Federation of Law Societies of Canada
and
Canadian Bar Association

NATIONAL FAMILY LAW PROGRAM,
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SECURITY

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

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Summaries of, and excerpts from, decisions, legislation, authors, and reports on principles and practice of professional, ethical, and legal responsibility, published during the period, primarily, from June 1996 to June 1998.

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FOREWORD

Lawyer scruples, under increased consumer, judicial and adversary scrutiny and under sullying siege from some quarters of government, media and general public, require the security of improved standards, service, client problem and complaint resolution mechanisms, and public relations. Besides increasing client satisfaction and numbers of satisfied clients, such measures should elevate, above the frostline, the present, widely-held public perception of the legal profession, generated by the in-fighting and client betrayal of relatively few lawyers. That perception. likened by the *Ottawa Citizen* to the experience of a burn unit, fancies family lawyer clients as "patients [who] almost always survive and learn too late their worst wounds were inflicted during the treatment."

This is an annotated complication of summaries of, and headnotes, cuttings, and excerpts from, decisions, authors, reports and legislation from Canada (primarily), the United States and England, concerning legal and professional responsibility of family law practitioners, published (principally) from 1996 (June) to 1998 (June). This maintains the scope and framework in, and is a sequel to, "Scruples", ((1987), 2 C.F.L.Q. 151-197) which canvassed the period from the date of legal memory to 1985 (June)) and "Scrutiny" (Federation of Law Societies of Canada. *National Family Law Program [Materials]* (Toronto, 1996)) which canvassed the period from 1985 (July) to 1996 (June).

D.C.D., Q.C.
08 June 1998

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1.0 INTRODUCTION

Makin, Kirk, "**Lawyers look for new image**"

The Globe and Mail (Toronto, 27 December 1997),
at pp. 1, 7.

A scene in the 1993 movie *Jurassic Park* quickly gained a reputation for causing spontaneous applause in theatres. It's when a dinosaur abruptly lunges at a lawyer and devours him.

To the legal profession, those are looking more and more like the good old days. The public image of lawyers has since plunged to a point where the profession is intent on doing something about it.

"It's not nice to work in a profession where you say 'I'm a lawyer', at a social gathering and everybody groans," said Trudi Brown, treasurer-elect of the Law Society of British Columbia.

"Virtually every lawyer I have ever spoken to is concerned about the image of lawyers," she said. "You hear an awful lot of talk about the image of lawyers being at an all-time low."

Marvin Huberman, a Toronto lawyer who has written extensively on legal ethics, said the popular view of lawyers as greedy, mealy-mouthed shysters who exploit the misery of others has taken on a life of its own.

"All the academic and professional commentary on it is that a line has been crossed that cannot be ignored," Mr. Huberman said in an interview.

Among the proposals emerging from the profession:

- Periodic integrity testing to weed out lawyers with careless or dishonest traits;

- Mentoring systems to keep young lawyers from making egregious errors that harm the image of the entire profession;

- Establishing mandatory legal-education classes to enhance the skills and ethical behaviour of practicing lawyers.

- Swift mediation to deal with complaints against lawyers from unhappy clients;

- A full-scale inquiry to find out why the cost of legal services is so prohibitive.

The first hurdle facing those who would fix the image problem is figuring out why it exists.

Many lawyers point to a decline in civility within their own ranks. It manifests itself in what is known as "Rambo-style" courtroom tactics and hostile behavior during behind-the-scenes dealings.

Add to that the occasional million-dollar client swindle and the extensive courtroom coverage of the strutting lawyers in the O.J. Simpson murder trial, and you have a full-fledged image crisis.

"Either there is a problem or there is a perception of a problem," Mr. Huberman said. "In either event, something has to be done to rectify the situation. Each and every one of us can improve in some way."

One of the primary causes of disillusionment with lawyers is, in fact, not of their making. When clients approach a lawyer, they tend to be caught up in a personal crisis. Up to half of them are going to come out on the losing end.

"At the end of the day, it is a horrible experience," said Sophia Sperdakos, a policy adviser at the Law Society of Upper Canada. "I practiced in family law, and it is very seldom that a client walks out of a family-law experience saying, 'That was great'."

Robert Martin, a University of Western Ontario law professor, compared the situation lawyers face to that of a doctor. "It's not the fault of doctors that people die."

Lawyers might also be forgiven for being confused about how the public views a combative courtroom style. "People want their lawyer to be contentious, but it is something they criticize in general," said Gavin MacKenzie, a bencher with the Ontario law society.

Ms. Sperdakos said a similar dichotomy turned up when clients were surveyed about their view of lawyers. They consistently profess a high level of satisfaction with their own lawyers, but a low opinion of the profession as a whole.

Ms. Brown maintains that one obvious solution is to get as many cases as possible out of the winner-take-all adversarial arena. She said lawyers should take the lead in weaning Canadian society from its penchant for resorting to rules and regulations.

"A lot of people are saying litigation is too expense," she said. "It may be necessary to say it is not appropriate any more. We should perhaps be saying that small issues are not entitled to go to court.

"Right now, you will find neighbors fighting in small-claims court over what side of the fence somebody's leaves fell. We have become a country where every time there is a little problem, we pass a law to deal with it."

Ms. Brown said a movement toward a less litigious universe is already under way, as evidenced by the increasing use of mediation and attempts by prosecutors to divert minor criminal cases out of the courts.

She said the B.C. law society is practicing what it preaches, having two months ago begun a program to mediate complaints against lawyers by their clients.

Reducing litigation could also help combat public anger over the high price of legal services.

However, Prof. Martin said this stops well short of a full remedy. He said a genuinely searching look at the prohibitive cost of legal services would go a long way toward restoring public confidence.

"Everybody knows legal services cost too much, but nobody really knows why," Prof. Martin said. "The legal profession should be in the forefront of pushing for a commission of inquiry to find out."

He said it is unfair that lawyers are constantly portrayed as avaricious vultures when materialism is no more rampant in law than any other pursuit.

However, Prof. Martin said that in one significant respect, the profession has sown the seeds of its greedy image: the evil of docketing.

Virtually every minute spend on a client's business must be accounted for – a soul-destroying stress point for many lawyers, Prof. Martin said. "All kinds of lawyers – especially young lawyers – are working appalling hours," he said. "The streets are not paved with gold for these practitioners."

In the United States, criticism of lawyers has become so shrill that leaders of the bar are hurriedly trying to obtain consensus for ethical guidelines. If the profession doesn't act rapidly, they warn, there will be heavy-handed attempts to regulate it by Congress and state legislatures.

Mr. Huberman said the Canadian legal establishment is anxious to move before a similar crisis erupts here. In a recent article in the Canadian Bar Review, he put forward the idea of integrity testing as a way of detecting potentially dishonest lawyers.

Mr. MacKenzie said he would support such a move if it could be proved reliable. "The difficulty is with the reliability of any testing. Is integrity a measurable characteristic? If you are using it as a basis for disbarring people or refusing them entry to the profession, you simply cannot have false results."

Mr. Huberman said far less flagrant conduct – simply failing to return phone calls or not filing documents properly – can have an extremely negative impact on clients.

Some of these errors may be more the product of inexperience, than recklessness, Ms. Sperdakos said. She cited lawyers who lay the groundwork for later conflict by not giving their clients a realistic appraisal of what to expect as a case unfolds – such as the client who feels betrayed at the sight of his lawyer having a cordial chat with the opponent's lawyer.

Ms. Sperdakos said many lawyers also make the mistake of not giving their clients a frank assessment of the chances of success. "Nobody likes to give bad news," she said. "But the client has to know what to expect."

One proposal that has surfaced is that law firms be required to give a proportion of free work each year to needy clients or causes. This would not only provide a service to the community, but help shine the image of the legal profession.

As laudable as the concept of pro bono work might be, a growing number of lawyers are being so quickly thrust into the open market that they are in no position to give away their services. Indeed, they scrabble simply to keep an office going and establish a client list.

Ms. Sperdakos said this has led to competency being a bigger question than it was in times gone by, when young lawyers would typically hone their skills at established firms under the watchful eye of a seasoned mentor.

"All the law societies are grappling with how to create a mentoring system," she said.

The Canadian Bar Association established a model two years ago – the Lawyer to Lawyer program – which attempted to match young lawyers with appropriate mentors in their community.

The idea behind it was not to provide legal advice in difficult problems, but to help young lawyers who are alone and unsure of how to make connections and keep an office going.

Two problems have arisen, Ms. Sperdakso said. First, there are not enough mentors to go around. Second, many young lawyers are reluctant to admit their lack of wherewithal to other lawyers who are, after all, their competitors.

Hansen, Mark, **"Lawyers in Harm's Way – Many surveyed report threats of violence in domestic relations cases"**

(1998) [March] ABA Journal (Chicago),
at p. 93.

While most divorce attorneys are aware of the potential dangers that come with their line of work, few of them do much to try to protect themselves, a new survey shows.

In an informal survey sent by fax last fall to members of the ABA Section of Family Law, 60 percent of the respondents said they had been threatened by an opposing party in a case, and 17 percent said they had been threatened by their own client. Twelve percent reported they had been victims of violence at the hands of either a client or an opposing party at least once.

Yet only one in four survey respondents said they had taken any special precautions to ensure their own safety. The vast majority – 74 percent – had done nothing to protect themselves.

Those who have taken precautions have done everything from installing panic buttons under their desks to keeping their doors locked. One lawyer in Portland, Ore., said he hides a golf club behind his office door.

Several lawyers interviewed said they are not surprised by the findings, given the emotionally charged nature of proceedings in divorce and other domestic relations cases. But many lawyers do not take such threats seriously, some say, because they don't believe any harm will ever come to them.

Maurice Jay Kutner, a Miami lawyer who chairs the Family Law Section, says that when a party in a divorce gets angry or frustrated by the course of the proceedings, the spouse's lawyer stands second behind the spouse in the line of fire.

"A criminal defense lawyer sees bad people at their best," he adds. "We see good people at their worst."

Kutner says he had been threatened seven or eight times in his 30 years as a divorce lawyer, but none of the threats ever resulted in violence. Nevertheless, he takes precautions – from watching his step to avoiding personal confrontations with opposing parties.

"That probably goes a long way toward preventing any problems," he says.

According to Chicago divorce lawyer Joseph DuCanto, who says he has been threatened many times in his 43-year practice, such behavior goes with the territory. "You're dealing with people who are in an angry, unhappy mode, so you can anticipate that at least some of these people are going to be less than cordial."

Be Nice and Be on Guard

DuCanto says he avoids becoming the victim primarily by being prepared. That includes treating the other side with courtesy and respect, not taking threats lightly, getting extra protection if necessary, and reporting to opposing counsel any client who shows animus toward the other party.

Karen J. Mathis of Denver, chair of the ABA Commission on Women in the Profession, does a lot of bankruptcy work, which she says is another high-risk field of practice.

Mathis, who has lectured, written and counseled firms on workplace violence, says lawyers who are in the business of taking something away – be it children or property – can avoid becoming an easy target by treating opposing parties with kindness and respect.

She also suggests that lawyers limit access to their offices, schedule conferences in neutral settings, and have an emergency plan in place.

All lawyers should have a zero tolerance policy toward violence, Mathis adds. "You can't ignore a physical threat. You have to take all threats at face value."

Donna Wesson Smalley, a general practitioner in Tuscaloosa, Ala., knows firsthand what it is like to have a violent client. She was returning to her office one day in October 1993 when she saw her client, a motorcycle cop in the final stages of a divorce, shoot and kill his estranged wife, then turn the gun on himself.

"It was a horrendous thing to watch," she says. "And it was totally unforeseen."

Smalley, now a partner in a two-lawyer firm, says the shooting caused her to re-evaluate her own safety. Shortly afterward, she says, she moved into a new office with a separate reception area and several avenues of escape. The reception's desk is also equipped with a panic button that automatically summons police.

Smalley says the experience taught her a valuable lesson: Lawyers who deal with domestic issues every day tend to underestimate the emotional toll divorce can take and to discount the significance of an angry gesture or threatening remark.

"They say to themselves, 'It can't happen to me,' " Smalley says. "They see it as just part of the cost of doing business."

But Smalley knows better.

"The legal issues may be simple, but the emotional issues are not," she says. "And you never know when or where domestic violence will strike. It crosses all socioeconomic lines, and it could happen at any time."

Fresco, Adam, "**Disgruntled Client May Have Killed Solicitor**"

The Sunday Times (London, 06 June 1998)

A young solicitor may have been murdered by a disgruntled client or an enemy she made while working on custody battles or divorces, police said yesterday.

Yvonne Killian, 22, was found strangled in her home on March 13. Her body, which had been set alight, was discovered by her financé, Joseph Scudders.

Detective Chief Inspector Chris Horne, who is leading the inquiry, said: "We are going into cases Yvonne worked on to see if people may have held a grudge against this hard-working, intelligent young girl."

Mr. Scudders, 24, who had planned to marry Miss Killian this year, yesterday appealed for help in finding the killer. "We need any information that can help get the person who has done this," he said.

Police want to interview a man seen waiting at the end of her road in Erith, Kent and have offered a £5,000 reward to find the killer. Mr Horne said: "Her body was burnt but she had already died from strangulation. Four people have been considered in our inquiry but we think it may have been a stranger."

After her murder, a video game console and compact discs stolen from her flat were found in the grounds of a nearby cemetery. Her mobile phone is missing.

Makin, Kirk, **"Complaints about Ontario lawyers to be mediated"**

The Globe and Mail (Toronto, 24 April 1998)

Thousands of complaints each year against Ontario lawyers will soon be dealt with through mediation – a move symbolizing the extent to which peaceful conciliation is replacing rancor in the legal arena.

Complaints likely to be mediated run the gamut from fee gouging to bad courtroom representation, said Allan Stitt, a private mediation expert hired to come up with mediation models for the Law Society of Upper Canada.

"This is part of the charging face of the law." Mr. Stitt said in an interview. "It is something that wouldn't have happened 10 years ago."

The law society has been assailed repeatedly by the media and members of the public for a lengthy and secretive complaints process that frequently results in a terse, one-word dismissal.

The move to mediation is aimed in part at streamlining the unwieldly process, while curbing the anger of clients who feel their complaints get summarily shelved.

"We're looking at options that will make more sense than complaints simply slipping by the wayside." Mr. Stitt said.

More than 4,200 complaints were made against lawyers by the public last year, about 200 of which went through a full disciplinary procedure. An additional 250 lawyers were investigated and disciplined by the law society for financial irregularities.

However, the vast majority of complaints either cannot be proved or are not sufficiently serious to send through a formal disciplinary process, said Scott Kerr, a Law Society of Upper Canada official.

The complainant is simply told: "Sorry, we're just going to have to close our files – that's the way it is," said Mr. Kerr, who will also be involved in implementing the mediation plan.

Under the new plan, any complaints that cannot be resolved through mediation would go on through a routine investigation and possible disciplinary process.

Mr. Kerr said most lawyers will be as happy as their clients over the introduction of a speedier and less formal procedure.

"The misery and unhappiness and miscommunication comes from both sides – the lawyers and the complainants," he said. "They are mad at the whole process and feel badly treated."

He said the only complaints that are likely to bypass the mediation stage are those involving flagrant instances of misconduct, such as misappropriation of funds or gross misconduct.

Mr. Kerr said a typical case that would be mediated could involve a plaintiff in a personal-injury lawsuit who has spent three or four years in litigation.

He said such a plaintiff may be angry about the amount of time that is passing, or about being unable to get answers from his or her lawyer – yet have no recourse apart from the blunt instrument of a formal complaint.

According to Mr. Stitt, this sort of dispute may melt away as a result of having both parties sit down and converse in the presence of a neutral third party.

In other cases, he said, years of acrimony may be avoided simply by having an erring lawyer agree to issue an apology or take an appropriate educational course.

"There is not really a process in place that allows that to happen now," he said. "I suspect what a lot of clients object to is that they have no control, that they are not part of the process. The law society is saying there is some truth in that."

However, Mr. Stitt said the law society is also wary of designing a system that would be perceived as soft on lawyers. "We don't want people getting off easy when they should maybe be disciplined or disbarred," he said.

Mr. Kerr said the law society is currently working with the Ministry of the Attorney-General on legislation to create an office of a complaints resolution commissioner – another body to protect the public, which would be independent of the law society.

Manual Editor's Note: Quebec has promulgated a "Regulation respecting the procedure for conciliation and arbitration of accounts of advocates": c. B-1, R. 9 (R.S.Q., c. C-26, s. 88).

American Bar Association will, later this year, consider the 09 January 1998 draft of a document entitled "ABA Model Rules for Mediation of Client Lawyer Disputes." The purpose of the Rules is to establish mechanisms "to resolve disputes between lawyers and clients and to handle non-disciplinary complaints about lawyers."

Smith, Charlie, **"Local Lawyer Quits in Protest"**

The Georgia Straight, 22 January 1998

A veteran Vancouver lawyer has resigned as a practising lawyer and sold his practice because the Supreme Court of Canada refused to grant leave to appeal a decision that labeled a disabled client a "misfit". Dugald Christie wrote a surprising letter of resignation to the Law Society of B.C. on November 26 saying that he has decided to work for free for the poor, particularly for the disabled. Christie, 57, now spends much of his time volunteering at the Salvation Army's storefront office on Fraser Street near Kingsway.

"It is not just the words of this particular Judgment that give offence but the attitude of the vast majority of lawyers and judges which I find has changed since the days when I took my oath of allegiance to the Court in 1967," Christie wrote in his letter to the law society. "It is only the exceptional lawyer who will help the really poor (and by that I do not mean the ordinary client who runs out of money). Most judges … insist on a written process that is beyond the pocket or patience of the disabled."

For the past 12 years, Christie has spent two hours every second Thursday afternoon providing free legal advice to the poor at the Salvation Army's office. Christie told the *Georgia Straight* that one his current goals is to set up a pro bono program on the Sally Ann's premises so other lawyers can come and offer free legal advice to the poor.

He said one way to get lawyers to do more free work is to offer them a location outside of their office, so the pro bono clients won't call them at the office and take up time that could be used for paying clients. He also said he hopes to attract funding to conduct research on court delays, with the goal of increasing access to justice for the poor.

Christie emphasized that he didn't resign as a practising lawyer to become a martyr but because he disliked working at a time when so many costs and delays are being imposed on clients. "I'm not just resigning to make a point," Christie told the *Straight*. "I'm resigning because I can't stand it."

He claimed the courts have a "callous disregard" for the rights of the disabled and the poor, but he then pointed out that the legal profession probably isn't any different from people working in other segments of society. As an example, he described some doctors who act as expert witnesses as "terribly greedy", often demanding hundreds of dollars up front before they'll consent to write a report for a plaintiff in a civil lawsuit. He also described a few lawyers and doctors as "saints" who will provide professional services even when they know there's no chance of making any money.

Christie said that what triggered him to sell his legal practice was a decision of the Federal Court of Canada in a review of the Canadian Human Rights Commission's dismissal of a complaint from former longshoreman Buddy Lee. Lee, who suffered a brain injury as a child in a car accident, found work in the docks as an adult. In 1983, however, the B.C. Maritime Employers Association ["BCMEA"] "de-registered" him for allegedly being a danger to himself and others. Lee's complaint of discrimination on the basis of a physical handicap was later dismissed by the Canadian Human Rights Commission.

"Buddy Lee is a very able guy," Christie told the *Straight*, adding that Lee recently helped him move, and carried heavy boxes and delicate equipment until midnight. Christie said that when he took the case on for free in an application for judicial review in the Federal Court of Canada, he had a report from a neurologist saying that Lee was perfectly able to do his job. However, that report was deemed

inadmissible because it hadn't been entered in the original human rights complaint before the commission.

During the judicial review, Christie relied on evidence that a BCMEA member had said he opposed having "misfits" working on the docks. To this day, Lee and Christie object to the use of the work *misfit*, which they say indicates prejudice. But in his decision dismissing the appeal, Justice Francis Muldoon wrote: " 'Misfit' is not a happy word, but it does not show the BCMEA or the member companies were prejudiced against Buddy Lee, as alleged by counsel. It is, as the witness testified, a waterfront word, meaning not delicate about sensibilities."

Muldoon also wrote that the word *misfit* was used long after Lee was deregistered, and not directly to his face. "The word is entirely descriptive without connoting criminality or immorality," Muldoon wrote. "It relates only to the activity or skill about which it is spoken."

Lee appealed Muldoon's decision to the Federal Court of Appeal, where Christie again represented him for free. During this appeal, Christie declared that he would resign from the law society within 30 days if the court didn't dissociate itself from Muldoon's conclusion that the word *misfit* was free of prejudice and accurately described Lee. This appeal was dismissed, and then on November 13, 1997, the Supreme Court of Canada denied Lee's application for leave to appeal.

"I work extensively with disabled persons and now find my position as an officer of the Supreme Court of Canada incompatible with my work," Christie wrote in his resignation letter. He told the *Straight* that he was very disturbed that Lee spend seven years pursuing his case, when he deserved a decision in far less time.

Over the years, Christie has taken an active interest in reducing trial delays. Last year, he submitted a 32-page paper to a committee that is examining the issue, headed by B.C. Supreme Court Justice Duncan Shaw. "The great plans now under discussion for access to law (by the Shaw committee and others) are being undermined by the majority of lawyers for whom money is everything," Christie wrote in his letter to the law society.

This letter was addressed to Ben Trevino, who was the law society treasurer until the end of last year. In the letter, Christie praised Trevino for his position on contracting out legal work, wherein the former treasurer defended the client's right to choose his or her own lawyer. "I understand that you did not receive the unanimous and whole hearted support your high minded and correct position deserved," Christie wrote.

Christie told the *Straight* his goal is that by the year 2000, B.C.'s civil justice system will deliver judgments in all trials within a year of a writ being filed, except when it is not possible because all the evidence isn't available or if both sides give informed consent waiving a one-year rule.

Christie, secretary for the Lower Mainland Society to Assist Research of Trials, wrote in his submission to the Shaw committee that the average length of court

claims, excluding divorces, is now approximately three years and 3.3 months – down from three years and 5.8 months in 1987. But he noted that the cost of filing a writ has increased, discouraging lawsuits, so he said it's not possible to conclude that there has been any improvement in dealing with delays. He said if trial delays can be reduced to a year – as is now the practice in Quebec – and poor and disabled people gain better access to justice, he will resume his legal practice.

Jones, Tim, "**New look for Jack and Jill's fatal hill**"

The Sunday Times (London, 06 June 1998)

Five hundred years after their deaths gave rise to a nursery rhyme, the path leading up the hill where Jack broke his crown and Jill came tumbling after is to be restored.

The well to which they climbed in the village of Kilmersdon, Somerset, was sealed up to 75 years ago because of fears that children would injure themselves.

Kilmersdon Parish Council wants to revive the legend by spending £30,000 on restoring the stone path leading to the well in time for the millennium.

According to the tale, Jack and Jill lived in the village when Henry VII was on the throne from 1485 to 1509. Each day, it is said, the unmarried lovers would climb the hill to draw water.

