Federation of Law Societies of Canada
and
Canadian Bar Association

NATIONAL FAMILY LAW PROGRAM,
1996

SCRUTINY

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

Prepared by
DAVID C. DAY, Q.C.
of the Newfoundland Bar, St. John's

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 1985 to June 1996.

June 1996

ACKNOWLEDGEMENTS

Deborah D. Dawe
Legal Secretary
St. John's, NF

Trina Nurse
Legal Secretarial Student
St. John's, NF

Donald Anthony
Student-at-Law
Faculty of Law
Dalhousie University
Halifax, NS

Organized by:	**Program presented at:**	**Presenters:**
Federation of Law Societies of Canada **(Ms. Heather Walker, Program Co-ordinator)**	**Ottawa Convention Centre** **Westin Hotel** **Ottawa, ON** **15-18 July 1996**	**David C. Day, Q.C.** **c/o Lewis, Day, Dawe & Burke** **Suite 600, TD Place** **140 Water Street** **St. John's, NF A1C 6H6**

FOREWORD

Make no mistake. Lawyers' scruples are subject to intensifying scrutiny by an increasingly discerning, demanding, distrusting, disloyal and devious public. This is a compilation of summaries of, and headnotes and excerpts from, some of the cases and commentaries from Canada (primarily), the United States and England, concerning legal and professional responsibility of family law practitioners, published (principally) from 1985 to 1996. This compilation, entitled "SCRUTINY", is a sequel to "SCRUPLES" (1987), 2 C.F.L.Q. 151-197 (which addressed cases and commentaries, to 1985, about the same subject).

D.C.D., Q.C.
14 July 1996

TABLE OF CONTENTS

1.0 INTRODUCTION

Epstein, Q.C., Philip M., "Family Law And Solicitors' Negligence" in: Special Lectures Of The Law Society Of Upper Canada 1993. ***Family Law [:] Roles, Fairness and Equality*** (Carswell, Toronto, 1994), pp. 21-60.

Author Text: There is definitely an upward trend in the incidence of … [claims generated by family law practice]. Almost unheard of ten years ago, family law claims now account for almost ten per cent of the total claims submitted to the insurer [for Ontario lawyers].

Editor's Note: This statistic, which relies on information furnished by the Insurance Department of The Law Society Of Upper Canada, does not indicate what portion of the ten per cent of claims results from alleged negligence by lawyers who are not, either by formal certifying process or by legitimate reputation, family law specialists.

The statistic introduces a thoughtful, thorough and instructive commentary by Philip M. Epstein, Q.C., Toronto barrister. Both principal and protégé may read Epstein, Q.C.'s perspectives and opinions for profit. They are incorporated in a book resulting from a 1993 program chaired by James C. MacDonald, Q.C. at Osgoode Hall, Toronto.

Buckingham, Don. **"Why Lawyers must build 'moral dialogue' with clients"**

The Lawyers Weekly, 10 May 1996, p. 7.

Author Text: Whatever the practice reality of today, the ethos of the legal profession has not always been the bottom line. Indeed, the hallmarks of the professional role are understanding and serving clients, the legal system and the general public.

It is the maintenance of this professional role, not the lawyer's profitability, which engenders the broad trust from the general public and the resulting grant of self-regulating status to the profession.

Part of providing advice and service as a lawyer is the ability to function as a moral agent, especially because the lawyer as a professional must learn to balance the interests of her client, the legal system and the general public.

How can such a balance be struck other than through moral reflection and dialogue? The lawyer, like it or not, has to be a moral creature to fulfill her professional responsibility.

Even if one does not accept the argument that the role of the professional lawyer is inherently a moral role, a lack of moral dialogue in the law office is bad for business.

. . . .

What does moral agency mean for a lawyer? Moral sensitivity, moral judgment and moral dialogue.

The Rules of Professional Conduct may be of some assistance in determining a justifiable moral judgment, but often these rules themselves are imprecise and conflicting.

For example, one rule requires the lawyer to advance every argument, however distasteful, on behalf of the client, but another rule requires the lawyer to be vigilant not to become a dupe of the client.

The rules at the same time urge the lawyer never to divulge any client confidence, but also ask the lawyer to maintain the integrity of the legal system.

Thus, doing the right thing may involve more than just reference to the rules but also to personal moral convictions and the sage advice of colleagues and the law society as well.

Danson v. Attorney General Of Ontario

(1985), 2 C.P.C. (2d) 109 (Ont. H.C.), McRae J., at pp. 113-114.

Decision Text: Dealing in particular with the High Court of Justice in England, I.H. Jacob's perceptive article "The Inherent Jurisdiction of the Court" (1970), Curr. L. Prob. 23, at pp. 24-25, analyzes the features of inherent jurisdiction. Inherent jurisdiction is part of procedural law. Its distinctive feature is that it is invoked in a summary way and without an ordinary trial. Anyone, whether a party or not and even in respect of matters not raised as issues in proceedings, may invoke the inherent jurisdiction of the Court. Inherent jurisdiction is a concept separate from discretion, although the two may overlap. The Rules of Court are additional to and not in

substitution of powers arising out of the inherent jurisdiction of the Court, and the powers are cumulative rather than exclusive, so that the Court may proceed under either head of jurisdiction. However, inherent jurisdiction cannot be exercised in contravention of a statutory provision.

… Inherent jurisdiction is a reserve or fund of powers which can be used to fill any procedural gaps left by the Rules when it is just or equitable to do so to do justice between the parties. It prevents oppression or injustice in the process of litigation.

Editor's Note: Inherent jurisdiction is frequently resorted to by courts in adjudicating questions of legal and professional lawyer responsibility.

Ladner Downs v. Crowley

(1987), 25 C.P.C. (2d) 189 (B.C. S.C.), Southin J., at pp. 190-191; 197; 198.

Editor's Note: Client appealed from refusal of registrar to tax bills already paid to solicitors who had ceased to act before performance of client's instructions to them completed.

Headnote: In the present case, the registrar erred when he held that payment of the periodic accounts barred the right to taxation. [He erred] because (i) the retainer was one for a single matter, and (ii) the payments by the client did not constitute a surrender of the client's right to taxation upon termination of the contract of retainer. There was no evidence that (a) the client knew he had a right to tax, or that by paying he was waiving or surrendering his right, or [that] (b) the solicitor had advised the client concerning the legal effect of the agreement or the payments on the right to tax.

In any event, leave to tax should be granted because it was just and equitable to do so. The solicitors intended that the client should have no right to tax even thought they had only partially performed their entire contract and they now raised payment as a defence to taxation. They could not in good conscience do so.

Moreover, leave to tax should be granted because it was just and equitable to do so.

Decision Text: Matters of solicitors' fees should, in my view, be considered in the light of some realities:

> 1. Many people who have to consult solicitors nowadays, especially in matrimonial matters, have had little previous experience with the law. They

do not know what is a fair arrangement as to fees. They do not know what has to be done to solve the problem. If quoted a fee of $X per hour, they have no idea how many hours of work are entailed. To begin with, they trust the solicitor. They do not go to another solicitor to find out if the arrangements as to fees are sound. They know nothing of taxation. Of course, there are clients who know all about these matters but the approach to be taken by the law, in my view, must be one that serves the interest of the least sophisticated clients.

2. Running a law practice today is expensive. Rent, staff, equipment, books - all cost more in real terms than they once did. In any time-consuming or lengthy matter, a lawyer needs money to go on with. His expenses have to be paid every month.

3. That some lawyers take advantage of clients in matters of fees is regrettably true. But it is also true that some clients, unless money is extracted from them at regular intervals, simply do not pay when the matter is concluded.

4. The best guide to just and proper remuneration where the solicitor and the client have not bargained for a single sum for the performance of an entire contract is *Yule v. City of Saskatoon* (No. 4) (1955), 17 W.W.R. 296, [1955] 1 D.L.R. (2d) 420 (Sask. C.A.).

2.0 TYPES OF RESPONSIBILITY

Parley, Louis. ***The Ethical Family Lawyer*** (Family Law Section, American Bar Association, Chicago, 1995), at pp. 30-32; 32; 33-34 (endnotes omitted).

Editor's Note: One of the principal elements involved in determining whether a lawyer adequately performed his/her responsibilities to a client is the lawyer's competence. Competence embraces knowledge, skill, preparation, and overall thoroughness.

(The other principle types of elements are: nature and circumstances of acceptance of retention; avoidance or resolution of conflict; definition of scope of representation; fee arrangements; lawyer/client relations (such as diligence, supervision, communication, and confidentiality); and advocacy (including conduct before tribunals, and fairness to others involved - both represented and unrepresented).)

Author Text:

Knowledge

One does not need a lot of knowledge to conclude that a lawyer ought to know the law, legal principles, and judicial procedures and rules relevant to the particular family matter being handled, and that he or she should also be able to pursue basic research to discover that information.

In this context, the failure to know the applicable child support guideline could constitute a lack of competence. Similarly, failing to pursue a party's military pension as a divisible asset could be incompetent representation. Filing the wrong motion is also a failure to perform competently, particularly if it results in a denial of the relief sought and an assessment of costs against the client.

One of the best known cases in this area is a California decision in which the court faulted the lawyer for not researching the issue of whether a military pension could be treated as community property subject to division by the family court. In contrast, in a later case involving the same problem of military pensions, the court protected a lawyer from malpractice liability when the evidence established that he had kept fully abreast of the shifting law regarding the divisibility of military pensions, reviewing not only cases but also commentaries on the cases. Under those circumstances, the lawyer's advice to his client that the pension was not divisible was an informed professional judgment, and the lawyer had not been inadequate in his representation.

The need to be aware of legal principles goes beyond knowledge of the formal legal rules. As noted in the New Jersey case of *Ziegelheim v. Apollo*, lawyers also must be aware of the customs and practices in the courts, so they can give the client useful advice on the risks of trial versus the grudging certainties of settlement:

> [W]e recognize that litigants rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we insist that the lawyers of our state advise clients with respect to settlement with the same skill, knowledge, and diligence with which they pursue all other legal tasks. Attorneys are supposed to know the likelihood of success for the types of cases they handle and they are supposed to know the range of possible awards in those cases.

Skill

While skills such as the ability to interview witnesses and to cross-examine opponents are necessary to any competent representation, two skills are particularly relevant to the practice of family law: the ability to draft understandable and enforceable documents, and the ability to negotiate.

One could say that a failure to competently draft a separation or divorce settlement agreement, or a premarital agreement, appears in almost every case in which the outcome of a proceeding turns on the interpretation of an agreement that is unclear in some respect: if the losing party's lawyer was the drafter responsible for the unfavorable interpretation and outcome, that lawyer could be said to have done an incompetent job. While this may be an overstatement, the fact is that many cases founder on a poorly drafted document, and the issue is not easily ignored.

A distinction should also be noted between unskillful drafting and not knowing what to draft, which is a lack of knowledge. This is not a distinction without a difference, as a claim of unskillful drafting may be legitimately defended by an argument that the selection of the words involved reflected a matter of professional judgment, while a lack of knowledge is indefensible.

. . . .

Thoroughness and Preparation

. . . .

A very clear example of a violation of the basic requirements appears in a Colorado disbarment decision, in which the lawyer's failings included preparing the case for a final hearing in the car with the client on the way to the hearing, and then having the client remain outside the courtroom and failing to raise several issues at the hearing.

Similar issues played a role in the Connecticut case of *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*. Among the failings of counsel identified in the opinion were

> 1. the failure of the wife's divorce lawyers to have done adequate discovery regarding the husband's financial resources, so that their advice to her regarding settlement was inappropriate as it was based on inadequate information:
>
> 2. the lawyer's inadequate attention to the preparation of the financial affidavit submitted to the court during the trial, which resulted in the omission of some income information and made the client appear to be less than credible about her own finances, which added pressure on her to settle due to a concern that the court would hold the "falsity" against her; and
>
> 3. the lawyer's failure to be attuned to the trial court's attitudes toward working women.

Of greater complexity is the extent of a lawyer's obligation to verify the facts provided by a client. The general rule is that a lawyer is not obligated to vouch for the statements of a client. That rule is altered in states that have rules that treat a lawyer's signing of a pleading as a certification that the allegations were verified by the lawyer. Further, in some states the courts have come to expect that lawyers have at least verified the contents of clients' financial affidavits so that the courts can feel comfortable in relying on them for financial orders. This development can make the verification requirement one owed to the client rather than to the opposing party or the court: if the lawyer allows the client to file a false or misleading financial statement, he or she is exposing the client to a later relitigation of the case, with a possible less advantageous outcome than might have been achieved at settlement on the full facts.

3.0 SOURCES AND STANDARDS OF RESPONSIBILTY

3.1 Professional Responsibility

3.1.1 Canons of professional conduct

Editor's Note: In Canada the original *Canons of Legal Ethics* were established by the Canadian Bar Association in 1920; materially influenced by comparable *Canons* adopted by the American Bar Association in 1908. Canada's *Canons of Legal Ethics* were replaced by the *Code of Professional Conduct* on 25 August 1974 which, in turn, was revised August 1987, and was amended August 1995 by addition of Chapter XX, is reproduced in Appendix I to this paper.

In the United States, the original Canons of Professional Ethics were adopted by the American Bar Association on 27 August 1908. They were replaced by the *Model Code* of Professional Responsibility on 12 August 1969. On 02 August 1983 the Association adopted the *Model Rules* of Professional Conduct. More than two-thirds of United States jurisdictions have, to date, approved of professional standards based on the *Model Rules*. The remaining jurisdictions continue to found their professional standards on the *Model Code*.

The Standing Committee on Ethics and Professional Responsibility of the 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 American Bar Association Center for Professional Responsibility, 541 North Fairbanks Court, Chicago, Illinois, 60611-3314, 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 and U.S. $25 annually for non-members).

Szebelledy v. Constitution Insurance Co. of Canada et al.;

Kozma et al. v. Szebelledy et al.

(1985), 3 C.P.C. (2d) 170 (Ont. D.C.) German D.C.J., at p. 175:

Decision Text: [Describing rules of professional conduct, in this instance established by The Law Society of Upper Canada]: These rules establish the framework by which

solicitors are to govern their affairs. However, the rules are broadly drafted and are vague or difficult to apply in specific situations. There are many cases which consider how these rules are to be applied and which set out the legal principles which are to be considered in conjunction with the professional rules.

Perell, Paul M. ***Conflicts Of Interest In The Legal Profession*** (Butterworths, Toronto, 1995), at p. 5, fn. 4.

Author Text: While the courts are not bound by the bar's rules of conduct, courts recognize these rules as an influential expression of public policy and relevant to determining a lawyer's duties to a client. See *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, 77 D.L.R. (4th) 249; *Ridge View Development & Holding Co. v. Simper*, [1989] 5 W.W.R. 133, 49 B.L.R. (Alta. Q.B.); and *Harvard Investments Ltd. v. Winnipeg (City)* (1994), 93 Man. R. (2d) 269, [1994] 6 W.W.R. 127 (Q.B.). See also *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 424, 9 W.W.R. 609.

3.1.2 Governing body rules

Kennedy v. Guardian Insurance Co. of Canada

(1992), 1 C.P.C. (3d) 304 (Ont. Gen. Div), Wright J.

Headnote: Although courts retained the ultimate right to determine who should be granted an audience, matters involving allegations of breach of professional conduct were better handled by the Law Society. This was not a case where the court should intervene to prohibit the solicitor from acting. The fact that it was highly likely that the solicitor would be called as a witness by the defendant to substantiate its version of the facts was not sufficient to order the removal of the solicitor from the record. It was for the solicitor to determine whether he would give evidence for the plaintiff. If he did give evidence, he was to relinquish his role as solicitor of record for the plaintiff.

3.1.3 Provincial legislation

3.2 Legal Responsibility

3.2.1 Generally

Doerner v. Lepointe et al.

(1985), 3 C.P.C. (2d) 245 (Ont. D.C.), Scott D.C.J., at p. 247:

Decision Text: …. The plaintiff refused to sign the release and repudiated the settlement. He contests this motion on the ground that he did not understand that what he signed was a "real legal" document which represented a final settlement … ; furthermore, he alleges that the settlement was unconscionable … .

…. the plaintiff himself signed the settlement. He is an adult and must be presumed to be sane; he had independent legal advice which must be presumed to have been competent. I find nothing unconscionable in the settlement. There would be no end to litigation if Courts were to permit repudiation of settlements in circumstances such as these.

3.2.2. To whom duty of care owed

Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.)

(1991), 35 R.F.L. (3d) 1 (Ont. Ct. J.) (Prov. Div.), Bean Prov. J.

Headnote: … just as a solicitor may not act for an adult client who is incapable of giving adequate instructions, neither may a child's solicitor act where, as here, the child is incapable of giving instructions. If … [a solicitor] would not remove himself, he could be removed by another party.

Editor's Note: For comprehensive commentary on child representation, see: Annotation by James G. McLeod to *Official Guardian v. M.(S.)* (1991), 35 R.F.L. (3d) 297 (Ont. Gen. Div.), Sutherland J., at pp. 297-301.

3.2.3 Nature of duty of care

Luchka v. Zens

(1989), 36 C.P.C. (2d) 271 (B.C.C.A.), Hinkson, Hutcheon and Locke JJ. A.

Headnote: Rule 16(4) of the British Columbia Rules of Court provided that an application declaring that a solicitor had ceased to act for a client could be made "where the solicitor who has acted for a party in a proceeding has ceased to act." That was a matter that was between the solicitor and the client and not one over which the Court had any control. The Rule recognized the relationship between the solicitor and the client. It was one of contract, and it established a relationship of principal and agent between the client and the solicitor. The solicitor was limited in his conduct of the matter by the instructions he received from his client. He was bound to answer to the client for such conduct.

Until an issue was raised between the retiring solicitor and one of the other parties or his own client, the Court was not called upon to investigate the matter critically. There was no issue raised to be investigated.

Holt and Another v. Payne Skillington (a Firm) and Another

18 December 1995 (C.A.), Hirst, Gibbon & Forbes L.JJ.

(*The Times*, 22 December 1995).

Summary: Plaintiffs took civil action for damages and other relief against the Payne Skillington firm of solicitors for alleged negligence in performance by the firm of their duties as solicitors. The action was founded on alleged breaches of duty in both contract and tort.

On appeal by the firm from the trial decision favoring the Plaintiff clients, the Defendant firm submitted that "where, as in the present case, there was a contract between the parties, the duties and responsibilities of the parties in both contract and tort were those to be found in the expressed or implied terms of that contract." The

firm further contended that "the nature and extent of those responsibilities were thus limited by the express and implied terms of the contract. In such circumstances there was no room for the imposition of further or different responsibilities by means of a duty of care in tort." The firm relied on *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank Ltd.* [1986] A.C. 80 (P.C.) at p. 107.

In reply, the Plaintiff client submitted that "if the assumption of responsibility and concomitant reliance which founded the duty of care in tort were referable to a wider set of factual circumstances than those which gave rise to a concurrent contract between the same parties, there was no reason in principle why the duty of care could not impose wider obligations than those arising under the contract."

The Times included, in its report of the decision of Hirst L.J. for the unanimous Court of Appeal in dismissing the appeal, the following:

> As Lord Goff of Chieveley had made clear in *Henderson v. Merrett Syndicates Ltd*. ([1995] 2 AC 145, 193-194), it would frequently be the case that the relevant assumption of responsibility did occur within a contractual context. That fact did not mean it must necessarily do so simply because, at some stage during the relevant course of dealing between the parties, they chose to enter into some form of contract.
>
> A consideration of the individual facts and circumstances of each case would determine whether any duty of care in tort which the general law might impose was of wider scope than any contract to which the same parties might agree at some stage during the same course of dealing.
>
> It was important to emphasise that the duty of care in tort was, in appropriate circumstances, imposed by the general law, whereas the contractual obligations resulted from the common intention of the parties.
>
> In their Lordships' opinion, there was no reason in principle why a *Hedley Byrne* type of duty of care (*Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd*. ([1964] AC 465)) could not arise in an overall set of circumstances where, by reference to certain limited aspects of those circumstances, the same parties entered into a contractual relationship involving more limited obligations than those imposed by the duty of care in tort.
>
> In such circumstances, the duty of care in tort and the duties imposed by the contract would be concurrent but not coextensive. The difference in scope between the two would reflect the more limited factual basis which gave rise to the contract and the absence of any

term in that contract which precluded or restricted the wider duty of care in tort.

Inkumsah-Cosper v. Cosper

(1995), 14 R.F.L. (4th) 152 (N.S. C.A.), Roscoe, Pugsley and Flinn JJ.A.

Headnote: The wife claimed that her lawyer pressured her into making an agreement which was unfair and sought to introduce fresh evidence to support her allegation. She applied for leave to appeal.

Held - Leave to appeal was denied.

The wife did not satisfy the test for the admission of fresh evidence. There was no basis for interfering with the agreement reached by the parties. If an error was made by the solicitor, the wife might have a remedy against the solicitor.

Svojanvoski v, Semchuk

[1995] W.D.F.L. No. 462 (Man. Q.B. [Master]), Master Harrison

---

Summary: The applicant wife instructed her lawyer, the respondent, to file a petition for divorce and bring a motion for interim relief. At that time, the children of the marriage were living with the husband for the most part. The wife was ordered to pay child support of $500 per month. The order further granted the physical care and control of the children to the husband. The wife was dissatisfied with the "physical care and control" clause. In a subsequent application, the court ordered that the husband be permitted to farm the lands jointly owned by the husband and wife, and that the husband pay security of $15,000. The wife was dissatisfied with this order because it did not specifically order the husband to make the delinquent mortgage payments to the Manitoba Agricultural Credit Corporation. Finally, she complained that her lawyer did not either fully apprise her of the complexities of the litigation or challenge some relevant statements made in the husband's affidavit. Upon the wife's application for a reduction of her legal account on the basis of these complaints.

Held - application dismissed.

The transcript of the first application indicates that the wife's lawyer made a strong expression of concern over the farm debt to M.A.C.C., which was not being serviced by the husband. The husband had the physical care and control of the

children at the time of the application, and the wording of the order simply reflected the situation. Finally, it was clear that the lawyer tried, but was unable to convince the wife of the realties of the litigation, and accordingly, there were no grounds upon which the legal account could or should be reduced.

3.2.4 Form of civil action

3.2.5 Specialists

3.2.6 Burden of proof

Winslow v. Richter

(1989), 39 B.C.L.R. (3d) 83 (B.C.S.C. [In Chambers]), Wood J.,
at pp. 89; 90; 94; 95; 96.

Headnote: When the plaintiff separated from his wife, the wife retained the defendant solicitor, who prepared a separation agreement. The plaintiff, being advised by the defendant to seek independent legal advice, signed a letter in which he acknowledged receiving advice but confirmed that he nonetheless wished to represent himself. The separation agreement provided, inter alia, that the plaintiff would transfer his half interest in the matrimonial home to the wife, but when the home was sold by her, he would receive half the net proceeds. Some time later the wife sold the home. The defendant acted for her on the conveyance and received the net sale proceeds in trust which she then paid out to the wife without informing the plaintiff. The wife used these proceeds to purchase a new home.

In divorce proceedings subsequently brought by the wife, the plaintiff filed a counterpetition in which he sought, inter alia, an order setting aside the separation agreement and a declaration that the wife's new home was a family asset. The parties settled prior to trial, and by a consent order the separation agreement was set aside and the wife was required to pay a sum of money to the plaintiff. The plaintiff then sued the defendant, alleging she was under a fiduciary obligation to ensure that he received his share of the proceeds from the sale of the matrimonial home, and that it was a breach of that duty to release his share to the wife, without at least giving him notice. The plaintiff claimed special damages for his legal fees in defending the divorce action, and general damages on the basis that he received less in settling that action than he would have under the separation agreement. The defendant applied under R. 18A to have the action dismissed on the grounds that she was not under a fiduciary obligation to the plaintiff or, alternatively, that the plaintiff's action constituted an abuse of process.

Held - Application dismissed.

Decision Text: In the … [case of] *Lac Minerals* [S.C.C., No. 20571, 11th August 1989] Sopinka J., who wrote for the majority on this point, adopted the words of Wilson J. in dissent in *Frame v. Smith* [[1987] 2 S.C.R. 99, 9 R.F.L. (3d) 225], at p. 136 [2 S.C.R.] … :

> … there are common features discernible in the contexts in which fiduciary duties have been found to exist and these common features do provide a rough and ready guide to whether or not the imposition of a *fiduciary obligation on a new relationship* would be appropriate and consistent.
>
> *Relationships in which a fiduciary obligation have been imposed* seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [emphasis added]

. . . .

In short, the evidence before me does not support the cause of action pleaded, namely, breach of fiduciary duty. That being the case the defendant's motion should, in the ordinary course of events, succeed. However, both parties argued the case before me as if the plaintiff had sued, as he should have, for a declaration that the defendant was a constructive trustee, and for damages for breach of trust. While the matter was not argued before me, there seems to be little reason why an application to amend the statement of claim to conform to the evidence brought before the court would not succeed. I am reluctant to dismiss the plaintiff's action, when the only result would be a new action commenced on his behalf in which the proper cause of action is pleaded. In the circumstances I believe the proper thing to do is to consider the defendant's application as though the pleadings had been amended in the manner described above.

On the evidence before me I am satisfied that, when they executed the separation agreement, the parties thereto intended that the husband retain a beneficial interest in the former matrimonial home, and that the provision transferring his legal interest in that property to his wife was intended to, and did, create a trust in his favour with respect to that interest. Thus the wife was clearly a trustee and as such she owed a fiduciary duty to the plaintiff to protect his interest in the trust property. The question

that necessarily arises is whether, and if so by what means, the defendant became a trustee as well.

. . . .

… a solicitor acting as agent of a trustee, who assists in the disposition of trust property, and who fails to make inquiries in circumstances in which a reasonable man would do so, will be charged with constructive knowledge of that trustee's breach of trust, and thus will be liable as a constructive trustee.

. . . .

… the actions of the wife clearly amounted to a breach of a trust. Even if the plaintiff was in breach of his obligation under the separation agreement to pay maintenance, his default in that respect could not, under the terms of that agreement, have discharged the wife from her fiduciary duty to protect for his benefit his equitable interest in the former matrimonial home.

. . . .

Since the defendant prepared the separation agreement, the only reasonable inference to be drawn, in the absence of any evidence to the contrary, is that she knew of its explicit terms and that she therefore had knowledge of the wife's breach of trust. At the very least, on the basis of the evidence before me, the facts known to her were such that an honest and reasonable person would be driven to make inquiries, failing which an inference of wilful blindness could properly be drawn.

4.0 APPLICATION OF STANDARDS OF RESPONSIBILITY

4.1 Unique Difficulties

(a) Acting as amicus curiae

Young v. Young

(1989), 22 R.F.L. (3d) 444 (Alta. Q.B.), McDonald J.

Headnote: The appointment of an amicus curiae is often helpful to assist the court in custody and access cases to determine the best interests of the children. The lawyer appearing for the amicus curiae should adopt an independent role in examining witnesses. Generally, the court should appoint an amicus curiae and not an advocate to represent the children's interests. In the circumstances, an amicus curiae should be appointed to assist the court. Counsel representing the amicus should have the right to examine and cross-examine witnesses. The children's lawyer in the application should not be appointed amicus curiae as the possibility of neutrality and impartial detachment on his part was destroyed.

(b) Acting as agent

Sgaglione, Lucille T. **"When Duty Calls Long Distance"**

82 *ABA JOURNAL* (May 1996), at p. 82.

Editor's Note: As for the formation, nature, and scope of relationships between a lawyer retained as "local counsel" by a client's primary solicitor, s(he) should consider the following steps:

- Conduct a complete and frank discussion with both the client and lead counsel to define your duties.

- Execute a written retainer agreement with the client specifying the nature and scope of your undertaking.

- Execute a memorandum of understanding with lead counsel detailing your respective duties, and have it agreed to by the client.

- If you are retained for a limited purpose, be sure that purpose is stated expressly in all retainer and letter agreements.

- In writing, explain to the client the limitations on your employment, and obtain the client's express approval of these limitations.

- Do not undertake any activities beyond the scope of your defined duties. A court may infer from such actions that the limitations were waived.

- Review local court rules to determine the specific duties of local counsel, and be sure to comply with them.

Author Text: Even when you have taken precautions as local counsel, you still may share the misfortunes of lead counsel in a legal malpractice suit. Most courts are likely to find that, as between a lawyer and client, it was the lawyer's duty to recognize the client's needs and to represent them effectively regardless of whether the lawyer was designated as lead or local counsel.

Furthermore, a lawyer's artificial limitations on his or her duties typically will be viewed with skepticism and may be held to be ineffective. Courts have held that a lawyer cannot ignore circumstances that require the lawyer to protect the client's interest merely because the particular legal needs of the client fell outside the scope of the assignment from lead counsel.

(c) Acting opposite unrepresented person

Parley, Louis. ***The Ethical Family Lawyer*** (Family Law Section, American Bar Association, Chicago, 1995), at p. 150 (endnotes omitted).

Author Text: The threshold issue for a lawyer is to determine whether the opposing party is represented, or about to be represented, because then the rules regarding communicating with a represented party would apply. Once the lawyer determines that the opposing party will proceed without a lawyer, there appear to be two basic concerns that arise. First, the unrepresented party may not be misled into believing the lawyer is acting on his or her behalf, and the lawyer may not give advice to his or her detriment. Second, the lawyer may not get involved in a conflict of interest by giving such advice and guidance to the unrepresented party, which creates concerns about the lawyer's loyalty to his or her original client.

(d) Acting without conflict

Perell, Paul M. ***Conflicts Of Interest In The Legal Profession*** (Butterworths, Toronto, 1995), at pp.5-6 (footnote omitted).

Author Text: A common or unifying theme for the various classes of conflicts of interest is the theme of divided loyalties and duties. This theme is recognized by the rules of professional conduct. For example, in Ontario's *Rules of Professional Conduct*, Commentary 1 to Rule 5 (Conflict of Interest) defines a conflicting interest as follows:

> Guiding Principles
>
> 1. A conflicting interest is one which would be likely to affect adversely the lawyer's judgment on behalf of, or loyalty to a client or prospective client, or which the lawyer might be prompted to prefer to the interests of a client or prospective client.

Commentary 3 to this rule focuses on loyalty and duty, and states:

> 3. Conflicting interests include but are not limited to the financial interest of the lawyer or an associate of the lawyer, and the duties and loyalties of the lawyer to any other client, including the obligation to communicate information.

When there is a conflict of interest, the lawyer is pulled between loyalty and duty to the client and loyalty and duty to oneself, or to family, partners, associates, other clients, or to the administration of justice.

On the theme of duty, conflicts of interest may be more easily understood and more accurately described by substituting for the word "interest" in the phrase "conflict of interest" the word "duty" where duty includes both responsibilities to others and a notional responsibility to self-interest. Thus, a conflict of interest is a conflict of duty, and for lawyers, conflicts of interest are problems of discordant or incompatible duties. When a client complains that a lawyer had or has a conflict of interest, the complaint more precisely is that the lawyer did not perform or will be unable to perform a professional duty owed the client because of some opposing or contradictory duty. Thus, a discussion of the general principles about conflicts of interest requires an inventory of the duties lawyers owe to clients and to others.

(e) Acting in non-adversarial proceedings

In re L (a Minor) (Police investigation: Privilege)

21 March 1996 (H.L.) (*The Times*, 22 March 1996, at p. 32).

Summary: L., child of two drug addicts, became seriously ill after ingesting a quantity of methadone. The mother's explanation was that the child's taking of the substance was accidental. On application of the parents, a district judge made the following order: "The parents shall have leave to disclose to a medical expert the court papers for the purpose of a report regarding the frequency of the consumption of methadone by L. The identity of such expert is to be disclosed to all parties. The report is to be filed … ". The effect of the order was that the report when filed would be available for inspection and copying by any party to the proceedings and by the guardian *ad litem*.

