to whether the attorney can encourage his or her client to speak directly to a represented party, and if so, whether the lawyer can indirectly "participate" in the conversation.

. . . .

The primary purpose of the ethical rules prohibiting contact with represented persons is to protect the interest of those individuals during the course of the legal process:

> The anti-contact rule is meant to (1) prevent unprincipled attorneys from circumventing opposing counsel to obtain careless statements from adverse parties, (2) protect the integrity of the attorney-client relationship, (3) prevent the inadvertent disclosure of privileged information, and (4) facilitate settlement by channelling disputes through lawyers familiar with the negotiation process.

. . . .

…. A more difficult question is whether a lawyer is violating the rules prohibiting contact with a represented party by advising his or her client to communicate directly with the other represented party, and the extent to which, if at all, the lawyer can "script" the communication.

. . . .

… in *Wilson v. Brand S. Corporation*, … the client informed his lawyer that he wanted to negotiate directly with the opposing party who was represented by counsel. The court held that it was appropriate for the lawyer to advise his client that, while the lawyer could not communicate with a represented party, the lawyer could not prevent his client from communicating with the party directly.

Nevertheless, other decisions and opinions suggest that counsel may be violating the rules prohibiting communication with a represented party by encouraging, or failing to discourage, a client speaking directly to the other party. For example, in *Miano v. AC & R Advertising*, the court indicated that:

> Where a client directly asks his or her attorney whether he should approach a represented adversary, the attorney *may not* ethically recommend or endorse such action. Nevertheless, according to the New York City Bar Association Opinion (1991-2), the lawyer may inform the client that such communication is not prohibited as long as the client independently decides to undertake the contact. [Emphasis added.]
>
> A recent North Dakota Opinion stated that:
>
> A lawyer whose litigation client, without any encouragement from the lawyer, is making direct contacts with a represented opposing party is under no duty either to demand that a client stop or to withdraw.

This opinion might be interpreted as implying that it is appropriate for represented parties to communicate only if neither of the lawyers suggested that the clients do so.

. . . .

If a lawyer is permitted to encourage his or her client to communicate directly with the other side who is represented, the next issue is the extent to which, if any, the lawyer can provide guidance as to what the client should say. Some of the opinions discussed above suggest that the lawyers should play no role whatsoever in the actual communication between clients. California Opinion 1993-131 suggests that a lawyer should not use the client as a conduit nor script the conversation a client should have with the other represented party. However, the opinion stated that the lawyer may "confer with the client as to the strategy to be pursued, the goals to be achieved and the general nature of the communication as long as the communication originates with and is directed by the client." In New York City Bar Association Opinion 1991-2, the Committee directed that, should a client independently initiate contact with the other party, "the lawyer may not assist, direct, or otherwise participate in the conversation without the consent of opposing counsel." San Francisco Opinion 1985-1 stated that it was improper for the lawyer to use his or her client as an indirect means of communicating with the adverse party. Likewise, Oregon Opinion 1997-147 indicated that the lawyer in allowing the client to communicate directly with the other side, may not use the client as a vehicle to relay information from the lawyer.

. . . .

In family law cases, the successful practitioner will appreciate that effective direct communications between the parties may help move the cases toward a prompt resolution which is satisfactory to both of the parties, whether relating to economic issues or issues relating to the custody of minor children. Family lawyers should encourage such contact and further have a duty to explain the law and provide competent advice, but must be careful not to cross the line by knowingly using the client as a vehicle to avoid the ethics rules that prohibit direct communications with third parties.

[**Note:** *Footnotes omitted*.]

3.5 Relationships With Third Parties

3.5.2 Law firm of client's spouse

"Lawyers & divorce: protecting the partnership from spousal claims"

Mucalov, Janice. *National* (Ottawa: Canadian Bar Association, March-April 1999), at pp. 33-35

[text]

Must a firm disclose its financial records?

When a couple splits, the two members generally share the value of the assets accumulated during the marriage, plus any increase in the value of pre-owned property brought into the relationship. A partner's interest in the law partnership is a family-owned asset [in some Canadian jurisdictions], just like her house, her Volvo and her RRSPs. A divorcing lawyer's spouse therefore has a one-half interest in the lawyer's partnership interest [in some Canadian jurisdictions].

"To value the asset, you need information about the partnership", says Ruth Mesbur, a Toronto family lawyer who is secretary to the national Family Law Section of the CBA and past chair of the section's Ontario branch.

"What would the partner be entitled to if he or she withdrew from the partnership on the date of separation?" she asks. "What's his or her share of the capital the partner has invested? Of the work in progress? Of the accounts receivable?" The partner's draw is also relevant for determining how much support the spouse and children should be paid.

Another financial titbit of interest, applicable to both divorcing associates and partners, is the amount of club dues, car allowance and other benefits paid by the firm. "These perks have an impact on income", says Mesbur. "If the firm is paying $3,000 or $4,000 in club dues, that should be included when calculating the lawyer's income for the purpose of the amount of support he or she can pay."

Most firms generally have little problem disclosing their partnership agreements, says Mesbur, who has represented many Toronto lawyers in untying the knot. "Where you run into difficulties is in obtaining the financial statements of the firm".

"The greatest concern for a law partnership when a partner divorces is having to produce their financial statements, in the event the financial performance of the firm is relevant to valuing the particular partner's interest," says Jeff Kay, a Vancouver family lawyer who practises with Farris, Vaughan, Wills & Murphy. "It's simply a confidential matter for firms. They're very reluctant to disclose their billings, expenses and related matters to other lawyers, the public and the judge."

Often, these records are produced on the condition that they be kept confidential. But as Kay points out, human nature is what it is. "Lawyers tend to gossip. Accountants tend to gossip."

Kay has often received the complete financial statements - including the incomes of all other partners in the firm - when acting for a divorcing partner's ex. "I'd hate to think other lawyers in this city would be aware of my income," says Kay. He's even aware of at least one reported case where a partner's income was detailed in the judgment.

With large firms, a letter from the controller or office administrator detailing the divorcing partner's capital contribution, history of income, partnership points and such like is normally acceptable to opposing counsel, and avoids the problem of divulging information about the firm's performance and that of other partners. "It's routine for them," says Mesbur. "There's little likelihood that the partner in question can manipulate the records." If necessary, a sheet is sometimes appended showing the draws for each partner, but with all partners' names blanked out except for the partner involved.

Small firms, however, are not accorded the same luxury of privacy. "With a small firm, say two or three lawyers, I absolutely will be wanting to look at the complete financial picture", says Mesbur. "There's not the same objectivity as with a big firm."

"I'm looking for evidence of manipulation - for example, holding back billings or the collection of receivables, " she notes. "Also, who are the salaries paid to? To the new girlfriend? And what's the level of vehicle and entertainment expenses, which are often a personal matter? Partners often write off huge amounts, which are accepted by Revenue Canada, that artificially deflate the real income and [are] relevant to the amount of support that can be paid".

To avoid the problem of revealing all, and yet still be able to satisfy the other side, the managing partner sometimes swears an affidavit concerning the financial particulars of the divorcing partner, notes Judy Boyes, a family law practitioner and partner with Turnbull Boyes in Calgary.

How else are the lawyer and firm affected?

In theory, a partner's share in the partnership assets is exigible. If the partner can't come up with the money required to satisfy the spouse's share of the family property, the spouse could go after half of the partner's interests in the firm's capital, accounts receivable and other assets. The partner would therefore have to find some way to top it back up. But this scenario is unlikely.

Ron Profit, chair of the CBA's national Family Law Section and a family lawyer with Patterson Palmer Hunt Murphy in Charlottetown notes that in Prince Edward Island and elsewhere [in some other Canadian jurisdictions], provincial legislation prohibits disrupting a business to satisfy the claimant's award, unless there's no other reasonable alternative.

More likely, your firm may find itself the subject of a garnishee or attachment order if the divorce partner fails to make his or her support payments. "I expect this would be more of an embarrassment for the partner though." Mesbur observes.

Perhaps the worst that can happen to a firm, suggests Kay is that the managing partner is subpoenaed to give evidence in court about the divorcing partner's income trend, the firm's financial performance and the inner workings of the firm. "I've had cases where I've had to consider subpoenaing other partners because its been necessary to get a real honest look" he says. To date, however, no case has yet required him to take the step of grilling a fellow member of the Bar on such sensitive issues.

Mesbur also notes that it's possible the divorcing partner could become bankrupt. But many partnership agreements provide for this contingency, requiring the unfortunate soul to leave the partnership.

Is it okay to represent yourself?

"You know the old saying", says Boyes. "A lawyer who acts for himself has a fool for a client". That is particularly true when it comes to handling your own marriage breakdown. While she agrees it may be fine to fend for yourself if the break is clean and simple, she doesn't recommend going it alone if you're feuding over contentious issues such as who can use the summer cottage and how much support to pay.

"I've seen lawyers act for themselves with bad results", adds Kay. "You lose your objectivity, and the court is suspicious of a lawyer acting for oneself." He cites as an example one lawyer who managed to persuade his wife to sign a marriage contract without obtaining independent legal advice. Later, when they separated, the lawyer acted for himself. The marriage agreement was set aside. "The result might have been the same if he'd retained another lawyer to represent him," suggests Kay, "but it might not have gone so badly."

Is a marriage contract a good idea?

A marriage contract can protect you and your firm by providing that your partnership interest doesn't form part of your net family property. If your interest is excluded from the pot, then there's no need to value your interest and have your firm's financial statement produced.

"An agreement does make it easier for a partnership and its partners", says Profit. "It may put other partners' minds at ease. You don't have to get into a legal dispute between one of your partners and his or her spouse."

If, however, you have an outstanding loan that offsets your capital contribution (as many partners do), your partnership interest may not be all that significant. "If your partnership interest is your only real asset apart from your home and some savings, I don't think I'd bother with a marriage contract," reflects Mesbur.

You must also consider the willingness of your spouse to sign such an agreement. "Why in the world would any wife waive her right to claim against her husband's capital contribution?" Boyes wonders. "For her to waive any claim to the value of what he puts into the partnership is insane. I'd have a real problem advising her to sign it."

Still most family lawyers acknowledge that a marriage contract can be a wise option for anyone. not just partners. in certain situations:

- If you have significant assets that you bring with you into the marriage, so there's a real imbalance between what you own and what your spouse owns;
- If you own substantial shares in a family business that's taken years to build up, and you want to protect any growth in the business; or
- If you've received or you expect to receive a sizeable inheritance.