But one day a loose boulder crashed into Jack and broke his crown. Jill was devastated and died … later while giving birth to their illegitimate son.

[Aggravating Jill's devastation was her discovery, in the wake of Jack's death, that arrangements to regularize her marriage to Jack, which she believed had been made by a lawyer she and Jack consulted three years earlier, in fact, had not been finalized. Her death, during labour, came the day after receiving the decision in her action for compensation against the solicitor. In his brief reasons, Clarence J. wrote, in *Mountbatten v. Harlowe* (unreported):

> No cause of action obtains to allow the Plaintiff, Mountbatten, recompense. Moreover, he who was thought by the Plaintiff to be learned in the law was but a scrivener [**Manual Editor's Note**: an old English term for "notary public"] and, for the three years since being consulted, had no prospect of doing any benefit to the Plaintiff as he lay delirious in his cot wounded by a duel. A charlatan, he, for he had need only have directed the Plaintiff and he with whom she lay to proceed before the County church steps and declare "I wed thee", for nothing more, not even a witness, be required in the common law to regularize the union. That commonplace, still, would not have cured the Plaintiff's agony. For the marriage would not relieve, the bastard child, born of the couple, of his disability. At all events, the Plaintiff had no standing to claim, being a woman.]

Barry Fowler, the parish council chairman, said: "The story has been handed down through the years by locals and their children. Now we want to give others the chance to come along and enjoy the site where Jack and Jill once climbed."

2.0 TYPES OF RESPONSIBILITY

"**The Lawyer As A Professional**"

Smith, B.C.L., Beverley G., *Professional Conduct For Lawyers And Judges*
(Maritime Law Book Ltd., Fredericton, 1998),
chap. 1, pp. 2-3; 4-5; 8.

[4] …, at this time in our profession's history we are faced with two inescapable facts. Both must be taken into account when dealing with any up-to-date definition of what makes a lawyer, and in our context especially a Canadian lawyer, a professional person. The first is that there appears to be a sizeable segment of the legal profession that offers to the public the special knowledge and skills acquired in legal training and in experience, but it is only as a means of establishing and maintaining a comfortable lifestyle that the offering is made.

. . . .

[5] Indeed, there have been spirited debates as to whether law is any longer a profession, or has become a business. One such debate reportedly [*The Lawyers Weekly* 09 April 1993] took place in Kelowna, British Columbia, where lawyers attending a meeting of the British Columbia branch of the Canadian Bar Association expressed the two differing views:

> We must confront the practical reality that we are in business and the importance, from a professional point of view, of staying in business.

and

> The profession of law involves service as its main aim and profit as an incidental.

While the debate continues, it is here submitted that the latter view is the correct one. ….

[6] The second fact to be taken into account today when dealing with the concept of a lawyer as a professional person in this: Canadian (and other) lawyers are now guided and governed in their professional dealings with others by both codes of conduct and by law. [All Canadian provinces and territories have adopted both a code or codes of professional legal conduct and supportive legislation. ….]

This is so, no matter how learned in their art they may be, and no matter with what spirit of service they as individuals may be offering their legal knowledge and skills to the public. The fact of having self-imposed rules of professional conduct apply to lawyers does not detract from the lawyers' option to offer their legal skills to the community "in the spirit of public service".

. . . .

[8] The formulation of codes of conduct by a profession speaks eloquently of the responsibility felt by it toward those whom its members serve. In the case of the legal profession that responsibility has sometimes been referred to, perhaps cynically, as enlightened self-interest. A self-regulating profession which appears to be cognizant of society's needs and wants is not as likely to feel the weight of a government attuned to respond to the expressed sensitivities of its electorate. Whatever the purity of its motives the legal profession has propounded ever more elaborate codes of professional conduct for its members which are backed by sanctions. It is suggested that that in itself is one of the badges of a profession. [An early (surviving) English code of conduct for the legal profession is that dating from the year 1280. It was promulgated by the City of London and carried forward the theme of "oughtness" of conduct: see Paul Brand. *The Origins Of The English Legal Profession* (Oxford: Blackwell Publishers, 1992), p. 122.]

. . . .

[14] What personal qualities have been viewed by Canadian lawyers as comprising good professional legal conduct? One jurist has indicated that in his view the qualities of honestly, integrity, trustworthiness and respect make up the necessary elements of conduct for a lawyer. [Justice E.N. Hughes of the Saskatchewan Court of Queen's Bench. *Seminar on Legal Ethics* (Saskatchewan: Second Annual Practitioners Seminar on Criminal Law. 1976)]. In a Convocation address delivered at the University of Toronto in 1986, Chief Justice Dickson of the Supreme Court of Canada used the term "compassion" as a further desirable element in a lawyer's make-up. His Lordship used the term in the sense of it being "a feeling of empathy or sympathy for the hardships experienced by others - a feeling, which extends to a sense of responsibility and concern to alleviate hardships at least in some measure." [[See also: …] *Professional Ethics* (London: Charles Knight & Co. Ltd., 1969), at p. 58. … .] To these qualities the Canadian Bar Association has added those of loyalty and competence. [The Canadian Bar Association, *Code of Professional Conduct*, August 1987. Preface p. viii, … .] Not to become semantic, it is this set of qualities which may in fact be synthesized into a triplet of terms: integrity, competence and a concept called "quality of service".

3.0 SOURCES AND STANDARDS OF RESPONSIBILTY

3.1 Professional Responsibility

3.1.1 Canons of professional conduct:

Manual 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, were substantially revised in August 1987, and were amended in August 1995 by addition of Chapter XX (dealing with non-discrimination).

Gavin Mackenzie, in *Lawyers And Ethics* [:] *Professional Responsibility and Discipline* (Carswell, Toronto, 1993) [loose leaf service revised at least annually] notes (at p.25-3, fns. 21, 22 and 23) that: Law Societies of Prince Edward Island, the Northwest Territories and Yukon have all adopted the 1987 Code with minor, if any, revisions. Law Societies of Saskatchewan, Manitoba, Ontario and Nova Scotia have used the 1974 and 1987 Codes as bases for their rules of professional conduct, but have modified and added to the Codes significantly for purposes of their respective Codes. Law Societies of Alberta, British Columbia and New Brunswick have adopted rules of professional conduct that bear little resemblance to either the 1974 or 1987 Codes.

Further, he reports (at p. 25-3) that the Barreau du Quebec relies to a significant extent on the 1974 Code.

Newfoundland has adopted the 1974 Code.

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 of the Center and U.S. $25 annually for non-members).

Cohen v. Cohen

(1997), 10 C.P.C. (4th) 266 (Man. Q.B.), Crindle J.,
at para. 27

The court is not bound by the Code of Professional Conduct of the Canadian Bar Association or the rules and directions of the Law Society of Manitoba. The use that courts can and should make of such statements is discussed by Sopinka J. in MacDonald Estate v. Martin … [(1990),[1991] 1 W.W.R. 705 (S.C.C.)], at p. 713.

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

3.1.2 Governing body rules

Wishart, Caron E., **"Legal Ethics and Professional Liability Insurance"**

Federated Press, *Professional Liability & Legal Ethics* (Toronto, 1998), at pp. II-12; II-13 to II-14.

A breach of the Rules of Professional Conduct is not, in and of itself, malpractice. It is only when such a breach results in a claim, or a circumstance that could give rise to a claim, and an allegation of damages suffered by a claimant, that LPIC [Lawyer's Professional Indemnity Company] becomes involved.

For example, a few years ago a solicitor was disciplined for verbally abusing opposing counsel and dumping coffee on his paper. While such conduct was a breach of the Rules of Professional Conduct, it did not give rise to a claim and therefore was not a matter that LPIC would deal with.

On the other hand, a lawyer who fails to file a statement of claim and misses a limitation period is clearly negligent and likely would be the subject of a malpractice claim.

. . . .

In some cases, ethical breaches often create the colour of malpractice and, in the client's eyes, become an issue of malpractice to be dealt with through a claim. An insignificant error can turn into a claim simply because of a conduct-related issue: faced with the lawyer's lack of professionalism, a frustrated client opts to sue rather than attempt to settle a relatively insignificant oversight with the lawyer. These types of claims rarely result in indemnity payments, as the losses, if there are any, generally are insignificant in the court's eyes. But they do cost the insurance program millions of dollars.

An example of such a claim is *Harrison v. Brady*, 14 A.C.W.S. (3d) 33, a judgment of MacFarland, J. dated February 9, 1989. The plaintiff had been involved in both a failed business venture and a failed marriage. He believed that the fact that his own solicitor had acted for his wife and erstwhile business associates contributed to his losses, and he used these alleged ethical breaches as the basis for his claim against his solicitor. MacFarland, J. found that the defendant solicitor had contravened Rule 5 of the Rules of Professional Conduct in representing more than one client. However, she also found that there was no causal connection between theses breaches and the plaintiff's loss. Although the solicitor was successfully defended, the action was expensive to defend for the insurer and no doubt emotionally and financially draining for the solicitor.

3.1.3 Provincial legislation

An Act To Amend The Child Welfare Act

~~S.N. 1992, c.57 [rep./sub. s. 38 of the *Child Welfare Act*, R.S.N. 1990, c. C-12]~~

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38. (1) Where a person has information that a child has been, is or may be in danger of abandonment, desertion, neglect, physical, sexual or emotional ill-treatment or has been, is or may be otherwise in need of protection, the person shall immediately report the matter to the director, a social worker or a peace officer.

(2) Where a person makes a report under subsection (1), the person shall report all the information in his or her possession.

(3) Where a report is made to a peace officer under subsection (1), the peace officer shall, as soon as possible after receiving the report, inform the director or a social worker.

(4) This section applies, notwithstanding the provisions of another Act, to a person referred to in subsection (5) who, in the course of his or her professional duties has reasonable grounds to suspect that a child has been, is or may be in danger of abandonment, desertion, neglect, physical, sexual or emotional ill-treatment, or has been, is or may be otherwise in need of protection.

(5) Subsection (4) applies to every person who performs professional or official duties with respect to a child including,

(a) a health care professional;

(b) a teacher, school principal, social worker, family counselor, member of the clergy, rabbi, operator or employee of a day care centre and a youth and recreation worker;

(c) a peace officer; and

(d) a solicitor.

(6) This section applies notwithstanding that the information is confidential or privileged, and an action does not lie against the informant unless the making of the report is done maliciously or without reasonable cause.

(7) A person shall not interfere with or harass a person who gives information under this section.

(8) A person who contravenes this section is guilty of an offence and is liable on summary conviction, to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 6 months or to both a fine and imprisonment.

(9) Notwithstanding section 8 of the *Summary Proceedings Act* [12 month limitation on laying information or complaint], an information or complaint under this section may be laid or made within 3 years from the day when the contravention occurred.

Neglected Adults Welfare Act

R.S.N. 1990, c. N-3, s.4

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4. (1) A person who has information which leads him or her to believe that an adult is a neglected adult shall give the information, together with the name and address of the adult, to the director [of neglected adults] or to a social worker who shall report the matter to the director.

(2) Subsection (1) applies notwithstanding that the information is confidential or privileged, and an action does not lie against the informant unless the giving of the information is done maliciously or without reasonable cause.

(3) A person who contravenes this section is guilty of an offence.

Manual Editor's Note: Most, if not all, provinces and territories have legislation that requires reporting about children in need of protection and neglected adults. Whether, in Newfoundland, the absence from the *Neglected Adult Act* (as reproduced above) of the specificity contained in the *Child Welfare Act* (as reproduced above), relieves solicitors from reporting on neglected adults has not yet been judicially determined.

3.2 Legal Responsibility

3.2.1 Generally

[No Entry]

3.2.2. To whom duty of care owed

[No Entry]

3.2.3 Nature of duty of care

Zarnett, Benjamin, **"Defences to Allegations to Liability"**

Federated Press, *Professional Liability & Legal Ethics* (Toronto, 1998), at pp. VII-4; VII-5 to VII-7.

In any action against a solicitor criticizing his or her professional services, two key questions must be answered; What was the solicitor required to do, and in what way, or to what standard, was it to be done?

In order to answer these questions, consideration must be given to the legal bases of the solicitors' relationship with his or her client.

The relationship of solicitor and client is first of all contractual. The retainer of the solicitor by the client is a contract. The express terms of the retainer describing what the solicitor is to do, are enforceable under the law of contract.

The retainer may, as well, be subject to implied terms. Provisions as to what the solicitor is to do and how the solicitor will perform services will usually be implied into the contract of retainer. These implied terms are also enforceable under the law of contract.

The relationship between solicitor and client is also one of "proximity", which under that branch of the law of tort known as negligence law, gives rise to a duty of care owed by the solicitor to the client.

Finally, the relationship of solicitor and client is a fiduciary one, pursuant to which the solicitor owes to his or her client the duties imposed by equity on fiduciaries.

Each of these legal bases can co-exist and they interact, to determine, in particular cases, what the solicitor was to do and how it was to be done.

That a solicitor's liability for professional services arises from both the express and implied terms of the retainer (i.e., by contract) and from the common law duty of care (i.e., by tort law) was conclusively established by the decision of the Supreme Court of Canada in *Central Trust Company v. Rafuse* [[1986] 2 S.C.R. 147]. ….

. . . .

…. As the duties of the solicitors were alternatively in contract and tort insofar as they related to the manner in which the work was to be performed, the plaintiff was entitled to sue the solicitors on either a contract basis or a tort basis, depending upon which cause of action appeared most advantageous in respect of any particular legal consequence, including the calculation of the limitation period. [*Central Trust Company v. Rafuse*, [1986]2 S.C.R. 147, at pp. 204-206.]

Contract and tort duties, however, are not all of the duties imposed on solicitors. A solicitor-client relationship is a fiduciary one. Fiduciary duties extend, not only to define what the solicitor must do in holding a client's money as trustee, but also to define, in certain respects, what the solicitor must do in connection with legal work or services being performed for the client. In the words of La Forest J., speaking for the majority of the Supreme Court of Canada:

"[n]obody would argue against the enforcement of fiduciary duties in policing the advisory aspect of solicitor-client relationships." [*Hodgkinson v. Simms* (1994), 117 D.L.R. (4th) 161, at pp. 182-183 (S.C.C.).]

Grant, Stephen M., **"Fiduciary Obligations"**

Federated Press, *Professional Liability & Legal Ethics* (Toronto, 1998), at pp. I-4 to I-5.

Fiduciary obligations play an ever-increasing role in lawyers' professional liability.

A fiduciary relationship is established "when a person is entrusted with powers for another's benefit…[and] in the exercise of those powers [is] not subject to the direct and immediate control of the other." [Finn, P.D. *Fiduciary Obligations* (Sydney: The Law Book Co. Ltd. 1977) at 1.] It is therefore characterized by three basic elements: discretion to act on behalf of a client with respect to the transaction. This relationship may also arise where there is evidence of a mutual understanding that one party has relinquished its own self interest and agreed to act solely on behalf of the other party. [*Hodgkinson v. Simms*, [1994] 3 S.C.R. 377.]

The lawyer and client relationship is certainly a fiduciary one. The existence of a fiduciary relationship between lawyer and client does not depend on a contract between them. [Mr. Justice H. Krever and M.R. Lewis, "Fiduciary Duties of Financial

Institutions" (1990) Spec. Lect. L.S.U.C. 279-307.] In fact, fiduciary obligations often arise before a formal retainer is entered into, such as when a potential client initially consults a lawyer, and clearly survives the termination of the solicitor-client relationship. [*Korz v. St. Pierre* (1987), 61 O.R.(2d) 609 (C.A.), leave to appeal to the S.C.C. refused; *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 (currently on appeal).]

Acting as fiduciary, a lawyer is obliged to act honestly, openly and in the best interests of her client. From this characterization, three guiding principles flow:

(a) a lawyer must represent her client with undivided loyalty;

(b) a lawyer must preserve her client's confidences; and

(c) a lawyer must fully disclose all material and relevant information that relates to her client's interests.

These three principles represent the key duties owed by a lawyer, as a fiduciary, to her client.

Whenever a lawyer acts contrary to any of these principles, she breaches her fiduciary obligation and liability may follow. The clearest example of this type of conduct is a breach of trust. However, it is crucial for a lawyer to appreciate that a breach of fiduciary duty may occur even where she is acting honestly and in good faith. [S.M. Grant and L.R. Rothstein, *Lawyers' Professional Liability* (Butterworths Canada Ltd.: Toronto, 1989).] Liability may be imposed regardless of whether the conduct in question was deliberate or dishonest and whether or not the damages were directly caused by the breach. However, the failure to provide accurate legal advice is not a breach of fiduciary duty. [*Fasken Campbell Godfrey v. 7-Up Canada inc. et al*., (6 January 1997), (O.C.G.D.) [unreported].]

The breadth of the scope of liability for breach of fiduciary duty distinguishes it from liability in contract (breach of the contract of service) or tort (negligence). As indicated above, because fiduciary obligations exist independently of any contract, a lawyer who fulfils the terms of the agreement may still be in breach of her obligations as a fiduciary. Conduct in violation of a fiduciary duty will often include negligence but that need not be the case. These differences in scope of liability are in large part accounted for by the fact that fiduciary obligations are creatures of equity, whereas duties in contract and tort are based in the common law.

Lawyers' fiduciary obligations are inextricably intertwined with the various Law Societies' Codes or Rules of Professional Conduct. In some cases, the legal obligation emanates from the ethical canon while in others, the ethical rule simply mirrors the legal obligation. Though ethical codes do not have the force of law, courts are frequently guided by them in measuring lawyers' conduct against their fiduciary obligations. For example, in one case, the British Columbia Supreme Court referred to the rule in that province's Professional Conduct Handbook regarding conflict of interest in deciding that a law firm breached its fiduciary duty of loyalty. [*Williamson*

v. Robert & Griffin, [1997] B.C.J. No. 2248 (C.A.); See also, *Confederation Life Insurance v. Shepherd, et al* (1992), 29 R.P.R.(2d) 271 (O.C.J. Gen Div), *McKinnon v. Conexco International Corp.* January 1992, Ontario Court of Justice No. 16582/86, *McKay and Esquimalt Mortgage Corporation v. Cowan et al.*, unreported, Victoria Registry No. 85/0923 June, 1989, (B.C.S.C.).]

3.2.4 Form of civil action

[See: Part 3.2.3: Nature of Duty of Care.]

3.2.5 Specialists

[No Entry]

3.2.6 Burden of proof

[No Entry]

4.0 APPLICATION OF STANDARDS OF RESPONSIBILITY

4.1 Unique Difficulties

(a) Acting as amicus curiae

[No Entry]

(b) Acting as agent

[No Entry]

(c) Acting opposite unrepresented person

[No Entry]

(d) Acting without conflict

Schmegner v. Franke

[1996] W.D.F.L. No. 2094, Ont. C.A., Charron J.A. for the Court
29 March 1996.

The husband had been aware that the former matrimonial home was up for sale for quite some time. Correspondence exchanged between the parties' solicitors revealed that the husband agreed to co-operate with the sale of the property [on which the wife held a mortgage] and that the husband had been extended the courtesy of being allowed to remain in the matrimonial home until April 1, 1996. The wife had agreed to keep the proceeds of the sale in a trust bearing account pending the determination of the husband's appeal. The day before the sale of the property was scheduled to close, the husband brought a motion for an Order restraining the wife from enforcing her mortgage remedies against the former matrimonial home. The wife argued that the enforcement of her mortgage remedies was the subject matter of a separate action and was not a matter under appeal with respect to which the Court had jurisdiction. At the commencement of the motion, the husband's counsel also objected to the wife's counsel continuing to represent the wife because her counsel had recently joined a firm which had acted for the husband in the past. The husband

sought an adjournment of the motion to permit both parties to prepare appropriate material.

Held - Adjournment denied; motion for restraining order dismissed with costs.

The adjournment was unnecessary as the motion could be decided without any prejudice to the husband. The issue to be decided turned upon events which occurred and material which came into existence long before the wife's solicitor changed firms and therefore could not be the product of any breach of confidentiality. The husband was free to bring a motion at a later date to have the wife's solicitor removed from the record. It was not necessary to consider the wife's argument as the circumstances were such that the restraining Order should not have been granted in any event. Although the husband had been aware for some time that the property was up for sale, he had taken no steps to restrain the wife's action until now. Nothing had changed which would justify the granting of the remedy sought today on the eve of the closing. Given that the wife agreed to keep the proceeds in a trust account pending the appeal, the husband would not be prejudiced by the closing with respect to the matters under appeal.

Primrose v. Primrose

[1997] B.C.J. No. 2819 (B.C.S.C.), R.M.J. Huitchison J.

Text: These proceedings were commenced in 1995 under the Family Relations Act. On 2 June 1996, an order was made by consent directing the defendant to pay $250.00 per month per child for the support of the children of the parties.

At that time, Barry Zacharias was counsel for the plaintiff. He was then associated with Ramsay Thompson Lampman. He left the firm in April 1997 and David Brooks of the same law firm became solicitor for the plaintiff on the record. John Motiuk had acted for the defendant in 1996: the solicitor for the defendant is now Fred C. Lowther.

On 2 October 1997, the plaintiff's solicitor filed a notice of motion seeking to have the defendant found in contempt of the court for failing to pay the maintenance ordered. The defendant brought forward a cross application seeking, inter alia, the David Brooks be removed from the record. It is that motion that I heard and will decide now. The other matters were adjourned to 1 December 1997.

David Brooks is married to Lisa, a close friend of the plaintiff. This friendship goes back a long time before Lisa met David Brooks. They have remained close friends. Through their friendship the defendant [then spouse of the plaintiff] met [David] Brooks and the two families would socialize, although the extent to which they socialized is disputed. Brooks deposed that their socializing was limited to a

camping trip at Cultus Lake in 1988, and on two occasions in 1989 when the Brooks stayed overnight in the Primroses' home and the Primroses stayed overnight in the Brooks' home. The defendant alleges that the contact between himself and Brooks was more frequent. He says the parties had camping trips and dinners together, and when they visited he and Brooks would drink beer together and exchange opinions and information about their backgrounds.

Brooks has some skill in laying carpet from his student days. At the defendant's request, Brooks helped him put a carpet in his house. ….

. . . .

In this case the issue is whether the relationship of Brooks and his family with the defendant give grounds for disqualifying Brooks or a member of his law firm from acting for the plaintiff [against the defendant after the plaintiff and defendant separated]. The leading case of MacDonald Estate v. Martin [1990] 3 S.C.R. 1235 dealt with confidential information obtained by a solicitor who had been actively involved in the litigation on behalf of the defendant; she then joined a firm who represented the plaintiff. The test propounded by Sopinka, J. was whether the public, represented by a reasonably informed person, would be satisfied that no use of confidential information would occur (page 1260). ….

. . . .