The solicitors for L's mother duly instructed a consultant chemical pathologist. His report concluded that there was no evidence for habituation by L to methadone but cast serious doubts on the mother's account of accidental ingestion by L on the occasion when the child became seriously ill.

Thereafter, police, while attending a case conference about the protection proceeding, came to hear of the report and made application to be provided with a copy for the purpose of investigating possible criminal offences by the parents. A judge held she had jurisdiction to order disclosure to persons not party to the protection proceeding and exercised discretion in favor of disclosure.

Mother appealed. She maintained that the court lacked jurisdiction to order disclosure of the report to police because it was protected by legal professional privilege. Counsel for the authority which instituted the child protection proceeding contended that a clear distinction existed between privilege attached to communications between solicitor and client and privilege attaching to reports by third parties prepared on the instructions of a client for the purpose of litigation. In the former case the privilege attached to all communications whether related to litigation or not but in the latter case attached only to documents or other written communications prepared with a view to litigation.

Lord Jauncey for the majority of the House of Lords concluded as follows:

> Care proceedings, which were primarily non-adversarial and investigative, were so far removed from normal actions that litigation privilege had no place in relation to reports obtained by a party thereto

which could not have been prepared without the leave of the court to disclose documents already filed or to examine the child.

If litigation privilege were to apply to the report in the present case it could have the effect of subordinating the welfare of the child to the interests of the mother in preserving its confidentiality. That would appear to frustrate the primary object of the Act.

. . . .

The judge's exercise of her discretion had not been plainly wrong. She had taken the view, which was entirely justified, that the best interest of L. would be served by disclosure. It could not possibly be said that in reaching such a decision she had acted in error.

In such proceedings it would be most unsatisfactory if the court, having information that the mother might have committed a serious offence against children whose welfare it was seeking to protect, should be disabled from disclosing such information to the appropriate investigating authority.

4.2 Proceedings

4.2.1 Disciplinary proceedings

In the matter of The Law Society Act and in the matter of C. of the City of Toronto, a barrister and solicitor. Report and Decision of the Discipline Committee of The Law Society of Upper Canada (Thomas Bastedo, Q.C., Chair; Stephen Goudge, Hope Sealy), 1323-018, 29 September 1993.

Editor's Note: A Discipline Committee of The Law Society of Upper Canada conducted a hearing into a complaint that C., a senior lawyer with extensive family law practise experience in Ontario, committed professional misconduct in that she allegedly "brought the administration of justice into disrepute" (i) by counselling a mother to disregard a court order requiring her to deliver custody of her child to the father; (ii) by counselling the mother to take a step that would render more difficult the location of the mother and her child by officials seeking to enforce the court order; and (iii) by omitting to counsel the mother to come out of hiding and cure her contempt of the order, until about 11 months after counselling her to disregard the order.

The Committee's Report And Decision, dated 29 September 1993, is Appendix II to this paper.

Lisi v. Pearlman

641 A. 2d 81 (R.I. 1994)

Editor's Note: A lawyer was disciplined for commencing a fee-collection proceeding against a client while prosecuting the client's divorce petition for which the fees were allegedly owed, although the lawyer knew the client objected to the quantum of fees the lawyer was claiming in the collection action. The Court concluded the lawyer should have either postponed institution of the fee collection or withdrawn as counsel in the client's divorce litigation.

4.2.2 Penal proceedings

4.2.3 Summary proceedings

4.2.4 Civil proceedings

4.2.5 Criminal proceedings

4.2.6 Public censure

[Dealt with under subsequent headings.]

4.3 Underlying Causes of Proceedings

COMPLAINTS AGAINST FAMILY LAWYERS - ONTARIO - 1986-1992 [1]

NATURE OF COMPLAINT (where over 2% of total)	**TOTAL**	**PERCENTAGE** (where over 2%)
Delay	670	20.5
Fees	406	12.4
Negligence	334	10.2
Client Instructions Not Followed	257	7.9
Fail to Communicate	244	7.5
Termination of Retainer	173	5.3
Other [2]	156	4.8
Conflict of Interest	141	4.3
Outside of Jurisdiction	119	3.6
Abuse of Litigation Process	104	3.2
Failure to Account/Report	97	3.0
Misleading Clients/Others	79	2.4
Conduct Toward Fellow Solicitors	75	2.3
Failure to Honour Financial Obligation	69	2.1
Substandard Practice	65	2.0
Total Complaints [3]	3269	91.5

1. Source: Scott Kerr, The Law Society of Upper Canada
2. Includes: threatening criminal charges, forgery, trust fund misuse, borrowing client money.
3. Similar types of complaints have been identified in other Canadian jurisdictions.

4.4 Retainer

4.4.1 Definition

Bank of Nova Scotia v. Omni Construction Ltd. et al. and Tujis (Third Party)

[1983] 4 W.W.R. 577 (Sask. C.A.), Cameron J.A., at p. 588:

Decision Text: A contract of engagement between a solicitor and a client may be oral or written or inferred from conduct: see *Bean v. Wade* (1885), 2 T.L.R. 157 (C.A.); *Blyth v. Fladgate*; *Morgan v. Blyth*; *Smith v. Blyth* [1891] 1 Ch. 337; and *Groom v. Crocker*, [1939] 1 K.B. 194, [1938] 2 All E.R. 394 (C.A.). The engagement may require of the solicitor performance of a specific duty, or a number of specific duties, and will, as it did in this case, carry the general duty to exercise skill and care …

Parley, Louis. ***The Ethical Family Lawyer*** (Family Law Section, American Bar Association, Chicago, 1995), at p. 7 (endnote omitted).

Author Text: To some extent, the real issue may not be the decision to decline or accept a case, but rather the making of that decision in a timely manner and clearly conveying it to the potential or rejected client. From the client's perspective, the acceptance of a matter means that the anxiety of finding a lawyer is over and the matter can proceed. Similarly, for the rejected person, the need for timely notice of the rejection is important, as there may be deadlines that have to be met to avoid suffering any prejudice in the system or a loss of any rights. From the lawyer's perspective, the issue is not merely one of politeness, as the failure to clearly indicate whether the case has been accepted could result in the lawyer being charged with having neglected a matter, resulting in malpractice or grievance claims for lack of diligence. ....

Whatever the issues are that the lawyer must evaluate in deciding whether to accept a case, once accepted, the client is entitled to the lawyer's full devotion and attention, to the extent warranted by the representation.

4.4.2 Types of retainer

Usipuik v. Jensen, Mitchell & Co.

[1986] 15 C.P.C. (2d) 251 (B.C.S.C.), Southin J., at pp. 255, 258.

Headnote: A Judge could exercise control over a solicitor's fees in both contentious and non-contentious business and could bring an independent opinion to bear upon the question of the amount of remuneration. Neither side has suggested a modification to make the agreement reasonable. There was a lack of detailed evidence as to the time usually expended on litigation of the character in question and the usual hourly rates of senior and junior counsel. To alter the agreement by fixing a fee in dollars would not be "modifying the contract" since the essence of the agreement was that it was contingent upon the extent of the recovery. The agreement must therefore be ordered cancelled and the fees left to be taxed.

Decision Text: The Courts referred to were a sonorous roll which I cannot resist setting forth …

. . . .

The question of remuneration for solicitors which has vexed the profession in England for centuries has similarly vexed the profession in British Columbia ever since we became a separate community in the nineteenth century.

. . . .

.... Contracts for so much an hour can lead to work expanding to fill the time available to do it in. As Mr. McBride, at one time a taxing officer of the Supreme Court of Ontario, said of time charges in *Re Solicitors* [1971] 3 O.R. 470 at 472:

> [The fee charged] suggests that one of the dangers of keeping detailed dockets is that one might become mesmerized by the ticking of the clock and come to value the expenditure of time to the exclusion of all other factors that should bear on the assessment of a reasonable fee for solicitors' services. It is not true that a solicitor has only time to sell and whoever was the author of that inanity has little to be proud of. Of course, he may have been referring to that hopefully small minority of solicitors who, indeed, have little to offer a client but their time. But a solicitor, a competent solicitor, has knowledge, advice, expertise and experience with which to embellish the passage of raw time. It is these factors that weigh more heavily when fees are being considered, rather than how much time was lavished on the client's affairs. Another

important factor is the value of the services of the solicitor, not to himself, but to his client. What did he accomplish for his client - if anything?

Editor's Note: This proceeding arose out of an earlier decision by Southin J., holding that a contract for fees made by respondent solicitors with a client was not "fair and reasonable" under s. 99 of the *Barristers And Solicitors Act*, R.S.B.C. 1979, c. 26. She gave leave in that decision to the solicitor "to make a submission for modification".

4.4.3 Pre-retainer duties

Usipuik v. Jensen, Mitchell & Co.

(1986), 12 C.P.C. (2d) 24 (B.C.S.C.), Southin J., at pp. 28-29, 34, 41-42.

Decision Text: ….the common claim in separation agreements "that each has been fully advised of the assets of the other" is useless to a Judge considering whether a spouse has failed, in fact, to disclose an asset.

In such agreements, the draftsman should list the assets disclosed as a schedule to the agreement and, in a letter confirming advice, the lawyer should, to borrow a phrase from another context, "condescend to particulars". That does not mean pages of what is to the client unintelligible jargon but a short statement of the principal points. Thereafter, no dispute can arise as to what the client was told. Especially is this so when the lawyer is entering into a contract with a would-be client as to fees and an issue may arise as to whether the lawyer has fully performed his obligations of fairness.

. . . .

I appreciate that a contract of retainer in many circumstances cannot be said to be, in strict theory, a contract with a client, for until the contract is made there is no solicitor-client relationship. But the layman who goes to see a lawyer has put himself, on the question of the retainer agreement, in the lawyer's hands. To say that there is no duty to advise the would-be client properly on the agreement is to permit unscrupulous lawyers (and regrettably there are a few) to take advantage.

Of course, I am not saying that, until the agreement is made, the lawyer necessarily has any other duty to the layman who consults him about taking his case, i.e., to issue a writ.

. . . .

A lawyer might say that he should not have to lift a finger in any way until the contract of retainer is made. As a matter of law, he is right. But if the lawyer takes the position that he does not have to advise the client on the client's position, i.e., that they should bargain in mutual ignorance of important considerations, then he runs the risk of the Court finding that his assessment of the risk, the possible results and the amount of work required was so hopelessly inaccurate as to lead irresistibly to a finding of unfairness [as to the substance of a retainer agreement].

Gardiner, Roberts v. MacLean et al.

(1989) 30 C.P.C. (2d) 85 (Ont. S.C.[Assess. O.]),
Assessment Officer Clark

Editor's Note: The fee for performing legal work was estimated by a solicitor for the client in advance of the work's performance (about $6,000 to $8,000); revised upwards during the work's performance (to about $10,000.00), and amounted to $15,200.00 in the solicitor's account ultimately rendered (following discount by the solicitor from his docketed total of $23,000.00). That the legal work was necessary and well-performed were not disputed. The client paid about 80 per cent of the account; declining to pay the balance. The solicitor applied to tax the account. On taxing down the account to the amount the client had thus far paid to the solicitor, Assessment Officer Clark considered the solicitor's obligation to a client when estimating, in advance, the fee for doing work. Although the facts of the case pertained to a home sale and to a business purchase financed partially from the home sale, the Assessment Officer's views are instructive for family law practitioners.

Headnote:

[1] A solicitor was entitled to be paid his reasonable fees for necessary work properly done, without arbitrary reduction. However, that right carried with it certain obligations towards the client, and in the same way carried a certain penalty if such obligations were ignored.

[2] First, it was incumbent upon the solicitor to ensure that so far as competence allows, the client was told what legal costs would lie ahead for the work required.

[3] Second, a solicitor was obliged to be as careful in estimating fees as he would be in doing the actual legal work in the retainer. If areas of uncertainty existed they were to be clearly spelled out, and in difficult or costly or complicated matters it was desirable that it be done in writing. It was often difficult for a solicitor to meet this obligation with certainty and precision because of the very nature of the legal work,

but where difficulty arose the solicitor had more obligation and was required to take the initiative in creating as well defined a retainer as the circumstances and an objective standard of competence permitted.

[4] Although no fault could be found with the hourly rates charged or the time docketed by the solicitors, in this case, the solicitors failed to ensure that when the contract of retainer was entered into the client had fee information that was as complete and accurate as a careful solicitor could provide. ….

MacLean v. Van Duinen

(1994), 30 C.P.C. (3d) 191 (N.S. S.C.), Grant J.

Headnote: On a taxation of a solicitor-and-client bill of costs, the solicitor had the burden of proof. The standard of proof was on a balance of probabilities. The test was whether the acts were reasonable in the circumstances at the time they were done. The manner in which the solicitor proceeded was reasonable. He was not negligent. His hourly rate was high but not unreasonable. It was probable that the issue of fees was raised by the clients. In the absence of a written retainer, the clients' version of that discussion was accepted.

The computer printout of the account provided the date of service, the service rendered, the initials of the lawyer performing the work, the time expended and the charge logged. Some work was done by solicitors whose time charges were less than the lead solicitor's but he was kept informed of the file progress, reviewed pleadings and either made the major decisions on the file or contributed to and/or reviewed them. The use of less costly staff and lawyers was to the immediate benefit of the client.

Telephone conferences between solicitor and client, progress reports and reports on other related topics should have been reduced to writing to avoid varied interpretation. This would have provided the solicitor and the client with a record of what had been said, done and planned and would have avoided misunderstandings. Likewise, a written retainer was the preferable and safest manner in which to proceed. The absence of a written retainer generally worked to the disadvantage of counsel.

The practice of not discussing fees early on was an option, but it might have avoided the word and spirit of the Code of Ethics. Legal services were based on contract. A client had the right to know what he/she was expected to pay. The lawyer who avoided this did not at his/her peril. Clients had the right to lawyer shop. If discussing fee led the client elsewhere, that was an example of the market forces at work. In circumstances where the procedure required was less than simple and the result uncertain, counsel had a higher burden to discuss fees. With unsophisticated

clients or comparatively unsophisticated clients, there was a higher duty on counsel to discuss the question of charges. To have no discussion of costs and not to disclose any per hour rate was a limited basis upon which to found a contract. Under such vague circumstances, counsel was almost forced into a quantum meruit situation to show the charges as fair and reasonable under the circumstances.

4.4.4 Retained lawyer seeking third party assistance

Ian MacDonald Library Services Ltd. v. P. Z. Resort Systems Inc. et al.

(1985), 6 C.P.C. (2d) 57 (B.C.S.C.).

Headnote: Whenever the nature of the case is such that counsel examining at an examination for discovery cannot reasonably be expected to conduct a full and proper examination of the witness being discovered without expert assistance, counsel will be permitted to have present in the discovery room such an expert whether or not he is to be a witness in the proceeding. Whether in any given cases such expert assistance is necessary will depend among other things on: (1) the issues in the action; (2) the level of technical and scientific knowledge which can reasonably be expected of counsel generally at any given time; and (3) the extent of inconvenience to which the parties may be put if counsel must conduct part of an examination then adjourn it, consult with an expert and conduct the rest of it on some other occasion.

4.5 Professional Responsibility

4.5.1 Representing both partners

Parley, Louis. ***The Ethical Family Lawyer*** (Family Law Section, American Bar Association, Chicago, 1995), at p. 20 (endnotes omitted).

Author Text: The concurrent representation of people who are involved with each other while each is seeking to divorce their respective spouses can also present conflicts of interest, which can result in the lawyer needing to withdraw from both cases. This can be a particular problem when "fault" is an issue in the division of property or alimony and at least one of the spouses alleges that the relationship involved is "adultery," or caused the breakdown of the marriage, and the clients will wind up being called as "co-respondent's" in each other's cases. These circumstances

can inhibit a lawyer's ability to advocate for a client, or interfere with the ability to protect the interests or confidences of the other client, and deleteriously affect the outcome of both cases. Although resolving whether to take on the representations may turn on the factual circumstances, doing so is warned against.

4.5.2 Changing partners

Parley, Louis. ***The Ethical Family Lawyer*** (Family Law Section, American Bar Association, Chicago, 1995), at pp. 10-11, 14 (endnotes omitted).

Author Text:

... two principal circumstances under which a lawyer should not take on the representation of a client: (1) where the representation will conflict with the representation of a client, and (2) when the representation will be deleterious to the interests of a former client.

. . . .

.... While there are endless examples of cases in which conflicts have been found, or not found, there are no hard and fast rules or circumstances that make it clear whether a conflict exists in a given case. Conflicts determination require the lawyer's exercise of insight and discretion.

MacDonald Estate v. Martin

[1990] 3 S.C.R. 1235,
Sopinka J. (Dickson C.J.C., LaForest and Gonthier JJ.) for the majority; Cory J. (L'Heureux Dubé and Wilson JJ.), dissenting

---

Editor's Note: Following is summary of *MacDonald Estate v. Martin* (also reported as "*Martin v. Gray*") from: The Canadian Bar Association Task Force Report[:] *Conflict of Interest Disqualification: Martin v. Gray and Screening Methods* (The Canadian Bar Association, Ottawa, 1993), at pp. 5-15.

(a) The Facts

In 1983, Martin retained A. Kerr Twaddle, Q.C., to represent him in an accounting action launched by Gray [administrator c.t.a. of the MacDonald Estate]. Gray was represented by the firm of Thompson, Dorfman, Sweatman. Twaddle was assisted on the file by Kristin Dangerfield, an articling student in 1983 and subsequently Twaddle's associate. Dangerfield was actively engaged on the Martin file and privy to confidences disclosed by Martin to Twaddle.

In 1985, Twaddle was appointed to the Bench and Dangerfield joined the firm of Scarth, Dooley. Two years later, eight of the eleven members of the Scarth, Dooley firm, including Dangerfield, joined Thompson, Dorfman, Sweatman. After her move to the Thompson firm, Dangerfield had no involvement with the *Martin v. Gray* file. Martin's new counsel brought an application to remove Thompson, Dorfman, Sweatman as solicitors of record for Gray. Both Dangerfield and senior members of Thompson, Dorfman, Sweatman filed affidavits with the Court stating that there had been no discussions between Dangerfield and firm members with respect to the *Martin* matter since Dangerfield had joined the firm and that no such discussions would take place in the future.

Martin's application to the Manitoba Court of Queen's Bench sought a declaration the Thompson firm was ineligible to continue to act for Gray and an order removing the firm as solicitors of record. Hanssen J. allowed the application. Gray's appeal from Mr. Justice Hanssen's decision was allowed by the Court of Appeal, with Monnin C.J.M dissenting.

(b) Reasons

The Supreme Court of Canada was unanimous in allowing Martin's appeal, but divided in its approach. Mr. Justice Sopinka wrote the judgment for a 4-3 majority (concurred in by Dickson C.J.C., La Forest and Gonthier JJ.) while Mr. Justice Cory set out the minority view (concurred in by L'Heureux Dubé and Wilson JJ.).

(i) The Majority's Reasons

Mr. Justice Sopinka identified the sole issue to be determined as "the appropriate standard to be applied in determining whether Thompson, Dorfman, Sweatman are disqualified from continuing to act in this litigation by reason of a conflict of interest" [at pp. 1242-1243]. In answering that question, he noted that three competing values must be considered:

1) the concern to maintain the high standards of the legal profession and the integrity of our system of justice,
2) the value that a litigant should not be deprived of his or her choice of counsel without good cause, and

3) the desirability of promoting reasonable mobility in the legal profession [at p. 1243].

Mr. Justice Sopinka explicitly rejected the argument that, in order to accommodate the mergers, partial mergers and the general movement of lawyers between firms that characterize the modern practice of law, a less rigid test should be applied in determining whether a conflict of interest exists.

> When the management, size of law firms and many of the practices of the legal profession are indistinguishable from those of business, it is important that the fundamental professional standards be maintained and indeed improved. […] Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client. [At p. 1244.]

Sopinka J. briefly reviewed the professional codes of conduct of the governing bodies of the profession as well as the law on conflicts of interest. The Rule set out in Chapter V of the Canadian Bar Association's *Code of Professional Conduct*, [The Canadian Bar Association, *Code of Professional Conduct* (1974, revised 1987) at 17 ff.], and in commentaries 11 and 12 to that Chapter, are held out as:

> the expression by the profession in Canada that it wishes to impose a very high standard on a lawyer who finds himself or herself in a position where confidential information may be used against a former client. The statement reflects the principle that even an appearance of impropriety should be avoided. [At p. 1246. Mr. Justice Sopinka referred to the 1974 version, as the Law Society of Manitoba has not yet adopted the revised 1987 version of The Canadian Bar Association's *Code*, although it is expected to do so shortly.]

Mr. Justice Sopinka reviewed English, American, Australian, New Zealand and Canadian authorities on the issue and noted that two distinct approaches can be distilled from the jurisprudence: the "probability of mischief" and the "possibility of mischief" tests. The former, less stringent, test is that applied in English cases, while the latter approach is that favoured in the United States [for a fuller description of these tests see Chapter 4 of the *Task Force Report*].

The English standard was rejected as being insufficiently high to satisfy the public requirement that there be the appearance of justice [at p. 1259]. A more stringent test is necessary, in Sopinka J.'s view, because of the difficulties inherent in determining whether confidential information has been used [at pp. 1259-1260]. Sopinka J. articulated the appropriate test as whether "the public presented by the reasonably informed person would be satisfied that no use of confidential information would occur." [Note that this test is then applied by Sopinka J. to each of the subsidiary questions that he poses.]

Mr. Justice Sopinka fleshed out this general test by identifying two subsidiary questions:

1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? [This issue did not have to be addressed in *Martin v. Gray* as it was common ground that Ms. Dangerfield had acquired confidential information during the previous representation. Nonetheless, the judgment of Sopinka J. goes on to address the question at some length. Cory J. did not, however, address the first issue and expressly left open the question of imputation of knowledge where there is not actual confidential information known to the moving lawyer.]

2) Is there a risk that it will be used to the prejudice of the client?

It is critical to an understanding of the issues raised by the judgment that these two questions are understood as entirely distinct. The first question applies to the lawyer's acquisition of confidential information of the former client, while the lawyer was affiliated with a *previous* firm. The second question relates to the possible misuse of that information at the lawyer's *new* firm. Confusion can easily arise as, in this analysis of both questions, Sopinka J. refers to "presumptions": these are two *different* presumptions. [As will be noted below, Sopinka J. only accepted the applicability of one of those presumptions – the second he held to be an inference rather than a presumption.] A second potential source of confusion arises from a matter that is *not* dealt with in Mr. Justice Sopinka's judgment – imputation of knowledge within the lawyer's *former* firm. This question has a bearing on the issues that arise in subsequent adverse representation situations, but did not arise in the facts before the Court and was therefore not addressed.

In answering the first question posed above, Mr. Justice Sopinka held that once it is shown by the client that there existed a previous solicitor and client relationship which is "sufficiently related" to the retainer from which it is sought to remove that lawyer, the court should infer that confidential information was imparted which could be relevant. He found that this would be a difficult burden to discharge as the court's degree of satisfaction must be such that it would satisfy the scrutiny of the reasonably informed member of the public that no such information passed. This burden is particularly difficult to discharge as the lawyer must do so without revealing the specifics of the privileged communication. [At pp. 1260-1261.]

Mr. Justice Sopinka went on to address the second question: whether there is a risk that the confidential information possessed by the lawyer moving to a new firm will be used to the prejudice of a client of the old firm. He noted that "there is … a strong inference that lawyers who work together share confidences". He held that affidavits stating that this confidential information has not been, and will not be, by themselves, sufficient to rebut this inference. However, the inference may be rebutted by the use of institutional devices like "Chinese walls" and "cones of silence" if these devices have been approved for this purpose by the governing bodies of the profession and are considered sufficiently efficacious by the court.

(ii) The Minority's Reasons

Mr. Justice Cory's judgment applied even more stringent restrictions on lawyers than those set out by Sopinka J. [But see Glenn, Case Comment, *Macdonald Estate v. Martin* (1991) 70 Can. Bar Rev. 351, who maintains, in considering the effect of the judgments, that there may be "less difference between the judgments of Sopinka J. and Cory J. than appears at first reading."] In doing so, Cory J. stated that the preservation of the integrity of our system of justice is by far the most important and compelling of the competing values identified by the majority judgment. [At p. 1265.] He held that where a lawyer who has *actually* received confidential information joins a law firm that is acting for those opposing the interests of the former client, an *irrebuttable* presumption that lawyers who work together share each other's confidences should apply (and not simply a rebuttable inference, as found by Sopinka J.). [At 1271.] Applying the presumption would result in the imputation to all members of the firm of the confidential information actually possessed by the moving lawyer and preclude the firm from acting for the current client.

Nordoff-Karpow v. Karpow

(1991), 36 R.F.L (3d) 378 (Ont. Gen. Div.), West J.

Headnote: In matrimonial proceedings the home was ordered sold. The parties disagreed as to the amount of the mortgage owing to the husband's parents. The lawyer acting for the wife on the divorce action was a partner of the solicitor who acted for both the parties and the mortgagees when the house was purchased. The husband alleged that the solicitor had received confidential information regarding the mortgage at that time.

The husband moved to remove the wife's lawyer on the basis of conflict of interest.

Held - The lawyer was ordered to be removed.

Where the parties dispute the circumstances surrounding the purchase and financing of a home, a partner or an associate of the solicitor who acted for all the parties in the real estate transaction may not be trial counsel for one of the parties in an action against the other.

Duncan v. Duncan

(1991), W.D.F.L. No. 799 (Ont. S.C.), Master Cork

Summary: In the parties' matrimonial litigation the wife's counsel of record was her father, who had represented the husband in a partnership dispute several years earlier. The husband sought to discharge his father-in-law as the wife's counsel, on the ground of conflict.

Held - application dismissed. The husband's application was premature.

His objection at this time was general in nature, and he could not point to any privileged information the solicitor might have which it would not be in the husband's interest for the wife to know. For a solicitor to be removed, there must be a suggestion of practical disadvantage to the complaining party. Although the solicitor here had general knowledge about the family history and might be able to add information with respect to access issues, that was offset by the fact that he had been the wife's solicitor for nearly three years, without any objection from the husband. The husband was at liberty to reapply on further information of a more specific nature as to possible compromise of his case.

Gouveia v. Fejko

(1992), 18 C.P.C. (3d) 12 (Ont. Gen. Div.), Coo J.

Headnote: A law clerk employed by the plaintiffs' solicitors and who assisted the plaintiffs' counsel on the file in question, accepted a position with the defendant's solicitors. At the time she took the position with the defendant's solicitors, the law clerk gave an undertaking to do no work on the file. She was also instructed by the defendant's counsel, with whom she would be working closely at the new firm, that she was not to do any work on the file. On the basis of those assurances, the plaintiffs' solicitor allowed the defendant's solicitors to maintain carriage of the action. After commencing the new position, the law clerk performed some tasks in connection with the file. The plaintiffs thereafter successfully moved before the master for an order removing the defendant's solicitors of record. The defendant's solicitors appealed.

Held - appeal dismissed.

Having regard to the law clerk's willingness to follow instructions to work on the file in her new law firm, the master's decision was regarded as correct and in accordance with the principles set forth in *MacDonald Estate v. Martin* and in *Everingham v. Ontario.* The master had held that the failure by the defendant's firm to conduct matters within the confines of the "Chinese Wall" erected to solve this problem placed the parties back in the position they were in had no such "wall" been erected.

Bell v. Nash

(1992) W.D.F.L. No. 704 (B.C.S.C.), Boyle J.

Summary: The petitioner telephoned the respondent matrimonial lawyer in December 1991 to discuss her marital difficulties. An appointment was arranged. Neither party realized at the time of the call that the respondent was already acting for the petitioner's husband, whose surname was different from his wife's. Soon afterward the respondent "realized the facts were familiar to me." Having confirmed this when the petitioner phoned again a few days later to reschedule the appointment, the respondent said she could not act for the petitioner. The petitioner obtained other counsel and sought to enjoin the respondent from acting for her husband, on the ground of conflict of interest.

Held - application allowed.

The substance of the first telephone exchange between the petitioner and the respondent was not so much the concrete particulars that were divulged as it was the information that went to the emotional heart of the petitioner's case. That was vital and prejudicial information which the petitioner was entitled to have held confidential. An alert and accomplished matrimonial lawyer such as the respondent would pick up such information virtually by osmosis. The telephone call primarily revealed the tactical intention of the petitioner in respect of claims for maintenance and custody. In addition, her emotional vulnerability was made generally plain. Were the respondent to remain on the record for the husband, a reasonably informed person would not be satisfied that no unauthorized use of confidential information would occur, and would hold it to be unfair and in conflict of interest. Although the respondent had appeared for the husband on an interim application in January 1992,

without immediate objection from the petitioner's counsel, that did not mean that the interim hearing was a "Rubicon of acceptance" after which objection was too late.

Hunt v. Hunt

(1992), W.D.F.L. No. 950 (B.C.S.C.), Prowse J.

Summary: In 1982 the petitioner consulted a lawyer regarding her matrimonial problems. The lawyer was practising with M. and a third lawyer, specializing in family law. M. subsequently moved to another firm, and some time later began acting for the petitioner's husband in divorce proceedings. The petitioner sought to have him removed from the record.

Held - application allowed.

The test to be applied in determining whether there is a disqualifying conflict of interest is whether the public, represented by the reasonably informed person, would be satisfied that no use of confidential information would occur. Here, a reasonably informed member of the public could not be satisfied, in the circumstances, that no use of confidential information would occur if M. were to continue to act for the husband. Although M. swore he did not recall ever discussing the petitioner's case with the lawyer the wife consulted in his firm in 1982, a member of the public could reasonably conclude that two or three lawyers practising matrimonial law together in a small firm would be likely to discuss their cases with one another. It was reasonable to infer that confidential information was imparted to M., and it was appropriate to restrain him from acting. That was not to say that M.'s integrity was in any way in doubt.

Inglis v. Inglis

(1993), 15 C.P.C. (3d) 129 (Man. Q.B. [Fam. Div.]), Goodman J.

Headnote: The solicitor RG acted for the wife since 1985 when the parties were divorced. The husband was represented by T from 1988 through 1990, and by A from 1991 until the husband retained GA in April 1993. T had been an associate of the firm WM since May 1989. T acted for the husband while with WM. In December 1991,

when T was no longer counsel for the husband, RG joined WM. The husband's solicitor at the time was A. RG contended that when he joined WM, he identified certain conflicts of interest relating to clients and other lawyers with the firm who acted for opposite parties. RG alleged that he agreed with T that they would not discuss cases in which they had been counsel for opposing parties, including the case at bar. RG stated that he recalled mentioning to A upon his move to WM that T had once represented the husband. Although A did not have such recollection, he was aware that T had formerly represented the husband but was unaware during the time when he acted for the husband that T and RG were in the same firm. The husband discussed all aspects of the case with T, and provided him with handwritten notes outlining his position and certain events that occurred during his relationship with the wife. When T transferred the husband's file to A, the husband alleged that the handwritten notes were not in the file. The husband contended that his present counsel GA advised him in April 1993 that RG and T were associates. The husband moved for an order that WM be removed as solicitor of record for the wife.

Held - motion granted.

T received confidential information from the husband which was attributable to a solicitor-and-client relationship relating directly to the matter at hand. There was a strong inference that lawyers who worked together shared confidences. This inference should be drawn unless there was clear and convincing evidence that reasonable measures had been taken to ensure that no disclosure would occur. Undertakings and conclusory statements in affidavits without more were not acceptable. The only evidence of steps taken to avoid disclosure was from RG but there was no evidence from T. In any event, confirmation by T would not be sufficient to meet the test.

Hudson v. Hudson

(1993), 16 C.P.C. (3d) 1 (Alta. Q.B.), McDonald J.