A fourth reason is if you've experienced a bad divorce and wish to avoid history repeating itself. "I've been involved in drafting many marriage contracts for lawyers on their second go-around who've been stung once and don't want to go through it again," Kay says.

In a similar vein, he has also seen shareholder's agreements of management companies that run a law firm provide that the non-lawyer shareholders, who are often the partners' spouses, agree to transfer back their shares to the management company upon divorce.

The downside to a marriage contract or similar provision in a shareholder agreement? "Most people don't want to think about breaking up when they're in love", observes Profit.

Also, while having a professional corporation (PC) run the law practice can make the issues more complicated, it won't protect the lawyer in the long run. "You make a claim against the shares of the PC," says Boyes. "It just adds another layer, but you're still entitled to complete disclosure of the financial records for that person's personal corporation."

3.5 Relationships With Third Parties

3.5.3 "Second Opinion" counsel

"Ethical Issues in Lawyer-to-Lawyer Consultation"

American Bar Association (Standing Committee On Ethics And Professional Responsibility) *Formal Opinion 98-411* (Chicago: 30 August 1998).

[text]

Despite their indisputable value to practitioners of every experience level, consultations with colleagues can be risky if undertaken without careful consideration. This opinion is not intended and should not be interpreted to discourage the practice of consulting between lawyers. However, both the consulting lawyer and the consulted lawyer should proceed with caution. A consulting lawyer must be careful to avoid disclosing client information, especially privileged information, without permission and in circumstances where the information will not be further disclosed or otherwise used against the consulting lawyer's client. The consulting lawyer must also exercise caution in consulting with lawyers who are likely to represent adverse interests. Although the consultation does not create a client-lawyer relationship between the consulting lawyer's client and the consulted lawyer, the consulted lawyer is obligated to protect information she receives that she has agreed explicitly or implicitly to keep confidential. Moreover, if the obligation to protect that information will materially limit her ability to represent her own clients, she can proceed with those representations only with consent. We believe these risks can be minimized if the lawyers take some or all of the following measures:

1. The consultation should be anonymous or hypothetical without reference to a real client or a real situation.

2. If actual client information must be revealed to make the consultation effective, it should be limited to that which is essential to allow the consulted lawyer to answer the question. Disclosures that might constitute a waiver of attorney-client privilege, or which otherwise might prejudice the interests of the client must not be revealed without consent. The consulting lawyer should advise the client about the potential risks and consequences, including waiver of the attorney-client privilege, that might result from the consultation.

3. The consulting lawyer should not consult with someone he knows has represented the opposing party in the past without first ascertaining that the matters are not substantially related and that the opposing party is represented by someone else in this matter. Similarly, a lawyer should exercise caution when consulting a lawyer who typically represents clients on the other side of the issues.

4. The consulted lawyer should ask at the outset if the consulting lawyer knows whether the consulted lawyer or her firm represents or has ever represented any person who might be

involved in the matter. In some circumstances, the consulted lawyer should ask the identity of the party adverse to the consulting lawyer's client.

5. At the outset, the consulted lawyer should inquire whether any information should be considered confidential and, if so, should obtain sufficient information regarding the consulting lawyer's client and the matter to determine whether she has a conflict of interest.

6. The consulted lawyer might ask for a waiver by the consulting lawyer's client of any duty of confidentiality or conflict of interest relating to the consultation, allowing for the full use of information gained in the consultation for the benefit of the consulted lawyer's client.

7. The consulted lawyer might seek advance agreement with the consulting lawyer that, in case of a conflict of interest involving the matter in consultation or a related matter, the consulted lawyer's firm will not be disqualified … [provided] the consulted lawyer "screens" herself from any participation in the adverse matter.

3.6 Promotion

3.6.1 Marketing

"B.C. Law Society slaps muzzle on aggressive ads"

Hasselback, Drew in: *The Financial Post* (Toronto: 12 May 2000)

[text]

The Law Society of British Columbia has issued a new rule to lawyers designed to muzzle barristers who use "aggressive" ads to attract clients.

The Law Society, the self-regulating organization that governs lawyers in the province, now says advertising must not "state or imply that the lawyer is aggressive".

Karl Warner, president of the society, said yesterday the rule is designed to ensure advertising is "dead accurate" and not misleading, while still permitting lawyers the freedom of speech.

"We don't sell aggression. We sell dispute prevention and dispute resolution", Mr. Warner said.

The new rule upsets T. …, a British Columbia personal injury lawyer whose advertisements in the Vancouver Yellow Pages feature a sketch of a leg in a cast, a drawing of a growling grizzly, and the motto "like a grizzly protecting its young."

But T. …, whose aggressive style earned him a one-year suspension from legal practice in 1974 for professional misconduct, said he will comply with the rule, even though he disagrees with it.

He has already agreed to stop running the Yellow Pages ad. "I've raised the white flag of surrender", he said. I'm intimidated by the law society. They can take away my license to practise law."

3.6 Promotion

3.6.2 Media

"What Can Lawyers Say In Public"

Brown, David M. in: (1999), 78 Can. Bar Rev. 283, at pp. 285; 302.

[text]

Today lawyers play a legitimate role in informing the public through the media, about the legal process and cases before the courts, but such liberty comes with rules and with risks. One risk is that by resorting too frequently to the media to discuss cases lawyers may jaundice the public's perception of lawyers and the fairness of the legal system. A poll conducted by the American Bar Association in 1997 showed that 58% of the American public believes that it is never appropriate for lawyers to use the media to influence public opinion about pending cases, and 55% said that the large degree of publicity some cases received had a negative impact on their view of lawyers.

A second risk involves lawyers exposing themselves to legal action for making statements to the media about a case - a statement by a lawyer may contravene the laws of defamation, give offence to a court or run afoul of provincial rules of professional conduct. Several recent libel cases involving lawyers graphically illustrate that any contact by a lawyer with the media must be done with caution and due consideration for the lawyer's personal liability.

Third, contact with the media may risk harming the client's case. As a matter of professional responsibility a lawyer always must be satisfied that any communication with the media is in the best interests of the client and within the scope of the retainer. Many judges do not react well to counsel whom they perceive are trying their cases in the media, and a client's interests may suffer as a result of media contact.

. . . .

While most provincial rules of professional conduct now recognize that there are occasions on which lawyers may make statements to the media about their cases, both current and former, the courts continue to hold lawyers to high standards of responsibility when making such statements. As the *Hill* case [(1995), 126 D.L.R. (4^{th}) 129 (S.C.C.)] demonstrates, the timing and location of a statement are just as important as its content in assessing its permissibility and lawfulness. *Stewart* [(1997), 150 D.L.R. (4^{th}) 24 (Ont. Gen. Div.)] requires an exacting precision and scrupulousness from lawyers when commenting on past cases, and *Botiuk* [[1995] 3 S.C.R. 3] appears to place a higher standard of care on lawyers even when making statements on matters not related to cases. Nor have the courts been prepared to expand significantly the scope of qualified privilege available to protect the content of lawyers' statements, Lawyers therefore must continue to approach the making of any public statements about cases with a caution approaching reserve, prudence and a strong dose of common sense.

. . . .

[**Note:** *Mr. Brown's incisive commentary incorporates an excerpt from a 1988 address by former Chief Justice of Ontario, Honourable Charles Dubin, including the following points*.

> *I am puzzled by what appears to be a practice these days of advocates thinking that in a case which he or she is conducting, you can leave the courtroom, throw off the mantel of responsibility, of independence, and take the case to the public. Trials are not like elections. They are not to be fought or won in the town hall or in the media. The advocate is not the mouthpiece of his client, nor the press agent, nor an advertising agency. When an advocate undertakes a case, he or she carries the responsibility of an advocate throughout, inside the courtroom and out. And I am concerned and worried when I see a practice developing in this province of lawyers holding press conferences announcing the commencement of an action and announcing judgment at the same time - a commitment to the client that the case is won … It unduly enhances the expectations of his client who will be puzzled after a commitment of victory goes awry. It alarms the opponent who will want his or her advocate to respond in kind and have a public debate. The advocate knows that what is said outside the courtroom will not and should not affect in any way the trial.*
>
> *… The advocate who takes his case to [the] public does not advance the client's case and indeed we intuitively subjectively hurt him because the court might be more hesitant to accept the submissions of an advocate, accept his frankness, his candour and credibility, if outside the court room he has prejudged the matter and made a commitment to his client.*]

3.7 Rendering Services

3.7.1 Generally

"The Difficult Client"

Epstein, Philip M. "Solicitors' Negligence Problems In The Nineties" (unpublished, November, 1994), at pp. 7-8

All of us from time to time will have difficult clients. Difficult clients should be a warning to you. If they are not satisfied, they will not pay your account. If you attempt to assess or sue for your account, they will counterclaim and plead that you were negligent in the handling of their dispute. The best way to deal with the difficult client is to make sure that you do everything in writing and confirm your instructions and your advice. If at all possible when essential matters are being discussed, it is useful to have a witness to the meeting who will keep notes and place the notes in the file. You must be loss-prevention conscious. If the client is difficult while you are acting for him or her, then you must foresee that the client will be even more difficult at the end of your solicitor and client relationship. Protect yourself. Keep memos of meetings and telephone calls. Do not carry out instructions that you do not think help the client's position.

That is particularly so in the family law field where clients are very quick to give instructions that in the long run are not for their benefit. If the client will not take your advice, get rid of the client. You are not a mouthpiece. You are a professional who has the right to bring your view forcefully to bear. If the client is not interested in accepting your views, that should be a warning sign that trouble lies ahead. If the client is not going to accept your advice and you are going to continue to act, then you must make it abundantly clear, in writing, that such an event has occurred. If lawyers did things in writing and kept memos of what advice they say they actually gave to the client, my guess is that about one-third of the claims against lawyers would be eliminated.

This is particularly so in the area of offers to settle. It is essential that clients make offers in the course of litigation, but the client should sign those offers and sign any rejection of offers and you should have a covering letter indicating that the offer was made with the authority of the client, or rejected with the authority of the client. Clients must be warned, in writing, about the consequences of not making an offer and what the cost consequences are if the parties are unsuccessful at trial.

3.7 Rendering Services

3.7.2 Confidentiality

"Solicitor-Client Privilege and Litigation Privilege in Civil Litigation"

Watson, Garry D. and Au, Frank in: (1998), 77 Can. Bar Rev. 315, at pp. 316, 346.