In this case, no solicitor-client relationship ever existed between the defendant and Brooks, nor was it contemplated. The material does not indicate that Brooks ever obtained confidential information from the defendant that could be used to his detriment in the dispute with the plaintiff. The courts have intervened to disqualify a solicitor from representing a party when a fair-minded person would perceive unfairness or impropriety in having the solicitor continue to act. That perception must come from the actual or anticipated relationship between a solicitor and his or her client, not from their relationship as friends. The court intervenes by reason of its inherent jurisdiction to control its process and ensure that the process is fair and has the appearance of fairness. No authority has been cited to me to suggest the courts have intervened in the past if the relationship of solicitor and client has never come about or was not contemplated.

The defendant has expressed his animosity towards Brooks as well as his belief that Brooks will not exercise independent or professional judgment when advising the plaintiff or dealing with the defendant's solicitor: this in turn could impede a settlement proposal, or could cause difficulties in pretrial procedures such as an examination for discovery. But those are not reasons for the court to intervene and exercise its inherent jurisdiction though they appear to be good reasons for Brooks to withdraw from active involvement in the case, and refer the matter to another solicitor either in his own firm or in another firm.

England v. Nguyen

(1997), 12 C.P.C. (4th) 289 (Man. Q.B.), Smith J.

Counsel for the wife in a custody and support trial had attended Alcoholics Anonymous meetings 10 years earlier at which her client's husband was present. AA members testified that they believed AA meeting to be anonymous and confidential, and that personal information was often disclosed. The husband alleged that counsel's attendance at these meetings created a fiduciary relationship between them, although neither he nor counsel had recollection of the details of the meetings. The husband moved to have the wife's counsel disqualified due to a conflict of interest.

Held - The motion was dismissed.

A factual basis indicating misuse of confidential information and the indicia of a fiduciary relationship are required to establish a conflict of interest. The mere attendance of the husband and counsel at the AA meetings did not create a fiduciary or confidential relationship. Because neither the husband nor counsel knew what was said, when it was said or what was said at the meetings, no misuse of confidential information or conflict of interest occurred.

Waxman v. Waxman

[1997] O.J. No. 3426 (Ont. Gen. Div.), G.D. Lane J.

Motion by the plaintiffs to remove defendants' counsel. The motion was based on two incidents in which the [now] former partner of the defendants' counsel was involved in discussions with the son of one of the plaintiffs. The discussions took place at social gatherings, before the lawyer in question was retained by the defendants. The plaintiffs claimed that there were extensive discussions regarding tactics and settlement strategies for the litigation, and contended that any information imparted to the former partner was confidential. The lawyer remembered the conversations, but did not recall specifically what was discussed and denied that the discussions were extensive.

Held - Motion dismissed.

The lawyer did not receive the information in his role as a solicitor and there was no reasonable expectation of confidentiality. There was no public policy reason for the risk of the son's loose talk to be borne by the hearer rather than the speaker.

The social context of the conversations did not raise policy imperatives which would justify denying the right to counsel of one's choice.

(e) Acting in non-adversarial proceedings

[See: Part 4.6.2(d): Responsibility To Third Parties … As Arbitrator]

4.2 Proceedings

4.2.1 Disciplinary proceedings

Office of Disciplinary Counsel v. Donnell

(1998), 9 *the Professional Lawyer*
(American Bar Association, Chicago, 1998),
at pp. 27-28.

In *Office of Disciplinary Counsel v. Donnell*, 684 N.E.2d (Ohio 1997) a lawyer who represented himself in custody and visitation matters exceeded the bounds of zealous advocacy such that a six-month suspension was appropriate.

Donnell represented himself in several motions relating to the agreed dissolution of his marriage under which his wife was granted custody of their three minor children. He had persistently contacted his ex-wife while the motions were pending. During the hearings on the motions he asked questions about issues that were not relevant to the issues before the court. On numerous occasions during the hearings and despite admonishments by the judge, Donnell, without testifying, asserted personal knowledge of the facts. The lawyer also constantly argued with and interrupted the judge and showed little respect for witnesses. Finally the lawyer habitually violated the rules of procedure by giving the court orders, cross-examining his own witnesses, arguing with witnesses and attempting to call opposing counsel as a witness.

The court concluded that this was a classic case of why lawyers should not defend themselves, finding violations of the rule against communicating with represented parties and the rules concerning fairness to opposing party and counsel as well as respect for rights of third persons. The court suspended the lawyer for six months.

4.2.2 Penal proceedings

[No Entry]

4.2.3 Summary proceedings

Forbes, Sandra A., **"Disqualification Motions – Allegations of Conflict of Interest and Misconduct"**

Federated Press, *Professional Liability & Legal Ethics* (Toronto, 1998), at pp. V-4; V-16 to V-18; V-21; V-7 to V-11.

The courts have an inherent jurisdiction to remove a solicitor from the record. Lawyers are officers of the court and their conduct in litigation which may affect the administration of justice is subject to this supervisory jurisdiction [*MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, at p. 1245]. Until the Supreme Court of Canada's decision in *MacDonald Estate v. Martin*, motions for an order removing a solicitor from the record were rare. Since *MacDonald Estate*, removal motions have become a frequent occurrence. ….

. . . .

The purpose of the appeal to the Supreme Court of Canada in M*acDonald Estate* was to determine the appropriate standard to apply in deciding whether a law firm should be disqualified from continuing to act as counsel in litigation because of a conflict of interest. ….

. . . .

Until *MacDonald Estate*, motions to remove solicitors from the record were rare; "few judges or lawyers seemed to be more than vaguely aware that such a remedy existed". [*Manville Canada v. Ladner Downs* (1992), 88 D.L.R. (4th) 208

(B.C.S.C.), at p. 224; affirmed: (1993), 76 B.C.L.R. (2d) 273 (C.A.)] Since *MacDonald Estate*, these types of motions have become a major growth area and a

common feature of litigation. Unfortunately, the principles of *MacDonald Estate* have been misused as strategic litigation weapons, the result being that the very value the court in *MacDonald Estate* sought to protect, namely the integrity of the justice system, has been undermined. While some of these motions are legitimate, far more have been brought for the purpose of harming the other party by increasing the length, complexity and cost of litigation. This practice raises serious fundamental access to justice concerns. Ironically, considering the emphasis placed by the court in *MacDonald Estate* on the integrity of the justice system, removal motions have

reduced the courts' ability to render judgment in a timely way and, accordingly, have contributed to the erosion of public confidence in the system.

Motions for removal necessarily delay the determination of the merits of the litigation. Until the motion is decided, the litigation is brought to a halt. Once a motion is brought, the challenged lawyer must retain and brief counsel. Depending on the state and complexity of the litigation, the briefing can be time consuming. Further, the challenged lawyer must prepare responding materials and be subjected to cross-examination, which also can be time consuming. In short, months if not years can be added to litigation as a result of a removal motion. Further, the expense of the litigation will increase as a result of the need to retain independent counsel and, in some cases, experts. [Both parties retained an expert to provide an opinion.]

Most importantly, and especially in non-conflict of interest cases, these motions can amount to a disguised inquiry into the instructions provided to the challenged solicitor, the litigation strategy developed and other privileged matters. In this sense, removal motions have the potential of fatally damaging the solicitor-client relationship, the protection of which was sought to be ensured in *MacDonald Estate.* This danger is inherent in removal motions because the challenged lawyer must respond to the allegations of improper conduct made against him or her and then be subjected to cross-examination on the affidavit.

As an example, consider a case where party A claims that party B's lawyer should be removed because he was involved in improperly withholding relevant documents and because he improperly refused questions on discovery. Further assume that party B's lawyer's response is that the relevant documents were produced and that nothing relevant was intentionally withheld. [As was the case in *Zawadski v. Matthews Group Ltd.* (B 356 / 92), Macdonald J, 09 January 1998 (Ont. Gen. Div.) (leave to appeal denied: Ferrier J., 11 February 1998).] Party A's counsel may very well attempt to cross-examine party B's lawyer on issues such as B's instructions about disclosure and the strategy ultimately adopted. While these matters are technically relevant to the issue raised on the removal motion, answering them threatens solicitor-client privilege. Also, considering the nature of these allegations, questions on the merits of the litigation could be relevant, permitting party A to delve into party B's views of the case and to obtain an "extra" discovery.

For these reasons: delay, cost and threat to the solicitor-client relationship – removal motions must be discouraged except in conflict of interest cases such as *MacDonald Estate. ….*

. . . .

The courts have responded to the misuse of removal motions in two main ways; first, by confining the situations in which removal is justified in both conflict of interest and misconduct cases and, secondly (and more recently), by utilizing costs awards as a deterrent.

Turning to the first point, regarding allegations of conflict of interest, several decisions reveal the court's general reluctance to apply the appearance of impropriety test to alleged conflicts of interest which do not fall squarely within the conflict of interest situation considered in *MacDonald Estate*. ….

. . . .

The *MacDonald Estate* test only applies to allegations of conflict of interest. The principles relating to protection of confidential information imparted by a client to her counsel do not apply in cases where the basis for the request for removal is alleged misconduct in dealings with the adverse party. Accordingly, a different standard for removal is justified. This distinction has been generally accepted by the courts.

A motion for the removal of a Crown lawyer on the basis of improper conduct succeeded in *Everingham v. Ontario* [*Everingham v. Ontario* (1992), 8 O.R. (3d) 121 (Div. Ct.).] Considering recent Canadian jurisprudence, this extraordinary result can be explained by the very particular facts at issue. Several patients committed to a mental hospital had applied for a declaration that their rights had been infringed by the imposition of a behaviour management program. While on a tour of a mental hospital as part of a conference completely unrelated to the application, one of the Crown lawyers, who was to cross-examine one of the patients on his affidavit the following day, spoke to that patient briefly in an interview room in the absence of the patient's counsel. The patient was concerned when he was told of the solicitor's presence in the building and the solicitor had spoken with him to alleviate his concerns about why he was at the hospital and about what was to occur the next day at the cross-examination. It was accepted that the solicitor obtained no confidential or other information from the patient.

The court recognized that its inherent jurisdiction to deny the right of audience to counsel where the interest of justice required it extended beyond the realm of conflict of interest. Where the ground for removal is alleged misconduct on

behalf of the solicitor, the court found that the appropriate test is whether a fair minded reasonably informed member of the public would conclude that the proper administration of justice required the removal of the solicitor.

The court ultimately concluded that the solicitor should be removed, mainly because of the vulnerable position of the mental patient who was interviewed.

> "No reasonably informed member of the public would think it fair for any lawyer, about to cross-examine a detained mental patient, to take the patient into a closed institutional interview room under the authority of the very custodians whose legal authority over the patient is challenged, and conduct a private unrecorded conversation without any notice to the patient's counsel either before or after the interview.

> The objective appearance of unfairness, oppression and deprivation of counsel is too blatant to be tolerated." [*Everingham v. Ontario* (1992), 8 O.R. (3d) 121 (Div. Ct.) at p. 128.]

The test for removal of a solicitor in a non-conflict of interest situation was further developed by the British Columbia Supreme Court in *MacMillan Bloedel Ltd. v. Freeman & Co.* [(1992), 78 B.C.L.R.(2d) 325 (S.C.)]. The plaintiff sought the removal of the defendant's counsel as a result of their unannounced visit and tour of the plaintiff's facilities. The plaintiff had sued the defendants for damages for the cost of removing asbestos from its pulp mills. The defendant's solicitors brought an application seeking an order requiring the plaintiff to allow them and their technical consultants to inspect the pulp mills. Before the application was heard, counsel for the defendant and the defendant's technical consultant made arrangements for a public tour of the plaintiff's mill, because they had never seen a pulp mill before and though that a tour would be an efficient way to become educated. The defendant's counsel did not inform the plaintiff's counsel of the intended visit. During that visit, the defendant's counsel spoke for approximately ½ hour with a manager of the plaintiff's mill before going on an escorted tour of the facility.

The plaintiff's motion was based on the allegation that the defendants' counsel had breached their obligation under the relevant code of professional ethics and that this breach created an appearance of impropriety. In other words, the plaintiff attempted to apply the reasoning in *Macdonald Estate* to this very different situation.

The court rejected the plaintiff's argument. It confirmed that the mere fact that a solicitor had breached a rule of professional conduct does not necessarily mean that his or her removal is justified. Court intervention by way of removal of counsel was found to be warranted only where the alleged breach raises a real hazard of injustice. In other words, the alleged result must be of so grave a nature that a just result in the proceeding may be threatened. ….

. . . .

In adopting the test formulated in *Everingham*, the [British Columbia] court concluded that this test required more than an appearance of impropriety to justify a solicitor's removal. Probability or apprehension of real mischief was required. The court's refusal to order the removal of the defendant's solicitors in … [the British Columbia] case was based on these reasons:

> [1] The defendant's counsel had invested a great deal of time and energy in becoming familiar with the issues and the situation of these defendants in particular. Requiring the defendants to find new counsel at this stage in the litigation would impose hardship.
>
> [2] This was not a case like *Everingham v. Ontario*. Communication between a lawyer and a confined mental patient has a far greater potential for creating an obvious

appearance of unfairness and a risk of real mischief than does communication between a lawyer and an experienced business executive.

[3] The question of whether the conversation constituted a breach of ethics was one to be decided by way of a complaint to the Law Society. The court found that the plaintiff had failed to show the probability that any real mischief resulted from the conversation. The plaintiff did not allege that the manager had said anything harmful or unfortunate. Since the manager was unquestionably on guard during the conversation knowing that he was speaking with knowledgeable and curious lawyers, the chances that he would have said anything that would do real mischief to the plaintiff's position in the action was found to be so remote as to be virtually non-existent.

4.2.4 Civil proceedings

[See: part 4.5.3(a): Agreeing to settlement.]

American Bar Association, **"Legal Malpractice Claims in the 1990s [In United States and Canada]**

(Chicago, 1996), at pp. 6; 39-43

Manual Editors Note: Gratefully acknowledged, in obtaining the material for the following tables, is the considerable assistance of Mr. Kirk R. Hall, Chief Executive Officer, Professional Liability Fund, Oregon State Bar, Suite 201, 5200 S.W. Meadows Road, P.O. Box 1600, Lake Oswego, Oregon, 97035-0889.

The legal profession is constantly changing, and so past claim trends are not necessarily an indicator of the future. For example, law firms have made tremendous loss prevention efforts over the years, and seem to have reduced the relative number of claims relating to missed deadlines and docket control problems. Firms are also more careful in client selection and in avoiding conflicts of interest which went unrecognized in the past. On the other hand, clients may be more willing to second-guess their former lawyers and assert a malpractice claim if they have suffered any kind of disappointment or poor result, and many law firms believe they are working harder in a more competitive, stressful environment than in the past. As this comparative study indicates, the pattern of legal malpractice claims has changed since [a study in] 1986, and can be expected to change still further in the future.

Finally, a few journalists and academics have used the 1986 study as proof that there are major problems with the legal profession. Their reasoning is that, because legal malpractice claims exist, the lawyers must be doing a bad job. This conclusion is utter nonsense. Consider the analogy of automobile insurance. Just because all drivers carry auto insurance (and just because there are always auto accidents) does not mean that all drivers are bad, or even that drivers with occasional accidents are bad. The very act of driving a car puts the driver and others at risk, and even excellent drivers can be expected to have an accident from time to time. The same is true for lawyers and other professionals (even journalists and academics!). The existence of legal malpractice claims covered by insurance should not be taken as a sign of trouble in the legal profession, but rather as a sign of financial responsibility by lawyers in protecting their clients and their own assets.

. . . .

Manual Editor's Note: The following tables (numbered 1, 2, 6, 7, 9, and 10) provide information from three lawyer-owned Canadian malpractice insurers, in British Columbia, Ontario and Quebec, for the period 1990-1995. The following tables also provide United States of America information from 23 states.

TABLE 1 - Number Of Claims By Area Of Law

Table 1 provides interesting contrasts, emphasizing what are likely the major differences in the practice of law in the U.S. and Canada. Real estate transactions comprise the single largest source of errors in Canada, with a percentage (39%) that is almost twice that of the single largest area in the U.S. data (Personal Injury- Plaintiff at 22%). The top three areas of law that are the major sources of claims in both countries are identical – personal injury-plaintiff, real estate, and business transaction/commercial law – although the total percentage contributions are quite different; in the U.S. these comprise 47% of the total, while in Canada they comprise 67%. In the next tier of areas of law giving rise to claims in Canada; Corporate/Business Organization (12%) and Family Law (7%) are at the head of the list; in the U.S., the figures are Family Law (9%) and Corporate/Business Organization (9%). Interestingly, the top five areas of law giving rise to claims in Canada comprise 86% of the total, but in the U.S. the top five areas of law only capture 65% of the total number of claims.

AREA OF LAW	**U.S. Data 1990-95 Absolute Frequency**	**U.S. Data 1990-95 . . . (Percent)**	**Canadian Data 1990-95 Absolute Frequency**	**Canadian Data 1990-95 . . . (Percent)**	**Difference between U.S. and Canadian Data . . .**
Personal Injury – Plaintiff	4147	21.65%	3603	13.23%	8.42%
Real Estate	2750	14.35%	10578	38.84	(24.48)%
Business Transaction Commercial Law	2042	10.66%	4194	15.40	(4.74)%
Family Law	1750	9.13%	1908	7.01	2.13%

AREA OF LAW	U.S. Data 1990-95 Absolute Frequency	U.S. Data 1990-95 . . . (Percent)	Canadian Data 1990-95 Absolute Frequency	Canadian Data 1990-95 . . . (Percent)	Difference between U.S. and Canadian Data . . .
Corporate/ Business Organization	1700	8.87%	3314	12.17	(3.29)%
Collection and Bankruptcy	1516	7.91%	706	2.59	5.32%
Estate, Trust & Probate	1454	7.59%	960	3.52	4.06%
Criminal	731	3.82%	112	0.41	3.40%
Worker's Compensation	632	3.30%	65	0.24	3.06%
Personal Injury – Defense	626	3.27%	352	1.29	1.98%
Securities (S.E.C.)	368	1.92%	127	0.47	1.45%
Taxation	305	1.59%	381	1.40	0.19%
Labor Law	271	1.41%	128	0.47	0.94%
Patent, Trademark, Copyright	180	0.94%	165	0.61	0.33%
Local Government	138	0.72%	224	0.82	(0.10)%
Construction (Building Contracts)	133	0.69%	0	0.00	0.69%
Civil Rights Discrimination	109	0.57%	381	1.40	(0.83)%
Consumer Claims	53	0.28%	2	0.01	0.27%

AREA OF LAW	U.S. Data 1990-95 Absolute Frequency	U.S. Data 1990-95 . . . (Percent)	Canadian Data 1990-95 Absolute Frequency	Canadian Data 1990-95 . . . (Percent)	Difference between U.S. and Canadian Data . . .
Natural Resources	48	0.25%	21	0.08%	0.17
Environment Law	45	0.23%	0	0.00%	0.23
Admiralty	43	0.22%	0	0.00%	0.22
Government Contracts/Claim	42	0.22%	0	0.00%	0.22
Immigration/ Naturalization	36	0.19%	11	0.04%	0.15
Antitrust	23	0.12%	0	0.00%	0.12
International Law	16	0.08%	5	0.02%	0.07
TOTAL	19158	99.98%	27237	100.02%	0.00

TABLE 2 – Number of Claims by Attorneys in Firm

Table 2 provides a decidedly different picture as to the source of claims for Canadian insurers. In Canada, 82% of the claims arise from firms with ten or fewer members. The is contrasted with 71% of the errors in the U.S. from the same size firms. It is noteworthy that sole practitioners represent 68% of the practice groups in Canada; firms with ten or fewer members (including the sole practitioner category) constitute 97% of the attorneys practicing in Canada. [Information on firm size provided by memorandum from The Canadian Bar Association, Ontario, Canada. February 1997.] In the United States, firms with ten or fewer members comprise 98% of the attorneys practicing. It is significant that although there is less than a one percent difference in the percentage of firms in the same size in the two countries, the percent of claims arising from firms of ten or fewer attorneys is 11% higher in Canada than the U.S.

NUMER OF ATTORNEYS IN FIRM	**U.S. Data 1990-95 Absolute Frequency**	**U.S. Data 1990-95 . . . (Percent)**	**Canadian Data 1990-95 Absolute Frequency**	**Canadian Data 1990-95 . . . (Percent)**	**Difference between U.S. and Canadian Data . . .**
1-5	13194	60.83%	16766	71.79%	(10.96)
6-10	2259	10.41%	2311	9.90%	0.52
11-39	2242	10.34%	2410	10.32%	0.02
40-99	894	4.12%	1269	5.43%	(1.31)
100 or more	3101	14.30%	597	2.56%	1174
TOTAL	21690	100.00%	23353	100.00%	0.00

TABLE 6 – Number of Claims by Expense Paid

Table 6 demonstrates that Canadian insurers are even more successful than their U.S. counterparts at resolving matters with less associated expense. In Canada, 81% of all claims are handled for less than $5,000 in expense; in the U.S., only 76% of the claims are handled for that amount of expense paid. At the high end of the spectrum, Canadian companies are also more successful. United States companies see slightly more than 4% of its cases (4.51%) in the range over $50,000 in expenses; this is while less than 1% (87%) of Canadian claims exact this amount of expenses.

CATEGORY ($)	**U.S. Data 1990-95 Absolute Frequency**	**U.S. Data 1990-95 . . . (Percent)**	**Canadian Data 1990-95 Absolute Frequency**	**Canadian Data 1990-95 . . . (Percent)**	**Difference between U.S. and Canadian Data . . .**
$0 to $1,000	16475	63.95%	14524	51.28%	12.67
$1,001 to $5,000	3186	12.37%	8659	30.57%	(18.21)
$5,001 to $10,000	1669	6.48%	2406	8.50%	(2.02)
$10,001 to $25,000	2087	8.10%	1945	6.87%	1.23
$25,001 to $50,000	1182	4.59%	541	1.91%	2.68
$50,001 to $100,00	691	2.68%	196	0.69%	1.99
Over $100,000	472	1.83%	50	0.10%	1.66
TOTAL	25762	100.00%	28321	99.92%	0.00

TABLE 7 – Number of Claims by Indemnity Dollars Paid to Claimant

The most notable contrast in Table 7 is that, while 89% of Canadian claims are settled for less than $10,000 in indemnity, the U.S. carriers settle 78% of their claims in that same category. Also, notwithstanding the same sample size, it is interesting to note that Canadian insurers reported only 22 claims settled for more than $500,000 while U.S. insurers reported 126 claims settled at the same high end of the spectrum. This is the result even though the total number of U.S. claims in this sample is almost 6,000 fewer than the Canadian sample.