Headnote: In 1987, the wife retained solicitor J. of the firm JM to represent her in a divorce action. The divorce was granted. The husband was granted generous access to the children. In 1992, the wife retained solicitor W of another firm to represent her on an application specifying access. The husband retained solicitor M of the firm JM. M told W that she had been retained by the husband but would not accept the retainer if the wife objected. The wife consented to M's acting for the husband and W so communicated this to M. M. retrieved the divorce file, allegedly only to obtain a copy of the divorce judgment. M contended that she did not read the contents of the file. The wife again changed solicitors. When she went to JM to retrieve her file, she learned that it was in M's possession. This upset her. The wife's new solicitor, K,

applied for an order removing the law firm JM as solicitors of record for the husband. K had concluded, after obtaining and reviewing the file, that there were matters recorded in the file that were relevant to the present issue of access.

Held - application granted.

When W gave consent on behalf of the wife, the consent was effective; however, the consent was later withdrawn. There was no possibility of an institutional mechanism being adopted by JM to prevent J from disclosing to M whatever information might be in his memory. M had already had the file in her possession. Although M deposed that she had not read the file, the court would not be placed in the position of having to decide whether to trust M. There must be "an appearance of justice". The removal was ordered and was to include a term that costs incurred by the husband, to the extent that they were necessarily duplicated by costs incurred by the successor solicitor, should be paid to the husband in any event of the cause.

Ziner-Green v. Green

[1993] W.D.F.L. No. 546 (Ont. Gen. Div.), Walsh J.

Summary: The parties had commenced their relationship while the husband was married to someone else. During the time the husband was seeking a divorce from that person, the then intended wife inquired of his solicitors as to the progress of the matter, as she was eager to marry the husband and start a family. She also provided an affidavit to be used in his divorce application. The subsequent marriage between the parties ended in separation, with the wife seeking a divorce and support. She now sought to have the husband's solicitors removed from the record, on the basis that a relationship had developed between herself and them, and that she had divulged confidential information to them which might now prejudice her.

Held - motion dismissed.

The wife was never a party to the husband's previous divorce proceedings, and she never retained or instructed his solicitors in any way. She imparted no confidential information to them, and there was no appearance of unfairness or impropriety.

Clozza v. Clozza

[1993] W.D.F.L. No. 932 (B.C.S.C.), Shabbits J.

Summary: The wife commenced an action under the Family Relations Act. The parties attempted reconciliation and both met with a lawyer in the firm representing the wife on several occasions for different reasons. The reconciliation attempt failed and the wife continued with the action. The husband applied for an order restraining the wife's law firm from acting for her, saying that he had discussed his marital problems with one of the lawyers in the firm and had imparted confidential information to that lawyer.

Held - application allowed.

Because the matter required immediate determination in the face of an interlocutory application, it was inappropriate to allow the firm to continue to act. The husband's allegations raised an appearance of conflict of interest and there was no affidavit material to rebut the allegations. The law firm had not been joined as a party as should have been done, and it would be at liberty to commence process seeking a declaration of entitlement to act for the wife.

Bell v. Nash

[1993] W.D.F.L. No. 1355 (B.C. C.A.), Cummings, Goldie & Prowse JJ.A.

Summary: The solicitor was acting for the husband in matrimonial litigation. The wife contacted the solicitor by telephone, seeking to retain her. The solicitor did not recognize right away that the caller was the wife of a client. Several days later, when the wife called for an appointment, the solicitor told the wife that she would be unable to act for the wife because she had already been retained by the husband. The wife brought a petition seeking to restrain the solicitor from continuing to act for the husband. The chambers judge accepted the wife's evidence that she had disclosed relevant confidential information to the solicitor during the telephone conversation. The petition was granted and the solicitor appealed.

Held - appeal dismissed.

The overriding test to be applied in determining whether there is a disqualifying conflict of interest is whether the public, represented by the reasonably informed person, would be satisfied that no use of confidential information would occur. The chambers judge applied that test. The judge was correct in holding that there did not have to be a formal retainer between the wife and the solicitor at the time of the confidential disclosure. As well, the judge was correct in concluding that the

wife did not waive her right to confidentiality or acquiesce in the solicitor acting for the husband by virtue of the fact that she did not object to the solicitor appearing on a chambers application regarding possession of the matrimonial home [prior to this application]. The wife was entitled to her costs on the application and on the appeal, but only those costs to which she would have been entitled had the application been brought within the matrimonial action.

Bezzeg v. Bezzeg

(1994), 33 C.P.C. (3d) 94 (N.B. Q.B. [Fam. Div.]), Boisvert J.

Headnote: The husband filed a notice of motion seeking interim custody of his two children. The wife opposed and contended that there was a conflict of interest by the husband's solicitor S of law firm S & S. When experiencing marital difficulties, the wife had consulted solicitor W regarding custody of her children. W shared the same office space and receptionist with S & S. The wife was concerned that W might have discussed her file and situation with S before the husband retained S & S and that S & S might have had access to confidential information through W before the husband retained S & S. The wife applied for an order removing the husband's solicitors of record.

Held - wife's application granted.

In order to request the removal of a solicitor of record, it was not necessary to show that the solicitor had acted improperly nor was it required to suggest or to show that some information was misused. It might very well be that S was not privy to any confidential information; however, in the eyes of the wife, there was an appearance of conflict. This was sufficient to remove S & S as the husband's solicitors of record. It could not be concluded that the husband would be unduly prejudiced. There was no evidence that substantial pre-trial preparation had been started.

Archer v. Archer

(1994), 6 R.F.L. (4th) 416 (Ont. Gen. Div.), Eberhard J.

Headnote: Approximately one month after the parties' marriage, the husband was awarded damages arising out of a motor vehicle accident. The accident occurred before the marriage. The law firm that had represented the husband at that time was retained by the wife to represent her in the parties' matrimonial proceedings. One of the contested items of property was the damages awarded to the husband. The lawyer retained by the wife admitted that he had read the husband's file, but denied that either it or earlier discussions of the case had made any confidential information available to him.

The husband moved for an order removing the law firm selected by the wife as her counsel of record.

Held - motion allowed.

Justice would not be seen to be done if the husband's opponent were to have free access to whatever information was contained in the file, whether about the property in question or about the husband himself. The possibility of a conflict of interest arising had not been eliminated by the taking of concrete measures. Thus, the onus upon the lawyer to demonstrate that there was no conflict had not been satisfied. Accordingly, to preserve the "confidentially of information imparted to a solicitor, the confidence of the public in the integrity of the profession and the administration of justice," the motion should be allowed.

Dow v. Buckley

[1994] W.D.F.L. No. 245 (N.B. Q.B.), Guerette J.

Summary: During the father's application for access to his 2-year-old daughter, the mother brought a motion alleging a conflict of interest in that following the initial interview between a lawyer and the mother's financé, arranged by way of a lawyer referral service, it became apparent that the lawyer's firm had acted on behalf of the father, which considered him to be a client of long standing. The lawyer with whom the mother's financé spoke took no action beyond the initial interview and terminated the relationship upon verifying the names of the solicitors on a consent order.

Held - motion dismissed.

While confidential information was conveyed to the lawyer, there was no risk that such information was to be used to the mother's prejudice. It had to be assumed that whatever information the lawyer received was subsequently revealed in the affidavits and that all the facets surrounding the issue of access were presented before the court. Furthermore, the father's lawyer gave his assurance that he did not obtain the details of the conversation in question. Fairness was to take into account the interests of both sides, as there was a public interest in allowing people to retain counsel of their own choice.

Mayer v. Mayer

[1994] W.D.F.L. No. 361 (B.C.S.C.), Hutchison J.

Summary: The parties married in 1984 and separated in 1992. The husband applied for an order directing that the law firm representing the wife cease to act for her by reason of conflict of interest. The same law firm had acted for the wife since 1980 in connection with her business dealings. In 1990, in order to assist the wife's business, the husband had signed a mortgage in front of a solicitor employed by the firm representing the wife.

Held - application dismissed.

The solicitor obtained no confidential information from the husband. She did not advise him specifically of his legal position in the wife's project. At most she dealt only with the consequences of the mortgage on the matrimonial home, the guarantee on his assets and the effect of a related promissory note, although the evidence was very sketchy from both sides as to how much advice was given. At best there was an imaginary appearance of conflict of interest that had no substance.

R. v. D. (W.R.)

(1995), 35 C.P.C. (3d) 236 (S.C.C.), Full Court

Headnote: The complainant in criminal proceedings against her stepfather for assault and gross indecency brought a civil action against the provincial government arising out of the same alleged incidents. The civil action was brought in March 1992, and the criminal proceeding was brought in September 1992. The criminal proceeding

was scheduled to proceed to trial in November 1993. At a pre-trial conference, the issue arose as to whether the Attorney General was in a position of conflict of interest. The argument was that the Attorney General could not present the complainant as a credible witness in the criminal prosecution and, at the same time, attack her credibility on the same essential facts in the civil proceeding. It was determined that there was a conflict, and a stay of proceedings was granted until outside counsel was retained to prosecute the case. The Crown successfully appealed. It was determined that in the criminal proceeding, the complainant was merely a witness, and was not in a solicitor-and-client position giving rise to confidentiality. The complainant, as plaintiff in the civil action, was an adverse party, and was not in a solicitor-and-client position with the Attorney General. No apprehension of bias arose out of the multiple responsibilities of the Attorney General in the conduct of civil and criminal litigation. It was presumed that the Attorney General would act in good faith. [(1994), 5 W.W.R. 305 (Man. C.A.).]

The accused appealed.

Held - appeal dismissed.

The appellant did not establish a conflict of interest or any appearance thereof.

Oliver, Derksen, Arkin v. Fulmyk

(1995), 37 C.P.C. (3d) 275 (Man. C.A.), Scott C.J.M., Twaddle and Helper JJ.A., at pp. 275, 277-279

Headnote: The plaintiff A and the defendants practised law together until December 3, 1992. The plaintiff sought an accounting of its share of the fees generated by files that the defendants allegedly took with them when they left the firm. The plaintiff joined the law firm WW. The plaintiff retained WW to commence proceedings against the defendants. The defendants unsuccessfully moved to have solicitor L of WW removed as "counsel of record" for the plaintiff on the ground that L's involvement was contrary to Chapter IX, Commentary 5 of the Code of Professional Conduct as adopted by the Law Society of Manitoba. The defendants appealed.

Decision Text:

. . . .

The law

Chapter IX, Commentary 5, of the Code of Professional Conduct, insofar as it is material, provides:

> The lawyer who appears as an advocate should not submit the lawyer's own affidavit to or testify before a tribunal save as permitted by local rule or practice, or as to purely formal or uncontroverted matters. This also applies to the lawyer's partners and associates; generally speaking they should not testify in such proceedings except as to merely formal matters … The lawyer must not … put the lawyer's own credibility in issue.

Whatever else its effect may be, this rule is not binding on superior courts. In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, Sopinka J. make this point in these terms (at p. 1245):

> The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics.

We are not dealing here, of course, with the removal of solicitors from the record, but with the removal of a lawyer as advocate in the cause. This latter remedy, while akin to the former, does not necessarily depend on the existence of a conflict of interest such as that which did exist in *MacDonald Estate v. Martin*, supra. Rather, it is based on the rule which found expression in the judgment of Cartwright J. (as he then was) in *Re Jardine Estate*, (sub. nom. *Stanley v. Douglas*), [1952] 1 S.C.R. 260. He said (at p. 272):

> It must have been obvious at all times that the counsel in question was an essential witness and it was "irregular and contrary to practice" - to use the words of Humphrey J., concurred in by Singleton and Tucker JJ. In *Rex v. Secretary of State for India* [[1941] 2 K.B. 169 at 175n] - that he should act as counsel and witness in the same case.

That rule was considered and commented upon by this Court in *R. v. Deslauriers* (1992), 83 Man. R. (2d) 7 at 12-14. Noting that the rigour of the rule is sometimes relaxed, as a concession to expediency, the Court indirectly indicated the criteria for its imposition. Delivering the judgment of the Court, I said (at p. 13):

> This relaxation is … ordinarily permitted only where the lawyer's credibility will not be impeached and where neither his conduct nor judgment is questioned.

An advocate's credibility may be impeached not only where the advocate doubles as a witness, but also where the advocate has a common interest with a witness in the accuracy of that witness's evidence. This may occur where the witness is a partner or associate of the law firm to which the advocate belongs and the other lawyer's evidence concerns a matter arising from the law firm's practice. The advocate then has an interest in the court accepting the lawyer's evidence as its rejection reflects on all members of the firm.

Similarly, the questioned conduct or judgment which bars a lawyer from acting as an advocate may be not the lawyer's own conduct or judgment, but that of another member of the advocate's law firm. But, there again, the advocate is only

barred where the questioned conduct or judgment of the other lawyer occurred in that lawyer's capacity as a member of the firm.

The existence of a wider rule was urged upon us by the defendants who brought the motion. They said it would be found in its application in *Harvard Investments Ltd. v. Winnipeg (City)* (1994), 93 Man. R. (2d) 269 (Q.B.), and *Tapper v. Kaufman* (1991), 77 Man. R. (2d) 209 (Q.B.).

Harvard Investments is, in fact, a case which falls within the rule as I have expounded it. A member of the law firm representing the plaintiff had conducted negotiations with the defendant concerning the subject matter of the action. An order requiring that outside counsel be retained if the law firm member was called as a witness was made. The negotiations conducted by the law firm member, about which he was to testify, were clearly undertaken in his capacity as a member of the firm. Other members of the firm had a direct interest in having their associate believed and were thus ineligible to act as counsel if the associate was called as a witness.

Tapper v. Kaufman, on the other hand, represents a departure from the rule as I have expounded it. In that case, a law firm was barred from acting for a partner in a divorce action. No common interest in the subject matter of the partner's evidence existed. Whether or not it was wise for the firm to act in the circumstance is not for me to say, but it clearly was legally permissible for the firm to do so. The case was not, in my respectful view, correctly decided.

Application

In the case at bar, the advocate had no common interest in the accuracy of his partner's testimony concerning matters solely to do with the plaintiff firm in which the advocate has no interest. Nor is the conduct or judgment of Mr. Arkin as a member of the advocate's law firm called in question. It is not sufficient to bar the advocate from acting that his client is his partner now.

Conclusion

For these reasons, I would dismiss the appeal with costs.

Baumgartner v. Baumgartner

[1995] W.D.F.L. No. 491 (B.C.C.A.), Southin, Wood & Hutcheon JJ.A.

Summary: The parties became engaged in a bitter matrimonial dispute. The husband consulted the lawyer F., who rendered an account shortly after interim custody and maintenance orders were made in the wife's action under the Family Relations Act. Later, another lawyer became solicitor of record for the husband. A year later, the wife changed counsel, retaining H. The husband applied to have H. removed as counsel for the wife, expressing concern that H. shared space in a "CO-OP" law office with F. The husband contended that H. would be privy to confidential information concerning the matrimonial proceedings. F. sublet office space to H., where a total of four lawyers shared a common receptionist, a photocopy machine and a fax machine. Their telephone lines were separate, as were their filing systems, books of accounts, and secretaries. F. deposed that when he heard from "casual chit-chat" that H. was representing the wife, he advised H. that he had previously acted for the husband. F. deposed that the two lawyers agreed not to discuss the case further. The chambers judge allowed the husband's application.

Held - On appeal for wife; order removing H. as wife's solicitor of record overturned.

The applicable test was whether a reasonable member of the public who was in possession of the facts would conclude that no unauthorized disclosure had occurred or would occur. The chambers judge did not put the test in those words. He postulated the test as "a reasonable member of the public who is in possession of the facts." A reasonable member of the public, knowing of the facts of this case, would conclude that no unauthorized disclosure of confidential information had occurred or would occur.

Merry v. Schenk

[1995] W.D.F.L. No. 949 (Ont. Prov. Div.), Webster J.

Summary: The wife met with H., a solicitor with law firm C., to discuss a possible separation from her husband. H. dictated a memorandum to file and outlined a strategy to be followed if the matter was pursued. The wife returned to law firm C. and retained them to act on her behalf in negotiating the separation. She asked for H., but was advised that he was too busy to take the case. A separation agreement was

negotiated. The wife retained another solicitor in another firm to apply for a variation of the separation agreement. The husband retained H. as his solicitor. H. was no longer employed by law firm C. Under the Law Society's Rules of Professional Conduct, a solicitor could act in the face of a conflict only where there had been complete disclosure and the express consent of the client. The wife informed her solicitor of H.'s previous involvement, but the solicitor brushed aside her concerns. The wife retained another solicitor, who advised H. that there was a conflict of interest and recommended that H. tell the husband to retain another solicitor. H. responded that he had not recalled the meeting with the wife, that he had not been in a position to disclose any confidential information to the husband, and that the husband would be considerably disadvantaged if he was required to retain a new solicitor. The wife applied to have H. removed as the solicitor of record for the husband.

Held - application allowed.

H. should have been aware of the conflict when he received a copy of the separation agreement, which contained the name of law firm C. and the date it was prepared. H. had received relevant confidential information from the wife in the context of a solicitor/client relationship. There was a risk that the confidential information could have been misused.

Blaeser v. Lang

[1995] W.D.F.L. No. 1246 (Sask. Q.B.), Rothery J.

Summary: The wife retained the family lawyer to represent her in divorce and matrimonial property proceedings. The husband objected because the lawyer had acted for the parties in matters of farm debt litigation and the husband's personal bankruptcy. He said that, in the course of their dealings, he had imparted confidential financial information to the lawyer that his wife did not know about and that this information could be used to his detriment in the current proceedings. The husband applied to remove the wife's lawyer and his firm from continuing to act for her.

Held - application allowed.

To determine whether there was a disqualifying conflict of interest, consideration had to be given to whether the lawyer received confidential information relevant to the matter at hand and whether there was a risk that it would be used to the prejudice of the client. Here, relevant confidential information existed which could be used to the prejudice of the husband. Accordingly, the lawyer was ordered to be removed from representing the wife in this action, and the other members of the lawyer's firm were restrained from representing her.

Vincent v. Vincent

[1995] W.D.F.L. No. 1288 (Ont. Gen. Div.), Sharron J.

Summary: The parties had a traditional 36-year marriage. The husband had been a practising member of the Ontario bar for 40 years. Throughout the marriage the husband's firm had represented the wife with respect to several legal matters. These matters included the sale and purchase of three matrimonial homes owned solely or jointly with the husband, the preparation of her will and an action which the wife had brought against a trust company alleging negligence in the handling of her father's estate. In each case, all legal matters had been either handled by the husband, or through him, and the wife never personally consulted with any members of the firm. The husband engaged his law firm, of which he was senior partner, to represent him in his divorce action. As part of the divorce proceeding, the husband was claiming a constructive trust in his favour with respect to the same properties that were the subject of litigation with the trust company. He took the position that no confidential information had been transmitted to the firm by his wife so as to preclude the firm from acting on his behalf. The wife brought a motion for an order removing the husband's firm as solicitors of record for the husband on the ground of conflict of interest.

Held - application dismissed.

The husband's choice of counsel had to be respected unless there was good cause to deprive him of that right. In this case, there was no doubt that the firm had received information from the wife in the course of representing her in the past. There was no doubt that the information was relevant to the divorce litigation. This information had been communicated to the solicitors in the course of the solicitor-client relationship with the wife and as such was confidential as between the solicitor and the client, even though the information had been communicated through a third party. However, it could not be said, in the circumstances, that there was any risk that this information would be used to the prejudice of the wife in the context of the divorce litigation. Since the wife had chosen to communicate in the course of past dealings solely through her husband, the communications lost their confidential character insofar as the husband was concerned. The wife would not be any more prejudiced if the firm of solicitors continued to act than she would be if the husband were forced to retain new counsel. In the circumstances, there was no real or apparent conflict of interest.

Arends v. Arends

[1995] W.D.F.L. No. 1701 (B.C.S.C.), Davies J.

Summary: The husband had been hired by the wife's family company before their marriage. He had worked for the company until shortly after the parties separated. The company had been incorporated as part of an estate plan developed by a certain law firm. Three years before the separation, the wife had been issued shares in the company as part of a reorganization. The husband had not attended at the completion of the share transaction at the firm. The wife commenced matrimonial proceedings. She was represented by a lawyer from the firm. The husband applied for an order that the firm be removed from the record.

Held - application dismissed.

Although a conflict of interest might arise if the wife's shares were declared to be a family asset, no conflict existed at present. The husband had never had a relationship of any kind with the firm, nor had there been any communication of confidential information.

Lance v. Lance

[1996] W.D.F.L. No. 546 (Ont. Gen. Div.), Murphy J.

Summary: The wife brought an application for equalization of assets, custody, spousal and child support. The wife's father, who was a solicitor, was a member of the firm which was solicitors of record for the wife in the action. The wife's father had acted as solicitor for both parties on previous occasions and most recently had acted on the sale of their matrimonial home. However, the purported purchase of another property was not completed because the parties could not agree on the issues of occupation and disposition of the existing matrimonial home. The husband consulted his own lawyer on that occasion on the issue of whether he should complete the purchase of the other property. The parties failed to put the wife's father in funds to complete the purchase. The purchase was thereafter completed by the wife's father on his own behalf to free both the wife and the husband from legal liabilities in connection with that proposed purchase. On another occasion, the husband had retained an independent lawyer to negotiate the terms of a domestic contract which was never signed. The husband deposed that the wife's father as a solicitor obtained confidential information which was directly related to the allegations in the domestic action commenced by the wife. He also argued that the wife's father, as grandfather of the children, might be obligated to attend a custody assessment and might have confidential information with regards to custody and access. The husband brought a

motion of have the wife's father's firm removed as solicitors of record for the wife and for an order restraining that firm from acting for the wife in the action.

Held - application dismissed without prejudice to husband to renew application at later date.

The court was not satisfied on a balance of probabilities that the wife's father had received confidential information attributable to the solicitor/client relationship that was prejudicial to the husband. It was premature to speculate that the wife's father or grandfather might be called to participate in a custody assessment.

4.5.3 Retainer and authority

(a) Agreeing to settlement

Scherer v. Paletta

[1966] 2 O.R. 524, 57 D.L.R. (2d) 532 (Ont. C.A.), MacKay, Kelly and Evans, JJ.A.

Headnote: The relationship of a solicitor to his client is a general one of agent to principal and, although the authority of the solicitor arises from his retainer and is subject to any qualifications set out therein, any such limitation of authority does not affect an opposite party with whom the client is engaged in litigation unless that limitation of authority is communicated to such opposite party. The solicitor is the client's authorized agent in all matters that may reasonably be expected to arise for decision in the proceedings for which he has been retained, including the compromise of such proceedings. Accordingly, where the client is under no legal disability, and whether or not as between the client and his solicitors themselves the client's instructions to settle a pending action are qualified, the Court will, in practice, where there is no dispute as to the existence of a retainer, enforce against the client a settlement arrived at by the acceptance by the opposite party's solicitor of the client's solicitor's unqualified offer to settle.

MacDonald v. MacDonald

(1986), 4 R.F.L. (3d) 463 (N.S. S.C. [T.D.]), Tidman J., at p. 462.

Decision Text: I granted a decree nisi for divorce in this action on 15 October 1986. At that time counsel informed me that as to 10 October 1986 the parties had reached agreement on all corollary matters. The oral agreement was to be put in writing and signed before the hearing. The respondent's solicitor prepared a draft agreement. Counsel for the petitioner informed me that on 11 October 1986, the day after agreement had been [orally] reached, the petitioner informed him that she had changed her mind and did not intend to sign the agreement. At that time, counsel for the respondent submitted that the petitioner was bound by her oral agreement.

Summary: The Court held that where the parties are negotiating under traumatic conditions which normally exist in a separation, the wife would not be bound by an oral agreement for corollary relief in a divorce proceeding where she repudiated the agreement within a very short time of its making and where the husband was not prejudiced by her conduct.

Racz v. Mission (District)

(1988), 28 C.P.C. (2d) 74 (B.C.C.A.), Hutcheon J.A. for the Court

---

Summary: Where consent dismissal order entered, notwithstanding that plaintiff's solicitor had no authority to consent, and defendant's solicitor knew the authority of plaintiff's solicitor questionable, order set aside.

Davis et al. v. Kalkhoust et al.

[1986] 12 C.C.C. (2d) 241 (Ont. H.C.), Carter L.J.S.C., at p. 244

Summary: Plaintiffs' action against one of defendants dismissed without costs pursuant to consent signed by solicitors of record for the plaintiffs and for the affected defendant. The plaintiffs changed solicitors and moved to set aside the consent order. Plaintiffs asserted former solicitors were not authorized to sign consent order giving

rise to the dismissal of plaintiffs' action against the affected defendant. On hearing of the set aside application, evidence disclosed a dispute between plaintiffs and their former solicitor as to whether the former solicitor had actual authority to consent to the order dismissing the action.

Held - motion dismissed without costs.

Decision Text: The solicitor had been retained. He had apparent authority to bind his clients. No want of authority was indicated to the defendant['s] … counsel.

(b) Receiving gifts

Wright v. Carter

[1903] 1 Ch. 27 (C.A.), Stirling L.J., at p. 57

I think ...[the decision in *Hatch v. Hatch* (1804), 32 E.R. 615 (L.C.)] is a clear authority for these two propositions: First, that transactions of gift between solicitor and client are watched and scrutinized by the Court with the utmost jealousy. This doctrine is one founded on important reasons of public policy; and the result is that, before such a transaction can be upheld, the Court must be satisfied that, as Lord Eldon puts it, "it is an act of rational consideration, an act of pure volition, uninfluenced." In other words, the Court, in dealing with such a transaction, starts with the presumption that undue influence exists on the part of the donee, and throws upon him the burden of satisfying the Court that the gift was uninfluenced by the position of the solicitor. Secondly, this presumption is not a presumption which is entirely irrebuttable, thought it is one which is extremely difficult to be rebutted.

4.5.4 Confidentiality and privilege

(a) Generally

–

Regina v. Derby Magistrates' Court, Ex parte B

19 October 1995 (H.L.) (*The Times*, 25 October 1995, at p. 36.)

–

Decision Text: The principle which ran through all the cases was that a man had to be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client had to be sure that what he told his lawyer in confidence would never be revealed without his consent.

. . . .

No exception should be allowed to the absolute nature of legal professional privilege, once established.

Alberta Wheat Pool v. Estrin et al.

(1986), 14 C.P.C. (2d) 242 (Alta. Q.B.), Chrumka J., at pp. 249-250

Decision Text: The existence of a person's right to have communications with his lawyer kept confidential has been confirmed in numerous authorities and most recently by the Supreme Court of Canada in *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, 28 C.R. (3d) 289, 70 C.C.C. (2d) 385, 1 C.R.R. 318, 141 D.L.R. (3d) 590, 44 N.R. 462 (S.C.C.). This general privilege from disclosure of communications made in confidence has existed since the sixteenth century. The basis for the privilege, as it now exists, is as stated by Brougham L.C. in *Greenough v. Gaskell* (1833), 39 E.R. 618 at 620 (approved in *Solosky v. R.*, [1980] 1 S.C.R. 821 at 834, 16 C.R. (3d) 294, 50 C.C.C. (2d) 495, 105 D.L.R. (3d) 745, 30 N.R. 380 (S.C.C.)): ….

. . . .

Later Jessell M.R. in *Anderson v. Bank of B.C.*, [1876] 2 Ch. D. 644 (C.A.) expressed the rule as:

> "The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolute necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating of his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

The solicitor-client privilege is that of the client and belongs to the client. It does not belong to the solicitor. It protects the client from the disclosure of confidential

communications made by him or his agent, to his solicitor and also from the disclosure of communications made by the solicitor in response, while the client was seeking legal advice.

R. v. Hale

(1992), 17 C.R. (4th) 241 (N.S. Co. Ct.),

Bateman Co. Ct. J. (*as she then was*), at pp. 241, 243-245.

Headnote: The accused was charged with uttering a threat to his common law wife. The complainant retained a solicitor to deal with the property issues involved in the termination of the relationship. The accused moved pursuant to the *Charter* to permit him access to the communications between the complainant and her solicitor, on the basis that they might be relevant to this charge. Without such access, he would be prevented from making the full answer and defence which is fundamental to his right to a fair trial. In the alternative, the defence submitted that if the privilege was not lifted, or the court was unable under s. 24(1) of the *Charter* to craft some acceptable, limited access to the information, the only proper remedy was a stay.

Shortly after the alleged incident, the complainant's matrimonial solicitor sent a "without prejudice" letter to the accused's solicitor, suggesting that the complainant was prepared to continue to reside in separate accommodation but within the same premises as the accused and to continue to jointly operate their business. This, the defence submitted, would put the parties in regular and frequent contact which was inconsistent with a threat having been uttered. The defence argued that the complainant might have said something to her solicitor which would assist the defence in attacking her credibility.

Decision Text: The absolute confidentiality of communications between a solicitor and client has long been recognized as essential to our justice system (*Solosky v. Canada*, [1980] 1 S.C.R. 821, 16 C.R. (3d) 294, 30 N.R. 380, 50 C.C.C. (2d) 495, 105 D.L.R. (3d) 745).

There are exceptions to the privilege. Counsel concedes, here, however, the information which he seeks is within the solicitor-client privilege and does not fall within the limited exceptions.

In *R. v. Fosty*, [1991] 3 S.C.R. 263, 8 C.R. (4th) 368, [1991] 6 W.W.R. 673, 130 N.R. 161, 75 Man. R. (2d) 112, 6 W.A.C. 112, 7 C.R.R. (2d) 108, (sub nom. *R. v. Gruenke*) 67 C.C.C. (3d) 289 the court acknowledges that there are two categories of privileged communications: those for which there is a prima facie presumption of inadmissibility and those for which there is a prima facie presumption that they are not privileged, but which may be determined to be covered by the privilege and not admissible on a case by case analysis.

Solicitor-client communications fall into the first category. As made clear by Chief Justice Lamer, these communications are excluded "not because the evidence is not relevant, but rather because there are overriding policy reasons to exclude this relevant evidence" (at p. 303 [C.C.C., p. 384 C.R.]).

. . . .

In *R. v. Seaboyer* (sub nom. *R. v. S. (S.)*) [1991] 2 S.C.R. 577, 7 C.R. (4th) 117, 128 N.R. 81, 6 C.R.R. (2d) 35, (sub nom. *R. v. S.*) 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, 48 O.A.C. 81 McLachlin J. …. says at p. 399 [C.C.C., p. 148 C.R.]:

> "The same is true of privilege. Courts have held that informer and solicitor-and-client privilege do not apply *where the effect would be to prevent the defendant on a criminal charge from bringing forward relevant evidence*." (emphasis added)

In certain circumstances, then, the court can admit the evidence notwithstanding the privilege. There is little guidance, however, as to when that should occur.

. . . .

The defence, here, suggests that Ms. Gidney's offer to remain in some contact with Mr. Hale is sufficient to raise suspicion as to what Ms. Gidney may have said to her lawyer about the alleged threat. ….

The defence says it wants to know if Ms. Gidney sought advice, prior to making this allegation, as to the remedies available through the criminal law, such as peace bonds. If she did so, the defence submits, the court might infer that Ms. Gidney manufactured this allegation to keep pressure on Mr. Hale in relation to the domestic proceeding. The defence says, as well, that if the alleged threat was not discussed with Ms. Gidney's solicitor, the court might infer it didn't occur. The defence also wishes to explore possible inconsistencies between Ms. Gidney's discussions with her solicitor and her evidence at trial.

I do not accept the defence submission that Ms. Gidney's offer to remain in contact with Mr. Hale is clearly inconsistent with a threat having been uttered. There could be many reasons why Ms. Gidney did not take the threat seriously in the sense

that Mr. Hale would actually carry through. Whether or not Ms. Gidney thought Mr. Hale intended to act on the threat is not relevant to the charge.

While policy alone cannot dictate the outcome, some consideration of policy issues must be made in the context of weighing the competing interests. One starts with the proposition that there is a well-founded basis for the solicitor-client privilege.