[text]

It is well established that while *solicitor-client privilege* protects confidential communications passing between client and lawyer for the purpose of obtaining legal advice, it does not extend to nor protect communications between third parties and the lawyer (e.g. expert reports obtained by the lawyer to assist in providing legal advice to the client). By contrast, the related but distinct *litigation privilege* protects materials brought into existence for the dominant purpose of pending or anticipated litigation, and applies principally to communications received from third parties (e.g. expert reports).

. . . .

A related problem, which also bears on the scope of privilege, has been caused by the fuzzy distinction between "agents" and "third parties". The fuzziness is unfortunate, as the distinction leads to crucial differences in results. If X (a third party) communicates with a lawyer as *the client's agent*, the communication is one between the client and the solicitor, and the communication is covered by solicitor-client privilege if made in confidence for the purpose of obtaining legal advice for the client. By contrast, if X's communication is that of a mere *third party*, rather than an agent, solicitor-client privilege will never apply (though litigation privilege will apply if the dominant purpose of the communication is for actual or contemplated litigation).

Airst v. Airst

[1998] W.D.F.L. 1120 (Ont. Gen. Div., 08 January 1998)

Facts and Issue ☐ Pursuant to order for a joint evaluation report regarding certain matrimonial assets, the husband gave the valuator a copy of a note he had written to his current counsel and a copy of a letter to him from his former counsel, both relating to the litigation. The disclosure to the evaluator was apparently inadvertent. The valuator did not use either document in making his report. ☐ The wife applied for a ruling whether privilege governing the two documents had been lost, thus entitling her to access. The spouses agreed the disclosure was inadvertent.

Decision and Reasons ☐ Application denied. ☐ The documents were communications between solicitor and husband client. Thus, they were presumptively privileged. Subsequent disclosure of them by the husband was limited in scope; i.e., by the husband to the valuator providing the joint evaluation report - a person retained in a confidential capacity. Although the contents of the documents were unrelated to the evaluator's work, thus had not been used by him, release of the two documents would afford the wife unfair advantage by revealing the tactical approaches previously adopted by the husband in the matters outstanding between him and his wife.

Watkins v. Faught

[1999] N.S.J. No. 239 (N.S. Sup. Ct.) (QL), Gruchy J., 02 July 1999

Facts and Issue ☐ The Plaintiff sued her former solicitor for negligence in representation of her in a divorce proceeding. An issue of solicitor-client privilege arose. ☐ She alleged her former solicitor had failed to advise her about certain pension benefits to which her now-former husband was entitled. Counsel for her former solicitor located evidence in a Family Court file to the effect that the Plaintiff's former solicitor knew of, and had advised the Plaintiff about, her now-former husband's pension benefits entitlement. Counsel for the Defendant (i.e., the Plaintiff's former solicitor) applied for pre-trial discovery of that material. Did solicitor-client privilege preclude production of the material in the family court file?

Decision and Reasons ☐ No. ☐ Solicitor-client privilege had been impliedly waived by the Plaintiff in her pleadings against the Defendant whereby the state of the Plaintiff's knowledge of the matters at issue in her civil proceeding against her former solicitor became relevant. Therefore, a consideration of the advice obtained by the Plaintiff from the Defendant, her former solicitor, is relevant and privilege had therefore been impliedly waived.

"Duty to Report Child Abuse"

Bessner, Ronda in: (1999-2000), 17 C.F.L.Q. 277, at pp. 287-288.

[text]

Reporting provisions in Canada and the United States deliberately set the degree of suspicion for reporting at a low threshold to encourage persons to report. The ultimate objective is to protect as may children as possible from abusive acts. Some statutes use words such as "reasonable grounds" or "reasonable and probable cause", which connote an objective standard. Others resort to subjective language with terms such as "knowledge", "believe", or "suspect". It has been argued by some that an objective standard offers greater protection to children at risk of abuse and facilitates the enforcement of penalties for failing to report.

In Saskatchewan, Quebec, and the Yukon, "reasonable grounds to believe" is the test employed in the child abuse reporting provisions. In Alberta, the standard is a combination of subjective *and* objective terms: "every person who has reasonable and probable grounds to believe and believes" is required to report. By contrast, the legislation in Prince Edward Island contains a disjunctive subjective/objective standard: "every person who has knowledge or has reasonable and probable cause" to suspect is required to report the abuse.

The Northwest Territories, Nova Scotia, Ontario, and Newfoundland use different statutory language for professionals and other members of society. The professional in Newfoundland must report when she or he has "reasonable grounds to suspect that a child has been, is or may be in danger" of abuse. By contrast, other persons who "have information" that a child is at risk of abuse are under a statutory obligation to report. Such language is used in the Northwest Territories *Child Welfare Act* and the Nova Scotia *Child and Family Services Act*. In Ontario, the test that triggers the duty to report for professionals is "reasonable grounds to suspect" while other persons who reside in the province may report if they "believe on reasonable grounds" that a child is or may be in need of protection. Also, professionals in Ontario, by contrast to members of the public, are required to report acts of abuse perpetrated on the child in the past. It is noteworthy that in new legislation expected to be proclaimed in the upcoming months, both professionals in Ontario and other persons will be subjected to the same standard, namely, "reasonable grounds to suspect".

[**Note:** *Footnotes omitted*.]

"Legal Ethics and the Internet: Ethical Considerations in Electronic Communications Between Attorneys and Clients"

Nelson, Ronald W. in: (1999), 33 Fam. L.Q. 419, at pp. 432-433

[text]

In protecting attorney-client communications, the attorney has at least two separate interests to guard: the interest to safeguard the confidences of a client so that confidence cannot be used against the client in litigation or other matters adverse to the client's interest, and to safeguard any communications so the client is not subject to ridicule, embarrassment or other adverse societal reactions. In the former, the client is protected although criminal means were used to obtain protected attorney-client communications. In the latter, the duty of the attorney is to take those actions reasonably necessary to protect the client against disclosure of confidences related to the attorney by whatever means that disclosure is accomplished - inadvertence or criminal behaviour - so long as it could reasonably be anticipated such disclosure may occur.

1. Think Before Clicking

…, by far the most common and most easily avoided breach of e-mail security is disclosure of attorney-client communications by inadvertently sending an e-mail to the wrong recipient, to

the client or another person not meant to receive the communication, or to an entire list of recipients (either by copy or listserv). Such inadvertent disclosures can easily be avoided by simply checking the e-mail address to make sure it is correct and that only that person or those persons *intended* to receive the e-mail are including on the "send", "copy", or "blind copy" line. Attorneys should be particularly careful not to reflexively click the "reply" button without carefully checking the names and e-mail addresses of all those who will receive the message. More than one message has been inadvertently sent to a mail list by such unthinking actions.

2. Notice to Recipient of Risks Inherent In E-mail Communications

To this end, it is recommended that *at a minimum* any e-mail communication to a client contain a standard notice to recipient indicating (1) the confidential nature of the communication, (2) that if the communication is not received by the intended recipient, the message should not be read and should be returned to the sender, (3) e-mail communications may not be secure and that if any such unsecure message is sent, the contents may be viewed … [by] anyone viewing the e-mail. Such a notice *should* be at the head of the e-mail to alert any recipient *before* the e-mail is read. Although such a notice is often irritating and bothersome, in dealing with protection of confidential communications the intent is to raise awareness, rather than promote ease of use. Such a notice may be in the following form:

> IMPORTANT NOTICE TO E-MAIL RECIPIENTS:
>
> 1. DO NOT read, copy or disseminate this communication unless you are the intended addressee. This e-mail communication contains confidential and/or privileged information intended only for the addressee. Anyone who receives this e-mail by error should treat it as confidential and is asked to call (collect) Rose & Nelson at (913) 469-5300 or by e-mail: ronels@bigfoot.com; or by fax: (913) 469-5310.
>
> 2. This e-mail transmission may not be secure and may be illegally intercepted. Do not forward or disseminate this e-mail to any third party. Unauthorized interception of this e-mail is a violation of federal law.
>
> 3. Any reliance on the information contained in this correspondence by someone who has not entered into a retainer agreement with ROSE & NELSON is taken at the reader's own risk.
>
> 4. The attorneys of ROSE & NELSON are licensed to practice law ONLY in Kansas and do not intend to give advice to anyone regarding any legal matter not involving Kansas law.
>
> **********
>
> THIS ELECTRONIC COMMUNICATION IS PRIVILEGED & CONFIDENTIAL

3. Signing and Encryption of E-mail Communications

Various methods of securing e-mail communications are available depending on the need for security and the level of security desired.

a. Privacy/encryption: ensures that only the desired recipients can read the message. The e-mail message is encrypted in such a way that only the person with a proper "decryption key" may "unlock" the encryption allowing the information contained therein to be read.
b. Message integrity: guarantees that the message sent is exactly the same one received.
c. Authentication: guarantees that the originator of the message is really the person they purport to be. This security service may be combined with "message integrity" to prevent forgery of e-mail communications.
d. Nonrepudiation: a protocol by which a person may be proven to have sent an e-mail message although they claim they did not send the message.

[**Note:** *Formal Opinion No. 99-413 of the American Bar Association's Standing Committee On Ethics And Professional Responsibility, in 1999, concluded that "e-mail communications, including those sent unencrypted over the Internet, pose no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy*."]

3.7 Rendering Services

3.7.3 Withdrawal and termination

"Don’t Take Their Guff"

Chanen, Jill Schachner in: (1999) ABA Journal (Nov.), at pp. 94-95.

[text]

It’s always easier not to take on a problem client than to fire one. So how do you know which clients are going to be trouble before you agree to represent them? Here are some warning signs:

- They call you numerous times before you agree to represent them.
- They call you their saviour.
- They don’t want to give you a retainer.
- You are their third or fourth attorney.
- They take copious notes or tape record you during an initial meeting.
- They miss their first appointment with you.

. . . .

Jay Foonberg, a Beverly Hills, Calif., lawyer who wrote *How to Start and Build a Law Practice* , says … practitioners often put up with bad client behavior because they do not want to admit failure. He adds that some lawyers are so hungry for a fee that they are willing to endure intolerable behavior. Some also fear that terminating a bad client relationship will result in a malpractice claim or a disciplinary action.

But hunger or fear should not paralyze solo and small-firm practitioners, Foonberg says. Bad clients can damage a lawyer’s practice, staff, finances and personal life.

… Foonberg advocates terminating deteriorating client relationships before they become professionally or personally destructive. "You can lose about 90 percent of your aggravation by losing 5 percent of your fees," he says.