CATEGORY ($)	**U.S. Data 1990-95 Absolute Frequency**	**U.S. Data 1990-95 . . . (Percent)**	**Canadian Data 1990-95 Absolute Frequency**	**Canadian Data 1990-95 . . . (Percent)**	**Difference between U.S. and Canadian Data . . .**
$0 to $10,000	17956	78.55%	25208	89.01%	(10.46)
$10,001 to $50,000	2988	13.07%	2303	8.13%	4.94
$50,001 to $100,000	977	4.27%	490	1.73%	2.54
$100,001 to $250,000	598	2.62%	250	0.88%	1.73
$250,001 to $500,000	213	0.93%	47	0.17%	0.77
$500,001 to $1,000,000	96	0.42%	20	0.07%	0.35
$1,000,001 to $2,000,000	17	0.07%	1	0.00%	0.07
Over $2,000,000	13	0.06%	1	0.00%	0.05
TOTAL	22858	99.99%	28320	99.99%	0.00

TABLE 9 – Time Interval: Error to Closing of File

Table 9 provides the most dramatic contrast of any of the Canadian and U.S. comparison tables. More than 50% of the Canadian claims are still not closed 36 months after the alleged error; this is in contrast to 36% of the U.S. claims. During the early stages of a claim, the U.S. companies are also more successful at closing a file; more than 28% of claims are closed within the first 12 months after the alleged error, while only 12% of Canadian claims are closed by the end of the first year. It is possible that some of this variance may relate to differences in how incidents … are handled in the two countries; some companies open and close claim files simultaneously, which could affect the statistics.

CATEGORY ($)	**U.S. Data 1990-95 Absolute Frequency**	**U.S. Data 1990-95 . . . (Percent)**	**Canadian Data 1990-95 Absolute Frequency**	**Canadian Data 1990-95 . . . (Percent)**	**Difference between U.S. and Canadian Data . . .**
Under 6 months	2241	15.59%	1129	4.45%	11.13
6 to 12 months	1784	12.41%	1935	7.63%	4.77
12 to 24 months	2842	19.76%	4812	18.99%	0.78
24 to 36 months	2265	15.75%	4596	18.13%	(2.38)
Over 36 months	5247	36.49%	12873	50.79%	(14.30)
TOTAL	14379	100.00%	25345	99.99%	0.00

TABLE 10 – Time Interval: Opening of Claim to Closing of File

Finally, Table 10 provides information that reinforces the Canadian information contained in Table 9. This table shows that claim files are opened and closed much more quickly in the U.S.; 49% of U.S. claims are opened and closed within 12 months. This is contrasted with 39% of Canadian claims in that same time frame.

CATEGORY ($)	**U.S. Data 1990-95 Absolute Frequency**	**U.S. Data 1990-95 . . . (Percent)**	**Canadian Data 1990-95 Absolute Frequency**	**Canadian Data 1990-95 . . . (Percent)**	**Difference between U.S. and Canadian Data . . .**
Under 6 months	3528	23.67%	4515	17.14%	6.53
6 to 12 months	3778	25.35%	5716	21.70%	3.65
12 to 24 months	3428	23.00%	7854	29.82%	(6.82)
24 to 36 months	1931	12.96%	4114	15.62%	(2.66)
Over 36 months	2238	15.02%	4137	15.71%	(0.69)
TOTAL	14903	100.00%	26336	99.99%	0.00

Manual Editor's Note: Other data tables were not reproduced because Canadian data was not available for comparison with United States data. Two noteworthy points from those other tables, based only on data from 23 of the United States, are the following:

(1) Areas of law in which the greatest increases in claims occurred between the period 1983-1985 and the period 1990-1995 were (expressed as percentages): business transaction commercial law: 7.62 %; corporate/business organization: 3.56 %; family law: 1.25 %, and worker compensation: 1.16 %.

(2) Types of error most often alleged in claims were: failure to calendar properly (that is omitting to diarize time deadlines): 11.46 %; failure to know/properly apply law: 9.74 %; failure to obtain consent/inform client: 9.46 %; and inadequate discovery/investigation: 9.21 %.

Sheehan, Katherine C., **"The Ethics Of Settlement For A Family Lawyer"**

American Bar Association [Section on Family Law]. *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), at pp. 839-841.

III. Duties to the Client in Negotiations.

Plainly, the attorney owes the client all the duties inherent in the attorney-client relationship, whether or not the representation includes formal litigation. What is not so plain [in actions for damages against attorneys and in disciplinary proceedings against attorneys] is what those duties specifically require of the attorney in the fluid context of negotiations.

A. The Attorney Owes the Client a Duty of Competent Representation in Negotiations.

1. **Model Rule 1.1** requires that the attorney have the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation undertaken. **DR [Model Code Disciplinary Rule] 6-101(A)** forbids a lawyer from handling a matter without the competence to do so unless a competent attorney is associated in [the matter], and demands that the attorney be adequately prepared. Courts have held that a client is entitled [to] demand from his or her attorney the same "skill, knowledge and diligence" with respect to settlement of a matter as in any other legal task. See LOUIS PARLEY, THE ETHICAL FAMILY LAWYER: A PRACTICAL GUIDE TO AVOIDING PROFESSIONAL DILEMMAS, ch. 3&7 (1995) for a thorough discussion of competence and diligence in family law representation.

2. Competent representation in negotiations includes:

- Familiarity with or adequate research into applicable law. Ignorance of the law leads to an inability to negotiate effectively or to advise [a] client regarding merit of opponent's position; see, e.g., In re Danelson, 142 B.R. 932 (D. Mont. 1992) (ignorance of applicable child support rules); McMahon v. Shea, 657 A.2d 938 (Pa. Super. Ct. 1995) (failure to realize and disclose to husband that settlement agreement called for alimony beyond termination of statutory obligation); reh'g denied (April 15, 1995), appeal granted, 674 A.2d 1074 (Pa. 1996); Smith v. Lewis, 530 P.2d 589 (Cal. 1975) (failure to research military pension's status as community property);

- Familiarity with and diligent use of court procedures and local practices, to avoid delay in obtaining benefits of agreement or inability

to evaluate consequences of failing to reach agreement; see, e.g., Duvall, Blackburn, hale & Downey v. Siddiqui, 416 S.E.2d 448 (Va. 1992) (failure to file consent order, resulting in lost support of client); Ziegelheim v. Apollo, 607 A.2d 1298 (N.J. Super. Ct. 1992) (negligent advice regarding likely outcome of trial; delay in finalizing settlement); People v. Baird, 772 P.2d 110 (Colo. 1989) (attorney disciplined for failing to file papers to effect agreed-upon custody and support);

- Adequate investigation and discovery into opposing party's income, assets, and circumstances relating to custody; see, e.g., Grayson v. Wolfsey, Rosen, Kweskin and Kuriansky, 646 A.2d 195 (Conn. 1984) (failure to investigate husband's fraudulent affidavit regarding value of real property); Baldridge v. Lacks, 883 S.W.2d 947 (Mo. Ct. App. 1994) (advice to settle based on negligent investigation of husband's assets); Segall v. Berkson, 487 N.E.2d 752 (Ill. Ct. App. 1985) (failure to interview witnesses to prove wife unfit to have custody); and

- Exercise of an ability to draft valid, clear and accurate premarital, separation and divorce agreements; see Ziegelheim v. Apollo, 607 A.2d 1298 (N.J. Super. Ct. 1992) (alleged inaccurate recording of terms of oral settlement in written agreement); see generally, 2 ALEXANDER LINDEY & LOUIS PARLEY, LINDEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS.

3. The parties' agreement to settle and the Court's approval of their agreement does not prevent an unhappy client from suing his or her allegedly incompetent attorney for malpractice. See Ziegelheim v. Apollo, 607 A.2d 1298 (N.J. Super. Ct. 1992); Grayson v. Wolfsey, Rosen, Kweskin and Kuriansky, 646 A.2d 195 (Conn. 1994); McCarthy v. Pedersen & Houpt, 621 N.E.2d 97, 99-101 (Ill. Ct. App. 1993) (surveying cases). [The question of whether and when a client unhappy with a settlement can sue his or her attorney for malpractice is currently in a state of uncertainty in Pennsylvania. Compare Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick, 587 A.2d 1346 (Pa.).]

4. The client's agreement, or instruction, to limit the scope of representation in order to save money does not excuse the attorney from a duty of competent and diligent representation. For a discussion of the ethical pitfalls of cost-cutting and practical suggestions for avoiding them see Anita Bola✶os Ward, *Cutting Costs Doesn't Mean Cutting Corners: How to Minimize Malpractice Risks*, 17 Family Advocate 38 (1994).

Brignolio v. Desmarais, Keenan & Robert

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

The plaintiff … [had been respondent] to a divorce proceeding … [by] his wife … [in which] 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 office of the Children's Lawyer and … [that] 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 of 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 [divorce] action to sanction counsel in costs.

Thomas v. McCulloch and Kress

(1996), 4 C.P.C. (4th) 370 (Man. Q.B.), Carr J.

Headnote: A lawyer prepared a separation agreement on behalf of the wife. The lawyer did not advise her of any right to claim the husband's pension. The wife retained the lawyer two years later on the divorce petition. There was then authority that a pension should not be included in an accounting. However, the lawyer had acted on a case which interpreted that authority as allowing inclusion of guaranteed portions of pensions. The lawyer again did not advise her of any pension rights and did not advise of any limitation period under the *Marital Property Act*. Thirteen years after the petition, the Department of National Defence notified the wife that she might have a claim against the husband's pension. The wife alleged that the husband had been receiving his pension at the time of the petition. She applied under s. 14(1) of the *Limitation of Actions Act* (the "Act") for an extension of time to sue the lawyer. The lawyer opposed the application only under s. 15(2) of the Act.

Held – The application was allowed.

Section 19 of the *Marital Property Act* requires an action for an accounting of assets be brought within 60 days from the divorce. Section 14(1) of the Act allows a court to extend the time to bring an action if not more than 12 months after the applicant first knew or ought to have known the supporting facts. Section 15(2) of the Act prevents an extension of time unless the applicant presents evidence showing a reasonable prospect of success.

A lawyer retained in a marital case has an obligation to seek disclosure of income and assets … [and] to advise respecting entitlement and limitation periods.

In the present case, the lawyer … [acted on] the wife's divorce, knew or ought to have known of the husband's pension and knew or ought to have known of [terms of] the husband's pension supporting a right of the wife to the pension.

The wife satisfied the requirements of the Act and was entitled to a two week extension to sue the lawyer.

Text (para. 11): …. Surely, in the absence of evidence of contrary instructions, a lawyer, retained in a martial case to, in the words of the applicant "protect my rights arising out of the dissolution of my marriage" has an obligation to seek disclosure of income and assets, to advise with respect to entitlement and to point out limitation periods when relevant. …. [and, citing *Justice v. Clamain* (1993), 105 D.L.R. (4th) 501 (Man. C.A.) at p. 514] … A court may well be more willing to find negligence where

the circumstances, such as allegedly existed here, should have aroused suspicion in a reasonably competent professional.

4.2.5 Criminal proceedings

[No Entry]

4.2.6 Public censure

[No Entry]

4.3 Underlying Causes of Proceedings

Wishard, Caron E., **"Legal Ethics and Professional Liability Insurance"**

Federated Press, *Professional Liability & Legal Ethics* (Toronto, 1998), at pp. II-27 to II-29.

In 1996, [… Lawyers' Professional Indemnity Company ("LPIC")] retained Professor Gold, former Dean of the University of Windsor Law School to study and report to us on the underlying causes of claims. The Gold Report was delivered in August 1997 with a very clear conclusion: lawyers have to recognize that conditions of law practice in Ontario are changing radically and that these changes are having destabilizing influences on lawyer conduct. In particular, Gold identified the following factors as contributing to the current practice climate and various forms of lawyer misbehavior:

- the practice of law is becoming more complex;
- there is more competition within and outside of the profession;
- consumerism is promoting both price and quality consciousness;
- there are new and ever-expanding bases for professional liability;
- there is a decline in professionalism; and
- lawyers take less care when their clients are friends or family.

Professor Gold made no distinction between unethical conduct and malpractice and suggested that, generally speaking, the following characteristics apply to lawyers and law practice:

- they have little insight into their own motivations;

- they tend to see their role as being a technical mechanism rather than as an agent of justice;

- there is a great difference between the study of law and the practice of law; and

- legal practice is not friendly.

Through a series of interviews with practitioners and people involved in the malpractice claims process, Professor Gold sought to identify why lawyers err. His findings included the following as underlying causes of error: failure of the lawyer/client relationship, poor communication, poor file management including lack of paper trail, lack of competence, ignorance of the law and misguided motivation, self-interest and procrastination.

His conclusion: Lawyers cannot change the environment in which they work. But they can control the circumstances in which they practice their profession.

In analyzing Professor Gold's report, a number of needs became apparent to LPIC:

- lawyers need help adapting to the changing practice climate;

- adapting to change requires a change in behavior patterns among lawyers; and

- some of the processes involved in the provision of legal services must be more carefully controlled through a risk management initiative.

After examining programs in other jurisdictions around the world, and based on Professor Gold's study, LPIC concluded that a comprehensive risk management approach was necessary in light of the known benefits which include: increased profitability and efficiency for practitioners; reduced exposure to claims and – most important – empowerment of lawyers to thrive, not just survive, in the changing practice environment.

4.4 Retainer

4.4.1 Definition

Holizki v. Reeves

(1997), 10 C.P.C. (4th) 63 (Sask. Q.B.), McIntyre J.

H was seeking a solicitor with respect to an application to be brought against the respondent, R, respecting child support. The provincial law society referred her to the respondent solicitor. H telephoned the solicitor long-distance and allegedly spoke with him for 14 minutes. She deposed that about a week later she spoke on the telephone with the solicitor again for about one half hour. Telephone records did not show the half-hour call alleged by H. H did not retain the solicitor and no fees were ever charged. The solicitor was eventually retained by R to oppose the child support application by H, and H applied to remove the solicitor as solicitor of record for R.

Held – The application was dismissed.

The question in this instance was whether the applicant had demonstrated on the facts a relationship sufficiently related to the solicitor's current retainer with R such that the presumption ought to arise that the solicitor received confidential information attributable to a solicitor-client relationship relevant to the matter. The evidence demonstrated that there was no solicitor-client relationship. No fees were charged. The facts of the present case were not such as to raise the presumption that confidential information was received by the solicitor.

4.4.2 Types of retainer

Randall & Co. v. Hope

(1996), 7 C.P.C. (4th) 166 (B.C.S.C.), Levine J.

Manual Editor's Note: On taxation of a law firm's account to a client, the Registrar of the Court determined to be unfair a contingency fee agreement entered into between the law firm and it's client, a former foster child, under section 78(9) of the *Legal Profession Act.*

The former foster child had sued his foster father's estate under the British Columbia *Wills Variation Act.* From the $1.8-million estate of his former foster father, he requested, in his proceeding, that a trust fund, larger than the $200,000 sum

provided under the decease's Will, be established to thereby generate a larger monthly income to the former foster child and, further, that a declaration of constructive trust be made to provide for an outright lump sum payment from the estate to the former foster child.

The former foster child, on taxation before the Registrar, testified that she did not understand the contingency fee agreement and was not advised by the law firm to seek independent legal advice before deciding whether or not to sign the agreement. Evidence on taxation further indicated that the former foster child was not a sophisticated user of legal services. The law firm appealed.

Held – Appeal allowed in part.

Headnote: On an appeal under s. 78(10), the court should be slow to change the registrar's findings of fact and should give due deference to his or her extensive experience in the area of reviewing lawyer's bills. Here, it was not likely that the client would have intended to retain the law firm to pursue the wills variation claim on the basis of a contingency fee agreement and to pursue the constructive trust claim under some other fee arrangement. The agreement was therefore valid with respect to both claims. In considering whether such an agreement was fair and reasonable, a two-step process should be followed. Fairness pertains to the mode of obtaining the contract and to the client's understanding and appreciation of its contents. Reasonableness pertains to the amount of the fee. The registrar's finding that the client could not have understood the effect of the settlement on her fees went to reasonableness, not fairness. To the extent that the registrar's conclusion about the unfairness of the contract was based on that finding, the conclusion was in error. Despite the client's lack of sophistication, there was no evidence of lack of capacity, undue influence, undue advantage, mistake or any other ground for finding the agreement unfair. However, the agreement was unreasonable in applying the provision for a lump sum payment of fees to an increase in the monthly payments to the client. For that reason, it should be cancelled. The fee of $7,500 set by the registrar was too low. In the circumstances, a reasonable all-inclusive fee would be $14,500.

4.4.3 Pre-retainer duties

[No Entry]

4.4.4 Retained lawyer seeking third party assistance

[No Entry]

4.5 Professional Responsibility

4.5.1 Representing both partners

Earle, Wendy J., **"Advising King Lear: Ethical and Professional Liability Issues for the Lawyer Advising on Intra-Family Transactions"**

Federated Press, *Professional Liability & Legal Ethics* (Toronto, 1998), at pp. IV-42 to IV-44.

Insist on Independent Legal Advice

Once the solicitor has determined who his client is, he should insist that the other parties receive independent legal advice. By doing so, in writing, the solicitor may be able to protect himself from liability to third parties in the event the clients refuse to follow … [his] advice.

The most unequivocal statement of the ability to limit liability through adequate disclosure is found in the New Zealand case, *Mouat v. Clark Boyce*. [[1993] 4 All. E.R. 268] In that case, the Privy Council, on appeal from the New Zealand Court of Appeal, allowed an appeal by a solicitor who had been found liable by the New Zealand Court of Appeal in circumstances where he had acted for a mother (Mrs. Mouat) who mortgaged her home (and her most significant asset) to assist her son in his business [and had also acted for the son].

[From the Judgment of Lord Jauncey Of Tullichettle in the Privy Council, at para. 2:

> In August or September 1998 Mr. R.G. Mouat wished to raise $100,000 to pay for certain alternations to his house and meet certain business expenses. Since his own house was fully mortgaged he asked his mother whether she would be prepared to mortgage her house for the required sum and upon her agreement he made preliminary arrangements for the execution by her of a mortgage as a first security over her house to secure a loan of $110,250 from Allied Mortgage Guarantee Company Limited ("AMG"). In terms of the proposed arrangements Mrs. Mouat was the mortgagor, Mr. R.G. Mouat was the guarantor and the loan was for a period of three years with interest of $4065 payable quarterly. It was part of the arrangement that Mr. R.G. Mouat would undertake primary liability for payment of the interest. In pursuance of the proposed arrangements AMG sent certain documents to Mr. R.G. Mouat's solicitor, Mr. P.M. Davis of Messrs. Meares and Williams, who was also a family friend, but he advised Mr. R.G. Mouat that it was not a matter in which his firm should properly act. Thereafter Mr. R.G. Mouat asked Mr. Boyce whether he would be prepared to act for him and his mother to which Mr. Boyce replied that he would subject to certain conditions. On 9th November 1988 Mrs. Mouat was taken by her son to Mr. Boyce's office and during the course of a meeting, …, Mrs. Mouat signed the mortgage and some ancillary documents. Mr. R.G. Mouat also signed the mortgage. In 1989 Mr. R.G. Mouat's business deteriorated and by early 1990 he was in arrears with payment of interest on his mother's

> mortgage. Later he became bankrupt with the result that Mrs. Mouat was left with a liability to repay the principal sum of $110,250 together with arrears of interest. She thereafter raised the present action against the [defendants/] appellants alleging in her statement of claim that they were in breach of contract in inter alia the following respects:
>
> > "(a) That the Defendant failed to ensure that the Plaintiff had her own independent advice in respect of the said transaction.
> >
> > (b) That the Defendant failed to refuse to act for the Plaintiff in respect of the said transaction when it was acting for the said Robert Gordon Mouat."
>
> She alleged negligence on the part of the appellants in identical respects. She further alleged that the appellants had breached their fiduciary obligations …]

The Privy Counsel found that the lawyer had absolved himself of liability, by making adequate disclosure to the parties involved:

> Since Mrs. Mouat was already aware of the consequences if her son defaulted Mr. Boyce did all that was reasonably required of him before accepting her instructions when he advised her to obtain and offered to arrange independent advice. <u>As Mrs. Mouat was fully aware of what she was doing and had rejected independent advice, there was no duty on Mr. Boyce to refuse to act for her</u>. Having accepted instructions he carried these out properly and was neither negligent nor in breach of contract in acting and continuing to act after Mrs. Mouat had rejected his suggestion that she obtain independent advice. Indeed not only did Mr. Boyce in carrying out these instructions repeat on two further occasions his advice that Mrs. Mouat should obtain independent advice but he told her in no uncertain terms that she would lose her house if Mr. Mouat defaulted. One might well ask what more he could reasonably have done.
>
> When a client in full command of his facilities and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise would impose intolerable burdens on solicitors. [(1993) 4 All E.R. 268 (P.C.), at 274 - 275 (emphasis added).]

With respect, the decision of the Privy Council appears to be harsh particularly after reading the hard-to-obtain-but-well-worth-reading reasons of the New Zealand Court of Appeal [(1991) 1 NZ ConVC: 190, 917.] Rather than focus simply on the

fact that Mrs. Mouat was advised to seek independent legal advice and knew what she was doing, the New Zealand Court of Appeal focused on the fact that the solicitor had the option of refusing to act for both Mrs. Mouat and her son and concentrated on the requirements necessary in order to obtain a client's full and informed consent to undertaking a joint retainer. In his reasons, McGechan, J.A. of the New Zealand Court of Appeal provides the following analysis of these requirements as follows:

> A solicitor should not only state facts material to the proposed double retainer, but should state material consequences of those facts, or insist upon independent advice for the same effect. I consider the solicitor should have spelt out that it was not in her interests to sign the mortgage. True, as the learned Judge remarks, such was obvious to any detached observer. However, she was not a detached observer, she was a loyal mother. The power which firm recommendations from a solicitor often have, even when they do no more than state the obvious, should not be overlooked. Like a doctor's advice, such recommendations can have condign [i.e. well- deserved] effects in forcing clients to face known realities and to act sensibly. Obviously, she was proceeding on trust and loyalty alone. The transaction from the view of her own interest was most unwise. Before she could be said to have given an informed consent to the matter proceeding on a joint retainer, the solicitor was obliged at a minimum to point out these matters, and to advise her in strong terms not to proceed. It was not sufficient merely to point out that there was a risk, unquantified, of her home being sold, and a question of independent advice. What was needed was an informed exploration of that risk and a positive recommendation to not proceed, with perhaps a little time for reflection following on. If the solicitor concerned felt unable to take such a stand (adverse to the interests of the other client, Mr. RG Mouat) in the latter's presence, he should have asked Mr. RG Mouat to leave the room temporarily and explain the matters concerned in his absence. If the solicitor felt unable to take such an attitude (adverse to Mr. RG Mouat's interests) at all, then the solicitor should have insisted the plaintiff take separate advice and declined to act for either unless and until she did so. An independent solicitor would have had no such qualms. [(1991) 1 NZ ConVC: 190, 917, at 190, 941 (emphasizes added).]

In short, it is not sufficient to advise the client that he or she should obtain independent legal advice, even if such advice is accompanied by an explanation as to the possible risks of the transaction. If the client refuses to take independent legal advice, then the lawyer only has two options: flatly refuse to act for one or both clients [the option preferred by the Mr. Mouat's former solicitor - see (1991) 1 NZ ConVC: 190, 917, at 190, 930.] or comply fully with the requirements of complete disclosure before undertaking the joint retainer.