In many situations of domestic violence or threatened violence giving rise to the criminal charges, the parties have retained counsel to deal with the domestic matters. To permit Mr. Hale to have access to the privileged communications between solicitor-client on these facts would open the door in almost every such case. There is nothing unique to this situation.

(b) Counselling

Bates v. Bates

(1992), W.D.F.L No. 623 (Ont. S.C.[Master]), Master Donkin.

Summary: The husband applied to strike the sections of the wife's affidavit that were headed "Mediation," alleging they were a recital of an attempt to settle certain issues. The affidavit also contained information about a social worker's counselling of the parties' daughter.

Held - specified paragraphs or portions and specified exhibits of wife's affidavit struck; leave to wife to include information concerning counselling of daughter with reference to mediation between parties, and to set out history of support payments to date.

The communications made in the course of the attempts at settlement were privileged. There was no discussion before the attempt to settle as to whether what was said would or would not be privileged. Information concerning the daughter's counselling was not privileged, as it was an attempt to assist the daughter in dealing with the situation and was not an attempt to settle any issue.

(c) Negotiations/"Without Prejudice" communications

Mueller Canada Inc. v. State Contractors Inc.

(1989), 41 C.P.C. (2d) 291 (Ont. S.C.), Doherty J.

Headnote: Two defendants had been involved in litigation which they later settled. The settlement was embodied in a letter. It was a term of the settlement that the details of the settlement not be disclosed to third parties. The plaintiff then sued both defendants for relief similar to that claimed in the action between the two defendants. The plaintiff also alleged that one defendant breached its fiduciary duty to the plaintiff because it violated an agreement to not settle its claim against the co-defendant without a concurrent settlement of the plaintiff's claims. The defendant denied the existence of any such agreement with the plaintiff. At examination for discovery, the defendant claimed privilege and refused to produce the settlement letter. The plaintiff obtained an order for production. The defendants appealed.

Held - The appeal was dismissed.

Generally, communications made in furtherance of efforts to settle disputes were not admissible or producible against the parties to those communications in subsequent litigation involving one of the parties to that correspondence and a third party. Parties should be free to engage in frank and reasonable negotiations without fear that their offers would be held to be admissions against interest if negotiations failed.

Where documents referable to the settlement negotiations or the settlement document itself had relevance - apart from establishing one party's liability for the conduct which was the subject of the negotiations, and apart from showing the weakness of one party's claim in respect of those matters - the privilege did not bar production. Where a contractual relationship resulting from the correspondence was in issue, the correspondence was not privileged.

In its pleadings, M placed the contractual relationship of S and K as established in the settlement in issue. The settlement letter was potentially relevant as being evidence of the nature and extent of the breach of contract by S, if M established that S agreed that it would not settle its claim against K without settling M's claim as well. Also, it was within one of the exceptions to the rule against disclosure of settlement-related documents.

Perepelecta v. Perepelecta

(1990), 24 R.F.L. (3d) 336 (Alta. Q.B.), Veit J.

Editor's Note: Wife filed affidavit in support of child financial support claim. Affidavit included summary of parties' pre-trial conference communication. In granting and quantifying child financial support the husband was required to pay, Veit J. stated that settlements are within the scope of a pre-trial conference; thus, if a formal settlement is not reached, any pre-trial discussions relating to settlement are privileged. Accordingly, the affidavit respecting the pre-trial conference should not be used on trial of the financial support application.

Papineau v. Papineau

(1986), 8 C.P.C. (2d) 249 (Ont. H.C.), Kovacs L.J.S.C., at pp. 251-252.

Summary: Husband's application for order to have wife re-attend at cross-examinations on an affidavit filed by her in litigation in which she pleaded *non est factum* in challenging the validity of a separation agreement which she had with the husband.

When originally cross-examined, husband's counsel sought to put questions to the wife concerning negotiations which had taken place leading to the separation agreement. Those negotiations were documented in correspondence; some of which were written "without prejudice." The wife refused to answer on the ground the correspondence was privileged.

It is not all letters that are without prejudice ... . In *Abrams v. Grant* Mr. Justice Steele said [p.309]:

> "I am of the opinion that the mere words 'without prejudice' attached to a letter do not make it a privileged document and therefore protect it from discovery or being admitted as evidence at trial. It is the intention of the writer and content of the letter that govern whether or not the document is privileged. .... "

. . . .

...[In] Eccles v. McCannell [(1984), 44 C.P.C. 43 (Ont. Div. Ct.)] ... the long settled principle is quoted by Mr. Justice Hollingworth as to why letters without prejudice should not be admitted normally. In referring to the text on evidence by Sopinka and Lederman His Lordship said:

> "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession that they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming."

In my view, here this is not a situation where reference to the letter may preclude settlement. ...[A settlement agreement] has already come to fruition. The issue is whether at the time that the wife was carrying on the settlement negotiations concerning the separation agreement, she was in a position where she was able to participate in those negotiations in a way [that] she was capable of entering into a valid agreement. In my view, that is a relevant issue in view of her pleading.

R. v. L.(C.K.).

(1987), 62 C.R. (3d) 131 (Ont. D.C.), Kerr D.C.J., at pp. 134, 135

Summary: Accused consented to psychiatric assessment only for purpose of assisting in his own defence. Accused's counsel at the time the assessment occurred promised a copy of the resulting report to the Crown. Accused subsequently changed counsel, stated that he had not authorized the undertaking to release the psychiatric assessment report to the Crown which had been given by his former solicitor, and claimed solicitor-client privilege with respect to the assessment report.

Decision Text: … In *Foster v. Hoerle; Parker v. Reg. of Motor Vehicles*, [1973] 2 O.R. 601, 34 D.L.R. (3d) 161 (H.C.)[,] …, Zuber J. (as he then was) stated at p. 602:

> Documents which come into existence for the purpose of being communicated to a solicitor with the object of obtaining his advice or enabling him to either prosecute or defend an action are privileged (*Wheeler v. LaMarchant* (1881), 17 Ch. D. 675) and obviously a report by a doctor to a solicitor can come within this rule: *Kelly et al. v. Curphy*, 1933 O.W.N. 181.
>
> . . . .

Does that privilege extend to the conversations between the accused and Dr. Orchard [the psychiatrist] which led to the preparation of the report?

No Canadian authorities have been cited to me which define the extent of the solicitor-client privilege afforded under these circumstances. Reference has been made to a California decision, *San Francisco (City & County) v. S.C. of San*

Francisco, 231 P. 2d 26 (Calif. S.C. in Bank, 1951). In that decision, in dealing with this question, at p. 31 Traynor J. states:

> . . . .
>
> It is no less the client's communication to the attorney when it is given by the client to an *agent* [emphasis added] for transmission to the attorney, and it is immaterial whether the agent is the agent of the attorney, the client or both. "(T)he client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication then by *any form of agency* employed or set in motion by the client is within the privilege."

And, further, on p. 31 he states:

> Thus, when communication by a client to his attorney regarding his physical or mental condition requires the assistance of a physician to interpret the client's condition to the attorney, the client may submit to an examination by the physician without fear that the latter will be compelled to reveal the information disclosed.

Perron v. R.

(1990), 75 C.R. (3d) 382 (Que. C.A.), Paré, Tyndale and Proulx JJ.A. for the Court.

Headnote: The full exercise of the solicitor-client relationship may sometimes encompass within it other professional relationships such as that of doctor and patient. In such a case the mandate given by the lawyer to another professional expert must be considered as an extension of the solicitor-client privilege, even if the lawyer is not present when his client meets that professional. However, if that professional testifies for the defence, there is an implicit waiver of the privilege. In the present case, the trial judge had erred in law in rejecting the defence objection to the cross-examination of the accused with respect to what he said to his psychiatrist.

Calvaruso v. Nantais

(1992), 7 C.P.C. (3d) 254 (Ont. Gen. Div.), Brockenshire J.

Headnote: The plaintiff was relying on evidence given by an expert. The expert's opinion was expressed in 16 numbered points. The defendants brought a motion to compel the plaintiff to produce the instructing letter from plaintiff's counsel to the expert. The defendants argued that as there was a new era of complete disclosure, the letter from the solicitor should be produced. The defendants also contended that as the expert's opinion was given in 16 numbered points, it was possible that the expert was answering a number of questions and these questions might have coloured the answers given.

Held - The motion was dismissed.

The solicitor-and-client or litigation-purpose privilege still existed and was an essential underpinning of our system of administration of justice. The defendants' material did not give any reason that would outweigh the solicitor-and-client privilege. The expert's letter did not purport to be in response to counsel's questions and it did not say that it was in response to information provided by counsel.

(d) Third Party reports

Desmarais v. Morrissette

(1991), 4 C.P.C. (3d) 297 (Ont. Gen. Div.), Flanigan J.

Headnote: There was no statutory privilege between a patient and doctor or psychologist. However, a public policy privilege has been established pursuant to *Slavutych v. Baker* [[1976] 1 S.C.R. 254] if the four requirements were satisfied. In this case, all of the criteria were satisfied. In particular, the harm to children of disclosure of the reports would be greater than any probative value envisioned from the unknown information [they] contained … . The motion was granted and the subpoena duces tecum was quashed.

(e) "Dominant Purpose"/Barrister's Brief

Brampton Engineering Inc. v. Alros Products Ltd. c.o.b. Polytarp Products

(1986), 8. C.P.C. (2d) 48 (Ont. S.C.[Master]), Master Donkin, at pp. 51-52:

Headnote: The privilege claimed is based on the privilege attaching to information given by a client to the solicitor or advice given by the solicitor to the client or information obtained by the solicitor for the purposes of bringing or defending the action. In most cases the material for which privilege is claimed will consist of letters between the client and solicitor, memoranda made by the solicitor or by the client for the use of the solicitor, photographs, reports of experts or reports of investigations requested by the solicitor or by the client for the solicitor. Quite often the question of whether the documents are privileged depends on the date of the documents. It therefore seems to me that in order for the opposite party or the Court to attempt to make any intelligent decision on whether certain documents are privileged or not would require at the least a description dealing with each category of document because often the date is very important. As an example, in a case involving the condition of a thing or a building or a place, a photograph of that thing, building, or place taken before the happening of the incident out of which the action arises could hardly be privileged because at the time it was taken there was nothing out of which an action could arise. On the other hand, photographs taken by an investigator well after the action had commenced on the instructions of a solicitor for the use of the solicitor might well be privileged.

In a similar way, reports or documents made before the action started might well not be privileged even though they eventually find their way into the hands of the solicitor while reports made after the action has commenced or while it is being contemplated may be privileged.

Couto v. T.T.C.

(1986), 14 C.P.C. (2d) 115 (Ont. S.C. [Master]), Master Clark, at p. 118

Summary: Following examination for discovery of plaintiff to a proceeding claiming personal injury damages, during which defendant elicited from plaintiff that she had, on her solicitor's advice, kept a daily diary record of her physical and emotional condition after the motor vehicle accident which generated the proceeding, defendant applied for an order that plaintiff produce the diary to defendant. (The diary, conceptually and purposively, was not unlike diaries kept by disputing estranged parents or an allegedly abused spouse, preparatory to litigation or negotiations.) Plaintiff claimed the diary was solicitor-client privileged from production.

Decision Text: The onus of establishing privilege lies upon … [the person] who asserts it; namely, in this instance, the plaintiff. No claim for privilege was made on examination for discovery, and no claim for privilege was made in an affidavit of documents. No claim for privilege is made either in the affidavit of the plaintiff or the affidavit of the plaintiff's solicitor filed on this motion. Since the diary is not described anywhere in the material as being privileged, and since no claim for privilege is specifically made, how can the plaintiff be said to have satisfied the onus of establishing privilege. The document does not become privileged just because it is described as being for the sole purpose of assisting counsel in conducting the litigation. There must be a claim for privilege and some proof.

Editor's Note: Affirmed on appeal: (1987), 16 C.P.C. (2d) 241 (Ont. H.C.), McKinlay J.

Mercaldo v. Poole

[1986] 13 C.P.C. (2d) 129 (Ont. H.C.), Steele J.

Decision Text: The defendant was the solicitor for the plaintiff and had prepared a separation agreement between the plaintiff and his wife. The present action alleges negligence by the defendant in so doing.

The material indicates that upon the alleged defect in the agreement being discovered the parties had three telephone conversations in the evening of July 25, 1985. During these conversations the plaintiff advised the defendant that he estimated his loss due to the negligence was $300,000; the defendant advised the plaintiff that he should consult another solicitor with respect to possible rectification of the agreement and that he could not discuss facts with him [the defendant solicitor] because the plaintiff should see another lawyer. After the last of the three calls the defendant dictated the letter in question. Early the next morning, on request of the plaintiff, the parties met and talked around in circles for about 35 to 40 minutes. The evidence of the defendant is that they met as a courtesy only and not on a solicitor-and-client basis. After the meeting the defendant prepared the memorandum in question and he states that it was made in anticipation of litigation.

The proper test in claiming privilege for documents on discovery is whether the dominant purpose for their preparation is for litigation (see *Waugh v. British Railways Bd*., [1980] A.C. 521, [1979] 2 All E.R. 1169 (H.L.)), and that there must be more than a mere possibility of litigation (see *Walters v. T.T.C.* (1985), 50 O.R. (2d) 635 (Ont. H.C.)). In addition, statements made by one party to another that are recorded by the party are liable to discovery subject to editing of any comments or impressions recorded therein (see *Mancao v. Casino* (1977), 17 O.R. (2d) 458, 4

C.P.C. 161 (Ont. H.C.)). This latter applies whether or not litigation is in fact in progress so long as the statements are not made without prejudice. ….

The learned Master concluded that the documents were privileged. However, I do not entirely agree with his reasons. With respect to the memorandum, the fact that litigation in fact ensued is irrelevant. Even the fact that litigation is more than a possibility does not in itself give privilege to the memorandum. Any statements made by the plaintiff to the defendant, or vice-versa, that are recorded in the memorandum are liable to discovery subject to editing of any comments or impressions personal to the defendant that do not specifically reflect statements actually made. Because of the nature of the memorandum it will be for the Master and not the parties to do such editing.

With respect to the letter to the Law Society it would be producible unless it was made in contemplation of litigation. The mere fact that the letter was sent in accordance with the requirement of Rule 5, Commentary 16 of the Law Society, does not in itself indicate that there is more than a possibility of litigation. A mere claim is not in itself reasonable anticipation of litigation. The obligation to send the letter occurs whenever a solicitor is "aware that an error or omission *may* have occurred which *may* have made him liable to his client for professional negligence." This relates to a possibility of litigation only.

The Master reviewed the letter and in effect stated that he agreed with the defendant's statement on discovery that it was prepared in contemplation of litigation.

In any given case there is a degree of opinion required in assessing whether or not there is reasonable anticipation of litigation. In the present case the Master concluded that the reasons for the letter was for such purpose. A Judge should not interfere with the discretion of a Master unless he is of the opinion that the decision is based on an error of law or that the Master was clearly wrong. I have read the letter and resealed it. Bearing in mind the amount of the potential claim and the wording of the letter I see no reason to interfere with the Master's discretion.

Yri-York Ltd. v. Commercial Union Assurance Co. of Can.

(1987), 17 C.P.C. (2d) 181 (Ont. H.C.), Callaghan A.C.J.H.C., at pp. 184-185.

Decision Text: [In determining whether solicitor-client privilege applies to statements obtained by plaintiff and his solicitor from prospective witnesses prior to commencement of litigation, the "dominant purpose" test governs.] The dominant purpose test, of course, arose from the English case of *Waugh v. British Railways Bd.*, [1980] A.C. 521, [1979] 2 All E.R. 1169. In that case, the House of Lords in quoting

dictum from the decision in *Grant v. Downs* (1976), 11 A.L.R. 577, 135 C.L.R. 674 (Aust. H.C.) stated as follows at p. 1183 [All E.R.]:

> " '… a document which was produced or brought into existence either with the *dominant* purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice [in relation to conducting or aiding in the conduct of litigation] or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.' "

It is clear from that decision that in order not to be subject to production, the documents in issue must have been prepared with a view to litigation, which itself must be in reasonable expectation.

The policy behind the rule, as it applies in this context is clear. Lawyers are not entitled to rely on the preparations of the other side for trial. As Jackett P. states in *Susan Hosiery Ltd. v. M.N.R.*, [1969] 2 Ex. C.R. 27, [1969] C.T.C. 533, 69 D.T.C. 5346 (Ex. Ct.), at p. 33 [Ex. C.R.]:

> "Turning to the 'lawyer brief' rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented in court in a manner *other than that contemplated when they were prepared*. … If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system." [emphasis added]

Hodgkinson v. Simms

(1988), 36 C.P.C. (2d) 24 (B.C. C.A.), McEachern, C.J.B.C., Taggart & Craig JJ.A.

Editor's Note: In preparing for litigation, plaintiff's solicitor made inquiries which produced photocopies of many documents he asserted to be pertinent to the litigation's issues. The originals of the photocopied documents were not, themselves, privileged because they had not been generated for the dominant purpose of litigation. (Whether, in fact, the originals were accessible to anyone privy to the litigation, including plaintiff, is unclear.) Plaintiff claimed privilege in respect of the photocopies on

grounds they were obtained after litigation arose "for the dominant purpose of preparing for this litigation" and formed part of the solicitor's brief.

A majority of a three-member bench of the British Columbia Court of Appeal allowed plaintiff's appeal from the decision of a Chamber's Judge and determined the photocopies to be privileged.

Headnote: The purpose of the privilege was to ensure that a solicitor could, for the purpose of preparing himself to advise or conduct proceedings, proceed with complete confidence that the protected information and material he gathered from his client and others for this purpose, and what advice he gave, would not be disclosed to anyone except with the consent of this client. While this privilege was usually subdivided for the purposes of explanation into two species, namely: (a) confidential communications with a client, and (b) the contents of the solicitor's brief, it was really one all-embracing privilege that permitted the client to speak in confidence to the solicitor, the solicitor to undertake such inquiries and collect such material as he might require properly to advise the client, and the solicitor to furnish legal services all free from any prying or dipping into this most confidential relationship by opposing interests or anyone.

The original documents were not privileged, and plaintiff's counsel asserted no claim in that behalf. It was apparent that the photocopies of these unprivileged documents resting in the plaintiff's counsel's brief were produced or brought into existence with the dominant purpose of being used in the conduct of litigation.

Where a lawyer exercising legal knowledge, skill, judgment, and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation, he was entitled to claim privilege for such collection and to refuse production.

(f) Involuntary Waiver

Sunwell Engineering Co. et al. v. Mogilevsky et al.

(1986), 8 C.P.C. (2d) 14 (Ont. H.C.), Gray J. at pp. 20-21.

Decision Text: … solicitor-and-client privilege is an important principle of our law, as expressed by Dickson J. (as he then was) in *Solosky v. Canada*, [1980] 1 S.C.R. 821 at 836, 16 C.R. (3d) 294, 50 C.C.C. (2d) 495, 105 D.L.R. (3d) 745, 30 N.R. 380 (S.C.C.), …

. . . .

Wigmore on Evidence, Vol. 8, at para. 2326, puts it thus:

> "(3) All involuntary disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle … that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client. This principle applies equally to documents."

The decisions in *Rumping v. D.P.P.*, [1964] A.C. at 822, [1962] 3 All E.R. 256 (H.L.), *Lord Ashburton v. Pape*, [1913] 2 Ch. 469, [1911-13] All E.R. Rep. 708 (C.A.), and *R. v. Dunbar* [(1982), 138 D.L.R. (3d) 221 (Ont. C.A.)], …, [where certain documents prepared by a solicitor, which were privileged, were left carelessly in a prison cell and, thus, held to be admissible evidence] are all said to be cases of involuntary disclosure where privilege is lost because sufficient precautions have not been taken.

(g) Voluntary Waiver

Hicks Estate v. Hicks

(1986), 15 C.P.C. (2d) 146 (Ont. D.C.), Stortini D.C.J.

Summary: A solicitor-client privilege continued after the death of the client. The privilege could be waived by the client's personal representatives in the same way and to the same extent as it could have been waived by the client when alive.

Sylman v. Sylman

(1986), 10 C.P.C. (2d) 231 (Ont. H.C.), Dupont J., at p. 233, 236.

Summary: Two days after wife's lawyer wrote to husband's lawyer confirming agreement, husband refused to proceed. He contended solicitor who represented him at the pre-trial acted beyond her authority. When cross-examined as to the nature and extent of his instructions to the solicitor on the issue of settlement, husband through his counsel present at the cross-examination claimed solicitor-client privilege "with respect to any instruction he gave his counsel and any advice his counsel gave to him".

The solicitor who represented the respondent at the pre-trial was also called as a witness and cross-examined and claimed the same privilege.

These proceedings arose when wife's lawyer sought judgment in terms of the alleged settlement.

Decision Text: In the ordinary case, it would be quite proper to claim such a privilege and to refuse to answer any questions regarding the nature of the instructions and extent of authority given to counsel. However, the respondent has put that very authority into issue. He cannot argue that there was no settlement because his solicitor exceeded her authority, and then refuse to answer questions regarding the extent of that authority and his instructions to his solicitor, claiming solicitor-client privilege. An adverse inference may arise from that claim of privilege.

. . . .

I find the agreement was properly arrived at between the parties with assistance of counsel duly authorized. The fact that additional minutes of settlement were contemplated or to be drawn to reflect in greater detail the basic settlement, or that other documents would need to be executed to finalize the settlement does not prevent the agreement from being a settlement final and binding on both parties, which I find it was.

Alberta Wheat Pool v. Ghermezian et al.

(1987), 14 C.P.C. (2d) 236 (Alta. Q.B.), at pp. 239, 240, Chrumka J.

Decision Text: …. Munroe J. in *Re Dir. of Investigation Research and Can. Safeway Ltd*., [1972] 3 W.W.R. 547, 6 C.P.R. (2d) 41, 26 D.L.R. (3d) 745 at 746 (B.C. S.C.):

> "That rule as to the non-production of communications between solicitor and client says that … [if] (as here) there has been no waiver by the client and no suggestion is made of fraud, crime, evasion or civil wrong on his part, the client cannot be compelled and the lawyer will not be allowed without the consent of the client to disclose oral or documentary communications passing between them in professional confidence, whether or not litigation is pending: *Susan Hosiery Ltd. V. M.N.R.*, [1969] 2 Ex. C.R. 27, [1969] C.T.C. 353."

. . . .

There are [additional] situations in which the solicitor-client privilege is displaced. The privilege does not extend to the very issue of the action, nor does it extend to those situations where the communications between the solicitor and client are legitimately put in issue in the action. Whenever the communication between the solicitor and client is legitimately put in issue in the action, the solicitor-client privilege is thereby waived. ….

Ontario (A.G.) v. C.E.C. Edwards Construction

(1987), 23 C.P.C. (2d) 61 (Ont. H.C.), Wright L.J.S.C., at pp. 65-66.

Editor's Note: Plaintiff kept extensive notes on all aspects of his life following an accident. Plaintiff contended notes were kept on the instructions of his counsel for the purpose of instructing counsel. On discovery, plaintiff referred to the notes and testified he kept notes in order to refresh his memory. Plaintiff declined to produce them on the ground that they were privileged. Defendant moved to have the notes produced. Wright L.J.S.C. decided plaintiff was required to produce his notes.

Decision Text: Solicitor/client privilege is based upon a practical need for the client to be absolutely forthright with his counsel and the expectation that the material given to counsel will be kept confidential.

But there are limits.

When a witness refers to notes, counsel is entitled to see the item referred to and to conduct his cross-examination in light of what it may disclose: *R. v. Vallillee*, [1954] O.W.N. 158, 18 C.R. 1, 107 C.C.C. 405.

The same is true of notes used by the witness to refresh his recollection prior to giving evidence: *R. v. Lewis* (1969), 67 W.W.R. 243, 3 C.C.C. 235 (B.C. S.C.); *R. v. Monfils*, [1972] 1 O.R. 11, 4 C.C.C. (2d) 163 (Ont. C.A.).

These are criminal cases.

In civil cases, use of otherwise privileged material is considered to be a waiver of the privilege.

With respect to solicitor/client privilege in particular:

1. The client's offer of his own or the attorney's testimony as to a specific communication to the attorney is a waiver as to all other communications to

the attorney on the same matter; for the privilege of secret consultation is intended only as an incidental means of defence, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former.

2. The client's offer of his own or the attorney's testimony as to a part of any communication to the attorney is a waiver as to the whole of that communication, on the analogy of the principle of completeness. (*Wigmore On Evidence* (McNaughton Rev., 3rd ed., 1981), vol. 8. 633, para. 2327.)

The client kept these notes to refresh his memory as well as to inform counsel. Upon using them for the former purpose, he waived any privilege that attached to the latter.

Denovan v. Lee

(1990), 40 C.P.C. (2d) 54 (B.C.S.C. [In Chambers]), Master Patterson.

Headnote: Privilege was waived with respect to the "without prejudice" documents. Since the defendants had elected to disclose in Part I of their list of documents part of the correspondence, they were required to disclose the remainder. The presence or absence of the words "without prejudice" on the letters was not determinative of whether the course of correspondence was privileged. An examination of the correspondence as a whole and of the defendant's conduct indicated that there had been a waiver of the privilege.

R. v. Charbonneau

(1992), 13 C.R. (4th) 191 (Que. C.A.), Rothman J. A.

Editor's Note: In *R. v. Dunbar* (1982), 28 C.R. (3d) 324, 138 D.L.R. (3d) 221, 68 C.C.C. (2d) 13 (Ont. C.A.), p. 39 [C.C.C.], Mr. Justice Martin stated:

"Dean Wigmore states that when the client alleges a breach of duty by the attorney the privilege is waived as to all communications relevant to that issue: 8 *Wigmore on Evidence*, (McNaughton Rev.), p. 638.

4.5.5 Representation

Re W. (D.F.)

(1991) W.D.F.L No. 805 (Alta. Prov. Ct. [Youth Div.]), Fitch Prov. J

Summary: Defence counsel told his young offender client he would be about 15 minutes late for trial because he had an appointment and a court appearance elsewhere. He was 40 minutes late and the charge was disposed of. He now appeared before the court to explain his tardiness, offering an unprompted oral apology.

Held - letter of undertaking required.

Counsel owe a duty to arrange for someone else to appear in chambers or docket court where such a commitment conflicts with a trial date. Although accepting instructions to appear in two different courts at the same time is prima facie evidence of contempt, a citation to show cause is undesirable if there is some other way to impress upon the Bar that such conduct is unacceptable. Counsel in this case was ordered to send the senior Family Court Judge a letter containing an undertaking to appear promptly for any future trials unless unavoidably prevented from doing so. Until the letter was received, counsel would not be permitted to proceed before the court.

California Formal Op. 1993-131

1001 *ABA/BNA Lawyer's Manual on Professional Conduct* 1602 (Bureau of National Affairs, Inc., 1989)

Decision Text:

1. The idea of the client-to-client communication cannot "originate with" or be "directed by" the lawyer:

> When the content of the client-to-client communication originates with or is directed by the lawyer it is prohibited under the rule. A lawyer is prohibited from scripting questions, statements, or otherwise using the client as a conduit

for conveying to the represented party words, thoughts, or even written materials originating with the lawyer.

2. The lawyer need not discourage the client from communicating directly with his or her spouse:

In fact, by discouraging direct communication between the parties themselves, an attorney may be failing to act competently by foreclosing opportunities to efficiently settle or resolve a dispute.

3. A lawyer may, nevertheless, help a client who wishes to speak directly with his or her spouse to prepare for such a discussion:

Thus, a 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 the client intends to pursue with the opposing party as long as the content is the client's and not the lawyer's.

4.5.6 Advertising

Georg v. Hassanali

(1989), 18 R.F.L (3d) 225 (Ont. H.C.), Walsh J.

Editor's Note: Although plaintiff was awarded $725,000 as compensation for her interest acquired from managing a building acquired by her cohabitant while they lived together, the Court denied her claim for costs because she conducted a press conference, with her solicitor's assistance during the trial, that sensationalized proceedings.

4.5.7 Barrister's services

Jonas v. Bendix et al.

(1987), 16 C.P.C. (2d) 198 (Ont. D.C.), McDonald D.C.J., at p. 199.

Decision Text: …. the policy of this jurisdiction is that lawyers cannot pick or choose the Judge they would like to conduct the trials. The reasons for this practice are many and varied but the Judges have as a rule followed the tradition of not assigning trials to any specific Judge.

Weldo Plastics Ltd. v. Communication Press Ltd.

(1987), 19 C.P.C. (2d) 36 (Ont. D.C.), at p. 38

Decision Text: A solicitor of record has an obligation to attend at trial when he has filed pleadings in answer to a plaintiff's claim. The only circumstances in which attendance at trial is not required are if the solicitor has been removed as solicitor of record under R. 15, or has withdrawn a defence under R. 23. As well, attendance is not required where there are formal minutes of settlement. In all other circumstances it is the duty of the solicitor to appear at trial. Failure to appear is disrespectful to the Court and as well places an unfair burden on the opposing solicitor who is obliged to explain the absence.

Purtle v. Comm. Of Professional Conduct

878 S.W. 2d 714 (Ark. 1994)

Editor's Note: This decision is summarized in Parley, Louis. *The Ethical Family Lawyer* (Family Law Section, American Bar Association, Chicago, 1995), at p. 38.

Author Text: ... lawyers retain control over procedural aspects of the case, as long as the action taken do not affect the substantive rights of a client, in which case the client must be involved in making decisions. The significance of this view is illustrated in an Arkansas opinion in which the clients complained that their lawyer agreed to a temporary custody order and a continuance of a hearing without their approval and to their detriment. The lawyer's agreement to the continuance at a hearing that the clients did not attend was uncontroverted, but the net effect of the lawyer's action was to maintain the status quo of the case and protect the clients from a possible total loss of custody, as their situation at the time of the hearing was highly problematic. The grievance committee's reprimand was vacated with the court viewing its actions as having "elevated form over substance."

4.5.8 Barrister as witness

(a) Affidavit Evidence

Clark v. Tiger Brand Knitting Co.

(1986), 10 C.P.C. (2d) 288 (Ont. H.C.), Perras L.J.S.C., at p.292.

Summary: The responding party is relying on the affidavit of a partner in the law firm representing him in this action and on the transcript of his examination for discovery. The responding party cannot use his own discovery for this purpose. The affidavit does not deal with the matter of the plaintiff's impecuniosity directly and even if it did it is my view that such evidence should be introduced by the responding party rather than through an affidavit deposed by his solicitors.

Caribou Construction Ltd. v. Cementation Co. (Can.)

(1987), 15 C.P.C. (2d) 244 (B.C. S.C.), Meredith J., at pp. 245-246.

Editor's Note: This was an application to set aside a garnishing order. A solicitor, not personally aware of the facts, deposed to them in an affidavit which a Court relied on to issue the garnishment order.

Decision Text: …. the form of affidavit required by the Act [*Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, Sched. I], Form C, makes it plain that the solicitor must himself be directly aware of the facts, not just made aware of the facts by someone else. This feature may be more important than it seems at first. No effective cross-examination could be undertaken on an affidavit unless sworn by someone who is personally involved. For this reason I hold that the garnishing order must be set aside.

–

Tapper v. Kaufman

(1991), 49 C.P.C. (2d) 77 (Man. Q.B. [Fam. Div.]), Davidson J.

–

Headnote: Pending determination of the husband's motion for a declaration that the wife was in breach of a judgment granted corollary to divorce, and in breach of a separation agreement, the wife moved for the removal of the husband's solicitor of record, his law partner [who had submitted an affidavit supporting the motion].

Held - The wife's motion was granted.

A lawyer appearing as an advocate should not submit his/her own affidavit to a tribunal or testify before the tribunal except as permitted by local practice or as to formal or uncontroverted matters. This principle also applied to the lawyer's partners and associates. It could not be said that the Judge at trial would be able to assess the evidence of the husband free from any influence of the alleged certificate of evidence by the lawyer conducting the case.