How a lawyer terminates a client relationship is important, Foonberg cautions. Soured attorney-client relationships are a leading cause of meritless malpractice suits and disciplinary complaints.

"Firing a client is always awkward. It's like firing someone else or breaking up with someone," says Mary L.C. Daniel, a solo practitioner in Winchester, Va.

Daniel says she writes the client a short letter that clearly states she is ending representation. In certain cases she explains why. One time, she told a client she could no longer represent him because she knew he had perjured himself in a disposition. Other times she will offer a generic explanation, especially if feelings are already inflamed.

Foonberg takes responsibility for the relationship, telling undesirable clients he isn't the right lawyer for them. "Do it in a nice way," he says. "Tell them perhaps you can help on another matter in the future."

By keeping relations with the client friendly, there is less of a chance of a possible suit or disciplinary claim, says solo Bruce Dorner of Londonderry, N.H., chair of the ABA Law Practice Management Section's Solo and Small Firm Division.

"I'm known as a great negotiator," he says. "I can settle most cases. Occasionally, I have clients who start off talking nice, then get into an obnoxious litigation mode. They want to fight for the sake of the fight. … I tell them honestly that I'm not the best guy for that approach and suggest they might be better served by another attorney whom I'm pleased to recommend."

Co-operation also may help reduce antagonistic feelings or suspicions lingering in the client's mind, Foonberg adds.

Dorner suggests getting a receipt from clients when they have taken possession of their files and other personal items. And, he says, send a polite letter confirming that.

In some cases, lawyers may even want to consider refunding clients' fees, especially when little time has been invested, Dorner suggests.

Doing so can be a lawyer's sweetest reward. Says Foonberg: "I say to myself, 'This is the client from hell. I don't need the money.'" Then he happily puts a check in the mail. And breathes a sigh of relief.

4.0 PROCEEDINGS DERIVING FROM PROFESSIONAL OR LEGAL RESPONSIBILITY

4.1 Discipline

Miket v. Miket

[1998] W.D.F.L. 1206 (Sask. Q.B., 30 September 1998)

Facts and Issue ☐ A defendant wife to matrimonial proceedings complained, by letter, to the Law Society about the plaintiff's lawyer. In the letter, the defendant made an allegation against the plaintiff husband; to the effect the plaintiff had sexually assaulted the son of the defendant and plaintiff. The plaintiff husband took action for defamation. ☐ The defendant wife applied to strike the claim on the ground it did not disclose a reasonable cause of action.

Decision and Reasons ☐ The application was granted. ☐ Absolute privilege applies to statements made in the course of a quasi-judicial proceeding; i.e., before the Law Society, a tribunal exercising judicial functions when dealing with a professional misconduct complaint. The absolute privilege extends to statements in documents incidental to the proceedings; even if the statement is entirely irrelevant to the proceedings, and the person to whom the statement refers is not party to those proceedings.

"When the Law Society is an ass"

Benedet, Janine. *The Globe And Mail* (Toronto: 15 November 1999), at p. A13

[text]

Recently, the Law Society [of Upper Canada]'s Convocation, the collective of senior lawyers or "benchers" elected to govern the profession, found that Brampton lawyer Z. sexually harassed a female client. Counsel for the Law Society urged Convocation to disbar Mr. Z. Instead, the benchers suspended him for six months, ordered him to take a training course on sexual-harassment issues, and forbade him from meeting unaccompanied with any female client in the future. A dissenting minority of the benchers would have disbarred him.

The client was a single mother who needed Mr. Z.'s help in securing a variation in her separation agreement. Mr. Z. shut the office door and put his hands on this client's shoulders, pulling her toward him. She pushed him away, but he told her that he liked to greet his clients that

way, "especially the pretty ones." She told him that his conduct was unprofessional and that he was old enough to be her father. Undeterred, Mr. Z. continued to ask whether he could kiss her goodbye after their meetings. He told her that he would like to show her a good time on the couch in his office. When the client objected to this treatment, he told her he was a lawyer, and knew all the loopholes. The client began taking her four-year-old son to the meetings. Finally, the client found a new lawyer who carried out her instructions.

When the client complained to the Law Society, Mr. Z. claimed she was "lying in all respects." He said their disagreement was over money. He said he may have tried to kiss her, but that was to make her feel more at ease.

This was not Mr. Z.'s first appearance before Convocation. In 1989, he was found guilty of conduct unbecoming a lawyer for sexually harassing three other female clients between 1981 and 1985. He was reprimanded. This time, the majority of Convocation justified its decision not to disbar Mr. Z. on the grounds that the focus of anti-discrimination law is supposed to be remedial, not punitive. Mr. Z.'s client told the Law Society that she ended her dealings with him because he was ineffective, not because of his sexual misconduct. The benchers apparently relied on this to conclude that disbarring Mr. Z. was not a "corrective" approach. Not corrective for whom? It certainly would have been corrective for members of the public.

Anti-discrimination law is characterized as remedial, rather than punitive, to make clear than an evil intent is not necessary for a finding of discrimination. A discriminatory effect is enough. This reasoning is supposed to expand the circumstances in which remedies for discrimination are available, not reduce the penalties handed out. The fact that the discrimination is intentional is supposed to be treated as an aggravating factor; the Ontario Human Rights Code, for example, authorizes up to $10,000 in additional damages in these circumstances.

The client could have laid a complaint under the Human Rights Code seeking compensation. That she may not have done so, for whatever reason, is not relevant to the Law Society's duty to protect the public. As the client pointed out in her letter to the Law Society, "My intention was simply to bring this matter to the attention of the Law Society, as it is a governing licensing body for law practitioners and thus is the most likely to look into this matter seriously." Sadly, the client's faith was misplaced.

4.0 Proceedings Deriving From Professional Or Legal Responsibility

4.2 Penal

"New Tax Measures Affecting Professionals"

The Information Service of the Canadian Bar Association (cba.org) EPIIgram (Ottawa: March 2000)

[text]

[**Note:** *A lawyer may, under proposed amendments to the Income Tax Act, become liable for civil penalties; for example where a lawyer, at the request of a client or the Canada Customs and Revenue Agency, prepares a letter supporting a client's claim for a tax deduction, under s. 18 of the Income Tax Act, for legal fees and disbursements incurred, and paid by the client to the solicitor, in a family law proceeding. Generally, as to the controversial subject of deduction of family law legal fees and disbursements, see the summary in: Preparing Your Income Tax Returns 2000 (North York: CCH Canadian Limited, 2000), para. 2355 (at pp. 1006-1007).*]

New tax measures announced in the 1999 and 2000 Federal Budgets – on civil penalties … – will have an important impact on lawyers and other professionals. The Canadian Bar Association played a significant role in ensuring that these federal government initiatives reflected lawyers' interests.

Civil Penalties for Tax Professionals

Proposed new amendments to the *Income Tax Act* will impose civil liability on third parties, such as lawyers and accountants, for intentionally making false statements or omissions that are used by another person (in most cases, the client) for tax purposes.

. . . .

Summary of the Legislation

The following is a summary of the legislation for the general information of readers. It is not an exhaustive description of the legislation and should not be taken as legal advice or opinion concerning its meaning. ….

The legislation adds a new section 163.2, which prohibits a person from making a false statement that could be used by a client for tax purposes. "False statement" includes omissions that are misleading. In addition, the prohibition applies to those who participate in making a false statement and those who cause others to make a false statement. It also covers circumstances of "culpable conduct" when a person would be reasonably expected to know the statement was false. "Culpable conduct" is conduct that: (1) is tantamount to being intentional; (2) shows an

indifference as to whether the *Income Tax Act* is complied with, or (3) shows a wilful, reckless or wanton disregard of the law.

. . . .

A tax professional will not be considered to engage in "culpable conduct" solely because he or she has relied in good faith on information provided by the client. This exception does not apply to statements made during the course of promoting or selling aggressive tax reduction schemes such as flow-through shares or tax shelters.

Normally, budget-related legislation is made retroactive to the date the budget was announced. In the case of civil penalties, however, the measure will only come into force on the date the legislation receives Royal Assent.

In re DiSandro

680 A.2d 73 (R.I. 1996)

An attorney who engages in consensual sexual relations with a divorce client should be publicly censured.

4.0 Proceedings Deriving From Professional Or Legal Responsibility

4.3 Summary

Chandra v. Chandra

[2000] N.J. No. 37 (Nfld. U.F.C.) (QL), Hickman C.J.T.D., 19 January 2000

[text]

Facts and Issue. This is an interlocutory application filed on January 18, 2000, by Ranjit Kumar Chandra ("the applicant") to have … counsel of record for Shakti Chandra, the former wife of the applicant ("the respondent's solicitor"), removed as solicitor for the plaintiff/petitioner, Shakti Chandra, in two actions presently before this Court.

[**Note:** *The application, in effect, alleged that the respondent's solicitor: (i) made untruthful and incorrect statements in correspondence to the applicant's former solicitors; (ii) made statements to the trial judge, in court, which were contrary to statements later made by the respondent's solicitor to the trial judge, in private room; (iii) misled the trial judge, in court, by statements he made (e.g., the impression left by the statement to the trial judge, in court, that he [the respondent's solicitor] personally had searched "every nook and cranny" of his client's address, in response to 83 requests from the applicant and the applicant's son requesting delivery to them of certain chattels personal; (iv) improperly behaved by making solicitor's statements to the trial judgment, in court, that amounted to unsworn evidence; (v) made statements to the Law Society of Newfoundland, in response to the applicant's complaint against the respondent's solicitor, to the Society, which were inconsistent with statements made by the respondent's solicitor to the trial judge, in court; (vi) was effectively in contempt of court in failing to comply with an undertaking earlier given to the trial judge, in court; (vii) subjected the applicant, at trial, to "snide remarks and innuendo"; and (viii) prepared, and witnessed the signature of his client to, an affidavit, which he knew or should have known was contrary to statements he earlier made to the trial judge, in court.*]

. . . .

Decision and Reasons. I conclude from listening to counsel, reading the affidavits and hearing the viva voce evidence of the respondent [solicitor] that there is nothing in the conduct or representations allegedly made to this Court by the respondent [solicitor] that would come close to being categorized as grounds to warrant his removal, at this time, as solicitor and counsel for Shakti Chandra.