Madsen v. Madsen

(1997), 8 C.P.C. (4th) 290 (Ont. Gen. Div.), McCartney J.

After the parties separated the wife's lawyer attempted to help the parties resolve their family law dispute. When the husband refused to sign the separation agreement prepared by the lawyer, the lawyer advised the husband that he would have to get his own lawyer. Shortly thereafter, the wife's lawyer started an action to deal with the issues that he had attempted to resolve. The husband had given the lawyer oral information and documentation; the husband's accountant also supplied the lawyer with information. The husband moved to have the wife's lawyer removed from the record.

Held - The motion was allowed and the wife's lawyer was ordered removed from the record.

The wife's lawyer failed to rebut the presumption that he possessed confidential information. He had received a considerable amount of information from the husband. On the basis of that information, the lawyer had been satisfied that he could prepare a net family property statement and a draft separation agreement dealing with property. To state that none of the information should be considered confidential because it would have eventually been disclosed was not a sufficient rebuttal of the presumption that he possessed confidential information.

4.5.2 Changing partners

Fisher v. Fisher

(1986), 76 N.S.R. (2d) 326 (C.A.), Macdonald J.A. for the Court

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Manual Editor's Note: The following is Bateman J.A.'s reference to *Fisher v. Fisher*, in *Montreal Trust Co. of Canada v. Basinview Village Ltd.* (1995), 39 C.P.C. (3d) 200 (N.S.C.A.).

In *Fisher v. Fisher* (1986), 76 N.S.R. (2d) 326 (C.A.), the court commented upon a solicitor's duty not to act against the former client of an associate, in the same matter. The facts are captured in the headnote:

> The appellant had contacted a barrister with respect to custody and other matrimonial matters; he had arranged for her to consult one of his associates who gave her advice and whose firm subsequently billed her for services. She later retained other counsel and eventually found that her husband, the respondent, had retained the barrister she had originally contacted.

In determining that the solicitor was disqualified from continuing to act Macdonald J.A., for the court, said at p. 330:

> In our opinion, it is no excuse for the barrister to say that, since he was not aware of what Mrs. Fisher told his associate, he should be allowed to continue to act against her. The knowledge of the associate surely must be deemed to be also the knowledge of the barrister. In any event, once he was made aware that Mrs. Fisher had been advised by his associate on the child custody issue, the barrister should have immediately withdrawn from the case.
>
> In our view, the barrister had no other choice. There is no possible justification we can see in the circumstances here present that would permit him to act against Mrs. Fisher on the matter of child custody or any related issue when he knew that she had been previously advised on those very matters by his associate.
>
> In our opinion, the barrister committed a grave error in judgment in not withdrawing from the case when he first became aware of his associate's previous involvement on a solicitor-client basis with Mrs. Fisher. …

MacDonald Estate v. Martin

(1991), 77 D.L.R. (4th) 249 (S.C.C.), per Sopinka J. (for the majority), at p. 267

Typically, these cases require two questions to be answered: (a) Did the lawyer receive confidential information attributable to a solicitor-and-client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

In answering the first question, the court is confronted with a dilemma. In order to explore the matter in depth may require the very confidential information for which protection is sought to be revealed. This would have the effect of defeating the whole purpose of the application. American courts have solved this dilemma by means of the "substantial relationship" test. Once a "substantial relationship" is shown, there is an irrebuttable presumption that confidential information was imparted to the lawyer. In my opinion, this test is too rigid. There may be cases in which it is established beyond any reasonable doubt that no confidential information relevant to the current matter was disclosed. One example is where the applicant client admits on cross-examination that this is the case. This would not avail in the face of an irrebuttable presumption. In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. None the less, I am of the opinion that the door should not be shut completely on a solicitor who wished to discharge this heavy burden.

The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.

Archer v. Archer

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

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 the 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 [while representing the husband] 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 – The motion was 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 "confidentiality 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.

R. v. G.K.

[1994] S. J. No. 612, 22 November 1994, Gerein J.,

Text (paras. 1-2): The accused stands charged that between December 11 and 12, 1993, at Saskatoon, Saskatchewan, he did for a sexual purpose touch a part of the body of J.B-K., a person under the age of fourteen, contrary to s.151 of the Criminal Code, R.S.C. 1985, c. C-46. The Crown now brings this application wherein it seeks a declaration that counsel for the accused is disqualified to act for the accused.

The complainant is seven years of age, having been born June 2, 1987, and the application is grounded in the concerns of the mother of the complainant. Her affidavit is the only material filed in support of the application and in the relevant portions thereof she states as follows:

. . .

3. That the Accused, G.K. and I had a personal relationship and he is the father of the Complainant.

4. That I, . . . was called at the preliminary hearing in this matter and have received a Subpoena to testify as a witness for the Crown at trial.

5. That at the preliminary hearing the Accused was represented by Mr. James Neumeier and I have been advised he intends to represent the Accused at the upcoming trial.

6. That in 1986, I retained Mr. James Neumeier to represent me with respect to a claim made against me by Saskatchewan Government Insurance.

7. That in May, 1986, I also retained Mr. James Neumeier to represent me with respect to a potential medical negligence action against a Saskatoon physician.

8. That in 1987, Mr. James Neumeier represented me with respect to an Infants Act application against the accused, G.F.K. That application dealt with the custody, access and maintenance of the Complainant.

9. That in 1987, I instructed Mr. James Neumeier to draft a will in which specific provisions are made concerning the custody of the Complainant. That this will is retained in Mr. Neumeier's office.

10. That I am concerned that Mr. James Neumeier, while acting as my solicitor, has been made privy to confidential information concerning my relationship with the accused which may be used in conducting the defence of the accused.

. . .

13. At the Preliminary hearing in this matter Mr. Neumeier conducted a cross-examination of me. I believe he will do the same at the trial. I thing it is unfair that my lawyer can now act against my interests and those of the Complainant.

14. That I make this affidavit in support of an application to have Mr. Neumeier declared to be in a conflict of interest and for an order he be removed as counsel for the Accused.

No material has been filed on behalf of the accused or his counsel and I therefore accept the facts as set out above to be true.

Held - The application was dismissed.

Headnote: No use of confidential information would occur. The accused was charged with a serious criminal offence and his choice of counsel should be respected as far as possible. Six years had elapsed since the lawyer had acted for the child's mother.

Michaluk v. National Bank of Canada

(1995), 39 C. P.C. (3d) 214 (N.S.S.C.), MacLellan J.
(as corrected by MacLellan J.'s erratum on 15 January 1996)

In the 1980s, the plaintiff retained lawyer S of the law firm BM to negotiate a cohabitation agreement with her common law husband. S and other members of BM had previously done work for the plaintiff. In the cohabitation agreement, the parties clearly set out how they intended to deal with their bank accounts and investments. They sought to ensure that the investments made from each party's independent account would remain the asset of that party. In 1989, the plaintiff removed $70,000 from her personal account and invested in a five-year investment certificate purchased from the defendant. The certificate was issued in both parties' names. The certificate was used as security for a personal line of credit up to $45,000 [obtained from the Bank].

Prior to obtaining the personal line of credit, the parties had applied [apparently through the Bank] for life insurance to provide for the payment of the

outstanding amount of the personal line of credit in the event of the death of either party. From September 1989 until December 1993, the personal line of credit was charged with insurance premiums to cover the life insurance. The common law husband died in December 1993. After the common law husband died, it was disclosed that the application for life insurance had been rejected and that he was not covered by insurance. The bank then attached the funds in the investment certificate to satisfy the debit balance on the personal line of credit.

The plaintiff sued for the return of $44,231 and alleged that she should have been advised that the life insurance had been rejected. The bank retained solicitor R of the law firm BM and defended on the basis that neither party had advised the bank that their completion of the loan depended on the common law husband's securing insurance.

The plaintiff applied for an order that the law firm BM was disqualified from representing the bank by reason of a conflict of interest.

Held - The application was granted.

The lawyer should be removed as solicitor for the bank because of a conflict of interest as a result of the fact that his firm had acted for the plaintiff on other matters. The cohabitation agreement was sufficiently related to the matter now before the court such that the plaintiff might fear that information that she had provided in relation to that transaction could be imparted to the lawyer now acting against her on this matter. The cohabitation agreement specifically dealt with concerns that the parties had about ensuring that their specific assets were clearly identified and concerns about protecting each of them against a possible claim by the other if the relationship ended. The plaintiff altered her position when she transferred money from her own account to the investment certificate in both names. The origin of the funds from the investment certificate would be relevant as the plaintiff attempted to show her intentions at the time she purchased the investment certificate and agreed to have it used as security for the personal line of credit. If that became an issue, there would be a clear conflict because S had acted for the plaintiff at the time of signing the cohabitation agreement. S deposed in an affidavit that, although he had no specific recollection of the meeting and there were no minutes from the meeting, he would have discussed with the plaintiff her financial affairs, personal property, financial resources and her motivation in relation to her own assets and financial future. The action against the bank was sufficiently related to the cohabitation agreement to constitute a possible conflict.

Morsky v. Morsky

(1996), 6 C.P.C. (4th) 230 (Sask. Q.B.), Hunter J.

The parties were involved in divorce proceedings. The husband's solicitor, P., conducted examination for discovery of the wife and was privy to confidential information regarding the corporate interests of the husband and negotiations on matters relating to property, maintenance, custody and access. The husband terminated her services and P. became a contract lawyer with another firm eighteen months later. A … solicitor at the firm [to which P. transferred] K., was co-counsel for the wife in the proceedings. [The firm to which P. transferred had offices in more than one city.] P. was located in a different city from K. and could not access any computer files from K.'s city unless they were transmitted to her. P. also was not sharing in the billings generated by K.'s work on the file.

The husband's new solicitors wrote to K. twice, informing her of the conflict and requesting that she withdraw as counsel. Five weeks after she first became aware of the conflict, K. distributed a memorandum to the firm which prohibited all staff at the firm from discussing the issues and status of the lawsuit or any prior representation of the family or corporate holdings of the husband. In addition, P. was barred from accessing the files relating to the lawsuit and staff were prohibited from assisting her in any requests for information relating to the lawsuit. The husband applied for an order disqualifying K.'s firm from acting for the wife.

Held - The application was allowed.

The test to be applied is whether a reasonably informed person should be satisfied that no use of confidential information would occur. In applying the test, the court needs to determine whether the lawyer received confidential information from the solicitor-client relationship and whether it would be used to the prejudice of the client. The firm had the onus of proving that P. had not passed on any confidential information to it. If the onus was not met, there was a presumption that it had received such information from P., and the firm's disqualification would be automatic. The question which needed to be addressed was whether, in the circumstances, the screening measures ensured that no disclosure would occur and satisfied the evidentiary burden imposed on the law firm. No measures were taken at the time P. joined the firm to ensure confidentiality of former client information. The firm was put on notice as to a conflict very early after P. joined. The time period [28 days] before taking appropriate steps or making sufficient effort to preserve the confidentiality of the husband's confidential affairs was completely inadequate in the circumstances [in the sense of being too long]. Consequently, the presumption was not rebutted and the firm was disqualified.

Shewchuk v. Shewchuk

[1996], M.J. No. 169, 19 March 1996, Duncan J.

Text (paras. 1-5)**:** This a motion by the respondent for an order that the solicitor of record for the petitioner be removed because of conflict of interest.

The basis for the motion is that Mr. W.R. Johnston, and some members of the Hunt, Miller law firm acted for the respondent in matters related to these proceedings, and Mr. Johnston is now acting for the respondent's wife against the respondent.

By way of affidavit, the respondent says Johnston is in a conflict of interest because he has "intimate and confidential" knowledge of his financial holdings as a result of having acted as his solicitor in the acquisition of those assets, and the organization of his financial affairs. In particular, he alleges that the Hunt, Miller firm acted for himself and his wife in the acquisition of approximately three quarter sections of land on which the marital home is situated, and these assets are now primary assets in the current litigation between husband and wife. In addition, a member or members of the Hunt, Miller firm acted for him in financial dealings with one Howell and one Frampton, and prepared a partnership agreement between the respondent and two other parties regarding a driving range. In fact, the respondent alleges that Hunt, Miller has been the law firm which he has dealt with for all of his personal and business transactions. He has had confidential communications with Mr. Johnston and Hunt, Miller about assets which are now the subject of litigation between the parties.

He maintains also that at the time of a divorce from his first wife, Mr. R.W. Singleton of the then firm of Sheldon, Midwinter, acted for him on the divorce and Mr. Johnston was of the same firm. At that time, Singleton represented him on the division of marital property and some of that marital property is now marital property in his present dispute. Also that Johnston acted for him in a custody dispute with his first wife and child support is an issue in these proceedings.

The only evidence relevant to this contest is the respondent's affidavit sworn on November 29, 1995 which, has attached thereto as an exhibit, a letter from Mr. Johnston to the petitioner's solicitor dated November 16, 1995 explaining his position. Mr. Johnston indicates that he is confident that there is no conflict, and that this is simply an attempt by the respondent to continue to delay the inevitable.

Held - Motion allowed.

Headnote: The evidence established clearly that the solicitors had confidential information from their previous dealings with the respondent. A lawyer who had relevant confidential information could not act against his client or former client. The continued appearance of the solicitors in this case would create at least the appearance of impropriety and jeopardize the integrity of the judicial system.

Rosin v. MacPhail

[1997] W.D.F.L. No. 177, B.C. C.A., Hinkson, Esson and Rowles JJ.A.
07 January 1997.

The wife lived with her husband until she began to live with the defendant. The marriage ended in divorce. A solicitor acted for the wife who maintained an active social relationship with her and the defendant. Ten years later, the wife brought an action [for a declaration of constructive trust] against the defendant, concerning a residential property that was acquired during the ten year period when the defendant and the wife, although not married, lived together. The solicitor represented the defendant. The [plaintiff] wife applied for an order to restrain the solicitor from continuing to act against her. The application was dismissed and the wife appealed.

Held - The appeal was allowed; the restraining order was granted.

This was a case where the overriding concern was that of maintaining the high standards of the profession and the integrity of the system. The fundamental issue was whether the previous retainer was sufficiently related to the solicitor's present retainer by the defendant. If it was, it is inferred that confidential information was imparted unless the solicitor discharges the burden of satisfying the court that no relevant information was imparted. The two retainers were different in important aspects. But they were part of a connection which was sufficient to establish a realistic possibility of mischief. The earlier case arose out of the problems between the plaintiff and her husband which arose as a result of the relationship then existing between the [plaintiff] wife and the defendant. This action arose out of the breakup of that relationship. The solicitor was retained by the plaintiff [wife] at the insistence of the defendant [after she left her husband for the defendant]. In [then] representing her, he necessarily became privy to confidential information, including information as to her financial circumstances. Those circumstances may prove not to be relevant to the present litigation but, having regard to the kind of issues customarily explored in constructive trust proceedings, there clearly was a possibility that they would. Were the solicitor to act through discovery and trial, it is possible, indeed likely, that his memory would be jogged and that he would then recall other things that were said, some of which might be adverse to the plaintiff. The wife established a sufficient relationship between the two matters. The lapse of ten years was of relatively little significance. The solicitor did not meet the heavy burden that no confidential information was imparted, in the course of the first retainer, which could be relevant in the present action. It was reasonable to assume that the discretion to restrain a lawyer from acting may be applied more readily in the context of family law then in commercial cases.

Card v. Card

[1997] N.S.J. No. 180 (N.S. S.C.), Haliburton J.

Headnote: Husband and wife jointly consulted solicitor Adams with respect to preparation of Joint Wills, Enduring Power of Attorney, and a transfer of assents between them. Subsequently, parties separate. Wife commences divorce proceedings. The husband is represented by the same solicitor Adams. Issues as to whether confidential information was actually disclosed and whether Counsel will necessarily be a witness.

Held - Application allowed.

Text (paras. 25-26)**:** The parties before me are, or at least were, at the time of separation, intimately familiar with the financial and business affairs of the other. This application, then, does not raise primarily questions of confidential disclosure. Rather, it calls into play the obligation of the Court to ensure "the integrity of the judicial system" as discussed by Cory, J. in Martin v. Gray [often also cited as *MacDonald Estate v. Martin*]. Proceedings by way of discoveries, by exchange of financial information, and by the production of documents would require these parties to disclose all relevant material in any event. The issue returns to one of optics and perceptions. Mrs. Card, as the wife of the Respondent, opened up her confidences to Mr. Adams, relying upon him for counsel and advice respecting the very issues which are now in dispute. Whether the duration of that relationship was only one conference or several conferences spread over a period of months, the principle is not altered. Would the appearance of the fairness and objectivity of the judicial process be affected in her eyes when she faces cross-examination by that lawyer with respect to those issues? Would a reasonably informed member of the public, knowing of the lawyer's advice to both parties, have diminished confidence in the judicial process and/or "that no use of confidential information would occur"?

The answer must be in the negative. An order will issue, if necessary, removing Mr. Adams from representing Mr. Card. I think it appropriate that the costs be costs in the cause in this matter.

Antoniewicz v. Antoniewicz

[1997] O.J. No. 3650 (Ont. Gen. Div.), Kruzick J.,
at paras. 2-5; 12-19.

Text: In December 1996 the husband retained the services of Nicole Tellier to act as counsel on his behalf. He informed her that Ms. Mossip had acted for his wife from 1988 to approximately 1990. Ms. Tellier was employed as an associate of Ms. Mossip at the time. Subsequently Ms. Tellier became a partner of Ms. Mossip's. That partnership ended some three years ago. Each of them has their own practice. Ms. Tellier very properly wrote to the solicitor who was acting on the wife's behalf. The solicitor was not as yet solicitor of record. In the correspondence dated December 19, 1996 Ms. Tellier clearly raised the issue of conflict. Failing response Ms. Tellier

indicated in her letter that she would deem any objection waived. No response was received.

Ms. Tellier sent four subsequent letters to which the solicitor did not respond. Ms. Teller then served him with a motion. The wife then responded with the objection of Ms. Tellier acting for her husband and alleged conflict.

The wife then changed counsel and asked that the motion be adjourned. Ms. Tellier for the husband consented to the adjournment.

The wife consulted with new counsel who again was not solicitor of record. He clearly informed Ms. Tellier verbally that he would not raise the issue of conflict. He confirmed this in correspondence faxed March 17, 1997 and in a letter of March 10, 1997 (the letter did not reach Ms. Tellier until April). On March 20, 1997 the wife's counsel wrote to Ms. Tellier informing her that "he had misled" Ms. Tellier and that his client objected to Ms. Tellier representing her husband. Ms. Tellier takes the position that the wife waived raising the issue of conflict. If she did not, Ms. Tellier's position is that no conflict exists.

Held – [No conflict found]

. . . .

In MacDonald Estate v. Martin, … [[1990] 3 S.C.R. 1235], at p. 1260 S.C.R. Sopinka J. states:

> In my opinion, once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfied the court that no information was imparted which would be relevant. This will be a difficult burden to discharge.

In my view, so far as Ms. Tellier is concerned, this difficult burden has been discharged. Ms. Mossip and Ms. Tellier worked together. I am, however, mindful that there has been a significant passage of time since Ms. Mossip's retainer by the wife (almost seven years ago). I am satisfied that Ms. Tellier had nothing to do with the file and therefore received no information to prejudice the wife's position. Ms. Tellier and Ms. Mossip ended their partnership arrangement more than three years ago. From my review of the facts, I find that Ms. Tellier possesses no confidential information. If she did, which I do not find, the second question is whether the confidential information could be misused.

In MacDonald Estate v. Martin, supra, at p. 1262 S.C.R., Sopinka J. states:

> There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and

> convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measure would include institutional mechanisms such as Chinese walls and codes of silence.

From the evidence put before me, I am satisfied that no disclosure of confidential information occurred at the time Ms. Tellier and Ms. Mossip practiced together. I am also satisfied that since this issue arose, there has been no disclosure of information which would serve to prejudice the petitioner's position.

In MacDonald Estate v. Martin, supra, at p. 1260 S.C.R. Sopinka J., before formulating the two questions to be answered, states unequivocally that the overriding policy that applies is that the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur.

Ms. Tellier who was aware of the conflict issue raised it with the two counsel. Ms. Tellier has made every effort to flush out the issue over the past 8 months. The first counsel completely ignored her correspondence. Counsel that followed clearly indicated that conflict was not an issue. He then got other instructions. The wife then retained other counsel.

. . . .

…. Seven years have passed since Ms. Mossip acted for the petitioner. Since then the petitioner has been represented by at lease three other lawyers. Ms. Tellier and Ms. Mossip have had distinct and separate practices for more than 3 years. Ms. Tellier has no access to Ms. Mossip's files.

Have reviewed the facts of the case before me, I have considered the question of the appearance of justice in the sense that justice must seem to be done. I have considered the public's confidence in the Courts balanced against disqualifying the lawyer in these circumstances. Having considered all the facts of the case before me, I concluded … that a reasonable person informed of the fact would view the application to remove counsel as nothing more than a "tactical maneuver, rather than a genuine concern for the preservation of confidentiality and the integrity of the legal profession".

Children's Aid Society of the City of Kingston and the County of Frontenac v. D.S.

[1997] O.J. No. 3699 (Ont. Gen. Div.), Dunbar J.

Headnote: The local children's aid society had its own in-house lawyer but, from time to time, when she was unavailable, the society hired members of the local bar on a contract basis to cover certain proceedings, choosing from amongst lawyers who were very experienced in child welfare law. The lawyer [Plain] who had been appointed as the legal representative of the child in this particular case was a private practitioner who had, on occasion, been retained on contract by the society in other cases that did not involve the respondent (the child's paternal grandmother).

On the very eve of the child protection hearing, the [respondent] grandmother made a motion, however, to have this particular lawyer removed from the record, precisely because he had represented the society's interests on isolated occasions in the past and she raised several grounds of objection for which she was unable to furnish any precedent.

Held - Grandmother's motion dismissed; costs of the motion to the society.

Text (paras. 21-26)**:** The traditional role of counsel is to be an advocate for a party's position. That tradition has included advocacy on behalf of many disparate parties and interests without impairment of the quality of representation. There has been no law and no facts cited here to indicate that that is not possible in this case.

There is no confidential material to be acquired by counsel for the child from the society as a result of his role as one of its contract counsel that would not be available to any party in the proceeding in the ordinary course. Given the policy and procedures of the society and the philosophy governing child welfare cases of full disclosure, it has not been shown to be possible that any confidential information about the respondent would become available to the Children's Lawyer as a result of his other relationship with the society that would not be available to him in his role as advocate for K.K.

There is no evidence that Mr. Plain has been involved in this case as society's counsel at any time.

The Children's Lawyer, Mr. Plain, has acted on the child's behalf since 1991. The matter is on the trial list and should be reached shortly on the application for Crown wardship. The child has many emotional and other problems according to the society and he has had many professionals involved in his short life. To change counsel for him on the eve of trial would be at the least unfair to him and perhaps would delay permanent arrangements for his care. To make such an order would be to prejudice the interests of the child.