McKee v. McKee

(1994), 29 C.P.C. (3d) 337 (Alta. Q.B.), Deyell J.

Headnote: The respondent's Toronto counsel retained an agent in Calgary. In the absence of the agent, the Toronto counsel gave instructions to the agent's partner and the partner swore an affidavit in which he deposed that he was advised by the Toronto counsel and verily believed that: "the rightful legal forum for dealing with these divorce and property matters is in the Province of Ontario and not in the Province of Alberta." The partner was cross-examined on this affidavit.

The petitioner applied for an order removing the Alberta agent's firm from the record on the grounds that the *Code of Conduct of the Canadian Bar Association* as adopted by the Law Society of Alberta in its rules at chapter VIII, Commentary, paragraph 3 prohibited a lawyer from submitting his/her own affidavit before a tribunal in any proceeding in which he/she appeared as advocate, except as permitted by local rules or practice or as to purely formal or uncontroverted matters, and that this principle, also applied to the lawyer's partners and associates. In support of this application, the petitioner filed a copy of the transcript of the cross-examination.

Held - The application was granted.

By deposing to an affidavit and giving evidence in this matter, the agent's partner placed himself and the agent in an inappropriate position. The statement in his affidavit raised the issue as to whether he was expressing an opinion on the appropriate forum for the venue of the trial.

(b) Oral Evidence

Re Hillcrest Housing Ltd.; Re Clans Ltd.

(1985), 7 C.P.C. (2d) 60 (P.E.I. S.C.), Carruthers C.J., at p. 72

Decision Text:

1. There is no rule of law which denies a litigant the right to … [have] his counsel testify as a witness on his behalf.

2. Evidence given by counsel is legally admissible.

3. A solicitor appearing as counsel for any party should not give evidence. It is highly undesirable, generally irregular and contrary to practice to do so and should not be done unless necessary in the interest of justice.

4. Once a solicitor appearing as counsel does testify in a case, he should not thereafter act as counsel.

5. Counsel who have appeared as witnesses at a trial are not heard on an appeal from the judgment.

Editor's Note: Emphasis added to indicate the Court recognized that the practice, although highly undesirable, is not prohibited.

Ifrah v. Ifrah

[1988] W.D.F.L., No. 1662 (Ont. S.C.[Master]), Master Cork

Summary: Both wife and husband petitioned for divorce on cruelty species of marriage breakdown ground. Wife retained solicitor K., mutual friend of the spouses, to represent her on trial of the petition. It appeared K. might be called as witness for one or both spouses. Husband applied to remove K. from record as wife's solicitor in divorce proceeding. Husband submitted that in family law matters, where a counsel is more than the usual dispassionate professional advocate of the client's case, such other involvement by counsel should be discouraged.

A solicitor of record can be removed if the possibility of real mischief or prejudice, or the appearance of impropriety is most pressing or forceful and offsets the fundamental right to choose counsel. Although the role of K. could develop to a point where real mischief could be done to the action by her continuing role as the wife's counsel, that scenario was not yet present.

Planned Insurance Portfolios Co. v. Crown Life Insurance Co.

(1989), 36 C.P.C. (2d) 218 (Ont. H.C.), Rosenberg J.

Headnote: The plaintiff's counsel intended to introduce evidence at trial from his partner concerning a material issue in the action. The plaintiff's counsel also had personal knowledge of the facts concerning which his partner was to give evidence. The defendant brought a motion during the trial for an order declaring that the plaintiff's counsel should not continue to act as counsel on behalf of the plaintiff. The defendant contended that it was not permissible for a lawyer to act as counsel and adduce evidence from his partner, especially where, as in this case, the plaintiff's counsel had personal knowledge of the same facts on which his partner would be testifying; in such a situation, counsel was almost certifying that the evidence from his partner was accurate, and accordingly the other side would be placed at a disadvantage.

Held - The motion was dismissed.

The evidence of a partner of counsel for one party was admissible. The circumstance that the evidence was being given by a partner of counsel for the party calling the witness might conceivably go to the weight to be given to the evidence. The circumstance that the plaintiff's counsel was known to be personally a witness to the same events or the same circumstances on which his partner was called to testify had no bearing upon the determination as to the appropriateness of having counsel continue to act in the matter.

Where possible, strong preference should be given to a party's wishes in selecting its own counsel. It would be a substantial hardship if the plaintiff's counsel were not permitted to continue as his counsel during the balance of the trial, where, as in this case, the plaintiff's counsel had been retained from the outset. This was not a case where the lawyer testifying or acting as counsel had a conflict of interest. Nor was this a jury trial. The trial Judge would be able to assess the evidence of the plaintiff's counsel's partner free from any influence of the alleged implied certification by the plaintiff's counsel of this evidence by reason of his own personal knowledge of the subject-matter of the evidence.

Although the Codes of Professional Conduct were not binding on the Court, they were helpful in determining the appropriateness of the plaintiff's counsel continuing to act as counsel. The Ontario Code of Professional Conduct did not indicate any impropriety in a lawyer appearing as counsel in connection with the matter in which his partners would be giving evidence. Although the Canadian Bar Association *Code of Professional Conduct* did indicate that it was improper for a lawyer to give evidence in a matter in which his partner or associate was acting as counsel, the Code specifically deferred to local rules or practices. The local practice in Ontario was that lawyers would frequently appear on motions where their partners had filed affidavits, even where the matters were extremely controversial and where there had been long and contentious cross-examination on the affidavits.

R. v. Parsons (G.J.)

(1992), 318 A.P.R. 260 (Nfld. C.A.), Marshall J.A. for the Court,
at pp. 261-262; 263; 265-266

Decision Text:

[1] The respondent in this case had retained … [S], a member of the Newfoundland bar, as his counsel in the first degree murder charge laid against him in connection with his mother's death. At the commencement of the preliminary inquiry Crown counsel applied to have … [S] removed as counsel for the defence.

[2] Crown counsel had made the motion because the accused's father was intended to be called as a Crown witness and … [S] had earlier represented him in a dispute with the deceased over maintenance payments which the deceased was claiming from him. He pointed out that in the course of the police investigation the accused had replied to the question as to who could have killed his mother by saying: "I don't know, but my father is in town". From this, Crown counsel surmised that the defence would raise the possibility that the father had a motive to murder his ex-wife. In advancing that position, he reasoned that the accused's counsel would be placing

himself in a conflict of interest position because motivation was to be the core issue in the case against the accused and any motive alleged against the father would have arisen from the very circumstances surrounding counsel's earlier representation of him. In light of such a potential conflict, and also because the accused's counsel himself was a potential witness in the proceeding, he submitted that the justice presiding over the preliminary inquiry lacked jurisdiction to proceed with the matter while the accused's counsel remained on the record.

[3] The accused's father had signed an irrevocable waiver in which he waived the solicitor-client privilege arising out of the former relationship and consented to his former solicitor representing the accused. It stated that the father realized he might be called as a witness at the trial and that the accused's counsel might cross-examine him upon any information, knowledge or communication which counsel possessed even if it would otherwise be privileged.

[4] The accused signed a consent and declaration stating he had retained his counsel in full knowledge of the latter's former representation of his father. Moreover, the declaration stated the accused realized his father might be called at the trial and have to be cross-examined.

[5] Both the waiver and declaration were signed after each signatory had received the benefit of independent legal advice.

[6] In these circumstances the justice approached the question on the basis of whether a fully-informed reasonable member of the public might feel the situation gave rise to an appearance of impropriety. He concluded that the circumstances would not give rise to such a feeling and no conflict of interest existed. He therefore ruled that accused's counsel should remain on the record and the preliminary inquiry should proceed.

. . . .

[15] A potential disqualifying conflict of interest obviously must first be established before it can be weighed against the fundamental right to counsel. In … [*MacDonald Estate v. Martin*], [1990] 3 S.C.R. 1235; [1991] 1 W.W.R. 705; 121 N.R. 1; 70 Man.R. (2d) 241; 77 D.L.R. (4th) 249 (S.C.C.), at p. 267, Sopinka J., held this involves establishing, as a first step, that the lawyer had received confidential information attributable to a solicitor-client relationship which was relevant to the matter at hand. Although … [*MacDonald Estate v. Martin*] was dealing with a motion in a civil matter for the removal of a firm of solicitors, this prerequisite for the establishment of a conflict has, in my view, equal applicability to such motions in criminal proceedings.

[16] The facts in this case do not establish that counsel for the accused gained any such confidential information from the earlier professional relationship which would be relevant to the criminal charge. In the absence of such evidence, the Crown's application rests merely upon an assumption that defence counsel might have

gained some such information. While it is recognized that conflict of interest concerns arise from possibilities rather than probabilities, there has to be some evidentiary foundation upon which a given possibility is construed. It cannot be presumed that in representing the accused's father in a matrimonial dispute with his mother that defence counsel automatically became privy to confidential information having a bearing upon the murder charge arising from her death. Furthermore, impugned counsel testified at the hearing that he did not have any such information.

. . . .

[28] Applying the test to the circumstances of this case, in my view a reasonably informed person would be satisfied that no use of confidential information would occur as it has not been shown that the impugned counsel possessed any confidential information from his former association which would be relevant to the charge. With respect the Crown's position appears to be founded upon conjecture and assumption - both as to the presence of a conflict and to a new trial resulting from accused's counsel continuing to act in the matter. As already indicated, while conflict of interest concerns arise from possibilities, there has to be some reasonable basis upon which the possibility is construed. It cannot rest, as here, solely upon the accused's counsel's former representation of the Crown witness in an unrelated matter.

[29] The Crown's objection to continuance of defence counsel because he was a potential witness is also unsustainable. The testimony given by counsel at the [preliminary] inquiry related solely to the preliminary question of his eligibility to continue in the case. There was no suggestion he was a witness to any of the circumstances directly connected with the alleged murder.

[30] In summary, the justice presiding over the inquiry appropriately directed his attention to the test formulated in … [*MacDonald Estate v. Martin*] and properly exercised his discretion in finding that no conflict existed. This decision should not be disturbed, even if it were liable to review, in the absence of proof that any perception existed as a result of the accused's counsel continuing to act in the matter. On the contrary, public confidence in the criminal justice system might well be undermined by interfering with the accused's selection of the counsel of his choice.

Webb v. Attewell

(1994), 31 C.P.C. (3d) 160 (B.C. C.A.), Macfarlane, Southin and Hutcheon JJ.A.

Headnote: The trial judge correctly held that counsel for the plaintiff did not require leave to call the defendant's counsel and examine him in chief. A litigant was entitled

to every person's evidence, subject to the rules relating to privilege and admissibility, and subject to an exception where calling a person as a witness would be an abuse.

The fact that a barrister gave, or might have to give, evidence did not preclude him/her from appearing for his/her client. The rule of professional practice was that a barrister ought not to continue to act only where to do so would put the court in an invidious position of having to choose between the evidence of counsel and that of another witness. The court was in an invidious position when counsel gave evidence on a contested issue. Only at the end of examination-in-chief would it have been possible to determine whether the court would be put in an invidious position and only then could a situation arise where, as a matter of professional practice, counsel might properly have retired.

4.6 Legal Responsibility

4.6.1 Responsibility to client

(a) Retention agreements

Samayoa v. Marks

(1975), 6 O.R. (2d) 419 (Ont. H.C.), Henry J., at p. 26

Decision Text: His [the Defendant lawyer's] explanation as to why he explained the document to the plaintiff is that in the first place, he was a friend; in the second place, he was not represented, and in the third place, it seemed to be "the decent thing to do". The plaintiff had not given the defendant a retainer, had not, up to the time of the meeting, requested advice concerning the transaction and subsequently was presented with no account by the defendant for services.

. . . .

.... The absence of a formal retainer does not affect the matter; the retainer is implied, the relationship exists and so does the contract arising from it.

(b) Delays/Omissions

Morton v. Harper Grey Easton

[1995] W.D.F.L. No. 1092 (B.C. S.C.), Wilson J.

Summary: The principle that where there is a conflict in the evidence of a lawyer and a client about the terms of a retainer, the client's version is to be preferred, does not apply only to fee disputes. The underlying premise is that it is for the lawyer to show what the agreement with the client is, and, if it is not in writing, the client's statement of it must be accepted. Although there was some delay in obtaining financial information from the plaintiff, the lawyer had never explained why the information was required or what its importance was. The lawyer had an obligation to make it clear to the plaintiff that no steps would be taken in the proceeding unless she gave specific instructions. It would have been clear to a prudent lawyer in these circumstances that the plaintiff was floundering. It was no answer to say that she did not indicate for several months that the matter was urgent. The unreasonable delay in pressing the child support application was entirely the fault of the defendant. It was not open to the defendant to contend that, in settling her claim for arrears, the plaintiff had surrendered that claim, when it was the defendant's own delay which created the claim in the first place. The plaintiff was entitled to damages of $2,400 for eight months arrears of support.

Editor's Note: As to assessment of damages in an action by a former client against defendant's solicitor for breach of contract and negligence (for failing to file a lis pendens against a matrimonial home), see: *Mullin v. Schwartz*, [1989] W.D.F.L. 1329, B.C.S.C., Leggatt L.J.S.C.

Parsons v. Jackson

[1990] W.D.F.L. No. 175 (B.C.S.C), Oppal J.

Editor's Note: Husband obtained mortgage approval and retained the defendant solicitor who obtained an order allowing husband to purchase his wife's interest in the matrimonial home. A term of the order obtained by the solicitor was that the husband pay $12,500 into the wife's solicitor's trust account within ten days (to help satisfy an earlier order whose breach had resulted in the husband being found in contempt of court). The closing of the husband's buy-out of the wife's interest in the matrimonial home was to take place two weeks after the $12,500 payment. The husband was

unable to raise some of the money required to buy his wife's interest in the property and lost the opportunity to do so. The husband sued the solicitor alleging breach of contract and negligence in failing to inform him of the terms of the order and failing to apply for an extension of time within which to enable him to raise the $12,500 sum required to purge his contempt of the earlier order.

The husband's action against the solicitor was dismissed.

Summary: On discovery and at trial the plaintiff admitted that the defendant had advised him of the terms of the order. It was his responsibility to raise the money sums, and the defendant had never undertaken to assist him in that regard. Although it might have been the plaintiff's intention that the sum of $12,500 would come from the mortgage proceeds, he did not tell the defendant that and she had no reason to assume it. Such a course would have been most unusual. The defendant's decision not to apply for an extension of time on the plaintiff's behalf was a judgment call made in light of his conduct, since he still had not complied with the consent order and was still in contempt. Generally, a person in contempt may not make application to the court, and had such an application been made, its outcome would have been uncertain.

(c) In face of conflict

Shute v. Premier Trust Co.

(1993), 50 R.F.L. (3d) 441 (Ont. Gen. Div.), J.H. Jenkins J.

Headnote: Although rule 23 of the Law Society of Upper Canada's Rules of Professional Conduct allows a lawyer to act for both a mortgagee and a mortgagor in the same transaction, he or she must comply with rule 5 by ensuring adequate disclosure to the client[s] so that the client[s] can decide whether the lawyer should proceed notwithstanding an apparent conflict of interest. The lawyer representing Premier Trust, the wife, and the husband did not comply with rule 5 because he did not speak to the husband. In spite of the expert evidence, the lawyer's professional dealings fell below standard and Premier Trust was entitled to judgment against him for what it had lost.

(d) Language-challenged clients

Shoppers Trust Co. v. Dynamic Homes Ltd.

(1992), 43 R.F.L. (3d) 97 (Ont. Gen. Div.), E. Macdonald J.

Headnote: The husband arranged for a business loan to be secured against the matrimonial home. The wife was not involved in the husband's business, nor was she aware of the particulars of its operation. One lawyer represented the husband, his company, and the lender. The documentation was drawn up by the lawyer and no one advised the wife of the importance of having independent legal advice or fully explained the financial aspects or potential risks to her. The wife had a poor grasp of the English language but understood that she was a signing a loan transaction. The parties separated 11 months after the mortgage was executed.

The husband defaulted on the debt and the bank attempted to enforce the security against the home by a motion for summary judgment.

Held - The motion was dismissed; the wife proved an arguable case that the agreement was invalid and that the security against the home was ineffective.

The court should carefully scrutinize a transaction where a spouse encumbers a matrimonial home to his or her detriment. Counsel overseeing the execution of contractual documents should be held to a higher standard of care to ensure that the spouse understands the transaction and the extent of his or her financial exposure. The lawyer had a discretion that affected the wife and should have recognized that she was particularly vulnerable. Based on the particular facts of this case, a fiduciary relationship existed between the lawyer and the wife. The lawyer had an obligation to ensure that the wife understood the ramifications of the deal, and to advise her to obtain independent legal advice. The solicitor accordingly breached his duty to the wife.

The mere lack of independent legal advice did not invalidate the mortgage. The defence of non est factum, however, was not available to the wife. She would have understood what she was signing if she had sought assistance. She was at fault for part of the problem and, as a result, could not rely on that defence.

The transaction could, however, be set aside for unconscionability. The agreement was clearly improvident and the husband had taken advantage of the wife's vulnerability. It would be inequitable to allow the lender to take advantage of the security it obtained in such a manner.

(e) Court Advocacy

Slapper, Gary. **The bulletproof barristers[:] "Advocates cannot be sued over work for the courts."**

The Times, 23 January 1996

…. If a lawyer acting as an advocate ruins a case through sheer carelessness, then, however dire the evidence against the lawyer, barristers and solicitor-advocates are protected by a special immunity from being sued for catastrophic court work, and work "intimately connected" with court room performance. This week the Court of Appeal will hear the first of two cases that challenged the protection of advocates.

There is a further rule that makes it unnecessary for a lawyer even to invoke the immunity principle. If he or she is accused of ruining a criminal defence by a (convicted) client, there is a rule that requires an action for negligence to be struck out as "abuse of the process of the court" if it involves a "collateral attack" on another competent court.

In other words, one cannot get a civil court to reopen a criminal trial by claiming that the conviction resulted from a lawyer's negligence. To do so might bring the system into disrepute by accommodating criminal and civil cases with conflicting decisions in relation to the same incident. In one case, a judge commented that though the rule against such "relitigation" is a hardship to the victim of the lawyer's negligence, and an undeserved and undesirable bonus by way of protection to a negligent lawyer, it is a "price which must be paid in the interests of certainty and finality, which are themselves necessary components in the proper administration of justice".

. . . .

The advocate's immunity from negligence actions goes back 200 years. Its scope has been narrowed over the years but there was confirmation of it by the House of Lords in 1969 in the case *Rondel v. Worsley* [[1969] 1 A.C. 191]. This held that barristers cannot be sued by their clients for negligent performance in court or for work preparatory to court work.

Editor's Note: There appears to be limited immunity, at least, for lawyers practising in Canadian courts; see, e.g.: *Demarco v. Ungaro* (1979), 21 O.R. 673 (H.C.), Krever J.; *Garrant v. Moskal; Garrant v. Cawood* (1985), 40 Sask. R. 155 (C.A.)

(f) Sexual Relations

Szarfer v. Chodos

[1989] W.D.F.L., No. 036 (Ont. C.A.), Morden, Cory & Krever JJ.A.

Editor's Note: This was an appeal from a decision entitling a husband to recover special and general damages from a solicitor who, while representing him, had a sexual relationship with the husband's wife. Husband had engaged solicitor to advise him on merits of suing his former employer for wrongful dismissal. Information furnished by husband to solicitor in support of the wrongful dismissal suit the husband

wished to pursue indicated severe strain in husband's relationship with his wife. By virtue of this marital information, solicitor engaged in sexual relationship with husband's wife. On discovering this turn of events, husband suffered emotional trauma. Husband successfully sued solicitor for emotional impact upon him of this behaviour. Solicitor's appeal dismissed.

Summary: The defendant stood in a fiduciary relationship with the plaintiff when the plaintiff confided information relating to the fragile state of his marriage. This personal information was relevant to the performance of the defendant's duty to the plaintiff with respect to the wrongful dismissal action. The defendant misused the information so confided and his breach of his fiduciary obligation caused the plaintiff serious injury of a compensable nature. ….

Task Force On Sexual Abuse Of Patients (Marilou McPhedran, Chair; Harvey Armstrong, Rachel Edney, Pat Marshall, Roz Roach, and Briar Long and Bonnie Homeniuk, Co-ordinators). *The Final Report* (Toronto, 25 November 1991), at pp. 11-12.

. . . .

Patients seek the help of doctors when they are in a vulnerable state - when they are sick, when they are needy, when they are uncertain about what needs to be done.

The unequal distribution of power in the physician-patient relationship makes opportunities for sexual exploitation more possible than in other relationships. This vulnerability gives physicians the power to exact sexual compliance. Physical force or weapons are not necessary because the physician's power comes from having the knowledge and being trusted by patients.

Many doctors who responded to the Preliminary Report [27 May 1991] questioned whether doctors should be held to the highest standard of accountability generated by the philosophy of **Zero Tolerance**. ....

It is well recognized that the nature of the trust between lawyers and their clients creates a fiduciary duty of trust. Fiduciary duty is recognized in law as having the highest standards of conduct and when breached, severe consequences are warranted. When lawyers breach fiduciary trust by taking a client's money wrongfully, lawyers are disbarred. Doctors, as well as lawyers, enjoy special status and bear special responsibility derived from their position within their profession. When doctors take advantage of that position to commit sexual abuse, they breach the fiduciary trust; adding a further dimension to the wrong done to the victim.

Consistent with the Supreme Court of Canada decisions in *Guerin* (1984) and *Lac Minerals Ltd*. (1989), the Ontario High Court recently stated this definition:

> "Where a fiduciary relationship exists, the fiduciary has a paramount duty of loyalty. A fiduciary cannot permit a conflict between the interest of his beneficiary and any other interest, especially his own. A fiduciary may not obtain a profit, benefit, or advantage as a result of his position."

- *Ontex Resources Ltd. v. Metalore Resources Ltd.* (1991). [At the time of writing this report (November 1991), the Supreme Court of Canada had not yet released its decision in the case of *Norberg v. Wynrib*, which is expected to clarify the fiduciary trust in the doctor-patient relationship ... .]

Editor's Note: The Supreme Court of Canada subsequently delivered its judgment in *Norberg v. Wynrib*, (1991) [1992] 2 S.C.R. 224 (drug addicted patient's suit for damages against doctor who provided her drugs in consideration of sexual contact) - and, shortly afterwards, in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 (adult daughter's suit for damages against father for sexual mistreatment of daughter in childhood). In *Norberg v. Wynrib*, Sopinka J. found the defendant doctor liable in negligence; LaForest J. (Gonthier and Cory JJ., concurring) found the doctor liable in battery; and McLachlin J. (L'Heureux-Dubé J., concurring) found the doctor liable for breach of fiduciary duty. In *M.(K.) v. M.(H.)*, the Court unanimously found the defendant father liable for breach of fiduciary duty.

At the annual meeting in Brighton, England, in fourth week June 1996, of the British Medical Association - which, like the Canadian Medical Association, has a policy of zero tolerance - a motion was introduced that the policy be varied, to permit doctors to have the right to consensual sexual relations with patients without risking disciplinary proceedings with its attendant threat of being "struck off." [*The Sunday Times*, 23 June 1996, p. 3.]

(g) Withdrawal

Jorgensen v. Kelly Peters & Associates Ltd. et al.

(1987), 24 C.P.C. (2d) 93 (B.C. S.C.), Catliff J., at pp. 94, 95-98.

Decision Text: [1] a solicitor who is retained to conduct or defend an action may withdraw only for good cause (*Gray v. Forbes*), [1980] 3 W.W.R. 689, 17 B.C. L.R. 392 (*sub nom Gray v. Solicitors*) (B.C. S.C.)); [2] an application under Rule 16.(4) [of the British Columbia Supreme Court Rules with respect to a solicitor being declared

to no longer act for a party] is required to be supported by an affidavit which should state the reasons for the solicitor having ceased to act; and [3] the Chambers' Judge has a discretion to grant or refuse such an application.

. . . .

In *Slater v. Kay* (1969), 9 D.L.R. (3d) 739 (B.C. S.C.) Wootton J. said at pp. 741-42:

> "If a solicitor desires to be discharged, then he may apply to the Court in accordance with that Rule, and in support of that application appropriate material must be tendered. Here the solicitors simply say, 'We cease to act for you.' In my respectful opinion they cannot do that. They may say, 'We cease to act for you because …' and should give a good cause for it: *Cordery on Solicitors*, 6th ed., p. 100(9). *Robins v. Goldingham* (1872), L.R. 13 Eq. 440; *Lawrence v. Potts* (1834), 6 Car. & P. 428, 172 E.R. 1306; *Underwood, Son & Piper v. Lewis* [1894] 2 Q.B. 306.

. . . .

Other decisions in this province deal with the sufficiency of the reasons given for seeking the declaration. In *Willann,* … [(1981), 32 B.C.C.R. 14 (B.C.S.C.)], the death of one client and the absence of instructions from the other was held sufficient. In *Edwards v. Barwell-Clarke,* [1980] 6 W.W.R. 426, 22 B.C.L.R. 6, 112 D.L.R. (3d) 128 (B.C. S.C.), the application was refused because the solicitor was seen merely to be trying to escape a contingency contract in a poor case. "To allow the solicitor to withdraw", said Murray J., "would be for the court to condone a breach by the solicitor of his contract." In *C.R.F. Holdings Ltd. v. Fundy Chemical International Ltd*. (1980), 21 B.C.L.R. 345, 14 C.C.L.T. 887, 10 C.E.L.R. 10 (B.C. S.C.) [Varied on other grounds, [1982] 2 W.W.R. 385, 33 B.C.L.R. 291, 19 C.C.L.T. 263 (B.C. C.A.) Leave to appeal to the Supreme Court of Canada refused (1892), 42 N.R. 358 (*sub nom. Smerchanski v. C.R.F. Holdings Ltd*.) (S.C.C.)], Taylor J. refused a R. 16(4) application as did Selbie C.C.J. in *Accord Mortgage Realty Corp. v. Penault*, N.W. Reg. No. F831421. In none of these cases was it suggested that reasons for withdrawal were necessary.

The situation is similar in Ontario. In *Ely v. Rosen*, [1963] 1 O.R. 47 (Ont. H.C.), Senior Master Marriott said at p. 48, after referring to the English practice:

> "I think that these authorities indicate that it is for the Court to determine on the facts whether the order sought should be made and that without 'the particular facts' there is nothing to support the application. The fact that an application has to be made to the Court for the order implies that the Court is to consider whether the case is a proper one in which an order should be made. This cannot be done

> unless there are facts adduced upon which an opinion can be based. In the absence of any objection by the client, I do not think the Court is bound to examine into the matter critically if some reason is given, but a solicitor should be required to make out a prima facie case before an order is granted."

In *Re Creehouse*, [1983] 1 W.L.R. 77 [1982] 3 All E.R. 659, the English Court of Appeal in applying a rule similar to R. 16(4) stated that reasons had to be given on the application. Lawton L.J. stated at pp. 662-63 [All E.R.]:

> "Rule 6 deals with the situation where the party to litigation either dispenses with his solicitor, as in this case, or, as can happen, the solicitor decides that he will no longer act for the party. In those circumstances of the case, it is appropriate for the solicitor to withdraw. It may be that the solicitor has been over-hasty in refusing to go on acting for a client. He may by his action have put the client in difficulty and therefore it is appropriate, as I understand r 6, that the court should be apprised of the reasons why the solicitor wishes to withdraw, so that the court can consider whether the reasons for withdrawal are adequate and can give protection to the client if it is necessary to do so."

Like the Senior Master in *Ely v. Rosen*, supra, I certainly do not wish to inquire into the matter critically, but think I should be given some reason upon which I can base the exercise of my discretion under R. 16(4). I do not construe R. 16(4) as permitting the Court, without inquiry, merely to rubber stamp a declaration that the solicitor had ceased to act. On the contrary, R. 16(4) requires the disclosure of facts so that the Court can consider if the declaration should be made or not.

Mr. Sliman refers to *Boult Enterprises Ltd. v. Bissett*, [1985] 3 W.W.R. 669 (B.C. C.A.) where Taggart J.A. said that there was [p. 671]:

> "… no obligation on counsel who finds himself in the position of being unable to continue with an appeal to seek the leave of the court to withdraw as counsel."

I was also referred to *Leask v. Cronin*, [1985] 3 W.W.R. 152 18 C.C.C. (3d) 315, 66 B.C.L.R. 187 (B.C. S.C.) where McKay J. at p. 200 [B.C.L.R.] said:

> ". . . . it is for counsel to determine whether or not he is prepared to continue to represent the litigant."

These cases deal with the right of counsel to withdraw as counsel. They do not, in my view, affect applications under R. 16(4) which does require a solicitor to seek "the leave of the court" in order to obtain the necessary declaration. Furthermore,

Leask v. Cronin, supra, concerned a matter of criminal practice which of course is not governed by the Supreme Court Rules.

4.6.2 Responsibility to third parties

(a) To client's spouse

Kern v. Kern et al.

(1986), 8 C.P.C. (2d) 31 (Ont. H.C.), Gray J. at pp. 36-37:

Decision Text: In my opinion, the respondent does not have a separate cause of action against her husband's solicitor, the appellant. This opinion is strengthened by the decisions in *Garrant v. Moskal*, [1985] 6 W.W.R. 31, 40 Sask. R. 155, 47 R.F.L. (2d) 1 at 4 (Sask. C.A.); and *Rade v. Rade* (1983), 45 C.P.C. 186 (Ont. Div. Ct.). .... It follows therefore that she has no cause of action against her husband's solicitor who owes her no duty.

A different factual situation was present in *Micro Carpets Ltd. v. De Souva Devs. Ltd.* (1980), 29 O.R. (2d) 77, 19 C.P.C. 118, 112 D.L.R. (3d) 178 (Ont. H.C.), where the question was whether a solicitor who registers a lis pendens in the name of and on the instructions of a client can himself be held liable by virtue of s. 41(4) of the Judicature Act, R.S.O. 1980, c. 223, for damages sustained as a result of such registration.

The factual situation was different but the principle is applicable, namely that no cause of action is conferred by the legislation against a solicitor acting qua solicitor. Robins J. (as he then was) held that the solicitor was not subject to liability if it should later develop that the client had no reasonable claim to the land. The solicitor acts on his client's instructions and it is inappropriate that in the present case the husband's defence and the appellant solicitor's defence should be involved in the same proceeding.

Hunter v. Greggain et al.

[1987] W.D.F.L. No. 211 (Sask. Q.B.), Barclay J.

Summary: Husband unsuccessful litigant in divorce and matrimonial property action. He subsequently commenced action against wife's solicitor and solicitor's law firm partners. Husband's Statement Of Claim sought damages on basis wife's solicitor deported self with incompetence and unprofessional misconduct in divorce and matrimonial property action. Barclay J., in allowing application by wife's solicitor and his law firm partners to strike the Statement Of Claim, concluded that "there was no professional relationship between the husband and the solicitor. Thus, the Statement Of Claim did not disclose a cause of action."

Jensen v. MacGregor

(1992), 38 R.F.L. (3d) 449 (B.C.S.C.), Sinclair Prowse J.

Headnote: The husband and wife separated and the wife retained a lawyer to provide her with legal advice concerning the matrimonial dispute. The husband alleged that, as a result of the advice, he became estranged from his children.

The husband sued the lawyer and the lawyer's firm on behalf of his children and himself for damages for the harm caused by their advice.

Held - The action was dismissed because no cause of action was shown.

There was no reason why the husband should have been relying on any advice the wife's lawyers may have given. He understood that they represented his wife and not him. Accordingly, because they were not acting on his behalf, they owed him no duty of care.

Neither did the lawyers represent the children. The duty to protect and promote the best interests of the children is the duty of the court, not of the lawyers representing the parents or the family litigants. The husband was confusing the theoretical and ethical obligations on lawyers and the court system with the actionable duty of care owed by a lawyer to his client, and, exceptionally, non-clients. Accordingly, there was no action on behalf of the children against the lawyers.