[Particularly as relates to solicitor's statements to the trial judge, in Court, the] … applicant must realize that when cases of this kind come before the Unified Family Court Division of the Supreme Court of Newfoundland that responsible, competent judges who understand family law

and understand the mandate and concept of the Unified Family Court often feel they have an obligation, where appropriate, to use their very best efforts to attempt to resolve some, if not all, issues that are in dispute in a conciliatory and non-adversarial manner. It is a desirable practice designed to save litigants in this kind of case from incurring the high cost of litigation. It is designed, as well, to achieve, in what often is a difficult and acrimonious atmosphere, a resolution of all or some of the issues in a manner that will reduce unpleasantness between the parties. If a trial judge sitting in chambers attempts to bring about that desirable end and the approach or presentation taken by lawyers involved is somewhat different than one would find during the adversarial process at trial, such procedure does not, in my view, constitute unsatisfactory behaviour on the part of counsel. Indeed, on the contrary, solicitors should be commended for working with the court in trying to mediate and resolve matrimonial disputes without recourse to a full blown trial.

. . . .

Counsel for the applicant suggested that the principles enunciated by the Supreme Court of Canada in *MacDonald Estate v. Martin* [1990] 3 S.C.R. 1235 which endorsed the comments of this Court in *O'Dea v. O'Dea* (1987) 68 Nfld. & P.E.I.R. 67 are applicable to the issue raised in this application. *MacDonald Estate* and *O'Dea* articulate the principles to be applied when a court is called upon to decide whether a disqualifying conflict of interest exists where a solicitor or his law firm has acted for a particular litigant at an earlier date. In my view, the test applied in MacDonald Estate and O'Dea, while dealing with the professional conduct expected of practising lawyers, is not relevant to the issue raised in this application. In cases involving conflict of interest, the courts very jealously endorse the principle that if there is any possibility of confidential information acquired by a solicitor acting for a client in another capacity being used in a subsequent case against an adversary, such scenario creates a real or perceived conflict which is unacceptable. In this case, the Court is not called upon to deal with the possibility of confidential information acquired by a solicitor acting for a client at an earlier date being used against such former client but rather is asked to decide whether the conduct of a solicitor in his dealing with the court and the solicitor on the opposing side is such as to warrant removing him as solicitor for a litigant of record.

This is the first application of its kind to be brought before this Court. The only case I have been able to find dealing with a similar application is *Zawadzki v. Matthews Group Ltd.* [1998] O.J. No. 43. In *Zawadzki*, the plaintiffs applied for an order removing the defendants as solicitor of record on the grounds that the defendant's solicitor had interfered with the discovery process and, amongst other things, provided incorrect information to the presiding judge. E.M. MacDonald, J. of the Ontario Court of Justice (General Division) dismissed the application and held that the court's discretion to interfere with a party's choice of counsel was to be exercised with the highest degree of restraint. It was further held that to grant the relief sought, the court would have to find a probability of real mischief. In *Zawadzki*, MacDonald, J. held that the principles which apply to conflict of interest as dealt with in *MacDonald Estate* was not applicable to that case.

. . . .

It was suggested by counsel for the applicant that because of the disagreements [between the applicant, when unrepresented, and the respondent solicitor] and representation[s] made by the respondent that her client, the applicant, has a mistrust of the respondent. While the applicant may not be kindly disposed toward the respondent, there is no evidence upon which I could conclude that any mistrust, no matter how genuine on the part of the applicant, is warranted in this case.

It is possible that in a case such as this (where the applicant at one period in the proceedings represented himself) which would bring him into contact with the solicitor for his wife that he would find that some of the discussions which, of necessity, involve emotional issues, generated disagreement between himself and the respondent. I can understand, as well, that where any litigant is subjected to cross-examination by counsel for the other side, that he may have something less than overwhelmingly enthusiasm and appreciation for the counsel so conducting the cross-examination. I can also understand why a litigant, listening to counsel in the discharge of his or her duty presenting arguments to court that may be contrary to what he or she feels is the correct position at law or the correct summary of the facts, would be in disagreement with what is being said. These occurrences frequently arise during trials and can be best categorized as a fallout from the adversarial approach properly used during the hearing of a case. However, such actions on the part of counsel do not in any way impact upon their professional integrity.

Most, if not all the concerns, raised by the applicant as to representations made by the respondent in the discharge of his professional duties to his client come within the exclusive purview of the trial judge who either at the end of the trial or during same will have to decide upon the validity of submissions made by counsel for both parties and undertakings given. These matters do not warrant the imposition by me of any sanction against the respondent.

In this case, I have been asked to remove a solicitor who is acting as counsel in a case that has been ongoing for an extraordinary long time. I have not inquired into the reason for the delays which have occurred in the disposition of the two actions presently before this Court, but I do note that the respondent, according to his record, has already spent 1000 hours on this case. It would be an extreme position indeed which would warrant this Court saying to the plaintiff, Shakti Chandra, you now have to retain and instruct a new solicitor with all the attendant costs and delays that would ensue. In that regard, this Court must exercise a high degree of restraint and grant the relief sought only in the most extraordinary circumstances.

[Gerald F.] O'Brien, Q.C., counsel for the respondent, directed my attention to the fact that the actions of the respondent upon which the applicant grounds his application occurred in 1996 and 1997 and that it was not until January 10, 2000, the date which had been set for the continuation of the trial, that counsel for the applicant advised the Court that her client wished to raise the question of the continued representation of Shakti Chandra by the respondent. This information necessitated an adjournment to January 12, 2000, when Ms. [Glenda C.] Best informed the Court that her client had instructed her to make the within application and requested that the same be heard by another judge. The record shows that on April 14, 1999, Mr. Justice Wells ordered "that the trial of both proceedings shall resume on Monday, January 10, 2000, at 10:00 a.m. and continue thereafter from day to day until completed". Ms. Best's response to the applicant's failure to raise the issues, which are now the subject of this application, during the intervening months, was that her client had on April 11, 1997, filed a complaint with the Law Society of Newfoundland raising the same concerns and is still awaiting a final decision from the Law Society. I do not find such response to be a satisfactory explanation for the delay in bringing this application. While such

curious delay is not a factor to be taken into account by me when deciding on the merits of this application, I do note that it has prevented the trial from proceeding in accordance with the order of Mr. Justice Wells of April 14, 1999.

I am satisfied there are absolutely no grounds upon which this Court could conceivably conclude that … [the respondent's solicitor] should be removed as solicitor or counsel for his client, Shakti Chandra.

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 vis a vis his 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.

It is ordered that the within application is dismissed with costs to the … [respondent's solicitor], on both a party and party and solicitor and client basis.

[**Note:** *An appeal to the Court of Appeal of the Newfoundland Supreme Court was peremptorily dismissed for brief, unanimous, oral reasons on 22 March 2000: N.J. No.81 (QL).*]

4.0 Proceedings Deriving From Professional Or Legal Responsibility

4.4 Civil

Conrad v. T.-S.

[1998] N.F.J. No. 95 (N.S. Sup. Ct.) (QL), Gruchy J., 17 March 1998

Facts and Issue ☐ An action for damages, founded on negligence, was taken against a solicitor. ☐ The plaintiffs were a husband and wife. They owned a farm. Their son, whose marriage was shaky, wanted to build a house on land forming part of the farm, for himself and his wife. The Plaintiffs retained the Defendant solicitor who performed the work required to convey a portion of the farm land from the Plaintiffs to their son. In having this work performed by the solicitor, the Plaintiffs told the solicitor that they did not want their daughter-in-law, in the event of a divorce, to obtain title to the portion of the farm land they were conveying to her and their son. The solicitor prepared a deed which included a right to the Plaintiffs of first refusal. Under the deed, the Plaintiffs were entitled to purchase the property for its fair market value, less $15,000.00 which represented the value of the portion of farm land being conveyed. Regards that land, the Plaintiffs' son and his wife had signed a conditional promissory note to the Plaintiffs to pay them the sum of $15,000.00. The son and his wife then built a house on the portion of the farm land acquired from the Plaintiffs. They financed part of the construction from a first mortgage. The son and his wife subsequently separated. The mortgage on their house fell into arrears. The mortgage holder commenced a foreclosure proceeding. The Plaintiffs moved to exercise their right of first refusal. The mortgage holder opposed; taking the position that the Plaintiffs' right of first refusal did not rank in priority to the mortgage. The Plaintiffs applied to be added as parties to the foreclosure action. Their action was dismissed on the ground that their rights were personally contractual only. ☐ The daughter-in-law, in vacating the house, removed from the house fixtures worth $13,000.00. She also did some physical damage to the property; resulting in it's appraised value decreasing from $77,000.00 to $64,000.00. ☐ Plaintiffs eventually did acquire the property at the mortgage foreclosure sale for $64,001.00. ☐ Plaintiffs alleged that the solicitor failed to protect their interest and, therefore, claimed damages equal to the decrease in value of the house which had been built by their son and his wife.

Decision and Reasons ☐ Judgment for Plaintiffs for $3,682.49. ☐ Refusal of the Plaintiffs' application to be added to the foreclosure action proved that their right of first refusal did not rank in priority to the mortgage. Therefore the solicitor erred in drafting the deed and in failing to explore alternatives in what is a difficult area of the law. The Plaintiffs were therefore awarded $3,682.49 to cover: (i) reimbursement of the Defendant solicitor's account which the Plaintiffs had paid in the real estate transaction with their son and his wife; (ii) the account of the solicitor who represented them on the application to be joined in the foreclosure action; (iii) the cost of a real estate appraisal; and (iv) expenses related to the foreclosure sale. ☐ However, the relationship between the Defendant's error and the decrease in value of the property was too remote. The daughter-in-law's actions were a supervening cause of the decreased value.

Thornburgh v. Thornburgh

937 S.W.2d 925 (Tenn. Ct. App. 1996)

Where a party in a divorce proceeding sought a new trial based on a theory of ineffective assistance of counsel, the court held that as a general rule, in civil cases, relief may not be premised on that theory. While the present case was not one of them, the court stated, *obiter*, there could be cases where the facts were so egregious that justice would require relief.

McWhirt v. Heavey

550 N.W.2d 327 (Neb. 1996)

A client who has agreed to settlement in a divorce proceeding is not barred from recovering against his attorney for malpractice if the client can establish that the settlement agreement was the product of the attorney's negligence; which was the proximate cause of the loss to the client. Finding that the attorney did not exercise the requisite knowledge and skill to completely advise his client regards the settlement, which provided the wife client with lifetime alimony and a large share of the husband's separate inheritance, the court affirmed a $91,000 judgment against the attorney. The court refused to adopt a rule that would insulate attorneys from exposure from malpractice claims arising from their negligence in settled cases - known as the "settlement defence".