Although the respondent's perception of some unfairness in the occasional retainer of counsel by the society may be real to her, there is no basis in law for his removal.

The motion is dismissed. The society is entitled to costs as successful party. The issue of quantum may be addressed by motion on notice or, in the alternative, reserved to the trial judge at the option of the society.

Black-Kostuk v. Kostuk

[1997] S.J. No. 474 (Sask. Q.B. [Fam. Law Div.]), Wilkinson J.,
at paras. 1-5; 8; 11; 18-19; 21.

Text: This is an application by the husband disqualifying the wife's counsel from acting in a dispute involving custody, access, maintenance and division of matrimonial property.

In mid-March 1997, the wife's lawyer joined the law firm of MacDermid Lamarsh. Mr. Bitz, a solicitor in that firm had done legal work for the husband between 1980 and 1985. He administered the estate of the husband's first wife, and the firm incorporated two companies for the husband: Concept 2 Consultants Limited and Irata Holdings Limited.

The husband and the current wife were married on November 14, 1985 and separated August 12, 1995. The wife's proceedings were commenced on August 14, 1995. The two companies, Concept 2 and Irate Holdings and the assets from the first wife's estate are the subject matter of the pending matrimonial property division.

Mr. Bitz has virtually no recollection of the estate of the first wife, other than that it was "large". He has no recollection of incorporating the two companies, and most of the work was accomplished by a paralegal who departed the firm five years ago. The minute books and corporate files were released to the husband in or about July, 1986 and no further work was done by MacDermid Lamarsh after that date.

The conflict, in the husband's words, is this: the assets from the first wife's estate are in dispute in the pending action as being "traceable or divisible because of their current value, as opposed to their alleged former value at the time they came into my possession. It was MacDermid Lamarsh law firm that established for me those values of my first wife's assets; such values being the subject of this action. MacDermid Lamarsh law firm now acts against me." The husband says that MacDermid Lamarsh also acted for him and several of his corporate entities which are the subject of alleged property division in this action.

. . . .

These matters, which have significance in the current matrimonial property proceedings, all have their genesis in the time period when MacDermid Lamarsh represented the husband. They are matters which the husband has put directly to issue.

. . . .

In the circumstances of this case there was a previous solicitor-client relationship between the husband and the MacDermid Lamarsh firm that is sufficiently related to the retainer from which it is sought to remove them. I must therefore infer that confidential information was imparted, unless the solicitor satisfies me that no such information was imparted over the five or six year period in question. As has been noted, this is a difficult burden to discharge. Mr. Bitz has virtually no recollection of these matters and that is understandable given the time that has elapsed and the nature of the work involved. But the absence of recollection does not exclude the possibility that such information passed. Memories can be refreshed.

. . . .

…, I conclude that the MacDermid Lamarsh firm is disqualified from representing the wife in these proceedings.

The wife's counsel suggested that if I reached that conclusion, her client should be compensated for legal work performed in the last two months, given the husband's delay in bringing the application. ….

. . . .

…. In these circumstances I do not deem it appropriate to reimburse the wife for any costs of legal work undertaken.

4.5.3 Retainer and authority

(a) Agreeing to settlement

[See: Part 4.5.5: Representation]

(b) Receiving gifts

[No Entry]

4.5.4 Confidentiality and privilege

(a) Generally

Parley, Lewis & Hofstein, David**, "Ethics Update"**

American Bar Association [Section on Family Law], *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), pp. 824-825.

In Matter of Mendel, 897 P.2d 68 (Alaska 1995), the Alaskan Supreme Court confronted some of the issues related to attorneys having made disclosures of confidential information where their clients have hidden themselves and their children in violation of court custody decrees. The Mendel opinion involved contempt findings against the absconding parent's attorney for not answering certain questions and not providing documents at a deposition of the attorney.

Several questions relating to statements made to the attorney by the client, or a representative of the client, concerning instructions to commence litigation with the father, were deemed irrelevant to finding the children and were also privileged communications. As there was nothing about the issues that suggested the lawyer and client were engaged in fraud in bringing the actions the "fraud exception" to the attorney-client privilege did not apply. The trial court was also faulted for not having accepted the lawyer's invitation to make an in camera inspection of her billing records, which not only admittedly contained names of possible other sources of information about the mother's location but which also contained information claimed to be privileged and work-product. The Supreme Court thought the trial court should have reviewed the redacted the records.

[See: Part 4.5.8(b): Oral Evidence.]

(b) Counselling

[No Entry]

(c) Negotiations/"Without Prejudice" communications

[No Entry]

(d) Third Party reports

[No Entry]

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

[No Entry]

(f) Involuntary Waiver

[No Entry]

(g) Voluntary Waiver

[No Entry]

4.5.5 Representation

Browne, Thomas L. **"The Lawyer's Liability for Settlements Made by the Client"**

1996 Symposium Issue of the Professional Lawyer (American Bar Association Centre for Professional Responsibility, Chicago, 1996), at pp. 139-147.

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A good settlement is often defined as one in which all parties walk away unhappy. While one can take issue with this definition, no one can challenge the fact that settlements involve compromise – i.e., acceptance of less than 100% of the ideal.

The implication of this to lawyers is obvious. A client who accepts a settlement is apt to feel some measure of disappointment, and a disappointed client is often an angry client. Who better to blame than the lawyer who did not deliver 100 % satisfaction?

The recent barrage of actions against lawyers arising out of settlements should come as no surprise to anyone. Perhaps, what is surprising is that it did not occur earlier. Certainly, the concept of lawyer responsibility for settlements is not new. The initial cases, however, arose in a different context from what we are seeing today. Lawyers were sued for *failure* to settle when the opportunity to settle presented itself. Generally speaking, this involved either a failure to convey an offer of settlement that would have been accepted or a failure to accept an offer that was in fact made.

Conceptually, cases based on a failure to settle are not particularly troublesome. After all, lawyers have a clear duty to keep their clients advised of material developments (such as receipt of an offer of settlement) and to follow the legitimate orders of their clients (such as to accept or convey an offer of settlement). Only rarely do these duties conflict with other responsibilities or concerns. They do not require the exercise of judgment, and when they are breached, the fact and amount of damage is easy to discern. One need only measure the ultimate result against what would have been had the offer been conveyed or accepted as the case may be.

An action based upon a settlement (as opposed to failure to settle), however, presents an array of serious problems. To begin with, any action that challenges the propriety of a settlement clashes at least to some extent with public policy that favors settlements. Because a lawyer's decision to encourage settlement involves professional judgment, such actions may also conflict with typical common law notions of lawyer judgmental immunity for the legitimate, honest exercise of one's

judgment. Issues of proximate cause are murky to say the least, and damages can be difficult to measure.

Case law concerning the lawyer's liability for settlements is still in its formative stages. Such actions, however, almost always are based on one of two premises: first, that some act or omission of the lawyer jeopardized or terminated the client's legal interest, and therefore the client had no choice but to settle on undesirable terms; or second, that the client's decision to settle was based upon incomplete or erroneous information for which the lawyer is responsible.

At first glance these theories appear innocent enough, but without significant limitations, the situation is unmanageable. If settlements are to be encouraged, as they must be, lawyers need protection. This is particularly true with clients who are not burdened by ordinary notions of good faith or other matters of the conscience.

There is now a substantial body of case law which, to a significant extent, has defined the parameters of lawyer liability for client settlements. Nevertheless, many issues remain unresolved as the courts continue to struggle with standards of liability, defenses and issues of proximate cause, measure of damages, and evidence. The problem is finding a proper balance between competing interests – the need to encourage voluntary resolution of controversies through settlement versus the lawyer's accountability for substandard legal services.

. . . .

The case of *Barry v. Liddle, O'Connor, Finkelstein & Robinson* [No 93 CIV. 8707, 1995 WL 702381 (S.D.N.Y. Nov. 28, 1995)] probably represents the outside limits to which a lawyer's liability for settlement has been tested. In *Barry*, the plaintiff alleged that he had retained the defendant law firm as legal counsel in connection with his claim against a debtor in bankruptcy. The law firm allegedly advised him that the bankruptcy filing had no effect on the six year statute of limitations governing contract claims. Because the firm's advice was wrong, the plaintiff did not file a timely proof of claim and his claim was thereby extinguished. Accordingly, the plaintiff alleged that he had no choice but to settle his $2,000,000 claim against the debtor for a meager $25,000.

The complaint was most noteworthy not for what it alleged, but for what it did not allege. The plaintiff made no attempt to allege or prove that "but for" his lawyer's negligence, he would have prevailed in the bankruptcy action. Instead, he claimed only a "lost opportunity" to sue which he argued had a value apart from the payment of the claim itself.

The court noted that in the absence of allegations that the outcome of the litigation would have been favorable, "the only tangible monetary value inherent in the ability to go forward with a lawsuit appears to be that of inducing a settlement." [*Id.* at 3].

After noting that compensatory damages must be proved with a reasonable degree of certainly and cannot be based on speculation or conjecture, the court held that:

> Were this case to proceed to trial, a jury would be forced to employ such techniques in order to grant Barry recovery…. Without offering any sort of proof, Barry's conclusory allegation that he may have been able to obtain a higher settlement is a matter of pure conjecture and, as such, would be insufficient to support a verdict in his favor. This problem seems inherent in such a 'lost opportunity' claim, because the exact value of a lost claim remains uncertain without allegations or proof of what the outcome of litigation would have been absent the alleged malpractice. In the absence of either allegation or proof, the claim is subject to summary disposition [*Id.* at 4.].

Barry is significant in that it represents the lawyer's first line of defense. No client will be permitted to argue that a claim has a higher settlement value than that obtained and for which the lawyer is responsible. A jury simply will not be permitted to guess what settlement might have been extracted from the opposing party. In other words, the adequacy of a settlement can only be measured against the ultimate merits of the settled matter.

In *Baldridge v. Lacks*, [883 S.W.2d 947 (Mo. App. E.D. 1994)]. the court reached a similar conclusion but in a different factual context. Whereas in *Barry* the plaintiff claimed that he need not prove the merits of the underlying matter, in *Baldridge* it was the defendant lawyers who objected to evidence of the merits of the underlying matter. In *Baldridge*, the plaintiff alleged that the defendant lawyers negligently advised her to enter into a separation agreement with her husband without first having fully and adequately assessed the nature and extent of the marital estate. The action apparently was brought on by the incredibly poor taste of her ex-husband who informed her that she had agreed to a bad settlement and could have recovered much more.

The defendant lawyer's contended that they were entitled to a directed verdict because there was no expert testimony that the settlement was unreasonable under the circumstances. The defendants acknowledged that in the unusual case of malpractice, the plaintiff must prove that but for the lawyer's negligence, the plaintiff would have been successful in the underlying matter. They argued, however, that the traditional standard does not fit where the plaintiff challenges legal advice given in connection with settlement of the underlying matter. According to the defendants, such evidence is speculative when the case is settled, and therefore, the court erred when it allowed evidence of what the plaintiff would have recovered had the case been tried. Instead, the defendants argued the plaintiff should have put on expert testimony that the settlement was unreasonable because such testimony is not speculative.

In affirming judgment in favor of the plaintiff, the court held that it was not necessary for the plaintiff to elicit expert testimony that the settlement was unreasonable. Furthermore, the court held that expert testimony as to what the

plaintiff would have received had the underlying action been tried was both proper and sufficient.

Insofar as *Baldridge* holds that the plaintiff must prove success at trial of the underlying case, it is consistent with the overwhelming weight of legal authority. In other respects, however, the holding in *Baldridge* is somewhat ambiguous and perhaps even gives cause for concern. This is particularly true with respect to the scope of permissible expert testimony.

While *Baldridge* holds that the plaintiff need not offer expert testimony on reasonableness of the settlement, it does not state whether it would have allowed such testimony if offered. That, of course, is a very serious issue.

Moreover, the *Baldridge* court did allow expert testimony as to what the plaintiff would have received had the underlying action been tried. Other courts would not permit such expert testimony. One of the attributes of a legal malpractice case is that the underlying matter can [in effect be "tried"] … . Evidence that would be admissible in the underlying case can be offered in the legal malpractice case. Likewise, the jury can be instructed just as if it were trying the underlying matter in the first instance. By allowing expert testimony as to the ultimate outcome, the court in *Baldridge* may, in effect, have allowed pure speculation.

In what is described as a case of first impression, the court in *Prande v. Bell* [660 A.2d 1055 (Md. App. 1995)] was asked to decide whether an attorney may be held liable for malpractice for recommending an allegedly inadequate settlement of a personal injury claim entered into by the client. The facts are somewhat involved, but the gist of the matter is that the plaintiff retained the defendant lawyer in connection with two automobile accidents in which she was involved. She gave inconsistent testimony in those cases as to the nature, extent and cause of her injuries. Her lawyer then recommended settlement of both actions for sums significantly under her special damages, and she agreed to those settlements. She later sued her lawyer for malpractice claiming that the settlements were grossly inadequate.

The trial court dismissed the action on the basis that her voluntary settlement collaterally estopped her from bringing the action. The appellate court, however, held that collateral estopped would not apply inasmuch as the plaintiff never had an opportunity to challenge the adequacy of her legal representation. The court further rejected the defendant lawyer's contention that no action would lie unless the plaintiff could show she was fraudulently induced to settle the original action.

The court distinguished the case from other types of legal malpractice where the conduct of the lawyer clearly affected the chances of winning such as a blown statute of limitations. Rather, as the court noted, the case before it "involves a judgment call …." [*Id.* at 1065]. As such, the decision of whether or not to recommend a settlement involves elements that are mostly subjective in nature and not easy to quantify. Furthermore, since these elements

> invoke the lawyer's overall knowledge and experience, which obviously differ from one lawyer to another, … there will, of necessity, be a range for honest differences of opinion in making settlement recommendations. A recommendation to settle or not to settle on particular terms is not malpractice simply because another lawyer, or even many other lawyers, would not have made the same recommendation under the alleged circumstances [*Id.*]

Thus, the court found that mere allegations of negligence alone were insufficient. As the court stated:

> [W]e hold that in order to state a cause of action for legal malpractice based on a recommendation that a case be, or not be, settled, the plaintiff must specifically allege that the attorney's recommendation in regard to settlement was one that no reasonable attorney, having undertaken a reasonable investigation into the facts and law as would be appropriate under the circumstances, and with knowledge of the same facts, would have made [*Id.*].

The court allowed the plaintiff an opportunity to replead provided she could allege "those facts that would normally be testified to by an expert, that is, that the attorney's recommendation of settlement is one that no reasonable attorney … would have recommended …." [*Id.*]

The approach suggest in *Prande* has considerable logic behind it. Most states recognize some form of judgmental immunity which protects lawyers from liability arising out of an honest exercise of legal judgment. The decision to recommend settlement ordinarily is an exercise in legal judgment; however, if no other lawyer would support that recommendation, the matter would seem to fall outside the parameters of one requiring the exercise of judgment. In other words, it would be much like a decision to file an action within the statute of limitations. Judgment is not involved because the situation allows only one response.

The *Prande* court obviously would require expert legal testimony as to whether the settlement recommendation was proper. In fact, it goes so far as to say that this is "normally" what would be done. Other courts, however, would not be so casual in allowing such expert testimony. In fact, as noted above, the court in *Baldridge v. Lacks* did not even believe expert testimony on the subject of reasonableness was necessary to prove or disprove a legal malpractice case based on a settlement.

While the standard of liability in *Prande* (no other lawyer would make the same recommendation) has logic behind it, it is not without significant drawbacks. In particular, the proofs required are problematic.

In order to try a case under the rule in *Prande*, legal experts must give opinions on probable verdict, verdict range, settlement range, and other subjective testimony concerning value. That type of expert testimony ordinarily is not permitted in a legal

malpractice trial because the jury does not require the "help" of some paid expert to determine what is or is not a proper verdict. In short, the price paid for following the rule in *Prande* is to allow expert testimony on the issue of value. Such testimony, no matter how much skill or experience is behind it, is subjective and in some measure speculative. It is not what is "normally" allowed. Rather, it is the type of expert testimony that legal malpractice defense lawyers fight tooth and nail to exclude, and usually with great success.

The subject of legal expert testimony also arose in *Williams v. Preman* [911 S.W. 2d 288 (Mo. Ct. App. 1995)] although in a different context. Unlike *Prande*, which involved suing the lawyer who actually recommended the settlement at issue, in W*illiams* the plaintiff sued his former counsel whose alleged negligence and breach of fiduciary duty forced him to [later] settle a legal matter on unfavorable terms. The defendant lawyer did not participate in the [plaintiff's] decision to settle.

The legal malpractice action arose out of bankruptcy proceedings where the defendant lawyer had represented the plaintiff as debtor. One of the plaintiff's creditors filed an objection to discharge on the basis … [that] the plaintiff had fraudulently concealed assets. The schedules as filed were incomplete. The plaintiff claimed that he disclosed all assets to his former lawyer and that any omissions on the forms and schedules were the fault of his former lawyer. He sought summary judgment on that basis. The creditor responded to the motion for summary judgment by attaching the affidavit of the plaintiff's former lawyer in which he denied the charge and specifically stated that he had listed all assets disclosed to him by the plaintiff. Thereafter, the plaintiff settled with the … [creditor] by agreeing to exclude $66,000 in debts from discharge. Plaintiff then sued his former lawyer for putting him in a position where he was forced to settle.

The trial court held that the plaintiff could not recover the amount of the settlement as damages. In affirming that decision, the Missouri appellate court stated:

> Settlement of the underlying claim creates speculation as to what could have otherwise been clear: the true merit of the underlying litigation, as distilled in the crucible of the courtroom …. It thus appears that, in a case where the underlying claim has been voluntarily settled, the courts are going to require a strong showing that the settlement was justified before the court will be willing to pass the cost of the settlement onto the defendant [*Id.* at 296].

The court further held:

> [I]n cases where the underlying claim has been settled, the plaintiff must carry the significant burden of establishing that the settlement was necessary to mitigate the damages flowing from defendant's negligence. It is not sufficient to argue that the defendant's negligence created additional burdens or difficulties for the litigation. There must be evidence that extra burdens or difficulties caused by the negligence could not be overcome, and would have been fatal to the result the

> plaintiff could otherwise have enjoyed. Plaintiff must prove that without the settlement, plaintiff would have fared significantly worse by allowing the litigation to run its course [*Id.* at 295-96].

The court justified its holding in part on the basis that the attorney who is accused of negligence is allowed no voice in whether the underlying claim should be settled. Thus, the plaintiff ought to be required to prove that the settlement actually mitigated damages. Otherwise, as the court noted, a plaintiff may be tempted to settle the underlying claim at any figure, believing that the responsibility for the damage will be passed on to the defendant at whatever the settlement figure may be. The court also warned litigation clients allegedly victimized by their attorney's negligence "not to assume that the justification for a subsequent settlement is somehow self-proving." [*Id.* at 298].

The court acknowledged that it was establishing a stringent burden of proof. It noted, however, that lawyers are trained to be thoroughly analytical and to reason through to a compellingly logical conclusion. Thus, the court concluded that "When a settlement is truly necessary, attorneys will be able to demonstrate the necessity and wisdom of the settlement." [*Id.* at 296].

As for the issue of expert testimony, the court held that the plaintiff must offer "cogent expert testimony which intelligently analyzes the pertinent considerations [and establishes] that the defendant's negligence proximately caused the loss …. The expert opinion need not be airtight or unassailable, but the subject matter must not be inherently unpredictable, and the evidence must show that the opinion is sufficiently grounded in careful and comprehensive analytical thought and have strong probative value on the issue of proximate cause. Superficial articulation of the appropriateness of a settlement will not create a submissible issue as to causation of damage resulting from a voluntary settlement." [*Id.*].

The appellate court affirmed the trial court insofar as it excluded the settlement as damages. While the plaintiff's legal expert testified that the defendant lawyer's conduct made an adverse result more likely than not and created definite difficulties, the appellate court held that there was no testimony establishing, by careful consideration and discussion of the pertinent factors, that the plaintiff was destined to lose his discharge as a result of his former attorney's conduct. As the court stated:

> We do not see, in any Missouri case, support for the proposition that expert testimony that an unfavorable result was more likely than not will be sufficient justification for the settlement, particularly when the analysis supporting the evaluation is superficial …. None of plaintiff's experts specifically predicted that plaintiff would have lost if the underlying claim had not been settled, and none discussed the particulars which would have supported such an opinion [*Id.* at 299].

Williams does not go as far as some cases in limiting the right of recovery against lawyers for "wrongful settlement." However, it is on the conservative end of the spectrum when it requires very strict proof of proximate cause. By holding that

this burden is not met by superficial expert testimony, the court acknowledges a real world problem. Like it or not, if permitted to do so, legal experts will give loose, careless and unsupportable opinions as to value and causation. Not surprisingly, the court was unable to express a clear test for when expert testimony is or is not sufficiently analytical to pass judicial muster.

Lawyers should understand that from a malpractice standpoint, today's conduct is often judged according to tomorrow's common law. No one can predict what issues will arise and how they will be decided in the future when it comes to lawyer liability for client's settlements. This, of course, makes legal malpractice avoidance more challenging. Nevertheless, adherence to a few principles will greatly reduce the chances of becoming a defendant.

First, do not foster false or unreasonable expectations in the client as to the probable outcome. Compromise is difficult enough when one has reasonable expectations.

Second, address the subject matter of settlement with the client early and often. A lawyer does not show weakness by discussing realities with the client.

Third, if and when a legitimate settlement opportunity arises, treat the matter seriously. Spending a few extra moments with the client to explain the advantages and disadvantages of settlement is the professional thing to do. Remember that if the client settles, it will involve compromise and therefore some measure of disappointment. Disappointment is easier to swallow if it is better understood.

Finally, make a record of all significant settlement related matters. Case law may put the burden of proof on the plaintiff; however, as a practical matter, the lawyer's chances of prevailing at trial are significantly diminished without clear, written proof on all material matters.

Parley, Lewis & Hofstein, David, "**Ethics Update**"

American Bar Association [Section on Family Law]. *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), p. 822.

The obligation of a lawyer to abide by a client's directions concerning limits on the scope of the lawyer's representation and authority was the focal point in The Florida Bar v. Glant, 615 So.2d 962 (Fla. 1994). The lawyer earned a public reprimand and six-month probationary period for writing a letter to the state child protection agency suggesting that her client have custody of all four children, despite her client's clear direction that she only wanted two of the children, and without telling her client she wrote the letter. The lawyer wrote the letter because she believed the

father was sexually abusing the children and that it would be better for them to be with her client and knew that if she told the client she was going to write it that the client would have forbidden it.

Parley, Louis, **"Malpractice Claims After Settlement Of Marital Dissolution Cases"**

1996 Symposium Issue of the Professional Lawyer (American Bar Association Centre for Professional Responsibility, Chicago, 1996), at pp. 129-137.