Brignolio v. Desmarais, Keenan & Robert

[1995] W.D.F.L. No. 269 (Ont. Gen. Div.), Lane J.

Summary: The plaintiff was a party to a divorce proceeding at the suit of his wife wherein the defendant firm and, in particular, the defendant, acted for the wife. There was a dispute regarding custody and possession of the matrimonial home. The plaintiff alleged that the defendant counselled and advised the wife to take steps to poison the mind of the 15-year-old son against his father in order to gain an advantage in the litigation. It was further alleged that the defendant had met with the child, discussed the litigation with him, and advised that if he stayed with the wife, she would likely be awarded possession of the matrimonial home. At that time, steps were being taken to obtain counsel for the child through the offices of the Children's Lawyer and the office was, in fact, appointed to represent the child. The wife, in fact, received custody and possession of the home and the relationship between the plaintiff and his son deteriorated to the extent that the plaintiff experienced severe emotional and psychological disruption. The plaintiff brought an action against the defendants for damages, alleging that the defendants had been negligent and that they had been unethical and had failed to meet the standards of the bar. The defendants brought a motion to strike out the plaintiff's Statement of Claim on the ground that it disclosed no reasonable cause of action.

Held - motion allowed; action dismissed with costs.

Because of the absence of a duty to the opposite party and for reasons of public policy, an action in negligence against the solicitor for one's adversary in litigation was not tenable in the law of Ontario. Similarly, although the defendants owed a duty to the court and the Law Society to act ethically, they owed no such duty in favour of the plaintiff which would form the basis of an action for damages. However, the plaintiff might have had a remedy before the Law Society or by way of a motion in the original action to sanction counsel in costs.

Editor's Note: Also see: *Rent v. Gillis et al*. (1991), 108 N.S.R. .(2d) 389 (N.S. S.C. [T.D.]).

(b) To Court/Opposing Counsel

McLeod v. Cdn. Newspapers Co.

(1987), 15 C.P.C. (2d) 151 (Ont. S.C.), Master Sandler, at pp. 159, 160.

Summary: Counsel for examining party took objection to private, oral and written communications taking place between witness being examined and the witness's counsel while an examination for discovery was underway. Examining party adjourned examination for discovery and brought motion for directions with respect to propriety of communications taking place between witness and witness's counsel. Master Sandler held the private communications were improper.

Decision Text: There is no doubt that a party is entitled to have a lawyer present on discovery to give legal assistance to the party being examined. But that assistance is to consist of the lawyer listening to the particular question and deciding whether the question is proper, or improper because it is irrelevant, or invades solicitor-client privilege, or is confusing or incomprehensible, or is otherwise improper, and if so, taking an objection to the question on the record in the manner contemplated by … [the appropriate Ontario Rule of Court]. But I find the practice adopted by plaintiffs' counsel [representing a plaintiff as witness] in this case to be improper, and contrary to what can be done by counsel acting for a party being examined for discovery.

I was referred by defendants' counsel to R. 8 of the Rules of Professional Conduct of the Law Society of Upper Canada and the Commentary thereon. Rule 8 provides that: "when acting as an advocate, the lawyer must, while treating the tribunal with courtesy and respect, represent his client resolutely, honourably and within the limits of the law."

Commentary 15 reads, in part, as follows: "The lawyer should observe the following guidelines respecting communication with witnesses giving evidence: …. [d]uring cross-examination by an opposing lawyer: while his witness is under cross-examination the lawyer ought not to have any conversation with him respecting his evidence or relative to any issue in the proceeding. [B]etween completion of cross-examination and commencement of re-examination: the lawyer whose witness is to be re-examined by him ought not to have any discussion respecting evidence that will be dealt with on re-examination." ….

While the Rules of Professional Conduct are not in the same category as the Ontario Rules of Civil Procedure, and while commentary 15 would seem to be expressly dealing with the conduct of a lawyer appearing in court proceedings before a judicial officer, and before boards, administrative tribunals and other bodies, it seems to me that there is an analogy to be drawn between the conduct of a lawyer in communicating with his witness/client during an adjudicative proceeding on the one hand, and during a non-adjudicative proceeding such as an examination for discovery or cross-examination before a special examiner on the other. Particularly because there is no judge or master present to supervise the conduct of the lawyer and the witness, counsel should show great restraint and take care not to make unnecessary or inappropriate intrusions into the discovery or cross-examination being conducted of his client so as to interfere with the rights of discovery or cross-examination by the opposite party. In an extreme case, the party risks an order for a second discovery or

the dismissal of his claim or defence, and the lawyer risks disciplinary proceedings before the Law Society. This Rule of Professional Conduct and the Commentary thereon have been helpful to me in coming to the conclusion I have reached, and my conclusion is consistent with the spirit of commentary 15 on R. 8.

Martin v. Martin

(1987), 19 C.P.C. (2d) 97 (Sask. Q.B.), at pp. 98-99

McLellan J.

Summary: Applicant's solicitor brought parenting application which omitted to comply with appropriate Rules and, on return of the application, failed to appear. Other side sought costs of the hearing of the application against applicant's solicitor personally.

Decision Text: In my opinion, that request is warranted in this case, where I consider the lack of concern shown by the applicant's solicitor as to compliance with the Rules of Court coupled with his complete lack of courtesy for his fellow counsel and this Court. His client, the applicant should not be responsible for those costs. I see no alternative but to order that the solicitor personally pay the respondent's costs and I so order.

Weldo Plastics Ltd. v. Communication Press Ltd.

(1987), 19 C.P.C. (2d) 36 (Ont. D.C.), West D.C.J., at pp. 37-38, 39.

Editor's Note: Motion by plaintiff for order requiring costs to be paid by solicitor denied.

Decision Text: The action was placed on the trial [list] as a defended action and counterclaim. When it was called for trial neither the defendant nor its counsel was present. Counsel for the plaintiff informed the Court that he had been advised by the defendant's counsel outside the courtroom shortly before Court opened that the defendant would be taking no further part in the proceeding. As a result, the Court heard the plaintiff's evidence and granted judgment …, and dismissed the defendant's counterclaim.

The Court expressed its dismay at the fact that the solicitor of record for the defendant did not appear at the trial and reserved judgment on the issue of costs in order to hear further submissions. It invited counsel for the plaintiff to consider whether costs should be sought against the defendant's solicitor in his personal capacity.

. . . .

The Court's displeasure with counsel for his non-attendance at trial is not in itself a basis for awarding cost against him personally. There is no claim against a solicitor acting qua solicitor and the only basis for awarding costs against a solicitor is if the facts fall squarely within the provisions of r. 57.07(1): *Kern v. Kern* (1986), 54 O.R. (2d) 11, 8 C.P.C. (2d) 31, 50 R.F.L. (2d) 77 (Ont. H.C.).

. . . .

It is clear from the material before me that the solicitor was completely unable to control his client. That, as well, is no basis for an award of costs against the solicitor nor is it a basis for any further order of costs with respect to the motions.

(c) To Children (As Amicus Curiae)

Romaniuk v. Alta. (Govt.) et al.

[1988] W.D.F.L No. 1140 (Alta. Q.B.), Miller J.

Editor's Note: A father, unsuccessful in obtaining custody following trial of corollary relief parenting issues under the *Divorce Act*, sued in negligence the *amicus curiae* who participated at trial on behalf of the children whose custody was an issue. (The father also sued (i) an investigator employed by the *amicus curiae* to investigate and report to him and (ii) the Province of Alberta.) On application of defendants, including the *amicus curiae*, father's action dismissed.

Summary: The power to appoint an amicus is believed to stem from the court's inherent parens patriae power. In this case the amicus had been granted wide powers to generally represent the best interests of the children, with the consent of the plaintiff and his wife. The role of the amicus in a custody and access dispute differs from that of the traditional amicus in that he is appointed and instructed by the court, he is responsible to it, and he is or should be paid either from public funds or by the child's parents. His only interest is that of the child. He is not a party to the action, nor is he a representative of the child in the usual solicitor/client relationship, since he may consider, but is not obliged to follow, instructions given by the child. Also, while the amicus may play an active role at trial by cross-examining witnesses, this is a privilege

granted at the discretion of the court, not an inherent right, and his opinion, if any, is considered as part of all the evidence the court will weigh in coming to a conclusion. There is in Alberta no clear-cut statutory or common law immunity which would preclude a successful action in negligence against an amicus, an investigator or the Crown, and the action here should not be struck on that ground, since there was an arguable issue to be resolved. However, in order to succeed in negligence, it must be established that a duty of care is owed and has been breached, and the amicus here owed no specific duty to the plaintiff. The amicus was not a party to the action and there was no express contract between him and the plaintiff or the wife. It is not clear whether an amicus is a "public authority" owing a duty of care to the public, which would include the plaintiff, but even if the amicus were a public authority, the duty of care is a limited one. The prime duty of the amicus is to the court, and short of fraudulent behaviour or malice toward the disputants, there is no legal duty of care other than that owed to the court. Although the plaintiff did not specifically allege fraud or malice, the statement of claim came close, so it could not be said that the plaintiff had completely failed to raise a triable issue. However, the damages he claimed were too remote. Even if the plaintiff could show that the trial judge had rendered an incorrect decision as a result of having been misled by the evidence and opinions of the amicus and the investigator, the plaintiff had not seriously challenged the defendants at trial and did not raise new evidence or previously unavailable or unknown information in this action. Consequently, res judicata applied to this action insofar as it was an attempt to relitigate the issues decided at the first trial, and the statement of claim should be struck as an abuse of process.

(d) To Parties (As Arbitrator)

Turpin v. Wilson

[1996] W.D.F.L. No. 297 (Ont. Gen. Div.), Rutherford J.

Summary: The parties separated after a 4-year marriage and agreed to submit various property issues, which had arisen on separation, to arbitration pursuant to the Arbitration Act. The parties executed an arbitration agreement, a date for hearing had been set, and the agreement, with an advance on fees and other documents, had been delivered to the arbitrator. The arbitrator wrote to the wife's lawyer saying that he had acted for the husband in connection with his previous marriage and that, out of caution, he required a letter from the wife acknowledging that she had been informed of that fact and she was satisfied that it did not present a conflict of interest. The arbitrator disclosed that circumstance as required by the Arbitration Act. Because of her lawyer's serious illness and consequential absence from his office, and his failure and that of his office to deal effectively with the matter in his absence, the question of possible bias never came to the wife's attention and she had no opportunity to consider it until the arbitration hearing had begun. After the wife was sworn as a witness, the issue was raised by the arbitrator. The wife was surprised, but her lawyer said nothing,

so she assumed it was normal for the arbitrator to act in such circumstances and therefore raised no objection. Her lawyer later raised with her another question of possible bias in that the arbitrator had also acted for the lawyer now acting for the husband. However, her lawyer advised her to raise no objection on that account. Upon completion of the arbitration, the wife brought an application to set aside the award of the arbitrator, on grounds that she was treated unfairly and that there was a reasonable apprehension of bias on the part of the arbitrator.

Held - application allowed; arbitrator's award set aside.

A reasonably informed bystander would have concluded that there was a reasonable perception of bias where the arbitrator in a marriage separation dispute, with issues of credibility to be determined, had acted as legal adviser to one of the parties in the party's earlier marriage separation dispute. The trust and confidence characteristic of a solicitor-client relationship precluded the necessary impartiality in the subsequent arbitration situation. Furthermore, the wife had had no real opportunity to challenge the arbitrator on the basis of his having previously been her husband's lawyer. By the time she learned of it, the hearing had begun, the fees had been paid in advance to the arbitrator and her lawyer had put himself in a position wherein he could not represent her on that issue at the hearing. Because she had no opportunity to obtain legal advice on the issue before commencement of the hearing, she had no real opportunity to challenge the arbitrator and the award was, therefore, not saved by s. 46(4) of the Arbitration Act.

4.6.3 Contempt

Angelopoulos v. Angelopoulos

[1986] W.D.F.L. No. 2006 (Ont. H.C.), Carruthers J.

Summary: In a family law proceeding instituted by a wife, a consent order was made requiring the wife to absent herself from the husband's place of business. The wife then changed solicitors. Her new solicitor (i) informed the husband in writing that the order was a nullity, (ii) advised the wife to ignore the order and attend at the premises when she chose, (iii) discontinued the family law proceeding in which the consent order was made, and (iv) took unsuccessful proceedings to attack the validity of the consent order. The husband applied to have the wife and her new solicitor cited for contempt.

Held - on hearing of interlocutory applications with respect to technical matters, the court ordered "the solicitor not to represent the wife, and the husband and wife to be personally present to hear what was going on at the next court hearing."

4.6.4 Barrister's services

(a) "Fair Advocacy" rule

Machado v. Berlet et al.

(1986), 15 C.P.C. (2d) 207 (Ont. H.C.), Ewaschuk J., at pp. 218-219

Editor's Note: In preparing for trial, defendant's counsel arranged for video-taped surveillance of plaintiff. Existence of the resulting video tapes was not disclosed to plaintiff before trial (even though the video tapes constituted "documents" liable to disclosure to plaintiff under Ontario Rules of Civil Procedure R. 30.01(1)(a)). The reason for not disclosing? Defendant's position was that the video tapes were solicitor-client privileged from disclosure. As characterized by Paul Bates, in a copious Annotation to the decision (pp. 208-215, at p. 208): the video tapes were privileged "on the 'Barrister's Brief' or 'solicitors work product' principle: … *Cook v. Cook*, [1947] O.R. 287 (Ont. H.C.) at p. 289 … ." Moreover, the resulting video tapes were not mentioned during cross-examination of plaintiff by defendant's counsel or otherwise referred to while plaintiff's case was being presented. The video tapes were first disclosed when defendant, as part of defendant's case, sought to have the video tapes received in evidence to assist impeachment of the plaintiff by contradicting plaintiff's evidence concerning matters disclosed by the video tapes.

Decision Text: The [fair advocacy] rule in *Browne v. Dunn* [(1893), 6 R. 67 (H.L.)] imposes on an opposing party the duty of giving a witness an opportunity of explaining evidence which the cross-examiner intends to use later to impeach the witness's testimony or credibility. In other words, a cross-examiner must expressly put to the witness the substance of evidence which is to be later tendered in an attempt to contradict the witness. Thus, a witness's testimony cannot later be impeached by contradictory evidence unless the contradictory evidence has been previously put to the witness in an express and particularized manner. It is noteworthy that the Supreme Court of Canada has expressly adopted the rule in *Browne v. Dunn* in *Peters v. Perras* (1909), 42 S.C.R. 244, 13 Alta. L.R. 80, as has at least one other level of Canadian Courts: e.g., *United Cigar Stores Ltd. v. Buller*, 66 O.L.R. 593, [1931] 2 D.L.R. 144 (Ont. C.A.).

I am satisfied that defendant's counsel has breached, though not totally, the rule in *Browne v. Dunn*. … [He] did, indeed, put to the plaintiff the various activities depicted in the surveillance films, but in a very generalized and superficial way. ….

It is my view that the rule of fair advocacy enunciated in *Browne v. Dunn* requires more. For example, if opposing counsel has written materials contradicting the witness, counsel must put the written materials to the witness and must point out the contradiction to the witness' testimony. If the written materials have been

authored by the witness, then s. 20 of the Ontario Evidence Act, R.S.O. 1980, c. 145, also applies. If opposing counsel has an impeaching photograph, the photograph must be put to the witness for comment and possible explanation. In the present case, I am of the opinion that the films need not have been shown to the witness during his cross-examination (although that procedure would have been feasible in this case given the short length of the films). However, it was at least incumbent on opposing counsel to put to the witness the fact that films had been taken of the plaintiff and to have particularized the films' contents so as to afford the plaintiff an opportunity to explain his conduct as it related to his injuries.

Counsel for the plaintiff submits that the films cannot now be used to impeach the plaintiff's testimony if the rule in *Browne v. Dunn* has been breached. Undoubtedly, there is precedent to that effect: *R. v. Jackson* (1974), 20 C.C.C. (2d) 113 (Ont. H.C.). It seems to me, however, that the more prevalent practice is to permit the impeaching evidence to be tendered (*R. v. Dyck*, 70 W.W.R. 449, [1970] 2 C.C.C. 283, 8 C.R.N.S. 191 (B.C. C.A.)), subject to the right of the plaintiff to call reply evidence to explain the impeaching evidence and subject to the right of adverse comment to the jury by both plaintiff's counsel and the Judge during address and charge. I will adopt that practice to this case.

(b) Ensuring Proceedings Merited

Christie Group Ltd. v. Parfum Jean Duvalier Inc.

(1987), 16 C.P.C. (2d) 219 (Ont. S.C.), Master Clark, at pp. 219-220.

Editor's Note: Solicitors for defendant moved to set aside default judgment. The motion was dismissed with costs against defendant's solicitors personally.

Annotation Text [Michael McGowan]: This is a very troubling decision. It indicates that there is an obligation on counsel to ensure that there are *bona fide prima facie* grounds for motions brought by his or her client. If counsel is of the opinion there are no such grounds he or she "is obliged to consider whether motion ought to be brought or not." [Judgment, p. 225.] If such a motion is brought, counsel is at risk personally for costs.

It is submitted that the effect of the principle enunciated in this decision is to make counsel his or her client's Judge as well [as] his advocate. If counsel wished to avoid being ordered to pay costs he must somehow prevent the client from bringing the motion. It would not be sufficient, it seems, simply to advise the client that the motion has little or no chance of success and accept the client's instructions whether to bring it or not. The advice and instructions would be privileged and could not ordinarily be disclosed to the Court.

(c) Undertakings to court

Atkins v. Holubeshen et al.

(1986), 23 C.P.C. (2d) 192 (Ont. C.A.)

Summary: The plaintiff's solicitor gave undertakings at the examination for discovery in a personal injury action and agreed that if the undertakings were not fulfilled within a specific time, the defendants could move ex parte to have the action dismissed. The plaintiff's solicitor failed to fulfill the undertakings and the action was dismissed. The plaintiff learned of the dismissal two years later from the Court Registrar. The plaintiff retained a new solicitor who moved forthwith to set aside the dismissal. It was held that the Court had inherent jurisdiction to regulate its own process. The Court set aside the dismissal. The defendant's solicitor could not assume that the plaintiff's former solicitor had any authority to agree that a penalty be imposed upon the plaintiff as a result of the solicitor's personal default. The defendants unsuccessfully appealed. The defendants further appealed.

Held - The appeal was dismissed.

(d.1) Agreements: Generally

Desanto et al. v. Cretzman et al.

(1986), 8 C.P.C. (2d) 191 (Ont. D.C.), Borins D.C.J., at p.195:

Decision Text: It is, of course, a fundamental principle of contract law that an offer is not accepted unless the offeree unreservedly assents to the exact terms proposed by the offeror. If, while purporting to accept the offer as a whole, the offeree introduces a new term which the offeror has not had the opportunity to examine, the offeree is making a counter-offer: see, e.g., Cheshire & Fifoot's Law of Contract (8th ed., 1972), p. 31.

Hamberger v. Hamberger

[1986] W.D.F.L. No. 803 (Ont. H.C.) Desmerais L.J.S.C.

Summary: A consent order is a contract and must be treated as such. Accordingly it can only be set aside or varied by subsequent consent [or other form of agreement], or upon such grounds as common mistake, misrepresentation, or fraud.

Tanaszczuk v. Tanaszczuk

(1988) 15 R.F.L. (3d) 441 (Ont. U.F.C.), Steinberg U.F.C.J., at p. 442

Decision Text: Once an action has been started, counsel may settle family law claims by less formal agreements than those envisaged by s. 55 of the Family Law Act [in writing and signed by both parties and witnessed]: see *Geropoulos v. Geropoulos* (1982), 35 O.R. (2d) 763, 26 R.F.L. (2d) 225, 133 D.L.R. (3d) 121 (C.A.); *Sylman v. Sylman* (1986), 10 C.P.C. (2d) 231 (Ont. H.C.). Where however what is sought to be enforced by the summary remedy is an agreement which predates the litigation, it must comply with the provisions of s. 55: see *Campbell v. Campbell* (1985), 52 O.R. (2d) 206, 47 R.F.L. (2d) 392, 6 C.P.C. (2d) 79 (H.C.).

Paradis v. Chamberlain

(1991), 35 R.F.L. (3d) 215 (Ont. Gen. Div.), Kozak J.

Headnote: A court will enforce a settlement negotiated in the course of pending litigation. A settlement is enforceable where the parties have reached an agreement, including the broad principle of access, even though they have not worked out in meticulous detail the specifics of access, and the formal minutes have not been executed or completed. A solicitor's misapprehension of the facts does not justify the court refusing to proceed with the settlement.

Annotation Text [by James G. McLeod]: This judgment in *Paradis v. Chamberlain* provides further evidence of the court's determination to uphold family law settlements and discourage litigation. While settlements between solicitors in the course of pending litigation may be subject to judicial approval, the bottom line is that the court will take a narrow view of when it should withhold approval. As a general rule, the settlement will be enforced. In *Patterson v. Kicma* (May 24, 1991), Doc.

Brampton 12467/89 (Ont. Gen. Div.), Morrissey J. reviewed the authorities in the area and held that a settlement negotiated during litigation should be respected. The respondent argued unsuccessfully that the minutes of settlement, which were not witnessed, did not qualify as a binding settlement. While it might not have been an enforceable domestic contract [under s. 55 of the Family Law Act], it was held to be a settlement negotiated between counsel. Morrissey J. did not go so far from the authorities relied upon as to hold that a settlement between the litigants personally should be enforced.

Cambrian Ford Sales (1975) Ltd. v. Horner

(1989), 37 C.P.C. (2d) 225 (Ont. S.C.[Div. Ct.]),

White, Rosenberg and Chadwick JJ.A.

Summary: Solicitors exchanged letters to settle legal proceedings. One of the parties subsequently resiled from settlement. Other party applied to enforce settlement. Application dismissed on the grounds that other party's solicitor had acted under a misapprehension of the facts rendering it unfair to enforce the settlement. An appeal from this decision was allowed.

Headnote: The exchange of letters constituted a clear and unambiguous settlement of the … [legal proceeding]. [The client's] solicitor acted under a misapprehension of the facts as opposed to a misapprehension of his instructions. A Court would not embark on an inquiry as to the limitation of authority imposed by a client upon his solicitor where the parties to a settlement were of full age and capacity and there was no dispute as to the existence of a retainer nor as to the terms of the settlement agreed upon by the parties' solicitors. Hence, in Ontario, it was clear that a solicitor's misapprehension of the facts did not justify the Court in setting aside or refusing to support a compromise.

Castaneda v. Castaneda

(1995), 27 C.P.C. (3d) 279 (B.C.S.C. [In Chambers]), Lowry J., at p. 281.

Decision Text: …. It is important to distinguish between cases where, as here, a settlement has been perfected within a solicitor's apparent authority, and cases where what has been agreed is that the parties will seek to obtain and enter a consent order disposing of an action which has been commenced. In the latter case the court retains a discretion over its process and in some circumstances, as for example where a solicitor has misapprehended his instructions, it will refuse to permit the settlement to be effected: *Hawitt* … .

Editor's Note: *Hawitt* refers to *Hawitt v. Campbell et al.* (1983), 37 C.P.C. 52 (B.C. C.A.), Taggart J., Macfarlane and Esson JJ.A. There, the Court held that the "case at Bar falls within the … line of cases …. where the settlement has yet to be perfected, and where it is still open to the Court to exercise 'its general authority over justice between the parties'. … The misapprehension which would give rise to refusing to give effect to a compromise [in such circumstances] is not limited to a misapprehension as to the solicitor's authority to make a settlement but is extended to a misapprehension of 'some particular matter forming part of the basis for the settlement'. The misapprehension, therefore, may be as to the instructions of the solicitors or as to the real facts" (at p. 58). The Court added that other bases for declining to confirm a settlement by a judicial order included the presence of fraud or collusion (at p. 59).

(d.2) Agreements: Held to have been made

Lunardi v. Lunardi

(1988) 31 C.P.C. (2d) 27 (Ont. H.C.), Gray J.

Summary: On the eve of trial, spouses and their respective counsel met to attempt settlement of a matrimonial proceeding. Towards the end of the meeting, as indicated in notes made during the meeting by both counsel, all issues in the proceeding were settled. Counsel then agreed that the trial coordinator be telephoned and informed of settlement. Whether the coordinator was telephoned is unclear. Subsequently, that evening, as the meeting ended, a conversation occurred between counsel in the presence of defendant wife only. That conversation ultimately prompted plaintiff to apply for an order declaring that a binding settlement had been reached and incorporating the terms/conditions of that settlement.

On the hearing, over three days, of plaintiff's application, both counsel and defendant were among witnesses. What transpired at the end-of-meeting conversation and its effect, if any, were priorities of the evidence. According to plaintiff's counsel, defendant's counsel remarked that until a written settlement agreement was signed the settlement was not final. To this, plaintiff's counsel testified, he then responded that if there was any question about the finality of the settlement negotiated, counsel for the spouses should there and then draft the settlement agreement or proceed to trial, as scheduled, next morning. Defendant wife's counsel recalled replying only, to the effect, "not to worry." Plaintiff's counsel disagreed that his friend's remarks were quite that succinct. He recalled defendant's counsel adding that a deal had been reached and that he would draft minutes of the settlement. Notes of both counsel, entered in evidence, concurred on the settlement terms. For her part, defendant wife could not remember what counsel had said to one another as the negotiation meeting ended. She appeared to be of the view a settlement had been reached and although her counsel never told her the settlement should be conditional on its terms/conditions being reduced to writing in an agreement, this was an assumption she independently made. Next morning, however, defendant wife telephoned her counsel and stated she was no longer agreeable to stand by the settlement achieved the night before.

(Parenthetically, this narrative underscores the importance of keeping precise and complete notes contemporaneously with settlement meeting/conference discussions; including discussions during foreplay and resolution stages of each meeting. Proceedings comparable to this application are often aggravated by recollections and notes which are illegible or confused (sometimes both) on issues of whether settlement was accomplished or what settlement terms/conditions were reached. Not least of the penalties slovenly note-making solicitors may suffer are costs against them personally and Bench censure, not to mention client demands for fee reduction or taxation or an action in negligence.)

In the application at Bar, Gray J. found the settlement agreement had been made. He entered the terms/conditions of the agreement in a judgment.

Headnote: Counsel retained in a particular proceeding may bind his client by compromise of those proceedings unless his client has limited counsel's authority to the knowledge of the opposing party. …. The Court had jurisdiction to enforce the settlement or refuse to do so notwithstanding any agreement between counsel. The discretion not to enforce an agreement would rarely be exercised; it was the policy of the Court to promote settlement. …. An oral settlement agreement was enforceable in both civil and family matters. In this case, a settlement was reached which was not conditional on the execution of a written agreement. The settlement agreed upon was fair.

Siluszyk v. Massey-Ferguson Industries Ltd.

(1986), 7 C.P.C. (2d) 247 (Ont. H.C.), Carruthers J., at pp. 249, 250.

Summary: Defendant's solicitor served written offer to settle which remained outstanding with no effort to accept or reject having been made until immediately prior to the case being called for trial. When counsel positioning themselves at the counsel table defendant's counsel turned to plaintiff's counsel and said in effect that the "outstanding offer is withdrawn." Thereupon, counsel for the plaintiff immediately wrote out an acceptance of the offer and handed it to his counterpart.

Decision Text: While rules of procedure in most provinces require that a notice of withdrawal of an offer be served pursuant to the provisions of the rule in writing in order to withdraw an offer "it is also my opinion that the Rule, interpreted in that manner, does not exclude a verbal notice of withdrawal of an offer of settlement from being effective.

. . . .

To my mind, a verbal withdrawal of an offer of settlement must be considered as being as effective as one made in writing, all else being equal.

McLeod, James G. **Annotation to *Foley v. Foley***

(1988), 15 R.F.L. (3d) 435 (Ont. D.C.), Houston D.C.J., at p. 436.

Editor's Note: Spouses made a marriage contract in 1980 whereby husband agreed to pay wife $50,000.00 should they separate before 1987. They separated before 1987. Wife sued husband for specific performance of the marriage contract. Apparently aided by their respective solicitors, the spouses signed minutes of settlement of wife's suit whereby husband agreed to pay wife $15,000.00 and costs in consideration of wife forfeiting her 1980 marriage contractual right to $50,000.00. Collateral to the settlement minutes - whether the solicitors acting in the wife's suit were privy is unclear - wife asserted husband orally agreed to pay to her $15,000.00 immediately in exchange for discontinuance of suit (which, she alleged, husband told her was damaging his credit rating) and pay her, sometime after discontinuance,

$35,000.00 sum. Wife's further suit to enforce alleged collateral oral agreement dismissed for failure to prove existence of collateral agreement.

Annotation Text: *Foley v. Foley* is worth nothing if for no other reason than the court's willingness to at least consider the effect of the parol evidence rule on the interpretation and validity of a domestic contract. Pursuant to the parol evidence rule, where a contract is wholly in writing, parol (oral) evidence cannot be admitted to add to, vary or contradict the express terms of the agreement. The exclusion of oral evidence to add to, vary or contradict a written document is often expressed in absolute terms. However, the rule is subject to a number of exceptions: (1) oral evidence is admissible to prove a custom or trade usage that does not appear on the face of the document; (2) oral evidence is admissible to prove that the contractual obligation is subject to a condition precedent; (3) oral evidence is admissible to invoke the equitable doctrine of rectification; and (4) oral evidence is admissible where the document is designed to contain only part of the terms, i.e., the agreement is partly oral and partly written.

. . . .

.... In *Foley v. Foley* the plaintiff was suing to enforce an alleged contractual promise that contradicted a written agreement. Houston D.C.J. quite properly held that the parol evidence rule applied. Domestic contracts are contracts and must comply with the basic contractual doctrines. However, in cases like *Horn v. Horn* (1987), 11 R.F.L. (3d) 23, 49 Man. R. (2d) 301 (C.A.), and *Marshall v. Marshall* (1988), 13 R.F.L. (3d) 337 (Ont. C.A.), the court allowed the oral evidence to explain and even contradict an apparently final agreement. The difference may be that the claimant in these cases is not trying to enforce an agreement that is at odds with the written bargain. Rather the claimant is seeking to have the court in its discretion not apply the contract. It is not a question of enforcing a different bargain but a question of deciding whether a court should exercise its statutory override discretion to ignore the contractual bargain. The difference between the two positions is rather tenuous and if this is the basis for the cases it should be explained clearly.

Odeco Drilling of Canada Ltd. et al. v. Hickey et al.

(1986), 9 C.P.C. (2d) 238 (Nfld. C.A.), at pp. 243-244.

Summary: Plaintiff's solicitor wrote to defendants solicitor offering to settle pending litigation. Defendant's solicitor accepted. Defendant's solicitor subsequently sent

settlement funds to plaintiff's solicitor with request they be held in escrow pending fulfillment of certain conditions. Plaintiff's solicitor declined to accept the settlement funds because of the conditions accompanying their tender. On appeal by defendant from dismissal of action to enforce settlement:

...[Defendant] submits that the conditions imposed by ... [the] letter [accompanying tender of settlement funds], although not expressed [in earlier negotiations], should be implied as terms of the contract in that they were sanctioned by custom. ...

We agree with counsel that contracts of this nature are set against a background of usage familiar to all who engage in similar negotiations and we accept, as a well-established rule, that a contract may be subject to terms that are sanctioned by custom even though they are not expressly mentioned by the parties: ... . The burden lies on those alleging usage to establish it, in this case ... [the Defendant].

In this case, however, the letter ... [accompanying the tender of funds] imposed terms [not expressed] in the settlement negotiations] that went far beyond those that were customary and would ordinarily be inferred, e.g., filing of discontinuances of the action and the execution of releases. ...