Shirk v. Shirk

561 N.W.2d 519 (Minn. 1997)

A sexual relationship between a client and her attorney contrary to professional rules does not *per se* result in incompetent representation so as to provide grounds for vacating judicial orders made during the retention.

In re DiSandro

688 A.2d 830 (R.I. 1997)

Unless a client proves that her attorney's legal services deviated from the standard of care or that the client's legal position was damaged by inappropriate behavior of the attorney - e.g., sexual relations with the client - a malpractice proceeding by the client will fail.

Vora v.Roe

No. 95-496498-NM (Oakland Cty. Cir. Ct., NM, 08 July 1998).

A client sued her former attorney for "silent fraud" and otherwise, resulting from the attorney's representation of her regards a post-nuptial agreement. The attorney drafted a post-nuptial agreement. He knowingly omitted to inform the client of certain omissions from the agreement. In a subsequent divorce proceeding, the post-nuptial agreement was alleged to be invalid. In the result the client paid more in settlement of the divorce proceeding than she would have paid had the post-nuptial agreement been treated as being valid. Judgment for the former client.

Ginsburg v. Roe

No. CC-98-01019-b (Dallas Cty Ct. No. 2, 12 July 1998).

[text]

A client sued her former attorney for negligence, breach of fiduciary duties, and otherwise, resulting from the attorney's representation of her in a divorce proceeding. Besides a divorce, the proceeding involved property division and parenting. Unknown to the client until after the retention ended was that the attorney had misrepresented his qualifications for representing her in the family law proceedings. The client lost assets in the property division settlement. Further, her access to her children of the marriage was restricted. Judgment for the former client; including punitive damages.

5.0 FEES AND COSTS

5.1 Liens

H & H v. Wilson

[1999] O.J. No. 662 (Ont. Ct. J. (Gen. Div.), Brampton) (QL), Septi J., 26 February 1999

Facts and Issue ☐ A solicitor at H & H applied for a charging order against proceeds of matrimonial assets to endeavour to protect his prospects of recovering fees owed to him as a result of representing the client in a claim for equalization of family property ("family matter"). ☐ His client applied for possession of the solicitor's files in the matter in which the client had been representing him. The client also sued the solicitor for damages founded on allegations of negligence in the solicitor's representation of him in the family law matter. ☐ The client, Wilson, had retained the solicitor to prosecute the family matter. The solicitor was successful in obtaining judgment, at trial, in the client's favour. However, the solicitor was subsequently unable to recover any monies under the judgment because the client's former wife, after trial, had disposed of the matrimonial home and a portion of her interest in a separate farm property, by conveyances to third parties. The solicitor sued to set aside, as fraudulent, the disposition of the matrimonial home and the wife's farm property interest. Further, the solicitor obtained a preservation order that the parties have no dealings with respect to the matrimonial home, or the wife's farm property interest. The wife made an assignment in bankruptcy. In response, Wilson's solicitor obtained an assignment of the wife's interest in the farm property from the trustee in her bankruptcy and, further, leave for the proceeding for fraudulent conveyance to proceed against the wife, notwithstanding the wife's assignment in bankruptcy. The client, in turn, sued the solicitor for negligence; alleging that the solicitor failed to take advantage of certain relief available to prevent the conveyances, in the first instance, by the wife of the matrimonial home and of her interest in the separate farm property. Further, the client sued the solicitor for a declaration that the solicitor's fees be disallowed. A substantial portion of the fees charged by the solicitor to the client remained unpaid.

Decision and Reasons ☐ Applications allowed. The solicitor was entitled to a charging order. ☐ His efforts and his instrumentality in obtaining the equalization judgment resulted in the client's entitlement to the properties, if recovered (consisting of the matrimonial home, the wife's interest in the separate farm property, and the proceeds of a boat sale). Had the solicitor not obtained the judgment against the client's spouse for an equalization payment, to divide marital property, the subsequent order preserving the assets, which was also obtained by the solicitor, would not have been made. Therefore, the solicitor's efforts played a substantial and integral part in the preservation of the client's assets. ☐ Merits of the professional negligence allegations and the propriety of the quantum of fees were to be determined at trial. ☐ The solicitor's files were to be provided to the client. The charging order provided sufficient security to the solicitor.

Hosseini v. O.C.

[1999] B.C.J. No. 1434 (B.C.C.A.) (QL), 18 June 1999

Facts and Issue ☐ A wife appealed from an Order allowing a solicitor's lien by her husband's solicitors on property awarded to her following family law proceedings. ☐ In 1995, the wife petitioned for divorce, including spousal financial support, and requested division of family assets. Her husband was represented by a solicitor at O.C. Some of the issues in the proceedings were litigated. The result of the litigation was that the wife was awarded full ownership of the family home in British Columbia and a trust fund containing proceeds from sale of other British Columbia property. The husband was awarded ownership of the spouses' properties owned outside Canada. The husband subsequently fled Canada, without paying legal fees he owed to the solicitor, totalling $300,000.00, in the proceedings. The husband's whereabouts were unknown. His solicitor placed solicitor's liens under the *Legal Profession Act* (B.C.), s. 88 against property - the home and trust fund awarded to the wife in the proceedings. The wife's petition to discharge the liens was dismissed. The British Columbia Supreme Court decided that even though the property had been awarded to the wife, section 88 of the *Legal Profession Act* conferred a lien on the properties in favour of her husband's solicitor.

Decision and Reasons ☐ Appeal allowed. The liens were ordered removed. ☐ The *Legal Profession Act* (B.C.), s. 88 did not confer a lien, on the wife's property, in the circumstances of this case. A solicitor's lien had to relate to what the lawyer was hired to do and what the lawyer accomplished. The solicitor's lien could only go against property that the lawyer recovered or preserved for his or her own client. Any other interpretation of *Legal Profession Act* s. 88 would have produced an absurd result.

[**Note:** *Cameron J.A. for the Court, in Health Care Corp. of St. John's v. Crosbie, [1999] N.J. No. 276 (Nfld. C.A.) (QL), 27 October 1999, wrote (at para. 13):*

> *There are two types of liens associated with a solicitor: a retaining lien which gives the solicitor the right, at common law, to retain the property of the client until accounts owing to the lawyer are paid; and a charging lien which enables the lawyer to enforce a lien over a fund or property which has been recovered or maintained as a result of litigation, including the settlement of litigation. In the latter case the property does not have to be in the possession of the lawyer .... it is accepted that the charging lien is not a lien at all but a claim to the equitable interference of the court to have property recovered or preserved through the solicitor's instrumentality ... [in this case, settlement funds delivered to a client's solicitor] held as security for the debt owed to the lawyer. (See James Bibby Ltd. v. Woods, [1949] 2 K.B. 449 at 453). Further, the power of the Court to protect the position of the lawyer is a discretionary one.*]

5.0 Fees and Costs

5.2 Fees

5.2.1 Upheld

F. v. Enayati

[1998] B.C.J. No. 946, (B.C.S.C.) (QL), Brandreth-Gibbs, Registrar, 23 April 1998

Facts and Issue ☐ A client applied for review of his lawyer's bills. ☐ The matter involved was complex matrimonial litigation. The retainer lasted from June 1994 to April 1997. There was no retainer agreement. The solicitor billed at his stipulated hourly rate and rendered regular interim accounts. The solicitor took pains throughout the case to indicate the reasons for the fees billed and suggested methods of resolving payment of them by the client. The fees and disbursements billed totalled $78,000.00. The client paid one-half. He disputed having to pay the balance. The solicitor withdrew. The litigation was subsequently settled. ☐ The wife was convinced that her husband (i.e., the client) was hiding assets in Iran, or was otherwise not disclosing his true worth by creating the appearance his corporation was not profitable. The husband alleged that his wife was a famous jeweller who had brought $4 million worth of precious gems into Canada. The case turned into a complicated document-intense proceeding; involving numerous interlocutory proceedings. The case was slowed down not only by the tactics of the wife, who was the driving force in the litigation, but by the husband's refusal or failure to obtain relevant affidavit material to support his position that he had no assets other than those he had disclosed. ☐ The client asserted that (i) he frequently instructed the solicitor to take no further steps (although he subsequently would instruct the solicitor to proceed); (ii) the solicitor took steps in the proceeding to inflate his accounts; and (iii) the solicitor had improperly withdrawn his services.

Decision and Reasons ☐ Solicitor entitled to full amount of outstanding accounts. ☐ The client's dispute came from a misunderstanding of the litigation process; such as involving a misunderstanding as to adjournments, which were unavoidable, rather than being sought to inflate the solicitor's accounts. The solicitor could not be faulted for the manner in which he brought the issue of the outstanding fee accounts to the client's attention or the manner in which he suggested dealing with them. He was entitled to withdraw his services after fully explaining the alternatives, and still not receiving any agreement from the client to arrange for payment of outstanding accounts. This was not a case where provision of an estimate of fees in advance of the case was appropriate. The conduct of the case was fuelled by the wife's zeal. The evidence supported the inference that her decisions would not be based on a cost-benefit analysis. The husband, unfortunately, was placed in a reactive position. The husband's solicitor provided sound, clear advice. The matter in which he did so was important and complex; such that the solicitor's fees could not be measured strictly against the results. The fees charged were fair and reasonable.

D.B.M. Law Corp. v. Manson

[1998] B.C.J. No. 2407 (B.C.S.C., Prince George) (QL), Baker, Registrar, 30 September 1998

Facts and Issue ☐ A client applied for review of a solicitor's account. ☐ The client retained the solicitor at D.B.M. to act in a matrimonial matter. The solicitor had practised matrimonial law for more than 20 years. The solicitor quoted an hourly rate of $200.00. The client's wife initially claimed spousal and child support and division of matrimonial property. Globally, considerable assets were in issue. Property included the matrimonial home and three rental properties owned by the client. Proceedings were acrimonious and confrontational. The client disputed accounts rendered by the solicitor. He alleged that the solicitor should have litigated more and negotiated less.

Decision and Reasons ☐ Solicitor's account approved as rendered. ☐ The solicitor's approach was appropriate. The matter was reasonably complex; compounded by enmity between the client and his wife. Time spent by the solicitor was reasonable; either as determined by the solicitor or on the basis of specific instructions of the client. The solicitor's rate was reasonable. Carriage and ultimate resolution of the matter was of significant importance to the client.