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In the past five years, courts have re-examined the policies that control legal malpractice actions brought by clients unhappy with the settlements made in their marital dissolution actions. This renewed consideration was largely the result of a series of Pennsylvania cases in which the adoption and application of a possible new standard was hotly debated. This essay reviews that debate, the attitude taken toward the proposed new rule in other states, and considers what matrimonial lawyers might do to avoid the problem of a post-settlement malpractice action.

The Pennsylvania Cases

The "shot heard 'round the world" was the Pennsylvania Supreme Court decision of *Muhammad v. Strassberger, McKenna, Messer, Shilobod and Gutnick*, [587 A.2d 1346 (Ps.1991). The legal malpractice claim arose from the settlement of a medical malpractice case. The claim can be fairly characterized as being that the lawyers advised the client to settle for less than the client really wanted and thought fair and necessary. The significant holding in the decision was that we will not permit a suit to be filed by a dissatisfied plaintiff against his attorney following a settlement to which that plaintiff agreed, unless that plaintiff can show he was fraudulently induced to settle the original action. An action should not lie against an attorney for malpractice based on negligence and/or contract principles when the client has agreed to a settlement. Rather only cases of fraud should be actionable. [*Id*. at 1348].

The principal policy reason presented in support of the rule was that it was necessary to support and protect the settlement process, as lawyers would be hesitant to recommend settlements without a clear rule identifying the limits of their liability: the absence of settlements would create havoc in an already overburdened legal system. [*Id*. at 1349-1351]. In view of this policy interest, the court felt that a rule that

inhibited cases based merely on negligence but allowed cases based on a lawyer's "knowing" commission of malpractice (which the lawyer then keeps secret from client induced into the settlement) was an appropriate balance between the relevant concerns. [*Id*. at 1351].

The holding in *Muhammad* was quickly imported into family law matters, in the Superior Court decision of *Miller v. Berschler*. [621 A.2d 595 (Pa. Super. 1993)]. The malpractice complaint in *Miller* focused on the fact that the underlying divorce settlement agreement had not addressed whether the husband's alimony obligation would be affected by the wife's cohabitation, which had resulted in a trial court declining to terminate his obligation when the wife began cohabiting after the entry of the divorce decree. [*Id*. at 596]. Mr. Miller claimed that his divorce lawyer had committed malpractice because he had not discussed the issue with Miller prior to the settlement, resulting in Miller entering into an agreement without knowledge of the consequences of omitting the cohabitation terms. [*Id.*]

Against this background, the defendant attorney sought the protection afforded by *Muhammad*: that he could not be sued unless it was alleged that he had fraudulently induced the plaintiff/former-client to settle. Miller's counsel argued that *Muhammad* was limited to cases involving claims of a failure to investigate and did not apply to cases where an attorney failed to "explain the consequences of a proposed settlement." [*Id*. at 597].Two of the three appellate judges agreed with the defendant's lawyer and concluded that the strong policy supports for the *Muhammad* rule established it as controlling in all legal malpractice cases. They believed that the state Supreme Court had intended to establish the *Muhammad* rule as "a clear, bright line" applicable to all cases. [*Id.* at 596].

The dissent, by Judge Wieand, took the position that there were important differences between the two cases which made the *Muhammad* rule inapplicable:

> In *Muhammad*, the only issue necessary to the client's decision to accept or reject the settlement was the amount of money being offered. In the instant case, the defendant-lawyer's alleged negligence does not lie in the amount agreed to be paid in settlement. The settlement agreement in this case involved a great deal more than offering and accepting an amount in settlement of appellant's rights and obligations. The intelligent entry of an agreement settling martial property rights depended on appellant's knowing and understand all relevant considerations. This required that his lawyer investigate the applicable law and disclose the effect thereof upon a settlement of the marital property rights. Without such information, the client could not make an intelligent decision regarding the terms of the agreement. . . . As such, the client was entitled to be told about the law pertaining to his obligation to pay alimony, the duration thereof, and the nature of those events which would effect a termination of his obligation. [*Id.* At 600-601].

The issues again arose in *Martos v. Concilio*. [629 A.2d 1037 (Pa. Super. 1993)]. In that case the plaintiff claimed that the defendant-lawyer had committed malpractice by advising him to agree to renegotiate the terms of an executed property settlement agreement, which resulted in the plaintiff having to give his soon-to-be-former-spouse more property and alimony than he would have had to under the original agreement. In a fairly straightforward opinion, the appellate panel held that the *Muhammad* rule applied, and that the trial court had properly dismissed the action in light of the absence of any fraud allegations.

Martos was followed by the decision in *Spirer v. Freeland & Kronz*, [643 A.2d 673 (Pa. Super. 1994) in which the claim made was that the defendants failed to obtain sufficient and appropriate financial information concerning her husband's assets. She claimed their discovery efforts should have revealed significantly more assets which could have been claimed as joint marital property. [*Id.* At 675].

The Superior Court applied the *Muhammad* test, and, in the absence of any claims of fraudulent inducement, entered judgment for the defendant attorneys.

All of this came to a head when the Superior Court gave *en banc* consideration to the issues in the case of *McMahon v. Shea*. [657 A.2d 938 (Pa. Super. 1995)]. Judge Wieand, now writing for four of the judges, along with a fifth judge's concurrence, was able to overrule the holding of *Miller v. Berschler*, and make the application of the *Muhammad* rule irrelevant to divorce settlements.

The problem presented in *McMahon* was the claim that Mr. McMahon's attorney had incorrectly advised him about the consequences of the support and alimony provisions of the parties agreement, which resulted in Mr. McMahon not being able to obtain a reduction of his obligation when his former wife remarried. The trial court's refusal to allow the modification had been upheld in an *en banc* decision of the Superior Court from which Judge Wieand had dissented. [McMahon v. McMahon, 612 A.2d 1360, 1368-1371 (Pa. Super. 1992)]. The malpractice action that followed had been dismissed [at trial] under the *Muhammad* theory, relying on that opinion and on *Miller*.

Judge Wieand was able to take advantage of this case to assert the priority of the position he had taken in dissent in the *Miller* case: that a lawyer was not free from a malpractice claim based on "the failure to advise the client properly about well established principles of law and the impact of an agreement upon the substantive rights and obligations of the client." [657 A.2d 938 at 941]. On behalf of his supporters he was able to state:

> Unless the Supreme Court directs otherwise, we will not interpret *Muhammad* to blindly protect lawyers who carelessly advise clients incorrectly about their substantive rights and the effect of a written agreement which is intended to resolve an existing dispute. [*Id.* At 942].

Although *Miller* was overruled, *Martos* and *Spirer* were distinguished as simply involving complaints that the client was dissatisfied with how the lawyer carried on the negotiation and not as cases encompassing claims that the lawyer had given erroneous advice about the law. [*Id.*]

The four dissenting judges were of the opinion that the distinction made in the majority opinion between merely giving bad advice to settle and failing to inform the client about the legal issues involved in the settlement was inconsistent with the clear holding of *Muhammad* and that the majority was ignoring the Supreme Court's holding. They also argued that *Martos* and *Spirer* were identical in nature to *McMahon* and that they, too, involved claims of inadequate legal advice and not just bad settlement judgment. [*Id.* At 944 n. 1.]

As of mid-1996, *McMahon* appears to be the rule in Pennsylvania, and the state Supreme Court has not examined the issue.

Other States

Whatever side is right about the proper status of the law in Pennsylvania after *Muhammad* and *McMahon*, the fact is that the *Muhammad* approach did not receive acceptance in any other jurisdiction.

The first case rejecting the *Muhammad* "fraud only" test was the New Jersey Supreme Court decision in *Ziegelheim v. Apollo*.[607 A.2d 1298 (N.J. 1992)]. The defendant attorney had represented the plaintiff in her martial dissolution proceeding. The matter was settled shortly prior to the assigned trial date, after several days of discussion, and the details were recited on the record, with the parties present and confirming their acceptance of the settlement. In addition to wanting a share of the marital property and support, Mrs. Ziegelheim was particularly concerned that she be held harmless from any federal tax liabilities. In fact, at the time she hired the defendant there was already an outstanding deficiency assessment. The settlement of the case provided her with alimony and about 14% of the marital estate; the oral record addressed the tax issues, with a "hold harmless" in her favor, although it appears the final written version of the stipulation may have omitted that provision. [*Id.* at 1300-1301.] About two years after the entry of the decree, Mrs. Ziegelheim moved to reopen the divorce judgment on the ground it was not a fair settlement. The reopening was denied on a finding that both parties had accepted the settlement as fair and equitable, and that conclusion was sustained on appeal. [*Id.* at 1301.] Thereafter, the malpractice action was brought against attorney Apollo, with the principal claim being that he had erroneously advised her that wives could expect to receive no more than ten to twenty percent of the marital estate if they went to trial. She claim[ed] that Apollo's estimate was unduly pessimistic and did not comport with the advice that a reasonably competent attorney would have given under the circumstances. [*Id.*].

She also claimed that he had failed to conduct adequate discovery and investigation and that he had missed assets worth about $150,000.

The trial court granted summary judgment in favor of the defendant attorney, concluding that his failure to persuade Mr. Ziegelheim to give Mrs. Ziegelheim more was not a failure of competency. In addition, the court saw Mr. Apollo's opinion about what Mrs. Ziegelheim might receive as an error of judgment, at best, and not as failure of adequate performance. The trial court's conclusions were highly influenced by the refusal of the divorce court to reopen the judgment and the statements by Mrs. Ziegelheim at the time of the divorce that she thought the agreement was fair. On appeal, the intermediate appellate court agreed with the trial court's judgment on all claims except for the claim going to his recommendation of the agreement, which claim it felt could not be decided on a motion for summary judgment, as there was a dispute between the parties' experts on whether Apollo's performance fell below the standard of performance. [*Id*. at 1303].

The *Muhammad* issues worked their way into the case before the New Jersey Supreme Court, as Apollo urged that court to adopt the *Muhammad* approach. The court rejected the invitation, taking a position similar to that expressed by Judge Wieand in his dissent in *Miller* and his opinion in *McMahon*:

> …. Although we encourage settlements, we 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 lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue 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 case.
>
> * * *
>
> After all, the negotiation of settlements is one of the most basic and frequently undertaken tasks that lawyers perform. [*Id.* at 1304].

These views were echoed in the Connecticut Supreme Court opinion in *Grayson v. Wofsey, Rosen, Kweskin & Kuriansky*. [646 A.2d 195 (Conn. 1994]). In addition to reiterating the view that lawyers are expected to give clients sufficient information to enable the client to make a reasoned decision to settle a case, the court rejected concerns posed by the defendant lawyers that rejection of the *Muhammad* rule would inhibit lawyers from recommending settlements and increase malpractice claims, as the absence of the rule to that point had not had either effect. [*Id.* at 200].

Discussion

If we assume that *Muhammad* establishes a viable rule, then it would appear that malpractice actions arising from the settlement of civil damage actions can be brought only if the lawyer engaged in some fraud to induce the client into the settlement. In other words, if the lawyer doesn't know that the case is better than he or she things, because he or she didn't think of reviewing the state of the law or relevant settlement outcomes, or whatever, then there can be no malpractice claim;

but if the lawyer knows that there is a legal issue that would help the client obtain a better settlement and hides that knowledge from the client in order to induce the client into the settlement (why would the lawyer do this: because the lawyer wants his fees now, not later), then an action might lie. [Although not a case based on the *Muhammad* rule, the decision of the New Jersey Appellate Division in Sommers v. McKinney, 287 N.J. Super. 1,670 A.2d (1996) provides a useful illustrate of a lawyer making misrepresentations to a client in order to induce the client to settle. The lawyer had claimed that the judge at the pretrial conference had strongly doubted whether there was a legal basis for the client's claim and that the defendant had strong evidence tending to reduce the damages recoverable. In fact, the lawyer had not researched or briefed the legal issues and had a letter from defendant's counsel conceding the strength of the client's damage claim. In this light, the malpractice claim could proceed.].

On the other hand, if the *McMahon-Ziegelheim-Grayson* line establishes the rule for family cases, then an action will lie not only for a knowing failure to perform, but also for an unknowing failure. Since this appears to be the classical rule, the question is whether the law ought to move to the *Muhammad* approach, or not. [This last aspect is highlighted in the *Ziegelheim* opinion where counsel was faulted for not knowing the "custom" of the jurisdiction regarding property division proportions. 607 A.2d at 1304. *See also* Grayson, 646 A.2d at 205 (counsel needed to be aware of court's attitudes toward woman and their roles and support needs.)]. In my view, the *McMahon-Ziegelheim-Grayson* cases are a more appropriate line of authority. This is based primarily on the fact that a divorce settlement is of a substantially different nature than the settlement of any other civil action. First, there is the fact that the settlement tends to result in the establishment of a contract between the parties, looking forward to future conduct, while the settlement of a damage action simply brings the matter to an end. In this light, a lawyer's performance with regard to the negotiation, drafting and explaining the settlement contract are the issues, and the lawyer's failure to investigate and give advice are subject to criticism in the same manner as would any other failure to perform adequately with regard to any contract matter. [*See generally* 3 RONALD MALLEN AND JEFFREY SMITH, LEGAL MALPRACTICE (4th ed. Est Publ. Co.) § 22.5. *Compare* Estate of Campbell v. Chaney, 485 N.W.2d 421 (Wis. App. 1992) negligently drafted premarital agreement)].

Both *Ziegelheim* and *Grayson* address the additional issue of the roles played by the original trial court's acceptance of the settlement as being "fair and equitable" and by a subsequent refusal of a court to set aside the judgment underlying the malpractice action. Both courts reached the conclusion that a finding that the settlement was fair and equitable did not bar the malpractice case, as that did "not necessarily mean that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's incompetent attorney been competent." [*Ziegelheim*, 607 A.2d at 1305]. If both cases are read as presenting counsel's failure to conduct discovery as the principal problem, which resulted in an inadequate valuation of the parties' assets, skewing the settlement, then the trial court's determination that that agreement was fair is irrelevant, as it acted on inadequate information, and that is not a defense to the claim. [*Grayson*, 646 A.2d at

200]. Similarly, if the malpractice was a failure to advise or inform the client, a finding of "fairness" by the trial court is not an appropriate bar, as it would not know that the party's lawyer failed to perform.[*See also* Callahan v. Clark, 901 S.W.2d 842 (Ark. 1995) (counsel's failure to advise client about consequences of an unusual default provision was valid basis for claim)].

Similarly, as the refusal to reopen was based on a failure attributable to the wife's attorney, which is treated as the party's failure, and not any improper conduct by the husband (in other words, he wasn't guilty of hiding or misrepresenting his assets) the refusal of the courts to reopen the judgment and require the husband to bear burdens based on the failing of the wife's attorney was not unfair and really served to reinforce the wife's claims against the lawyer, rather than sustain the claim that the lawyer had adequately performed. [*See, e.g.*, Monroe v. Monroe, 413 A.2d 819, 825, *appeal dismissed*, 446 U.S. 801 (1979) (court would not require opposing party to carry "the burden of establishing that the plaintiff's relationship with her counsel was one of informed consent"). *See also* Stewart v. Stewart, 901 S.W.2d 302, 304 (Mo. App. W.D. 1995) ("While lack of disclosure of assets by husband may in the court's discretion, entitle the wife to a new trial, ineffective assistance of counsel does not")].

The issues that make it appropriate to decline to apply the *Muhammad* rule to divorce cases also make it [in]appropriate to use divorces as authority for rejecting the *Muhammad* rule in other areas of practice, as the principal policy issues are not the same. In addition, it should be recalled that, while a civil damage action can be settled and withdrawn, a divorce requires judicial action and approval, an involvement which adds a further distinction. [*But see* Malfabon v. Garcia, 898 P.2d 107 (Nev. 1995) (relying on *Grayson and Ziegelheim*, court declined to apply *Muhammad* rule to civil damage actions)].

Conclusion

What then can be done to avoid these problems?

First, practice competently. "Not knowing" is not a defense, and legal research and study must be kept current. [36 *See generally* 7A C.J.S. Atty & Client § 257 (lawyer must conduct research to inform self). *Compare* Smith v. Lewis, 13 Cal.3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (advising client to waive interest in spouse's military pension without researching the issue was malpractice) *with* Davis v. Damrell, 119 Cal. App.3d 883, 174 Cal. Rptr. 257 (Cal. App. 1981) (no malpractice where lawyer kept abreast of legal developments and issue was unsettled at time of settlement; exercise of judgment).].

Second, keep your client involved and keep the involvement documented. The cases hint that a principal problem is that the clients did not get enough information and advice about the contents of the settlement agreement early in the negotiation process, so that discussion of the "boiler-plate" provisions can be had and maybe even some discussion of the terms being crafted for the case. This should help the client understand the various adjustments made through the negotiation process.

Third, "lobby" or "litigate" for other protective rules. For example, in 1991 the Connecticut Supreme Court altered the rules regarding disclosure of financial information so as to shift the burden to require affirmative disclosure, rather than allowing a party to wait to be asked. This change was accomplished by eliminating the classical requirement that the party claiming fraudulent conduct by the other had to have diligently sought to discover and disclose the fraud. [*See* Billington v. Billington, 595 A.2d 1377, 1379-1381 (Conn. 1991)]. The relevancy of this to avoiding malpractice is that it can protect a party's lawyer from a claim of malpractice based on a failure to discover an asset so long as the lawyer made a reasonable effort to obtain disclosure from the other side. In light of this rule, the *Spirer* and *Ziegelheim* cases might have had different outcomes with regard to the "failure to conduct adequate discovery" claims as the original judgments might have been reopened because of the concealment of the asset by the other spouse.

As nice as it would be to have the protection provided by the *Muhammad* rule, the fact is that divorce cases are different and require a different approach to settlement than other actions.

Sheehan, Katherine C., **"The Ethics Of Settlement For A Family Lawyer"**

American Bar Association [Section on Family Law]. *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), at pp. 841-842.

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3. **AAML [American Academy Of Matrimonial Lawyers] Standard 2.6** … advises the marital attorney to "keep the client informed of developments in the representation and promptly respond to letters and telephone calls." The Comment to **Standard 2.6** urges the lawyer to communicate to the client "all settlement offers, no matter how trivial or facetious." **Standard 2.7** tells the attorney to provide sufficient information to permit the client to make informed decisions.

4. It should go without saying that the lawyer must not lie to the client or fail to inform the client of problems and setbacks in negotiations, including those due to the attorney's own errors, yet disciplinary cases involving such misrepresentations are legion. See, e.g., Culpepper v. Mississippi State Bar, 688 So.2d 413 (Miss. 1991), reh'g denied Docket No. 89-BA-1347 (Miss. 1991); In re Fox, 547 N.E.2d 850 (Ind. 1989).

5. In some cases, particularly where clients are being unreasonable or the attorneys have a cordial relationship, lawyers may be tempted to try to speak to each other "off the record"—that is, with the understanding that the information exchanged will not be communicated to the clients. There is no "off the record" exception either to the attorney's duty to keep her client's

information confidential under Model Rule 1.6 or to the duty to keep the client reasonably informed. While "a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail," Comment 3 to Model Rule 1.4, if information received from opposing counsel is something that the client should otherwise be informed of, the fact that the information was transmitted "off the record" does not excuse the attorney from an obligation to convey it to the client.

Varga v. Varga

[1995] W.D.F.L. No. 1066, Ont. Gen Div., Fleury J.
30 November 1995.

Three sets of litigants, presented uncontested divorce petitions, seeking "over-the-counter" divorce Judgments. On each of the three divorce petitions, under the rubric "name, address and telephone number of solicitor or party", was endorsed the same name, address and telephone number of a firm of paralegals who also commissioned all of the affidavits. That particular firm of paralegals had been expressly notified by the Court that agents were not authorized to act on behalf of parties in divorce proceedings. All three sets of litigants petitioned for uncontested divorces.

Held - All three divorce proceedings stayed; Judgments not to issue until petitioners or their solicitors appeared before Court to explain conduct in misrepresenting their addresses and telephone numbers.

The Divorce Act contained specific provisions concerning the duties of those who might be involved in preparing parties for their divorce. In addition, the Ontario Rules clearly spelled out who could appear before the Courts in a divorce proceeding, namely the parties themselves or their solicitors. There were excellent policy reasons why parties could not be represented by agents in any proceeding involving divorce. When a firm of entrepreneurs offered divorce services to the public, neither Parliament nor the Court on its behalf could control the quality of the reconciliation and mediation advice that was provided. The absence of that safeguard alone was sufficient reason to require Court approval when a spouse wanted someone other than a lawyer to represent them in divorce proceedings. A solicitor was expected to provide advice beyond the mere obtaining of a divorce and if a solicitor provided negligent advice to a particular party, that party was financially protected. If a solicitor could not adequately represent clients, the Court could prevent that solicitor from representing clients in the Court. On the other hand, the Court had no authority over the exercise of their profession by the firm of paralegals concerned and could not visit any penalties upon them.

Burton v. Burton

(1996), 50 C.P.C. (3d) 211 (Alta. Q.B.), Veit J.

Text (paras. 1-3): Messrs. Burton and West each paid approximately $840 to First Choice Paralegal Services, an independent paralegal who is not a lawyer, to prepare their divorce petitions and the other documents required in the proceedings. Messrs. Burton and West now ask the court, pursuant to the provisions of Rule 5.4, for leave to be represented in their respective divorce proceedings by First Choice, a person other than a lawyer. In other words, Messrs. Burton and West ask the court to continue processing their divorce petitions even though the work on the proceedings has been done to date by an independent paralegal.

Mr. Burton's average yearly gross income is $100,000; Mr. West's average gross income is $60,000. The value of the Burton matrimonial property is at least $200,000.

The Law Society, which has been given leave to appear as an intervenor, urges the court to declare that the proceedings in each of the Burton and West proceedings is flawed by the use of paralegals and that the court could stay these divorce proceedings until each of Burton and West obtain the services of a lawyer. Nevertheless, the Law Society does not ask the court to order a stay in these particular proceedings. Rather, it encourages the court to continue processing these divorce proceedings on the condition that Messrs. Burton and West each give the following undertaking, in relation to these divorces, to the court:

that they will not resume their agency relationship with First Choice;

that they will not establish new relationships with any independent paralegal;

that if they use agents they will only use lawyers; and

that if they do not use agents they will act on their own.

Held – Application dismissed

Headnote: Although the paralegal retained by the petitioners may have been in breach of the provisions of the Legal Profession Act (Alta.), barring representation in matrimonial matters by non-lawyers, there was no evidence to suggest that the petitioners knowingly collaborated [with the paralegals they had consulted] or condoned any such breach.

There was no compelling reason for the court to exercise its jurisdiction under R. 5.4 to allow paralegal representation in the present circumstances, assuming that was possible under R. 5.4, because economic necessity had not been established. Moreover, in deciding how to exercise its discretion, the court could not condone

breaches of the Legal Profession Act. Although the court had the jurisdiction in the present circumstances to stay the divorce proceedings pending the petitioners' retention of proper legal counsel, it should not do so in light of the fact that the petitioners had done nothing wrong, there were no children involved and the formalities of their respective divorces had been completed.