...., in our view ... [the letter accompanying the tender of funds] amounted to a refusal by ... [the Defendant] to complete in accordance with the agreement by the imposition of new terms, over and above those that fell within a recognized usage. That refusal rendered the contract voidable at the instance and option of the ... [plaintiffs].

Lutes v. Lutes

(1985), 3 C.P.C. (2d) 7 (Ont. H.C.), Vannini L.J.S.C., at pp. 8-9.

Summary: A motion to preclude a wife from defending a husband's divorce petition was dismissed, due to the spouses, apparently through their solicitors, having made an agreement the wife would not oppose the husband's petition.

Decision Text: I am not aware of any Judge having any authority to make an order to preclude a party to a divorce action from defending a divorce action on the grounds sought for the dissolution of the marriage, notwithstanding that the party may have at one time agreed not to defend provided certain conditions agreed to are complied with.

It would be contrary to public policy to hold a party to an agreement not to defend a divorce action, if subsequently a party should decide, for whatever reason, to defend.

It is not that type of condition of an agreement that a Court will hold a party to in accordance with the general principles that parties entering upon an agreement in normal circumstances [in pending litigation] should be held bound by the agreement which the party has entered into.

(d.3) Agreements: Held not to have been made

Flynn v. Canadian General Insurance Co.

(1985), 2 C.P.C. (2d) 146 (N.B.Q.B.), Jones J, at p. 149.

Summary: An application for summary judgment founded on the submission a binding agreement in pending litigation had been reached by the parties' solicitors was dismissed.

Decision Text: … cases in which solicitors' settlements had been upheld and have been sufficient ground to prevent further proceedings … [are those in which] Courts have satisfied themselves that there was no merit in the objection raised by the parties refusing to finalize an agreed settlement. Nevertheless it has been recognized that if there is an issue with respect to fraud or misrepresentation that this may well be grounds for going behind an agreed settlement: see R. C. Archiepiscopal Corp. of Winnipeg v. Rosteski (1958), 26 W.W.R. 82, 13 D.L.R. (2d) 229 (Man. Q.B.).

4.6.5 Costs

Editor's Note: Costs means fees where the context requires.

(a) Generally

Wilson v. Wilson

(1985), 3 C.P.C. (2d) 59 (N.S. T.D.), Glube C.J.T.D. (In Chambers) at p. 72.

Decision Text: Counsel for Mr. Wilson pointed out to me the remarks in the case of Jones v. Jones (1973), 10 R.F.L. 295 (N.S. T.D.), by Gillis J., at p. 295 and I can do no better than repeat them:

> "However, before going to that I want to preface what I say by the remark that probably there is no area, at the present time, in the whole of the practice of law and the operation of the courts where the integrity of the Bar and, indeed, at times the court is more called into question than in the matter of divorce costs. The proliferation of comment is such that it even reaches the back halls of the Supreme Court chambers.
>
> I think high divorce costs are the subject of extreme public dissatisfaction and disappointment with the Bar and the court."

Horn, John W. **Annotation to *Robertson, Ward, Suderman & Bowes v. B.C. Transit***

(1987), 25 C.P.C. (2d) 276 (B.C. C.A.), Taggart, Anderson, McLachlan JJ.A. at p. 277.

Annotation Text: . . . . [The Court of Appeal] seems to go so far as to hold that the client had contracted out of the right to tax all accounts whether paid or unpaid. If so, the client's only remedy would be to apply for an order to tax relying upon the inherent jurisdiction of the Court.

In the absence of any such contract as was found to exist in the present case, a retainer to work at fixed hourly rates will not exclude the right of the client to tax, though the taxation is limited to a consideration of whether the hours charged were actually worked and whether the number of hours worked were necessarily spent (see *CCB Mortgage Investment Corp. v. Rohata Development and Consultants Ltd*., [1983] 2 W.W.R. 143 Alta. L.R. (2d) 303 (Alta. Q.B.); *Gaglardi v. Gaglardi*, [1983] 4 W.W.R. 752, 44 B.C.L.R. 271 (B.C. S.C.); *Swinton & Co. v. Perry*, (1985) 69 B.C.L.R. 114 (B.C. Co. Ct.)).

Gorin v. Flinn Merrick

(1994), 30 C.P.C. (3d) 260 (N.S. S.C.), Stewart J.

Headnote: Where there was no written retainer and there was a conflict of evidence between the solicitor and client on the fee contract, if the evidence remained on equal footing, more weight was to be given to the client and the lawyer was to take the consequences. Notwithstanding an agreement between the parties, a taxing master had a duty to the pubic to determine whether the fee charged was reasonable. The lawyer had the burden to prove the agreement and the account before the taxing master on a balance of probabilities.

The taxing master did not err. The basis of the fee account when the client accepted the offer to settle was the same agreement that was entered into when the lawyer was retained. There was no evidence that it was an hourly rate agreement or that it was discussed. The lawyer's method of calculation of fees was accepted.

The matter was not straightforward; the claim was significant. Throughout the matter the solicitor assumed the responsibility for all aspects of the claim. The time expended was reflective of the issues. There was time spent on the file that was not docketed. The amount of research done was not excessive. The taxing master was aware from a computer printout that a paralegal did a substantial amount of the research work over 25 hours and that the hourly rate of $35 rather than the solicitor's fee of $100 to $125 per hour was charged.

Cohen v. Kealey & Blaney

(1985), 26 C.P.C. (2d) 211 (Ont. C.A.), Robins J.A. for the Court.

Summary: Solicitor and client agreed fees and disbursements payable, if trial of proceeding solicitor undertook for client was successful, would not exceed $50,000. If trial unsuccessful they agreed fees and disbursements would not exceed $20,000. Solicitor accepted $10,000 retainer and, prior to trial, demanded additional $30,000 retainer. Client treated this request as tantamount to repudiation of the solicitor-client agreement and terminated the solicitor-client relationship.

On appeal from taxation by an Assessment Officer, the Court of Appeal approved of the "considerations applicable on an assessment":

(a) time spent,

(b) legal complexity of matters;

(c) degree of responsibility solicitor assumes;

(d) matter's monetary value;

(e) matter's importance to clients;

(f) degree of skill and competence solicitor demonstrates;

(g) results;

(h) client's ability to pay;

(i) client's expectation as to quantum of fee.

Argila v. Argila

607 A. 2d 675 (App. Div., N.J., 1992), at p. 679

Decision Text: There comes a time when counsel is obligated to limit … conferences or accept the fact that he cannot always expect full remuneration for the time so consumed. This is particularly true in divorce actions. Some litigants will virtually take over counsel's office and absorb most of his time if permitted by counsel to do so.

. . . .

While there is no requirement in New Jersey that counsel differentiate their rates [in the same retainer] according to the complexity of the tasks involved, such practice may be prudent billing judgment in matrimonial matters, and especially where, as here, the total hours expended reach such an inordinately high level.

. . . .

[A] lawyer who spends four hours of time on behalf of three clients has not earned 12 billable hours. A lawyer who flies for six hours for one client while working for five hours on behalf of another, has not earned 11 billable hours.

Cavotti v. Cavotti

(1987), 22 C.P.C. (2d) 109 (Ont. S.C.), Assessment Officer Saunders, at p. 111.

Decision Text: [On taxing a counsel fee] I look only at the experience of counsel to determine if too many hours were spent on a tariff item.

Woods v. Chamberland

(1991), 5 C.P.C. (3d) 217 (Ont. Gen. Div.), Chadwick J.

Headnote: On an assessment of the applicant solicitors' account before the assessment officer, the respondent alleged that the solicitor had been negligent in the conduct of his action. The solicitor moved for an order transferring the assessment from the assessment officer to a judge.

Held - The motion was granted.

Although masters and assessment officers had the jurisdiction to assess the accounts of solicitors, the court retained inherent jurisdiction to deal with assessment matters. The court should only exercise its discretion to hear assessment matters in rare circumstances. Here, as the respondent has alleged negligence by the applicant, the assessment should be removed to a judge.

(b) Security for costs

Ismail and Another v. Richards Butler (a Firm)

(*The Times*, 23 February 1996, p. 34)
Moore-Bick, J.

Summary: It had long been recognized that a solicitor had the general right to embarrass his client by withholding papers in order to force him to pay what was due and that the court would not compel him to produce them at the instance of his client.

Where the solicitor discharged himself he was not allowed to exercise his lien so as to interfere with the course of justice.

In those circumstances the overriding principle was that the court should make such order as was most conductive to the interests of justice by weighing up (a) the fact that the litigant should not be deprived of material relevant to the conduct of his case and (b) that litigation should be conducted with due regards to the interests of the court's own officers who should not be left without payment for what was justly due to them.

Although on the facts the defendant [solicitors] had brought an end to the retainers the reality of the case was that the value of the lien to the defendant was likely to be … [considerably] diminished if papers were handed over.

His Lordship could not decide on the material before him whether the defendant was entitled to recover the full or any amount of its claim but taking all the circumstances of the case into account his Lordship considered that some departure from the normal practice was called for in the interests of justice.

Accordingly the case required that the plaintiffs provide some security for the defendant's claim and an appropriate amount was nothing short of the full amount of the claim. His Lordship therefore set the sum at £450,000.

(c.1) Liens/Charging orders: allowed

Lang v. Ball

[1988] W.D.F.L., No. 2209 (Ont. H.C.), Vannini L.J.S.C.

Summary: Wife's application to recover arrears of child financial support yielded an order that husband pay (i) the arrears by installments equal to one-third of each payment he received on account of damages he recovered in a personal injury claim, until the arrears were fully satisfied and (ii) costs of $1,500.00. Wife's lawyer sought a charging order for his account to the wife in representing her on the support arrears proceeding. Ordered that the $1,500.00 costs, but not the support arrears payments from husband, be liable to a charging order for lawyer's benefit.

A charging order was not to be made in favour of the applicant in respect of the child maintenance arrears or the payments from the damages which were to go, in part, toward the payment of maintenance arrears. Money for child maintenance is not money to the parent having custody but money of the child for his support although the order directs payment to the custodial parent.

Cox Downie v. Patterson

(1992), 9 C.P.C. (3d) 21 (N.S. S.C. [T. D.]), Saunders J.

Headnote: At common law, a solicitor was entitled to a lien for his/her proper fees on property recovered or preserved by his/her efforts. This created an action in rem. The right was, in each jurisdiction, subject to the rules of court. In Nova Scotia, the remedy sought was a declaration under r. 63.26. The court had a discretion to choose when it would exercise its equitable jurisdiction in granting declaratory relief. The court would balance the equities having regard to all circumstances, including an assessment of the solicitor's work and the extent to which that work secured or protected property. A solicitor's lien would not extend to all of the debtor's property, but only that which was recovered or preserved through the instrumentality of the solicitor.

Here, the issues in the divorce action related to the division of assets under the *Matrimonial Property Act* (N.S.). The wife had left the matrimonial home, leaving the children in the house with their father. No claim for custody, spousal support or child support was made by the wife. The husband did not claim child support. No identifiable portion of the solicitor's work related to custody or maintenance. The solicitor's time in processing the divorce itself was minimal, given that the client was the respondent in the divorce and given that there was not an action under the *Matrimonial Property Act.* The preparation and attendance at discovery, the exchange of financial information, the preparation of financial statements, settlement negotiations and other trial preparation would have been the same whether or not a separate divorce proceeding had been launched. The respondent received a very favourable treatment of the debts and achieved close to an equal division of assets notwithstanding his wife's claims.

In this case, the solicitor's fees and disbursements related entirely to the issue of matrimonial property. The solicitor was instrumental in acquiring and preserving his client's interests in specific and identifiable property. The solicitor was entitled to a charge for fees and disbursements in priority to all other creditors, pursuant to r. 63.26.

Stancer, Sidenberg v. Maricic

(1992), 11 C.P.C. (3d) 89 (Ont. Gen. Div.), E. Macdonald J.

Headnote: The respondent law firm represented the applicant with respect to a matrimonial dispute and an aborted real estate transaction. The fees outstanding for services rendered were at least $7,300. On an application for delivery of files from the respondent law firm to the current law firm representing the applicant, the issue arose as to whether the respondent could properly assert a lien on the files for non-payment of the account.

Held - The solicitor's lien was upheld and the application was dismissed.

According to a solicitor's lien for non-payment of account available under the *Solicitors Act* (Ont.), the client was required to make some efforts to discharge the financial obligations either in whole or in part or to demonstrate to the court some valid reasons why efforts could not be made. The respondent took the position that reasonable arrangements for the payment of the account could be made, however, the applicant had not made any efforts to discharge the financial obligation or to make arrangements to pay the account over a long period of time, or to offer some form of security. The applicant had also not particularized his alleged cash flow problems.

The following factors were relevant: the nature of the solicitor/client relationship in matrimonial matters meant that the solicitor's lien had to be given some meaning; the respondent law firm did not withdraw their services; and nothing in the materials suggested dissatisfaction with the respondent law firm's services.

(c.2) Liens/Charging orders: not allowed

Re Tots & Teens Sault Ste. Marie Ltd.

(1975), 11 O.R. (2d) 103 (S.C.), Henry J., at p. 106

Decision Text: It is well settled that a solicitor has what is referred to as a retaining lien for his costs on property of his client in his possession, such as documents. It is also well settled that he has a lien on property of his client representing the fruits of litigation for which the solicitor has successfully expended his efforts: this latter is referred to as a charging lien in the works to which I have referred and as I understand it is distinguished from the retaining lien in that it may be enforced against property which is not in the possession of the solicitor.

Editor's Note: The foregoing excerpt is considered in *Morris/Rose/Ledgett v. Sivirilli* (1993), 22 C.P.C. 83 (Ont. Gen. Div.), Chapnik J., at p. 85. At Bar, the solicitor's application was denied.

Georg v. Hassanali

(1987), 19 C.P.C. (2d) 240 (Ont. S.C.), Master Clark, at pp. 241, 242.

Decision Text: This motion was brought ex parte on behalf of the plaintiff's former solicitors for an order declaring that those solicitors are:

> "… entitled to a first charge for the reasonable fees and disbursements upon any funds, monies or other property recovered by the plaintiff in this action or obtained by the plaintiff in connection with, or as a result of this action."

Such relief is otherwise known as a solicitor's charging lien.

The charging lien sought in the within motion is not really a lien at all. At best it is a right in a solicitor to apply to the Court to have his fees and disbursements paid out of a fund he or she has worked to create (i.e., a judgment for money), or out of property … she has preserved.

. . . .

Since in the within action, discoveries have not yet been completed, there is no property *already* recovered or *already* preserved. Whether property may be recovered or may be preserved, is speculative. I have canvassed the well known cases and have been unable to find any instance where the Court has granted the charging order on speculation that there may be some proceeds available.

. . . .

What is meant by "preserved" in this context is that which results from a final judicial or other termination of the lis between the parties, not the temporary freezing of assets.

(c.3) Liens/Charging orders: priority

Canadian Imperial Bank of Commerce v. Gray

(1987), 16 C.P.C. (2d) 181, Master Saunders, at pp. 183-184.

Summary: Plaintiff was entitled to recover $1,981.40 as costs from defendant, Defendant, in turn, was entitled to recover $2,504.00 as costs from plaintiff. When

the costs of each party were assessed, plaintiff's request refused that plaintiff's costs be set off against defendant's costs whereby net amount owed by plaintiff to defendant would be $522.60. The reason was that defendant's solicitor claimed a solicitor's lien against defendant's entire entitlement to costs from plaintiff. He had done so because defendant had not paid any of defendant solicitor's accounts. On review, set-off determined to take preference over defendant solicitor's lien.

Decision Text: Counsel for the plaintiff has relied on the decision of *Durall Construction Ltd. v. H.J. O'Connell Ltd.* (1977), 16 O.R. (2d) 713, 5 C.P.C. 126 (Ont. H.C.).

In that case Southey J. decided that the set-off takes precedence to the solicitor's lien, and stated at p. 130 [C.P.C.]:

> "The solicitor can have no higher right than his client as against the other parties to the suit, and his lien, whenever its exists against the fund belonging to his client, is confined to the ultimate sum which the client himself is entitled to."

(d) Equitable assignment

Jering v. Jering

[1987] W.D.F.L. No. 1724 (Man. Q.B. [Fam. Div.], Bowman J.

Summar: Husband agreed with solicitor to pay all fees and disbursements of that solicitor from his share of proceeds of sale of home husband owned jointly with wife. Sale of home had already been agreed to. Pursuant to a judgment, husband required to make equalization payment to wife which was to be satisfied, in part, by transfer of the husband's entire share of proceeds of sale of the jointly held matrimonial home. Husband's solicitor claimed a portion of the proceeds of the home sale to cover the husband's legal fees and disbursement. Existence of the husband's claim had been known to the court at the time of the hearing at which the judgment was granted requiring the husband to make an equalization payment to the wife that would be partially satisfied from the husband's share of the proceeds of sale of the home. Bowman J. held that the solicitor was entitled to retain the amount claimed from the matrimonial home sale proceeds.

In so deciding, Bowman J. concluded that the solicitor did not have a solicitor's lien on the sale proceeds because such a lien applies only to funds which are the fruits of the solicitor's labour. The sale proceeds in this instance did not result from the solicitor's efforts. However, the agreement between the husband and solicitor with regard to payment of the husband's fees and disbursements constituted

an equitable assignment of a then undetermined portion of the sale proceeds as security for the payment of husband's subsequently-incurred legal fees and disbursements. That arrangement had been made in good faith and had been disclosed to the Court at the relevant time.

(e.1) Taxed costs: upheld

Carpenter et al. v. Malcolm

(1985), 6 C.P.C. (2d) 176 (Ont. H.C.), Catzman J. at p. 178,

Summary: An appeal from an Assessment Officer's taxation of party and party costs was allowed.

Decision Text: There is no suggestion that the hours claimed were not spent in preparation for what was, until the eve of trial, expected to be a contested … [matter] … . If counsel are to discharge the functions which the Courts expect them to discharge, and on occasion fault them for not discharging, they ought to be able, in my view, to expect that their clients' party-and-party costs will be assessed in a manner that reasonably and without arbitrary diminution acknowledges the efforts legitimately expended in that connection.

(e.2) Taxed costs: reduced

Price et al. v. Roberts & Muir

(1987), 25 C.P.C. (2d) 166 (B.C. C.A.), Nemetz C.J., Hinkson, McLaclin JJ.A.

Summary: Law firm made written agreement with client to undertake litigation at specified hourly rate; reserving right to include in the final account to be rendered a claim for a bonus for success and other factors. The firm gave the client an estimate of the full cost of the proceeding subject to the qualification that the estimate did not amount to a guarantee. Later, the firm revised upwards, in writing, the estimate of the full cost of the proceeding. The total of the accounts ultimately rendered substantially exceeded the revised estimate given by the law firm to the client.

On appeal by the firm from a Chambers Judges' certificate reducing the bills from the amount claimed to the amount of the last estimate plus a bonus for success, the British Columbia Court of Appeal decided that although the last estimate was not a guarantee, the effect of the last estimate was not to denude it of all contractual effects.

One of the terms of the contract between the firm and client was that the law firm's charges calculated at a specified hourly rate would be subject to the approximate limit estimated. Some variation was permissible and, in addition, the fee should properly reflect the success achieved.

Peletta v. Mackesy, Smye, Turnbull, Grilli & Jones

(1989), 38 C.P.C. (2d) 291 (Ont. H.C.), Potts J.

Editor's Note: Solicitor rendered client an account 3-1/2 years after completing services for the client. Assessment Officer reduced the solicitor's account from $30,768.72 to $23,785.65 solely on the ground it was unfair to the client to receive a bill so long after services covered by the bill were completed. On review, Potts J. upheld the Assessment Officer's determination. While the Assessment Officer did not specifically state why the delay was unfair to the client, Potts J. concluded that it could be inferred the Assessment Officer decided that the delay deprived the client of the opportunity of effectively assessing the bill.

Kettner & Frydman v. Moshenberg

(1991) W.D.F.L No. 922 (Ont. S.C. [Assess. O.]), Assess. O. Roblin

---

Summary: The solicitor's bill for work on a matrimonial matter over the course of two years was reduced from $16,512 to $12,512. Although the number of hours was reasonable and the case had advanced as quickly as possible under the circumstances, a lack of communication between solicitor and client had confused the client as to the billings. The solicitor did not render a detailed account until he knew the assessment was coming up. Interest of $765 was allowed in accordance with s. 35 of the Solicitors Act.

Gray v. Baldes

(1991) W.D.F.L. No. 1006 (Ont. S.C. [Assess. O.]), Assess. O. Gramlow

---

Summary: The solicitor's account was reduced from $7,702 to $5,300 for work on a separation agreement and divorce petition. Although the bill was reasonable, the client was unable to pay, as she was under medical care and had not worked for some time. There was no indication as to when she would be able to seek employment in the near future.

Garfin v. Komorowski

[1993] W.D.F.L. No. 1628 (Ont. S.C. [Ont. Assess.]), Assess. O. Eperon

---

Summary: The solicitor was retained to act for the client in a matrimonial dispute. The client sought to obtain an order relating to interim possession, sale and partition of the matrimonial home, as well as support and custody of the son and an equalization payment. The retainer outlined the client's wishes and an hourly rate of $175 was agreed upon. The husband obstructed proceedings from the outset by registering a security interest on the matrimonial home. The sale of the home was prolonged, and it was obvious that the husband was hiding assets even thought he maintained that he was in debt. An accountant was permitted by the court to investigate the husband's financial position, but his work uncovered no significant information. The client eventually signed a settlement agreement with the husband which was unfavourable to her, without consulting the solicitor. From June 1990 to December 1990, the wife was billed $29,701, calculated from a print-out of the work done. In October 1991, the judge who directed a pre-trial expressed the view that there should not be any further motions of any kind. Twelve bills rendered by the solicitor to the client amounted to $79,247 in fees and disbursements of $7,741. One bill showed three payments for attendance on motions after the direction for pre-trial. The ledger statement showed an amount of $7,303 payable to the accountant and another bill for the motion lifting the security interest. The number of hours were multiplied by the solicitor's hourly rate. On assessment, the client's position was that the amount was grossly excessive, that the solicitor failed to warn of the excessive costs in pursuing the matter and that the result achieved and the estimate given was not related to the final billing.

Held - the amount owing to the solicitor was reduced to $63,200 for fees and $4,392 for disbursements, not including G.S.T.; the amount owing to the accountant was reduced to $4,303.

For the work performed and the results achieved, the accountant's bill was excessive. With respect to the solicitor's bill, it was not enough to make a print-out available to the wife to prove the amount outstanding. A reporting letter was required outlining the accomplishments and expected future results from continuing motions. Although the solicitor was entitled to be compensated for her work, the direction which she advised her client to pursue was an ill-advised, costly undertaking which was of little value to her client. As the wife failed to prove that she did not realize the estimated fee was exceeded and the solicitor failed to prove that the hours spent were all of value to the client, the account was assessed on a quantum meruit basis, resulting in a reduction of both fees and disbursement. The accounts relating to the attendance motions were not allowed and the client was not responsible for the cost of removing the security interest.

In re Collins

Alameda County Superior Ct., State of California, 07 September 1993, Duncan J.

Summary: The lawyer (Collins) was consulted in San Mateo, California by the mother of a 7-year-old son, for advice on the prospects of moving with her son from California to White Plains, State of New York. The mother's husband - stepfather to her son - desired the boy to continue to reside in California. In preparing to render advice to the mother, the lawyer accessed his copy of the West CD-ROM Library set of three disks containing every judicial opinion (and, apparently related statues) published in California during the 33-year period to (perhaps including part of) 1993. After inserting each disk, the lawyer entered "stepparent/5 custody" to access all relevant opinion (and, apparently, related statues) over that period. He then went "Define Block" and "Move", and then went "Print", producing hardcopy of what he had selected from the three disks. The lawyer prepared memoranda from this material. He conducted other preparation. He advised the mother. He represented her at a trial in which she was successful. Costs of the mother were ordered to be paid by the stepfather to cover fees and disbursements of the mother's lawyer (Collins), subject to judicial approval of the amount.

On application for judicial approval of the lawyer's fees and disbursements ($9,591.50), the judge presiding over the approval application, Duncan J. of Alameda County Superior Court, California ascertained from the lawyer (an experienced practitioner who had represented more than 1,000 persons over 20 years in family law matters) that the lawyer's bill included $4,950.00 for 22 hours research at $225.00

hourly, including 10 hours over the Fourth of July weekend in 1993. The stepfather's lawyer contended that (i) this research was computer-driven; and that (ii) large portions of the fruits of the research had been copied into memoranda of the wife's lawyer, verbatim, without attribution (all but three paragraphs in one 7-page excerpt of memoranda and all but 6 lines in another 9-page excerpt of memoranda).

Per Duncan J.: "It is difficult to believe that even a first-year law student could have spent 22 hours cutting and pasting the draft of these ... [documents]." Bill taxed down from $9,591.50 to $3,000.00. Lawyer's behaviour to be reported to disciplinary enforcement section of the Bar of California.

On the lawyer's request for reconsideration, the lawyer adduced evidence from William P. Eppes 3d, licensed since 1978 to practice law in Tennessee, who sold the compact disk library to the lawyer on behalf of West Publishing Company. He testified that by entering "cdWestpub/prs" after the "C prompt", he ascertained the lawyer had used these disks for 9 hours and 33 minutes since he purchased. The lawyer, in a memorandum supporting reconsideration, contended the entire time had been employed researching the parenting case. Moreover, his memorandum attributed generous quoting from the computer disks to the fact the disk data "was better written than I would have composed it myself", subject to some minor alterations.

Per Duncan J. (on reconsideration): application to vary the original taxation denied. Report to the Bar of California withdrawn on the basis inefficiency rather than dishonesty explained the excessive research time claimed by lawyer.

David Margolick, whose 11 December 1993 column in *The New York Times* is the principal source of information for this summary, concluded his column on this case with the results of his interview with the affected lawyer: "... he is still miffed at Judge Duncan." In an interview, he described the jurist as a "cavalier" judicial "maverick" whose ill-considered opinions had periodically been criticized by the California courts of appeal. How did he know? He consulted his trusty CD-ROM and plugged in the words "Duncan" and "reversal".

Samson v. Samson

(1994) 3 R.F.L. (4th) 415 (N.B.Q.B. [Fam. Div.]), Boisvert J.

Summary: On trial of a wife's petition for divorce and financial corollary relief and for equal division of marital property under the *Marital Property Act* (N.B.), in response to which the husband sought enforcement of a separation agreement which had been made between husband and wife, the wife's petition for divorce was granted;

her claims for financial support and equal division of marital property were dismissed, and the separation agreement was confirmed. The husband was entitled to recover from the wife costs in the total sum of $2,300.00. However, his solicitor had failed to file a pre-hearing brief in the various proceeding within the time prescribed by R. 38.06.1 of the *Rules of Court* (N.B.). Bearing that failure in mind, the husband's costs were reduced to $1,800.00.

Van Bork v. Van Bork

(1994), 30 C.P.C. (3d) 116 (Ont. Gen. Div.), E. Macdonald J.

Headnote: The divorce action was commenced in 1984. The trial, including 6-1/2 days of argument, took place over 60 days spread between November 1992 and May 1993. Judgment delivered in November 1993 awarded the wife an equalization payment and property division worth approximately $1.8 million. The wife was awaiting the proceeds of the disposition of another jointly held property. She was also awarded support. Following trial, supplementary reasons were released regarding costs. The wife was awarded her costs on a party-and-party basis to March 8, 1991, the date of her offer to settle, and thereafter on a solicitor-and-client scale. Counsel were invited to make submissions on the fixing of costs. The total for fees, disbursements, and GST sought by the wife's counsel was $752,458.21 of which approximately $470,000 was for fees for preparation and attendance at trial. Counsel for the husband submitted that costs should be fixed in the amount of $250,000.

Held - Fees were fixed in the amount of $391,304 together with disbursements, GST and postjudgment interest.

There was a fundamental distinction between the fixing of costs and the assessment of costs. In fixing costs, the judge determined what the services devoted to the proceeding were worth according to the submissions of counsel, the judge's own experience, and with some regard to what would be taxed on the party-and-party scale. With respect to solicitor-and-client costs, this was intended to be a complete indemnification except for extra charges beyond the reasonable scope of the litigation and the preparation and presentation of the client's case.

The draft bill of costs presented by the wife's counsel contained no premium for successful results. No fees were charged to the wife during the course of the litigation; however, the private financial arrangements that prevailed between the wife and her counsel were not relevant in fixing costs.

Lawyers who practised in a specialist firm could be expected to have knowledge of that area of law at their fingertips. While this did not mean that there would be no requirement to do research, it should mean that research time would be

drastically reduced. It should also mean that the experience brought to the case by the knowledge and expertise of the solicitors would reduce costs and result in an efficient use of costly time. The expertise of the firm was a relevant consideration in looking at the efficiency of time spent on certain items during the various stages of the lawsuit. Expertise and experience should create the reasonable expectation that lawyers with such specialist experience would require far less preparation time than a lawyer newly called to the bar.

The complexity of the proceedings and the trial was relevant to fixing costs. At trial, there was no expert evidence, and the parties were the only witnesses. The conduct of the husband made the litigation complex. His attitude to production and discovery was to frustrate the process.

The approach to fixing costs should not be based on a detailed analysis of the docket entries but by balancing the number of hours spent with the nature of the tasks facing the solicitors. Consideration was to be given to the solicitors' experience and expertise which carried with it the assumption that the number of hours required for each step should be much less than that of an inexperienced solicitor of much lower hourly rates. For counsel fees, the wife's solicitors were allowed $325 per hour for senior counsel, $225 per hour for intermediate counsel and $125 per hour for junior counsel.

For preparation for trial, the … [portion of the $470,000.00 covering trial preparation and attendance] sought was $239,682. The amount fixed was $111,250. Trial preparation should occur at a time reasonably close to the time to the actual trial date. Trial preparation could include the organization of documents for the trial, including the preparation of exhibit books. The trial was scheduled to commence in September 1992 and was adjourned to November 1992. The bulk of preparation should have taken place in the Fall of 1992. Senior counsel claimed 345 hours, intermediate counsel claimed 567 hours and junior counsel claimed 42 hours. The time for the junior lawyer was substantially lower than senior counsel. Given her lower hourly rate, the junior counsel should have done the bulk of legal research, document preparation and organization. By the time experienced lawyers became engaged in trial preparation, they were deemed to have a very good knowledge of the case and the relevant law. The amount sought was excessive and unreasonable. Senior counsel was allowed 160 hours, intermediate counsel 240 hours and junior counsel the full amount claimed.

For preparation of argument at the close of trial the amount sought was $107,946. Senior counsel claimed 142-1/2 hours, intermediate counsel claimed 218-1/2 hours and junior counsel claimed 99.5 hours. There had been a delay between the conclusion of trial and the actual delivery of argument. The amount claimed was excessive and failed to recognize that by this time in the trial, experienced counsel had the benefit of all of the time previously devoted to the issues in trial preparation time and the attendance at trial itself. The matter was not ordinary but it was also not so

extraordinary as to justify the suggested use of time to prepare legal argument. The amount fixed was $34,500.

Regarding costs of motions and attendances in other litigation between the parties and third parties, those costs were not separate and distinct from the divorce action. All of these actions arose because the parties were embroiled in the divorce proceedings. The only item to be disallowed was for attendance in connection with the son's bankruptcy. Those attendances were clearly not related to the disputes over the division of family property.

With respect to motions in which the orders were either silent as to costs or contained the order "no costs", it was not appropriate to alter these dispositions in fixing costs of the entire proceedings.

A disbursement was allowed for fees charged by an expert who provided valuation and income tax advice but no report. The fact that there was no report should not defeat the disbursement. It was reasonable to engage expert assistance to analyze the tax implications of the property transfers. Without detailed accounts and in the absence of a written report, $22,000 was excessive and the disbursement was reduced to $10,000.