Wegert v. Hoffer

[1999] M.J. No. 60 (Man. Q.B., Winnipeg) (QL), Sharp, Master, 16 February 1999

Facts and Issue ☐ A client applied for assessment of a solicitor's bills. ☐ The client retained the solicitor to represent him in separation and divorce proceedings. No written retainer agreement was made. The solicitor submitted at least 6 accounts to the client based on an hourly rate of $175.00. The accounts did not specify the hourly rate. The client did not dispute the first four accounts, each of which were interim billings. The solicitor submitted two additional accounts totalling $14,952.00. These were the two accounts the client requested to be assessed. Work performed by the solicitor included attendances at examinations for discovery and a pre-trial conference; completion of a marital property accounting, and correspondence. ☐ During the assessment, the client argued that the account totals were arrived at arbitrarily; that the solicitor had not adequately represented the client; that the solicitor's delays resulted in increased costs; that the lack of billings for the three years prior to the disputed accounts deprived him of the opportunity to change counsel; that the deduction of the billed amounts from settlement funds was improper; and that he suffered emotionally and financially as a result of the way the solicitor proceeded. ☐ The solicitor argued that the fees did not reflect the total of time actually spent on the matter and that he routinely ceased to send out interim bills if the client had failed to make payments.

Decision and Reasons ☐ Accounts confirmed as billed. ☐ The client had clearly retained the solicitor to represent him. The solicitor was entitled to fees charged which were fully disclosed, fair and reasonable. While the hourly rate was not disclosed in the statements of account, the client had not challenged the four interim accounts and continued to use the solicitor's services subsequently. Absent a specific agreement as to the calculations of fees, a solicitor's fees for time and effort were to be calculated on a fair and reasonable quantum meruit basis. Considering the complexity and importance of the matter and the skill required, the hourly rate was not excessive when considered against the solicitor's extensive experience in family law practice and the customary rates of solicitors with similar standings. The solicitor failed to discharge the duty to disclose, by not committing to writing the formula for charging fees. However, the failure to make firm fee arrangements and to provide an accounting for a substantial period was not sufficient to warrant a variation in the fees charged. Payment of fees from settlement funds was consistent with the Rules of the Law Society of Manitoba (Rules 54.07; 54.08; 54.09; 54.10).

Orkin, Mark. *The Law Of Costs* 2nd ed. (Toronto: Canada Law Book Ltd.)

A solicitor was entitled to payment for providing emotional support to a matrimonial client; [359. *Myers v. Van Lange, Elliott* (1997), 68 A..C.W.S. (3d) 805 (Ont. Ct. (Gen. Div.)) however a lawyer should not charge normal rates for mediating squabbles between clients. [359.1. *Borkowski Estate (Re)* (1998), 133 Man. R. (2d) 19 (Man. Q.B.).

5.0 Fees and Costs

5.2 Fees

5.2.2 Reduced

C.L. v. Hadfield

[1998] B.C.J. No. 433 (B.C.S.C.) (QL), Patterson, Registrar, 26 February 1998

Facts and Issue ☐ A law firm applied for review of its bill for services to a client. ☐ The law firm had been retained to assist Ms. Hatfield attempt to set aside her previous matrimonial settlement agreement. A $20,000.00 retainer was paid by the client. After examinations for discovery and a four-day summary trial, the firm convinced the Court that the agreement was in violation of the husband's judicial interim release order under the *Criminal Code* and, therefore, the agreement was set aside. Court costs were assessed in favour of Ms. Hadfield; however, on the basis that the summary trial was deemed to have consumed only one day, considering that several of the grounds advanced by Ms. Hadfield were rejected by the Court and, further, had contributed substantially to the undue length of the trial. The law firm submitted to the client, and received payment for, an account of $17,000.00. The account was paid from the $20,000.00 retainer. The law firm rendered a second account which, it indicated, reflected reduction of fees that would, ordinarily, have been charged. The second account totalled $28,500.00. The client did not pay the second account. The client refused to appear on the account review several times and had been uncooperative in arranging dates.

Decision and Reasons ☐ Client's application allowed. Bill for $28,500.00 reduced to $5,000.00. ☐ While the client, Ms. Hadfield, was difficult and demanding, the firm had spent more time than reasonable, in the circumstances of the client's case and, further, the fee was extraordinary for a matrimonial summary trial. A reasonable fee was $5,000.00 in addition to the first bill, previously rendered and paid. No regard was had for the reduced costs-Order made by the trial judge; because Ms. Hadfield's conduct did entitle her to more costs than what the trial judge allowed.

Doig v. D.M.

[1998] B.C.J. No. 723 (B.C.C.A.) (QL), 01 April 1998

Facts and Issue ☐ A solicitor appealed from an order that the solicitor's fee agreement be reviewed. ☐ The solicitor's client and her husband separated in 1993. The client consulted a solicitor at D.M. She made a fee agreement with the solicitor to represent her on issues resulting from her separation. Terms of the fee agreement provided that periodic statements on account

would be sent by the solicitor to her; setting out estimates of likely charges. The solicitor represented the client, for 34 months, until June 1996. (In June 1996 she discharged the solicitor and retained another solicitor.) Under the fee agreement, the solicitor sent the client 34 monthly accounts claiming $174,724.47 for fees and, in addition, further amounts for sales tax and disbursements. The bills exceeded the solicitor's fee estimate given on retention. The client had paid 32 of the monthly accounts. Outstanding when she discharged the solicitor were the May and June 1996 accounts totalling $66,000.00 (i.e., part of the total invoiced fees of $174,724.47). ☐ At issue was whether the client was entitled to have the 34 monthly accounts reviewed, considering that she had paid all but two of the accounts. The British Columbia Supreme Court ordered that she was entitled to have all 34 accounts reviewed. The solicitor appealed.

Decision and Reasons ☐ The solicitor's appeal was dismissed. ☐ The terms of the fee agreement were not sufficiently clear to oust the common law principle entitling a client to have the 34 accounts reviewed. Further, special circumstances obtained in this case because of (i) differences between the estimate of fees given by the solicitor and the total of the 34 accounts, and (ii) absence of disclosure, in the accounts, of either time spent or by whom the time was spent.

Ostopchuk v. M. Law Group

[1998] A.J. No. 439 (Alta. Q.B., Edmonton) (QL), Christensen, T.O., 15 April 1998

Facts and Issue ☐ A client applied for review of her solicitor's account. ☐ The client retained a solicitor at M. Law Group to apply for a divorce, spousal support, and sale of matrimonial property. No proper, fair and reasonable retainer agreement was made between solicitor and client or, at least, if one was made, the agreement was not filed on the application. The solicitor made one written disclosure, almost 2 years after being retained by the client, which stated that billing to the client was being made in accordance with straight time. The total claimed in the solicitor's accounts exceeded $11,000.00. The solicitor's written disclosure to the client omitted to explain that straight time billing did not take into account complexity, results achieved, ability to pay, skill and competence, and other relevant factors. The issues involved were not legally complex. The client had little chance of obtaining a significant financial support order. Several junior lawyers had worked on the file. Clear from intra-office correspondence was that the junior lawyers involved had done research on obvious points of legal procedure.

Decision and Reasons ☐ Accounts taxed on a quantum merit basis; resulting in reduction that exceeded $5,000.00. ☐ The client did not receive a reasonable explanation of straight time billings. Even if the accounts had been taxed on a straight time basis, a reduction of some $4,000.00 was warranted, just to allow for time unnecessarily or wastefully spent. Further, the account was reduced partly because of the lack of complexity of the client's legal issues, the fees claimed by the accounts being disproportionate to the result, and lack of skill of junior lawyers involved which resulted in excessive time spent.

N.S. v. Mathisen

[1998] B.C.J. No. 1221 (B.C.S.C.) (QL), 20 May 1998

Facts and Issue ☐ A client applied for review of his solicitor's accounts. ☐ The client retained a solicitor at N.S. to act on his behalf in a contentious family law proceeding. Issues in dispute in the proceeding involved parenting and division of substantial family assets. The client and the solicitor made a retainer agreement. The agreement did not state the solicitor's hourly rate. The solicitor informed the client that legal costs could exceed $100,000.00. The solicitor, a senior counsel, was assisted by a junior counsel at the solicitor's firm; a firm which specialized in commercial law. During retention, junior counsel increased his hourly fee without notice to the client. The solicitor claimed 400 hours on the file. The client submitted the fees were excessive because of the limited success achieved in the proceeding.

Decision and Reasons ☐ Client's application allowed; solicitor's account reduced to $55,000.00. ☐ The solicitor's fee agreement did not set out hourly fees. The firm failed to notify the client of fee changes. The fee rate was excessive given the firm's decision to act outside its field of law. The solicitor's handling of the client's file was inadequate. The firm failed to prepare the client for the possibility of failure. The firm failed to recognize the weakness of the client's case. Although the firm recognized the need to set aside an *ex parte* home possession order immediately, it did not do so promptly. The firm did not adequately keep the client informed about various interlocutory matters. The firm commenced an unnecessary second family law proceeding and, in addition, an unsupported contempt motion, against the wife.

D.M. v. Krentz

[1998] B.C.J. No. 1953 (B.C.S.C.) (QL), 13 July 1998

Facts and Issue ☐ The client applied for review of her solicitor's accounts. The solicitor at D.M. rendered two bills to the client: (i) $7,874.15 and (ii) $4,549.17. The solicitor's hourly rate was $250.00. She had commenced practising family law in 1995.

Decision and Reasons ☐ Client's application allowed, in part. The first bill was approved as rendered. The second bill was reduced to $2,500.00. ☐ Although the proceeding in which the solicitor represented the client was, generally, routine, some aspects were complex and difficult. The solicitor, although she had only commenced practising family law in 1995, had considerable skills in that area of practice. An hourly rate of $250.00 was reasonable for an experienced civil litigator but did not reflect the relatively short time that the solicitor had spent practising family law. The matter was of utmost importance to the client. Results obtained by the solicitor for the client were, initially, very good; although, not a great deal was achieved towards the end of the retention. Also considered was the fact the client was difficult; failing to keep appointments, to return the solicitor's telephone calls, and to provide adequate information regarding issues relevant to the proceeding covered by the retention.

W. v. Lougheed

[1998] B.C.J. No. 1765 (B.C.S.C.) (QL), Brandreth-Gibbs, Registrar, 24 July 1998

Facts and Issue ☐ A client applied for review of her solicitor's account. ☐ The solicitor, at W., avoided entering into a retainer agreement. Moreover, the solicitor delayed in providing the client with a fee estimate. The account covered representation from mid-October 1990 to September 1995. The retention, unsupported by information regards a fee per unit of time, involved representation in matrimonial litigation. Fees, expenses and taxes claimed in the account totalled about $50,000.00; including fees of $35,449.00. The client had paid the fees. The solicitor subsequently claimed the client owed a further sum of $13,131.00. The client refused to pay. Her position was that she had paid enough. Although there was extensive trial preparation, no such preparation was required during the time the preparation was undertaken. The matrimonial litigation did not ultimately proceed. The proceeding was tentatively settled through mediation whereupon the client withdrew from that process. The solicitor maintained that the retainer related to matrimonial proceedings and, therefore, justified the fees charged. The solicitor maintained that the client was "high maintenance". ☐ A complicating factor was evidence of an intimate sexual relationship between the solicitor and client. The solicitor denied the relationship. The client maintained the relationship occurred and had a significant impact on the matter because she was unclear when the solicitor was acting in a professional or personal capacity.

Decision and Reasons ☐ Fees reduced from $35,449.00 to $17,500.00. ☐ The additional sum of $17,949.00 in fees paid by the client was ordered to be repaid to her by the solicitor. ☐ Considerations by the Registrar, in reducing the fee, included: (i) absence of solicitor's notes for hundreds of telephone calls he claimed had taken place between him and the client; (ii) the solicitor's position that requests by the client for estimates of fees was a nuisance, and her concern about fees was a "constant refrain"; (iii) when difficulties arose because of the personal relationship between client and solicitor, which threatened to complicate the family law proceedings and incur further expense, the solicitor did not inform the client; (iv) the solicitor's quality of legal services was affected by his relationship with the client; (v) the solicitor's objectivity as solicitor to the client was blunted by his personal relationship with the client; (vi) the solicitor poorly discharged his duties and never properly informed the client; (vii) the solicitor reacted inadequately to the client's concerns over mounting legal expenses; (viii) complexity, alleged by the solicitor as a factor in rendering the accounts, was never established; (ix) the time spent was not reasonably expended; and (x) no agreement for a fee based on unit of time was made.

J., A., M. v. Schultz

[1998] A.J. No. 1433 (Alta. Q.B., Edmonton) (QL), Christensen, T.O., 28 September 1998

Facts and Issue ☐ The client applied for taxation of a series of accounts rendered by her former solicitors. ☐ The client retained the firm to represent her in divorce and matrimonial property proceedings and to dissolve her interest in a profitable corporation. The retainer agreement between the client and the firm was as follows: $175.00 per hour for lawyer's time; $75.00 per hour for legal assistance's time; and $100.00 per hour for an articling student's time. Because the firm did not receive a financial deposit to be applied towards fees, the retainer agreement also entitled the firm to a bonus calculated as a percentage of matrimonial property obtained by the client. Division of matrimonial property was contested. During the three-year period the firm represented the client, the firm filed a number of motions and notices and obtained a number of orders. Further, the firm spent 25 days in pre-trial examinations for discovery. A five-day trial was scheduled. Shortly before the trial, the client terminated the firm's retention. She then settled the matter in person. The firm spent 267 hours pursuant to the retention. The total of time-based accounts was $40,000.00. An additional account, covering the bonus provided for by the retainer agreement, was $77,100.00. The total of the accounts for fees, disbursements, and GST was $129,000.00.

Decision and Reasons ☐ Fees allowed at $45,000.00. ☐ The retainer agreement was unenforceable to the extent that it purported to provide an hourly rate method of billing and to the extent it provide for a bonus fee arrangement. The hourly fee arrangement was unenforceable because it was based on time spent as the only legal factor. Matters such as legal complexity, monetary amounts in dispute, degree of legal skill and competence, and the client fee expectations were, under the fee arrangement, irrelevant. The law firm was entitled to fees only on a quantum meruit basis. ☐ Factors considered were as follows. The client was aware of the file's mounting legal costs, despite her claims to the contrary. Time spent on the file was justified. The matters were not complex; however, the client's husband did not compromise, which resulted in extraordinary legal wrangling. The firm handled the matter expertly. In doing so, the firm avoided tangential and expensive squabbles. The fact a law firm carried the client's legal fees without payment over the entire life of the retainer agreement was also a relevant consideration. The results the firm achieved for the client were very favourable; attributable to the efforts of the firm. However, the circumstances under which the retainer was terminated were not relevant to the reasonableness of the accounts.

C.K. v. Nord

[1999] A.J. No. 43 (Alta Q.B.) (QL), Christensen, T.O., 20 January 1999

Facts and Issue ☐ A solicitor applied to tax accounts submitted to a client in family law proceedings.

Decision and Reasons ☐Taxation substantially allowed. ☐ Among items varied downward on taxation, however, were: (i) photocopying charges from $0.35 to $0.25 per page and (ii) faxing charges from $1.00 to $0.50 per page.

6.0 FORMS

Parley, Louis. ***The Ethical Family Lawyer [:] A Practical Guide To Avoiding Professional Dilemmas*** **(Chicago: American Bar Association, 1995), pp. 9; 36; 41; 154-155**

[text]

Form 1
Nonacceptance Letter

Thank you for considering this firm to serve as your attorney in your [family law matter]. However, after reviewing the information you have provided to us, we have determined that it would be inappropriate for us to accept your case. You should not be concerned that this conclusion reflects anything about the nature of the case, or you personally, as the decision is based on a number of factors, including our caseloads, the availability of particular lawyers to handle the matter, and our ability to meet all of the obligations that might arise in the case.

You should bear in mind that we will keep the nature and content of our discussions and the information that we have, confidential.

[**Note:** *In addition to using this letter as part of the record-keeping for conflicts purposes, it also serves to establish that the potential client was not left with the expectation that the firm was accepting the case, thereby avoiding claims that the firm was not diligent in communicating with the person involved.*]

Form 3
"No Guarantees" Provision for Retainer Agreement

Although you and I have discussed some of the possible outcomes of your case, that was primarily in the context of my explaining to you the relationship of the various criteria that a court would be considering with regard to the financial and custody arrangements in the case. I also described to you some of the "rules of thumb" and customary outcomes. You understand that none of what I described was intended to tell you exactly how your case might come out, nor was any of it intended to guarantee any particular outcome by you. By entering into this retainer agreement, you are acknowledging that no guarantees were made to you regarding the outcome of any settlement or trial. If you believe otherwise (that is, that I made such promises or guarantees)

please let me know immediately, before signing and returning this retainer agreement, what it is you believe I promised or guaranteed.

[**Note:** *Often a description of possible outcomes, coupled with a lawyer's assertion to zealously represent the potential client, can be understood by the client to be a guarantee of a particular result, which will affect the client's ultimate evaluation of the lawyer's competency. Therefore, it is important that the client be reminded, in writing, that no guarantees were made. Including the reminder as a portion of the retainer agreement is a good place to put it.*]

Form 4
Retainer Agreement Provision Defining Scope of Representation

The services I provide will all be related to representing you in the marital dissolution action (you have asked me to commence for you) [your spouse has commenced against you]. These services will include handling all court proceedings and related negotiations, through the entry of the decree of dissolution. This includes any proceedings for temporary support, alimony, custody, or visitation orders or any other necessary temporary orders, and any proceedings to enforce or modify any temporary orders. If details must be addressed to complete the terms of the agreement or decree, those, too, are included. Typical of the kinds of post-decree matters that are appropriate for me to handle is the completion of any documents necessary to put the decree or agreement into effect, such as deeds, notices to insurance companies regarding medical or life insurance policy arrangements, or notices to pension plan administrators. Further, an occasional need arises to file post-judgment motions with the court seeking a clarification or correction of the decree. My services under this agreement *do not include* the following: (1) representing you in any other lawsuit that might arise against you during the divorce proceedings; (2) any post-decree proceedings to enforce or modify the divorce decree or settlement agreement; (3) any appeals of any court orders, whether of temporary or final orders; or (4) any other lawsuit you may wish to bring during the pendency of the divorce case. My services also *do not include* any other legal matter that might arise, such as the negotiation of another contract of some kind. If you wish me to take on any other legal matters for you, that must be separately discussed between us and will be subject to a different retainer agreement between us.

Form 5
Letter to Unrepresented Party

This letter is to inform you that I have been retained by your spouse to represent him in connection with the marital dissolution (divorce) proceeding that he intends to commence.

Your husband has told me that you are agreeable to the dissolution of the marriage and he has provided me with notes he described as reflecting a settlement agreement worked out between the two of you. He has also told me that to keep down the expenses related to the dissolution, you intend not to obtain a lawyer of your own and that you will be relying on me to prepare the

necessary papers and draft the agreement into the appropriate legal language. Based on this information, there are several things that I think ought to be made clear to you at the outset.

I have been hired as your husband's lawyer, and not as yours. This means that in drafting the form of the agreement, and in preparing any papers to be submitted to the court, I will be working with his interests in mind, and not yours, even though it may appear that both of your interests overlap at any given point. This also means that I will not be providing you with any advice or guidance on what is best for you, nor will I be explaining the consequences of the terms of the agreement in any manner intended to suggest to you that certain alternatives might be better from your point of view. In this light, it is important for you to obtain the services of a lawyer so that your interests will be represented and protected in this process. I also urge you to obtain a lawyer because it is often merely a good idea for both parties to have their own lawyers, as the lawyers can then work together to fashion a clearer, fairer, and possibly more mutually beneficial agreement, than one lawyer might draft while focused on the interests of one party.

For these various reasons, I would urge you to obtain a lawyer. I have discussed this with your husband, and he has agreed that he will make $_____ available to you to enable you to obtain your own lawyer if you so desire. He has further agreed to let me promise you that he will make the same amount of funds available until _____ days after you have seen the first draft of the agreement, if you want to wait until then, although we would urge you to act more promptly.

If you should now decided to obtain a lawyer, let either your husband or me know of that intent, and the funds will be made available and we will delay commencing any proceeding for a period of time to enable you to seek a lawyer. As your husband's lawyer I cannot recommend anyone to you, so you will have to seek other direction and assistance.

On the other hand, if you presently intend not to obtain a lawyer, please sign the copy of this letter enclosed for that purpose. Upon receipt of the signed copy, I will arrange for the service of papers on you to commence the divorce case. Please read the various instructions on those papers carefully, as your acceptance of them will have significant legal consequences for you, including the waiver of any ability to object to the courts of this state hearing the case.

[on the day of , 2000] /Signature/

I have read the foregoing letter
and understand its contents and the
importance to me of having my own lawyer.
However, at this time I do not wish to obtain
my own lawyer and will represent myself in
this matter:

_____