The fees in the draft bill were excessive and beyond what could be recovered. Lawyers with high hourly rates and who were of esteemed experience had an obligation to control the number of hours spent on a file. This experience justified the high hourly rates and the client, or other payor of the fees, was entitled to the expectation that the courts would not permit the usage of time that was excessive and unreasonable, even where the case was made difficult and lengthy by an opposing litigant.

As for the costs of the hearing to fix costs, it was disclosed that there had been offers to settle. Accordingly, counsel were to reattend to make submissions on the disposition of costs for the hearing itself.

Mortimer & Rose v. Sahrmann

[1995] W.D.F.L. No. 1139 (B.C. S.C. [Master]), Master Donaldson

---

Summary: The client received an account from his former lawyer. The account was for legal fees in the amount of $7,400, representing 26 or 27 hours of work on a matrimonial matter, at a rate of $275 per hour, performed by the senior, experienced lawyer. After the lawyer had been acting for the client for six months, counsel for the client's wife raised the issue of conflict of interest, since the wife had consulted the

lawyer for one hour, five years previously. The lawyer did not recall meeting with the wife until the issue of conflict was raised. After the issue was raised, the client specifically instructed the lawyer to continue to act for him, although the lawyer was less confident than the client that no real conflict existed. The client retained other counsel to act on the conflict issue only. One month later the court ruled that an apparent conflict existed and that the lawyer could not longer act for the client. Three hours of the time billed had been spend on the conflict issue and another five hours had been spent on other matters after the conflict issue had been raised. The client applied to tax the account.

Held - application allowed. Account reduced by $1,375.

The lawyer had done significant legal work which was of value to the client. However, the client did not have to pay for a portion of the work done after the conflict was identified.

Maxwell Schuman & Co. v. Nieuwkerk

[1995] W.D.F.L. No. 1420 (B.C.S.C. [Master]), Master Patterson

---

Summary: The client had retained the applicant lawyers to act for her in the settlement of questions of access to and support for her children. She had signed a retainer letter which outlined the lawyers' hourly rates. There were difficult negotiations, which were complicated by the lawyer's difficulty in communicating with the client. She gave oral instructions which she later changed in writing. She was also extremely particular and very detailed in her instructions. A comprehensive settlement was ultimately reached. The lawyers rendered six accounts totalling $10,866, of which $5,767 was paid. The client had numerous complaints about the lawyers, particularly that there was delay, that she was not informed of the settlement and that they had acted contrary to her instructions that she wanted an all or nothing settlement. The lawyers applied for a review of their accounts and a certificate for the balance owing.

Held - application allowed. The certificate was granted with minor adjustments totalling about $220.

The lawyers had done a good job in concluding a comprehensive settlement which was in the best interests of the children and which saved a considerable amount of unnecessary time in court. The lawyers had reasonably spent their time, at reasonable rates. Costs of the taxation were assessed summarily at $300.

K.(V.) Estate v. Hogue

[1995] W.D.F.L. No. 1458 (Man. Q.B.), Schulman J.

Summary: The client acted for the client in family law and criminal matters. When both matters were nearly complete, the client agreed on a fee with his lawyer and satisfied payment by a transfer of property. The client died soon after, and his daughter, acting as administratrix of his estate, obtained an order for assessment of the lawyer's accounts. The master determined that the lawyer's fees for defence of the criminal charges should be reduced from $13,500 to $8,000, and for conduct of the domestic matter from $11,000 to $7,000. He determined that some of the time charges for correspondence, court time and explanation times were excessive. The lawyer moved to oppose confirmation of the report of the master.

Held - motion allowed.

The master's report was varied by reducing the lawyer's total fees from $24,500 to $21,500, rather than to $15,000. Further, the transfer of the land to the lawyer was valid, and he was entitled to retain the gain on the sale of the property.

Weldon v. Finkelstein

[1995] W.D.F.L. No. 1459 (B.C.S.C. [Master]), Master Bolton

Summary: The client retained the lawyer to act for her in a matrimonial matter. Initially, the lawyer assisted in the preparation and revision of a separation agreement. Later, he was instructed to file a petition for divorce. He did not, however, do so in a timely manner. The client owned several pieces of property jointly with her husband. The lawyer inquired whether she thought she would have any difficulty in receiving her share of the proceeds when the properties were sold. She said no and the lawyer did not pursue the possibility of filing any lis pendens. The client did subsequently have problems collecting her share of certain sale proceeds. As a result, the lawyer undertook a flurry of activity on her behalf, including the preparation of an application to sever a joint tenancy which was never brought. Throughout, it appeared that the lawyer listened to the client, but did not give firm advice. Furthermore, he did not get clear instructions in writing when the client indicated that she did not want to pursue all of her available remedies. The lawyer billed the client $750, representing 2½ hours work, for the petition for divorce. He also billed her for a one hour meeting to discuss

the delay in preparing the petition. He billed her $3,100 for the work in respect of the property and $1,050 for various other work in respect of the lawyer's account.

Held - order accordingly. The lawyer's account was reduced to $2,000 in total.

Given that the lawyer already knew the client's circumstances from his work on the separation agreement, the petition for divorce should have taken only 15 minutes to prepare. The bill for the petition was reduced to $250. Nothing should have been billed for the meeting to discuss the delay. Much of the other work arose out of the lawyer's lack of attention, especially to the lis pendens issue. The preparation of the application to sever the joint tenancy was unnecessary. Letters putting the vendors, purchasers and other lawyers on notice would have sufficed. The bills for the work in respect of the property were reduced to $700.

Stark MacLise v. Newell

[1995] W.D.F.L. No. 1581 (B.C.S.C.) (Registrar), Registrar Wellburn

---

Summary: The client retained the lawyers to deal with a matrimonial matter, in particular to obtain a reduction in the $6,900 per month support payable to his wife, to unfreeze a brokerage account and to obtain an order for reasonable child support. Both lawyers had more than 15 years experience in family law and charged $225 per hour for their services, as set out in the fee agreement with the client. Interest on accounts was expressed as a monthly rate. The client was a stockbroker with complex personal financial affairs. Much time had to be spent by the lawyers in reviewing those affairs with the client and obtaining documentation. The client tended to be vague and unfocused in dealing with the information. An interim court appearance was necessary, at which the lawyers were successful in setting aside certain garnishing orders by consent, although the other issues remained unresolved. The client discharged the lawyers, complaining that the goals he had set at the beginning of the retainer had not been achieved. The lawyers applied for a review of their account in the amount of $11,500.

Held - order accordingly. The lawyers' account was reduced to $11,000.

The lawyers had exercised the requisite skill and responsibility and their hourly rates were reasonable. The amounts at issue were substantial and of great importance to the client. There was no dispute that the time claimed by the lawyers had been spent. The time spent was reasonable given the difficulty the client had in communicating the details of his financial situation. A $500 deduction was made for an abortive court appearance and an adjournment, where one side or the other did not

attend. Interest could only be charged at five per cent under the Interest Act, as it was expressed as a monthly rate in the retainer agreement.

Clark, Wilson v. Baumgartner

[1995] W.D.F.L. No. 1821 (B.C.S.C. [Master]), Master Donaldson

---

Summary: The plaintiff law firm acted for the defendant client in a difficult family law matter. The client's husband was violent, domineering, viperous and obstructionist. That was conveyed to the law firm at the outset of its retainer. One of the potential family assets was a fitness and health club business. Immediately upon matrimonial proceedings being commenced, the husband transferred the business to other family members. No searches or valuations of the business were ever ordered by the law firm, nor were any steps taken to reverse the transfers. Another major family asset was the matrimonial home. The law firm advised the client, who had exclusive possession of the home, to agree to a sale of the home and an equal division and distribution of the proceeds. Soon after the sale of the home, the law firm collected its interim account of $20,000 from the proceeds and "fired itself", recommending that the client find other, less expensive counsel. The client did not dispute that the billed legal time had been spent. Pleadings had been drafted and there had been discoveries and several chambers motions. She did, however, complain about the advice given and the results obtained. She also objected to non-legal, such as secretarial and word-processing, time that had been billed. The law firm commenced an action to collect its account which totalled $36,200, less the $20,000 previously collected, plus taxes and disbursements. The matter was referred to a registrar for review.

Held - order accordingly. The law firm's account should be reduced to $20,000 plus taxes and disbursements.

The steps taken by the law firm in respect of the family business were inadequate. The advice to sell the matrimonial home and distribute the proceeds was a serious error in judgment. It eliminated any leverage the client might have had to assist in resolving the other issues with her husband. Considering the work performed on behalf of the client and the results obtained, a fee reduction was appropriate.

Connell Lightbody v. Yoo

[1996] W.D.F.L. No. 411 (B.C.S.C. [Master]), Master Tokarek

Summary: The client retained the lawyer to act on his behalf in matrimonial proceedings. His wife claimed a reapportionment of family assets in her favour, sole custody of their three children and spousal and child maintenance. She claimed that he owned assets valued in excess of $8 million. The client claimed that substantially all of the assets were not beneficially owned by him, but were held in trust for an overseas family as a result of an arrangement between that family and his late mother. The trust arrangement included the matrimonial home and was not known to the wife or anyone else during the 13-year marriage. The overseas family commenced an action against the client because, on the advice of the lawyer, the client advised the family of potential jeopardy to their assets. The wife was also named as a defendant in that action. The lawyer's activity in that action consisted mostly of giving advice and consulting with counsel for the family in determining strategy and procedure. The lawyer also appealed an interlocutory ruling granting interim custody of two of the children to the wife in the matrimonial proceedings. Before examinations for discovery began, the wife committed suicide. The wife's lawyers invited the Public Trustee to pursue the proceedings. The proceedings were eventually resolved following the lawyer's negotiations with the Public Trustee. The lawyer claimed that the matter was difficult and complex and billed the client $60,780 for fees and $3,230 for disbursements. The lawyer charged the client a minimum of .2 for every letter, telephone call or acknowledgement of correspondence. The client had agreed to pay for non-secretarial respondence. The client had agreed to pay for non-secretarial work of a legal assistant nature. The lawyer billed the client $90 to $105 per hour for such work and a substantial amount of routine secretarial work performed by the lawyer's secretary was charged at the paralegal rate. An application was made for a review of the lawyer's account.

Held - order accordingly. The lawyer's account for legal fees should be allowed at $47,000.

There was insufficient evidence to justify the claim that extra costs were incurred as a consequence of the assets being outside of the jurisdiction. The issues on the custody matter appeared routine. There were no discoveries, the matter was not set down for trial and essentially ended with the wife's suicide. The lawyer's submission that the matters were complex and difficult without actually explaining how that complexity or difficulty led to greater fees did not in and of itself lead to the conclusion that the fees were reasonable. Absent an agreement to do so, it is not appropriate for a lawyer to charge a minimum for every letter, telephone call or acknowledgement of correspondence. There was no evidence to show that $90 to $105 per hour was an acceptable arrangement for legal assistant work. Because the lawyer's secretary did not testify with respect to her work and the entries on the bills were not reviewed in detail, a reduction for secretarial time would be made arbitrarily. The disbursements should be allowed as presented with the exception of a file opening fee of $50, a $5 per file folder charge and a $9 per binder charge.

(f.1) Costs against counsel: procedure

Jamieson v. Jamieson

(1986) W.D.F.L. No. 541 (P.E.I. S.C.[Fam. Div.]), MacDonald J.

Summary: $1,000 of costs of a parenting proceeding were awarded against the father's solicitor because "he had allowed his objectivity to be blurred" in the proceedings. "As it is necessary for a solicitor to be before the court or to have notice of the intent to award costs against him, it was directed that the matter costs be set down at the convenience of the parties."

(f.2) Costs against counsel: allowed

Orleski et al. v. Reid

(1985), 2 C.PC. (2d) 300 (Sask. Q.B.), Matheson J., at pp. 306-308, 314:

Decision Text: The imposition of costs on the solicitor for one of the parties occurs but rarely. Robins J. did so in Re Bisyk (No. 2) (1980), 32 O.R. (2d) 281 at pp. 287-288, [affirmed 32 O.R. (2d) 281n (Ont. C.A.) … .

…. [Robins J. …. stated, at p. 288:

> … [The proponents to the litigation, three sisters living in the Soviet Union (as it then was)] were represented by an attorney, a member of the Bar of this Province, who conducted the litigation for them and undoubtedly made the judgment calls. It appears evident that he had been in control of the litigation and in any event has joined himself to the proceedings as attorney and in that capacity has participated in the proceedings. In my view he must assume responsibility for the allegations advanced and should bear the risk of costs where allegations are made irresponsibly and without foundation.

. . . .

The underlying principle in problems of this nature is that the Court has a right and a duty to supervise solicitors appearing before the Court. Costs should not be imposed on a solicitor as a result of a mere mistake or an error in judgment. But gross neglect, or inaccuracy in a matter which it is a solicitor's duty to ascertain, may suffice: Myers v. Elman, [1940] A.C. 282, [1940] 4 All E.R. 484 (H.L.) at p. 318 (Lord Wright).

. . . .

…[In] Edwards v. Edwards, [1958] P. 235, [1958] 2 All E.R. 179, … Sachs J. stated that the dereliction of duty must be of a serious enough nature to justify the word "gross". It was further stated that it is not normally necessary to establish mala fides or other obliquity to reach this conclusion.

Sachs J. agreed with the submission that the jurisdiction of the Court to impose costs on solicitors should be exercised sparingly and that the Court should bear in mind the repercussions. He nevertheless concluded that these considerations cannot affect the duty of the Court to protect litigants from being improperly damnified.

Although Courts may attempt to effect settlements of civil disputes, it is not ordinarily a function of the Court, in an adversarial system, to pre-determine which disputes are litigable, nor to even comment after resolution thereof as to the necessity for the litigation. All individuals will make mistakes and errors in judgment. But a lawyer enjoys a preferred status as one learned in the law, which entitles the lawyer to charge fees for legal advice. Lawyers are also officers of the Court, and it is anticipated that they will exercise reasonable judgment commensurate with their training and preferred status. If it appears that a lawyer may have been guilty of a gross dereliction of these duties, involving a matter before the Court, it is the duty of the Court, and not the supervisory body of the legal profession, to conduct the requisite inquiry and ultimately determine the question.

. . . .

It would be most unfair to impose on the plaintiffs all, or the greater burden, of costs when it has been concluded that their solicitor was principally responsible for this unjustified litigation. Because of the unjustified allegations against the defendant, the plaintiffs must nevertheless share some of the burden of costs.

Editor's Note: For the reason, the Court concluded, the plaintffs' solicitor knew in advance of the litigation that on matters essential to success of the litigation there was no probative evidence, the Court apportioned party and party costs, which it determined to total $9,500.00, between the plaintiffs: $1,500.00 and the plaintiffs' solicitor: $8,000.00.

Aliferis v. Parfenuik

(1985), 1 C.P.C. (2d) 41 (Ont. C.A.), per Cory J. A. for the Court, at pp. 42, 45:

Summary: Appeal on behalf of plaintiff from a decision refusing his application to renew an expired writ of summons was granted.

Decision Text: This lawsuit has followed a lethargic and listless course. The plaintiff has been ill-served and the legal profession demeaned by the poor performance of the solicitors for the plaintiff.

. . . .

(2) the costs on a solicitor-and-client basis of the original application and of this appeal must be paid by the solicitors for the plaintiff forthwith after taxation in any event of the cause. If these costs are not paid as ordered, this appeal will be deemed to be dismissed. These costs are not to be passed on to the plaintiff and are to be the sole responsibility of his solicitors.

Hockey v. Hockey

(1989), 21 R.F.L. (3d) 105 (Ont. S.C. [Div. Ct]),

Montgomery, Rosenberg and Arbour JJ A., at p. 107.

Summary: Parents married in 1982 in United Church where their twins were subsequently baptized. Parties divorced in autumn 1987 whereupon mother granted custody of the twins subject to father's access. Father remarried and adopted faith of Jehovah's Witnesses. In April 1988, mother of twins denied father access because of her animosity towards Jehovah's Witnesses. In correspondence on behalf of the mother, her solicitor wrote to father's counsel as follows (in part): "To ensure that there is no misunderstanding let me state unequivocally that the restrictions in your exercise of access to the children has been precipitated primarily because of your acceptance (sic) of the Jehovah's Witness faith." The mother denied all access to the father from 30th April 1988 to 27th October 1988.

Trial judge varied access to prevent father from instructing the children in the Jehovah's Witness faith. Father appealed. Appeal allowed. In allowing the appeal, Ontario Divisional Court awarded costs against the solicitor, personally.

Decision Text: As far as costs are concerned, we are asked to assess costs against the wife and her solicitor in his personal capacity. We are of the view that this dispute has been exacerbated by the reckless letter of Mr. … [L.] notwithstanding his reference to the medical issue. Such an attack based on religious bias goes far beyond the bounds of propriety and far beyond the duty of counsel and must evoke the censure of this court. Further, there was a disregard for an existing access order of the court. There will therefore be an order for costs to the appellant up to and including the order of Justice Osborne against the solicitor, … [M.L.], personally on a solicitor-and-client basis. Costs of this appeal against the respondent will be on a party-and-party basis.

Treen v. Treen

(1991), W.D.F.L. No. 245 (Sask. Q.B.), Maurice J.

Summary: As a result of the actions of both counsel, the parties were denied a pretrial conference and the opportunity to settle and therefore proceeded to trial. The conduct of counsel was not beneficial to their clients. Both counsel should not charge their clients for any services provided to them during the course of these proceedings and they were ordered to bear all the expenses and disbursements of these proceedings.

Scott v. Scott

(1993), W.D.F.L. No. 200 (Ont. Gen. Div.), Wilson J.

Summary: After the parties separated, the husband severed the joint tenancy in the matrimonial home by registering a deed to himself. The effect of the registration was that the home was owned by the parties as tenants in common. The husband then registered a mortgage in favour of his solicitors without the consent of the wife. It was clear that none of the exclusionary provisions of s. 22(3) of the Family Law Act,

1986 applied. Shortly before the scheduled sale of the matrimonial home, the wife and her counsel became aware of the mortgage, and immediately objected to its validity. A motions court judge made an order which had the effect of recognizing the validity of the mortgage. The wife applied for leave to appeal.

Held - leave granted pursuant to R. 62.02(v)(a).

There was an apparent conflict between the decision of the motions court judge and a prior decision. It would be desirable and in the public interest to grant leave to appeal from the former. In light of the previous decision, there appeared to be good reason to doubt the correctness of the decision of the motions court judge. In the prior decision, the judge found that the severance of the joint tenancy contravened s. 42 of the Family Law Reform Act, which is identical to s. 22(1) of the Family Law Act, 1986. The judge in the prior decision also found that mortgaging the matrimonial home without consent also contravened s. 42 of the Family Law Reform Act. The court refused a motion by the husband for an order pursuant to s. 24 of the Family Law Act, 1986 to dispense with the wife's consent to the registration of the mortgage. Given the modest resources of the parties, the mortgage, although small, might have interfered with the wife's division of net family property. The funds representing the mortgage were ordered to be placed in trust in the parties' joint names or paid into court to the credit of the action until the issues between the parties were resolved. The solicitors for the husband were ordered to pay the wife's costs of the motion in the amount of $600.

Louie v. Louie

[1995] W.D.F.L. No. 1616 (B.C.S.C.), Preston J.

Summary: In a matrimonial action, the defendant wife's lawyer sent an amended statement of defence to the plaintiff husband's lawyer asking him to consent to its filing. The amendments raised two new claims. The husband's lawyer was prepared to consent to the amendments, but said that the pleadings should be framed as an amended statement of defence and counterclaim, rather than simply as an amended statement of defence. The following day, the wife's lawyer presented to the court registry an amended statement of defence and counterclaim setting out the two amendments already proposed, and adding a third claim for support for the wife's mother. The wife's lawyer endorsed the amended pleading as being filed under R. 24(1)(a), which was untrue. The court registry accepted the endorsement, as was its policy, and filed the pleading. When the amended statement of defence and counterclaim was served on the husband's lawyer, he applied for an order that it be withdrawn from the court file. In her affidavit filed in response to that application, the wife's lawyer admitted that she had added the additional claim without the knowledge

of the husband's lawyer, justifying her action by stating that the husband's lawyer had the right to oppose the addition of the new claim up to the commencement of the trial.

Held - application allowed. The pleading should not have been filed, and the wife's lawyer had not given any acceptable excuse or proper reason for her actions. The amended statement of defence and counterclaim were to be removed from the file, placed in an envelope and marked "Not to be Searched or Dealt with without further Order of this Court".

The wife's lawyer had acted improperly by deliberately circumventing the Rules of Court in order to gain an advantage for her client. She was ordered to pay the costs of the application as special costs and the registry was instructed to forward a copy of the reasons for judgment to the Law Society.

(f.3) Costs against counsel: not allowed

Editor's Note: Generally, see: *Young v. Young* (1993), 49 R.F.L. (3d) 117 (S.C.C.), at pp. 162-163.

Naeyaert v. Elias

(1985), 4 C.P.C. (2d) 298 (Ont. H.C.), Bowlby J.

Summary: Plaintiff brought action which was dismissed at trial. The trial Judge notified the plaintiff's solicitor he was considering awarding costs against the solicitor personally and a hearing was scheduled to determine the matter. On hearing for that purpose, determination made that costs not to be awarded against the solicitor.

Material filed on the motion, available as a result of the plaintiff waiving solicitor and client privilege, showed that the decision to proceed with the trial was made by the plaintiff against the advice of her solicitor who had serious concerns about the issue of liability and who had managed to procure an offer of settlement from the defendant which the Plaintiff declined to accept.

–

Piercy v. Piercy

(1990), 40 C.P.C. (2d) 194 (B.C.S.C. [In Chambers]), Spencer J.

–

Headnote: After the respondent retained new counsel in preparation for trial, his former counsel rendered his final account and took out an appointment for taxation.

Counsel for the petitioner sent a junior member of his firm to take notes [at the taxation]. The respondent was represented by counsel who was aware that a junior lawyer had been sent to the hearing by the petitioner's counsel.

At the hearing, privileged information relating to the pending trial was disclosed. The respondent subsequently applied for production of the notes taken by the junior lawyer, for an order that the petitioner and her counsel reveal to whom they had communicated the contents of the hearing, and for an injunction barring both the lawyers and the petitioner from telling others what they had learned. The respondent applied for an order that the petitioner's solicitor be removed from the record.

Held - The application was granted in part, … .

The respondent was entitled to production of the junior lawyer's notes and to an order enjoining the petitioner and her counsel from communicating information learned by them at the taxation, that was of a confidential nature passing between the respondent and his counsel, to any other person except as between themselves and to the Court on the trial of the proceeding.

The respondent's former counsel was entitled to refer to privileged matters that arose between solicitor and client in order to justify his bill. The privilege was not set aside for all purposes and in an appropriate case could be protected by having a closed hearing. The privilege was lost through the respondent's counsel's oversight in failing to intercede and draw the issue of privilege to the registrar's attention. The loss of privilege was the fault of said counsel, thus the Court would not order the removal of the petitioner's counsel from the record.

Editor's Note: Spencer J.'s decision invited counsel to apply as to costs of the application that, he suggested, he would consider ordering against petitioner's lawyer. On further hearing to determine liability for costs, Spencer J. ordered the petitioner to pay the costs of taxations: (1990), 26 R.F.L. (3d) 24. (On appeal to the British Columbia Court of Appeal the order for production of the notes was set aside; the Court forming the opinion (summarized in the headnote to the published decision: (1990) 43 C.P.C. (2d) 64) that there was "nothing improper or unprofessional about

instructing a junior associate to attend … to hold a watch brief. Accordingly, there was no basis for the injunction against the solicitors for the petitioner.")

Harding v. Nicholson

(1992), W.D.F.L No. 080 (B.C.S.C.), Newbury J.

Summary: After the court ordered partition and sale of the parties' property, the respondent moved out and placed her belongings in storage. The storage company later refused to return the goods to her, as it had received a threatening letter from the petitioner's solicitor. The respondent sought to have her moving and storage costs be borne personally by the petitioner's solicitor. The solicitor did not attend the hearing, having told opposing counsel shortly before that it was not worth his while. The order was granted and special costs were assessed. The petitioner's solicitor now applied to vary the order, deposing that the parties disputed ownership of certain appliances which were among the goods in question, and that subsequent to the filing of the respondent's notice of motion he had agreed to the release of all the goods except those.

Held, application allowed; earlier order vacated.

At the time the original order was made, the court was unaware of the dispute regarding ownership of the appliances. Given this information, it was not appropriate to censure the petitioner's solicitor for the action taken on his client's behalf by awarding costs against him personally. While his letter to the storage company bordered on the reckless for implying that the order for partition and sale would be violated by the release of chattels which were not the subject of the order, the main thrust of the letter was to warn the storage company that legal action would be taken if the goods were released. The failure to appear on the respondent's application was discourteous to the court and to opposing counsel, but fell short of contemptuous behaviour warranting personal liability for costs. The court's power to order a solicitor to bear costs personally should be exercised with great care. Here, the solicitor's conduct was also the subject of a complaint to the law society, which could more appropriately deal with the matter.

(g) Judgments for costs

Andrew, Donahoe & Oake v. Young

(1990), 29 R.F.L (3d) 76 (Alta. Q.B.), Master Breitkreuz.

Headnote: A lawyer was appointed amicus curiae in a custody proceeding. The husband's lawyers stated that the husband was prepared to pay the amicus' fees. The amicus' law firm sued for the amicus' fees.

Held - Judgment for fees.

The husband and the amicus had entered a binding contract. The husband's lawyers had the right to enter into the agreement on his behalf and there was no evidence of any restriction on their authority to bind the husband. The action and judgment should have been in the name of the amicus' lawyer as the contracting party, not the entire firm.

(h) Appeals from taxation of costs

Re Knipfel; Kelleher, Hoskinson v. Knipfel

(1982), 27 C.P.C. 309 (Ont. C.A.), Blair J.A., at p. 314.

Decision Text: The principle to be followed by an Appellate Court in reviewing the decision of a Taxing Officer is well settled and has been stated in innumerable cases. In Orkin, The Law of Costs (1968) it is set forth as follows at p. 128:

> 'It is a settled rule that on an appeal from the taxing officer the court is only concerned with questions of principle, and not with mere questions of amount, or the manner in which the taxing officer has exercised his discretion, unless the amounts are so inappropriate or the taxing officer's decision so unreasonable as to suggest an error in principle.'
>
> The Court will not interfere with the discretion of the Taxing Officer where the dispute involves no principle but only a question of amount unless the amount is 'so grossly large … as to be beyond all question improper': *Re Solicitors* (1912), 27 O.L. R. 147 at 159, 7 D.L.R. 323 (C.A.) per Garrow J.A."

Goring v. Nash

(1990), 45 C.P.C. (2d) 139 (B.C.S.C. [In Chambers]), Master Wilson.

Editor's Note: This was an appeal from the determination by the registrar of the quantum of a solicitor's bill for fees to a client.

Headnote: The registrar's reasons for her decision showed two errors of principle. First, the presence or absence of a written retainer agreement was not a determinative factor on the assessment of the quantum of a solicitor's bill. Second, knowledge by the client of a specific hourly rate, per diem rate or manner of billing, was not determinative on the assessment on the quantum of a solicitors bill. The assessing officer's principal concern on the assessment of a solicitor's bill was to determine whether the client had received reasonable value for the fee levied, not whether there was a written agreement or whether the client had knowledge of the solicitor's billing practices.

4.6.6 Criminal liability

Philadelphis Op. 89-13

901 *ABA/BNA Lawyer's Manual on Professional Conduct* 7526 (Bureau of National Affairs, Inc., 1989)

Editor's Note: This opinion is summarized in Farley, Louis. *The Ethical Family Lawyer* (Family Law Section, American Bar Association, Chicago, 1995), at p. 91.

Decision Text: In one case, the questions put before an ethics committee involved photos of financial records that the client secretly obtained: the issues were whether the lawyer had to disclose to the opposing side how the photos were obtained and whether the photos could be offered in evidence. The committee's response was that (1) the information about how the photos were obtained did not have to be disclosed under any of the ethical rules, (2) the photos could not be disclosed if illegally obtained by the client, as that would be the disclosure of a past event, as covered under the confidentiality rules, and (3) if not illegally obtained, the photos could be offered in

evidence, although the lawyer had to be sure to warn the client of the possible consequences if it turned out the photos had been illegally obtained.

Editor's Note: Tape recording by a wife of the husband's telephone message to her is not a criminal offense, whether or not the husband knew at the time he telephoned his wife that his message to her was being recorded. This is because the recipient of the telephone message was consenting to the tape recording. (The same conclusion applies if the maker of a telephone call, unknown to the recipient, tape records the call.) [See: *Criminal Code*, s. 184(2)(a).] However, an offense may have been committed contrary *Criminal Code* section 184(1) if a third party, who has not been authorized by either of the participants in the telephone conversation or by judicial order under Part VI of the *Criminal Code*, tape records the participants' conversation on an extension telephone; such as where a jealous male friend of an estranged wife records a telephone call between the wife and her husband on a telephone extension in the wife's flat.

As to duplication of third party documents by client or solicitor, see: *R. v. Stewart* (1988), 85 N.R. 171 (S.C.C.).

R. v. Chubb

Inner London Crown Court (with a jury), March 1996

Summary: Accused, 52-year-old solicitor with Messrs. Child and Child, London, charged, in private prosecution by Laura Harold, a client, with assault occasioning actual bodily harm and with false imprisonment. Alleged offences occurred when complainant went to solicitor's firm to obtain deeds to the Harold's residence at a time when the Harolds and the firm were in dispute over payment of a bill the firm claimed the Harolds owed to the firm.

Complainant testified: "It was like one of those Wild West films. I thought he was going to kill me. I thought he was going to break my back when he threw me into the street. [When I went to the firm for the title deeds to our home at my husband's request, Mr. Chubb was] rude and brusque [and ordered me to leave. When I refused to go he pulled me off my feet and dragged me head first on my back across the floor, gripping me under the armpits]. When we got close to the door, I realised by the ferocious way he had manhandled me that he was intending to throw me out of the front door. [To save myself, I curled my left leg around a desk leg and, in the process, lost my coat, my bag, and my shoes. He just kept pulling me until I didn't have the strength to hold on to the desk any longer. The next thing I remember I am

on the threshold with my back to the outside street. He just threw me with all the force he could summon out of the door. ... I hit the ground on my back and he came down on top of me and bounced off me and went over my head. I was absolutely shocked and wondering whether I had broken anything. I sat up and I was aware that my shoes had come clattering out ... They landed down beside me. I couldn't believe what had happened. [And when I later went back to get my fur coat, he told me the police had been called and pinned me] body to body [to the floor, having tackled me around the waist].

Accused testified: [I was calm and collected when I first ejected Mrs. Harold from the building. I did not attack her or kick her or hit her. I would expect some bruising on her lower legs but that is more the result of her own actions, not of my own, occasioned by her resisting her lawful removal from the premises. [She started shouting when I refused to hand over the deeds of the unmortgaged property which her husband Michael wanted to hand over to his bankers in connection with a property deal at the back of the couple's home in Belgravia.] She would not take no for an answer [and refused to go, obliging me to use] no more than reasonable force [to remove her. My treatment of her had been gentle and she bounced along the floor on her bottom as I pulled her and at one stage tried to anchor herself by hooking her legs around the leg of a desk in the reception area. I deny throwing her out of the building. I tumbled as I pulled her through the front door and fell onto her]. I don't see how I could have used less force than I did. I thought I behaved reasonably. I believe that what I did was lawful and proper. After a short interlude, Mrs. Harold got up and charged back into the premises with her head down. She didn't say anything. She charged along the hall like a rugby prop forward. I caught her with both arms and she either fell or I pushed her to the floor on her back. I was worried she might get hurt and my objective was not to hurt her. I therefore pinned her to the floor."

The jury found accused guilty as charged.