4.5.6 Advertising

Bernstein, Nina**, "Battles Over Lawyer Advertising Divide the Bar"**

The New York Times (New York, 19 July 1997),
pp. 1ff

Albuquerque, N.M. July 16 – Ron Bell's face is too big to miss on the highway billboard that advertises his legal services on one side and on the other, Pizza Hut. This year, someone shot an arrow right between his smiling eyes. For weeks it stuck there, like an emblem of the backlash over lawyer advertising that has divided the legal community here and across the country.

[In a television advertisement for his law firm, a bare-chested Ron Bell donned boxing gloves and shorts to show that he fought for his clients.]

. . . .

"I got great free radio on that," he recalled with glee as he drove past his sign on I-25 in a white Mercedes with NM LAW license plates. "I was the very first lawyer billboard in America." He also claims the first full-page ad in the Yellow Pages of the U.S. West telephone directory and the first lawyer ad on MTV.

But 20 years after the United States Supreme Court opened the door to lawyer advertising on First Amendment grounds, the establishment trial bar is trying to crack down on maverick competitors like Mr. Bell. The lawyers disciplinary board of the New Mexico Supreme Court has slapped him with a year's probation and threatened him with disbarment for violating its legal advertising rules, and he is fighting back with a Federal suit.

It is one of may such battles being waged around the country as the old-line leaders of disciplinary boards and state bar associations from Florida and Nevada to Iowa and New York try to rein in their more freewheeling colleagues. Depending on one's perspective, they are part of a last-ditch struggle for the soul of the legal profession, or a crass conflict for economic advantage by the old-boy's club, waged at the expense of free speech principles.

"Lawyer advertising adversely affects the respect the public has for the judicial system and the administration of justice," said Richard Ransom, the retired chief justice of the New Mexico Supreme Court who spearheaded the adoption of tough advertising rules in 1992.

Counters Victor Marshall, the lawyer who is representing Mr. Bell in his Federal suit against the board, which ruled that some of Mr. Bell's ads could be misleading: "The rules are unconstitutional as written and even more so as applied. Members of the public have seen his ads five hundred million times without ever claiming that they were misled. The only people who actually complained are other lawyers."

A changing and even contradictory patchwork of state regulations governs lawyer advertising, but since the 1977 Bates v. State Bar of Arizona decision, the country's highest court has repeatedly held that the content of lawyer advertising cannot be constitutionally restricted except to prevent false, deceptive or misleading communication. Nevertheless, many state bar regulators have used those parameters to try to govern everything from the kind of music allowed in a lawyer commercial to the exact size of a disclaimer like "lawyer advertisement".

Lawyer advertising has grown every year since the 1977 decision, according to William Hornsby, director of the American Bar Association's Commission on Advertising. Television advertising by lawyers reached $157 million last year, and they spent $627 million on ads in Yellow Pages in 1996, up from $447 million four years earlier.

At best, the results of laying down the law to colleagues who wander in this commercial wilderness can mystify the public. A Rochester lawyer was recently allowed to use a vulgarism in an ad calling himself the meanest advocate in town, but was censured for advertising with the words "Shapiro Legal Clinic" because it could mislead people about the breadth of his practice. In Florida, where some of the country's most restrictive rules just became stricter, only instrumental music is allowed in lawyer commercials, which means ads could use Jimmy Hendrix's version of the national anthem, but not a choir's rendition of "God Bless America."

When Brad Slutsky, a lawyer at the Atlanta law firm of King & Spaulding, tried to make the firm's World Wide Web site abide by advertising rules for every state, he found many of the required disclaimers so contradictory, he said, that even his effort to compile them in a 500-word statement is out of compliance in some states. … [The special problems of regulating lawyer advertising on the Internet was considered at the American Bar Association's annual meeting in August 1997.]

Among the many ads rejected by the New Mexico screening committee under the state's 1992 rules was a …. television dramatization showing a happy woman leaving Mr. Bell's office with an 8-by-4 foot check as the lawyer turned to the camera and said, " I can't guarantee that I can get you a check that big, but I will evaluate your case free of charge." . . .

. . . .

"If it's in poor taste, that's not an issue," said Frank Spring, the former chairman of the Legal Advertising Committee of the Disciplinary Board, ...

. . . .

"My values, to be candid, are small-town values, "said Mr. Spring, 54, who wore chinos and an open-collared shirt and was leaving early for a trout fishing trip in the Pecos Mountains. He called lawyer advertising "demeaning" and "distasteful" and lamented its role in fueling settlement mills where clients get short shrift.

"Are we going to become simply commercial entities or focus on getting justice for people?" he asked.

Mr. Bell's reaction to such high-minded concerns by his competitors is derisive. "They want justice, shud-dup!" he said with a dismissive wave of his hand. "Our entire remedy in civil justice in America is a check. I want to get the case and I want to get the check."

Underlying the principled rhetoric of their opponents, Mr. Bell and other proponents of lawyer advertising contend, is fear of price competition which would benefit the consumer.

. . . .

... Stephen Durkovich ... and his partners denounce lawyer advertising as a corrosive trend that allows inferior lawyers to prey on the poor, the uneducated and minorities.

... A $60,000 poll commissioned by the State Supreme Court found that those with the least income and education were most likely ... to believe that lawyers who advertised were better than those who did not advertise. In reality, Mr. Durkovich contended, the opposite was true, which makes such ads inherently misleading to one segment of the population, while it makes the better educated even more critical of the legal profession.

4.5.7 Barrister's services

[No Entry]

4.5.8 Barrister as witness

(a) Affidavit Evidence

Csak v. Mokos

(1995), 18 R.F.L. (4th) 161 (Ont. Gen. Div.), Clark, Master

Manual Editor's Note: Defendant's lawyer had previously acted for the Plaintiff's former wife in earlier matrimonial proceedings. The Plaintiff brought a motion to remove the Defendant's lawyer from acting in current proceedings. On the motion, the Defendant's lawyer proposed using an (i) affidavit from an associate, which the lawyer had composed, outlining the proceedings to date and which the associate deposed "on information and belief" and (ii) pre-trial briefs received by the Defendant's lawyer in the prior matrimonial proceedings (i.e., which involved the Plaintiff's former wife).

Preliminary to hearing of the motion to remove the Defendant's lawyer from acting, the Plaintiff applied to strike the associate's affidavit and to exclude the pre-trial briefs.

Held - The material was struck.

Headnote: An affidavit should not contain argument or irrelevancies and the affidavit in question contained both. Neither may an affidavit offer hearsay except as allowed by r. 39.01(4) of the *Rules of Civil Procedure* (Ont.). The affidavit also did not explain the deponent's full involvement so that a judge could assess the extent of her personal knowledge. An affidavit should not contain conclusions without offering the facts on which the conclusion is based nor state as facts the conclusions that must be drawn by the court itself. The associate's affidavit was sufficiently flawed that it should be wholly struck out.

The pre-trial briefs were the plaintiff's documents delivered under court compulsion. While the briefs contained some information that was public they also contained a great deal more information that was private and would not have been divulged except for the requirement that litigating parties be open and forthcoming in their [pre-] trial briefs to isolate issues and perhaps settle the action. A party who obtains a document from the other party under the discovery process in the *Rules of Civil Procedure* is subject to an implied undertaking not to use the document for a purpose other than that of the proceeding in which the document was obtained except with consent of the other party or with leave of the court. The plaintiff was entitled to the protection of the implied-undertaking rule with respect to the pre-trial briefs. There were no special circumstances justifying overriding the implied under-taking rule so that the pre-trial briefs could not be used … .

McLeod, James G., **Annotation to *Csak v. Mokos***

(1995), 18 R.F.L. (4th) 161 (Ont. Gen. Div.),
at pp. 162-163.

The reasons of Master Clark in *Csak v. Mokos* provide a useful primer on what can and cannot be included in affidavits for use on motions. As well, the reasons reinforce the confidential nature of the pre-trial settlement process by prohibiting the defendant from relying on information contained in the plaintiff's pre-trial material from previous matrimonial proceedings.

Some lawyers seem to think that they can include anything that a client wants to say in an affidavit. Accordingly, it is not uncommon to receive affidavits containing allegations of matrimonial misconduct from years before. In many cases the affidavit seems calculated to cast the other party in a poor light for reasons unrelated to the proceedings. The effect is to inflame an already emotional situation and invite the other party to engage in similar character assassination tactics. Master Clark has sent a clear message that such affidavits are improper.

An affidavit is a written statement containing a person's evidence. Civil Procedure Rule 4.06(2) confines every affidavit to evidence that a deponent could give if testifying as a witness in court. Master Clark stated that that limitation means an affidavit should not contain irrelevancies or argument. Nor should an affidavit contain hearsay except as allowed by r. 39.01(4). Courts should insist on a "best evidence rule". A party seeking to rely on hearsay evidence in an affidavit should explain why the evidence of the person who provided the information cannot reasonably be produced at the time. The affidavit should also explain how the information was received by the person with actual knowledge of the facts and how the chronicler deposing the affidavit came to receive the information. The affidavit should contain sufficient particulars to allow a judge to assess the evidence of the deponent and the reliability of the hearsay evidence relied upon.

An affidavit should contain facts explaining the role of the deponent in the proceeding and how he or she came to be in possession of information that is contained in the affidavit, so that a judge can assess the veracity of the information and distinguish a deponent's personal information from information received from others.

Master Clark stated that an affidavit should not contain conclusions or opinions without the facts upon which the conclusion is based. In a related vein, an affidavit should not contain a conclusion stated as a fact in respect of a conclusion that must be drawn by the court itself. If judges in family-law cases routinely applied the principles set out by Master Clark, much of the emotional turmoil of family cases could be removed. At the same time, many affidavits would probably be struck entirely as occurred in *Csak v. Mokos*!

By convention, a lawyer should not rely on his or her affidavit on a motion. A lawyer who tries to do so is put in the position of witness and lawyer, and a judge is forced to assess the credibility of counsel. Most lawyers and judges routinely accept that rule. However, some lawyers try to skirt the rule by dictating an affidavit based on information and belief in the name of another lawyer, clerk or secretary in the office. The affidavit states that the deponent is informed by the lawyer and believes the information to be true. The evidence in the affidavit is the evidence of the lawyer not the deponent. A judge should not allow a lawyer to appear on an affidavit by an associate, clerk or secretary if the information in the affidavit is the lawyer's evidence and is in dispute. A lawyer should not be allowed to give evidence on matters in controversy through a hearsay affidavit and appear on the motion. Unfortunately, Master Clark did not pursue the issue of a lawyer relying on an associate's affidavit notwithstanding the admission by the defendant's lawyer that he composed the associate's affidavit upon which he relied.

Master Clark's reasons are also important in limiting use of pre-trial conference material in subsequent proceedings. Litigants are encouraged to file confidential information in their pre-trial briefs to provide a pre-trial judge with as much information as possible to improve the judge's ability to resolve issues at a pre-trial conference. Allowing a person to use information in the pre-trial brief in different proceedings discourages openness and disclosure. Master Clark applied the implied-undertaking rule set out by the Ontario Court of Appeal in *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 and decided that the defendant's lawyer could not use in evidence material the plaintiff had included in his pre-trial briefs in the earlier proceedings.

Rule 50 provides that confidential material filed in connection with a pre-trial cannot subsequently be used in the same litigation. The statements are privileged as part of the settlement process. In *Csak*, Master Clark confirmed the confidentiality of pre-trial information and statements by applying the implied-undertaking rule to material in pre-trial briefs and prohibited the use of material in a pre-trial brief from being used against the interest of the maker in subsequent proceedings.

(b) Oral Evidence

Hantelman v. Jordan Estate

[1996] W.D.F.L. No. 2006; 50 C.P.C. (3d) 166 (Sask. Q.B.), McIntyre J.
28 May 1996.

The petitioner had a common law relationship with a woman who was now deceased. He had commenced an action against the deceased's estate under the dependant's relief legislation and for … remedies under the laws of constructive trust, resulting trust and unjust enrichment. He now sought to have the lawyer for the

mother of the deceased, and his law firm, removed as counsel of record for the mother on the grounds that the lawyer had gained confidential information as a result of his longstanding personal relationship with the petitioner and that the lawyer might be called as a witness in the action. The petitioner and the lawyer had known each other socially for 10 to 15 years.

Held - Application dismissed.

There was never a solicitor and client relationship between the lawyer and the petitioner. In order for him to have the lawyer disqualified on the first ground, the petitioner had to show he believed he was dealing with the lawyer in a professional capacity, which was not the case here. With respect to the second ground, although the lawyer was potentially a witness, it was by no means clear that he would in fact be a witness. There were many other people with whom the petitioner and deceased socialized with who could just as easily be called as witnesses to give evidence on the same matters.

Albanese v. Albanese

[1996] W.D.F.L. No. 933, B.C.S.C., Coultas J.
18 April 1996.

During the trial of the parties' matrimonial proceedings, the parties reached a settlement agreement out of court and without their counsel. Upon being informed of the agreement, the counsel for the wife asked for a recess to ensure that she had the benefit of his legal advice. After two hours, the court reconvened and the wife's counsel informed the court that an agreement had indeed been reached and, subject to the court's approval, the trial should be adjourned. Later, the wife commenced an action challenging the agreement as unconscionable and made under duress. The wife's counsel continued to act for her. The husband's counsel stated that he would call the wife's counsel as a witness to the validity of the agreement and that the wife's counsel should not therefore appear as counsel in court. The wife's counsel took the position that the only evidence he could give would relate to privileged discussions and that the privilege had not been waived. The husband applied for an order removing the wife's counsel as solicitor of record.

Held - Application dismissed.

The discussions between the wife and her counsel during the court recess were privileged. The counsel could not be required to testify as to those discussions. The fact that counsel had been instructed to announce the agreement to the court did not constitute a waiver of privilege. Since the wife was not denying the fact of the agreement or the fact that she had received legal advice, and since her counsel was not a witness to the circumstances of the agreement itself, he could give no relevant evidence. Accordingly, although it is settled law that a lawyer may not act as counsel

and witness, there was no need to remove the wife's counsel as solicitor of record in the circumstances.

4.6 Legal Responsibility

4.6.1 Responsibility to client

(a) Retention agreements

Foster v. Parker

[1997] W.D.F.L., 02 May 1997, (Alta. Q.B.)

The defendant met with the plaintiff lawyer regarding matrimonial problems she was experiencing. Based on their discussions, the plaintiff was of the view that some of the defendant's concerns required immediate attention, and that the action would involve substantial assets and the litigation would be complicated. Since the defendant has limited resources, she accepted a contingency fee arrangement based on 15 per cent of the amount of property she recovered. The plaintiff advised her that she needed independent legal advice on the contingency agreement, and arranged for her to see a lawyer unassociated with his firm. The plaintiff was also sufficiently concerned about the defendant's emotional state that he arranged for her to see a psychologist the same day. However, he believed that she was competent to give instructions and receive advice. The plaintiff filed a divorce petition the day following the initial meeting, and obtained court orders dealing with child custody and the preservation of matrimonial property. Three days later, the defendant advised the plaintiff that she was convinced the preservation order should be set aside. She subsequently faxed the plaintiff, indicating that she had reached an agreement with her husband and no longer wished to retain his services. The plaintiff acknowledged the defendant's instructions, but expressed concern that she was under pressure to enter into an agreement and outlined the nature of their fee agreement. When it became apparent that there was a dispute over the contingency fee, the plaintiff invoiced the defendant showing a fee of $4,380.52 and disbursements of $619.48 owing, for a total of $5,000. He had been holding this amount in trust for disbursements, but transferred it to his general account to apply against what he claimed was the outstanding balance. He then brought an action to recover fees of $30,600, representing 15 percent of the estimated $204,000 of the defendant's property settlement [which the wife had, apparently, entered into directly with the husband as a result of their negotiations which were co-ordinated by a lawyer friend of both spouses]. The defendant claimed that because of her emotional state, she lacked the capacity to appreciate the agreement, that the plaintiff exercised undue influence over her, that money advanced for disbursements was used by the plaintiff in satisfaction of any outstanding fees, that the plaintiff did not diligently provide

services and was deceitfully maintaining the action, and that the … [plaintiff] was deceitful in his billing practices. She counterclaimed for partial return of fees and punitive damages for stress caused by the plaintiff's conduct.

Held - The defendant was awarded fees of $7,650 and disbursements of $765.78 plus GST; the counterclaim was dismissed.

There was no doubt that the defendant was emotionally distraught when she first met with the plaintiff, but she was not irrational and was fully competent to instruct him and be guided by his advice. However, given her lack of recollection of so many events and the medication she was taking, her evidence was not generally accepted. The fact the defendant had been manipulated was a logical inference to draw from the circumstances of the case. It was clear that a lawyer [other than the Plaintiff] and friend of the defendant and her husband was actively negotiating a final agreement between them in a situation where the defendant was effectively without legal advice. While the initial steps taken by the plaintiff on behalf of the defendant were relatively routine, they were the first steps in what was anticipated to be a long and difficult process.

Contingency fee agreements in matrimonial actions are proper and this was a proper case for such an agreement, having regard to the information available at the time it was negotiated. However, given the subsequent events which led to an early and unexpected resolution of the matrimonial dispute, it was appropriate for the court to review the adequacy of the fees as contemplated by the agreement.

When the agreement was negotiated, the evidence was that it was necessary and reasonable. The plaintiff did not take advantage of or manipulate the defendant, but reacted responsibility, compassionately, and professionally to the needs and desires of his client. He was concerned about her actions when it appeared that she was being influenced by others in a manner that may have been contrary to her best interests. Having accepted the defendant's instructions [terminating his services], the plaintiff attempted to deal quickly and amicably with the unresolved issues of his fees. Evidence that the invoice of $5,000 did not include the totality of the work done on the file was accepted. The evidence fell short of establishing that the plaintiff was deceitful or high-handed in dealing with the funds in trust. While it may have been preferable to hold the funds in trust pending a taxation of the account or a resolution by way of litigation, the plaintiff's actions were not devious or dishonest. It was not possible to conclude that the acts complained of by the defendant produced any measurable stress or anxiety, or to justify the award of any damages.

In determining the value of the services provided by the plaintiff, it was necessary to consider the speed and effective action taken to address his client's concerns. The full effect of the plaintiff's experience and expertise was not realized because of the intervening actions of his client. The termination of the agreement by the defendant before completion put the court in the position of assessing the proper fee on the basis of quantum merit. While it would be inappropriate to conclude that the plaintiff was entitled to the full benefit of the agreement simply because he contributed to the results achieved, it was equally inappropriate to suggest that his fees

must be calculated on an hourly rate. One of the circumstances to be considered in determining a reasonable fee is the degree of success achieved and the extent to which the solicitor's actions contributed to the success. The actions of the plaintiff contributed significantly to the ultimate outcome of negotiations between the defendant and her husband.

Having regard to all the circumstances, the contribution of the plaintiff to the settlement was placed at 50 percent, and the plaintiff was entitled to fees based on 25 percent of the total settlement negotiated, or $7,650. Total disbursements on the file should be $765.78 plus GST. The balance owed by the defendant to the plaintiff was therefore $3,415.78.

The defendant, until closing arguments [on taxation], took the position that she was incapable of understanding the contingency agreement and that the plaintiff was manipulative and deceitful. There is an obligation on the part of litigants to bring forth at least some evidence in support of their claims, particularly in cases like the present case where serious allegations are made about the professional conduct of a solicitor. The counterclaim of the defendant was without merit and was dismissed. Her unfounded assertions needlessly protracted the proceedings and frivolously attacked the character of a member of the bar. The plaintiff was accordingly entitled to recover costs.

(b) Delays/Omissions

Filip, Christine S. and Johnston, Ann E., **"Failure to communicate may spark a suit"**

(1998) [February] Trial at pp. 60-61.

Manual Editor's Note: Christine S. Filip is an attorney and the president of The Success Group, a New York business development company for law firms. Ann E. Johnston is a civil litigator in Medway, Massachusetts. This article is reprinted with permission of *The National Law Journal* and the authors.

…, in *In re Hindin*, a California case, the state review board imposed the penalty of disbarment rather than the two-year stayed suspension recommended by the hearing judge after finding additional areas of culpability. [In re Hindin, 3 Cal. St. B. Ct. Rep. 657 (Review Dep't of the State Bar Court, May 28, 1997), corrected July 23, 1997]. The attorney disbarred – a too, too busy litigator – had no prior disciplinary history, and there were no findings of dishonesty or false statement.

Rather, the court found the "total picture" of the attorney's conduct controlling: Numerous client matters in which the attorney failed to communicate with clients, as well as the failure to perform legal services competently by not devoting enough time to matters, constitute incompetence and abandonment, which the court deemed acts of moral turpitude justifying disbarment.

Parley, Lewis & Hofstein, David, **"Ethics Update"**

American Bar Association [Section on Family Law], *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), p. 822.

At issue in Vande Kop v. McGill, 528 N.W.2d 609 (Iowa 1995) was whether a lawyer was guilty of malpractice for not including an "alimony waiver" in a premarital agreement drafted for the plaintiff. Noting that at the time the agreement was drafted in 1975, Iowa law treated such provisions as contrary to public policy, the court held that the lawyer could not be faulted for not anticipating that in 1980 the state legislature would statutorily alter the policy.

(c) In face of conflict

[No Entry]

(d) Language-challenged clients

[No Entry]

(e) Court Advocacy

Langor v. Spurrell

1996 No. 181, Nfld. C.A., 17 November 1997, Green J. A. for the Court

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[para. 65] [On an application to set aside a default judgment] … the Court is entitled to take into account the normal expectations and understandings that exist between counsel as a matter of professional courtesy in determining whether it is just to set aside a default order. Where counsel for a party proposing to file a default judgment in the face of non-compliance with the rules [in the sense that a defence has

not been filed within the time the rules prescribed] is aware that the other party is represented by counsel, there is a professional obligation not to proceed without notice. The Code of Ethics adopted by the Law Society of Newfoundland [the 1974 Code of Professional Conduct of the Canadian Bar Association] provides:

> Where the lawyer knows that another lawyer has been consulted in a matter he should not proceed by default in such matter without inquiry and warning.

The professional standards which govern the professional relations between lawyers infuse the Rules of Court with an additional dimension which the Court can take into account in determining the expectations of the parties and the reasonableness of positions which they take. The Rule [of The Supreme Court, 1986] themselves are not rigid absolutes, particularly when it comes to matters of time limits. This is evident from the emphasis in Rule 2 which generally provides that non-compliance with the Rules will be treated as an irregularity subject to being cured, rather than as a nullity, and Rule 3 which allows the Court to extend the time within which a person is required or authorized by the Rules to do or abstain from doing any act in a proceeding. When those principles are melded with the principles of professional conduct, it can be seen that a party contemplating entry of a default judgment can have no expectation of a right to the judgment solely because of technical non-compliance. Nevertheless, it would have been more appropriate for counsel for the respondents, upon receipt of the statement of claim, to have contacted the solicitor for the appellant to discuss the timing of the filing of the defence if the technical rule was not going to be complied with. Counsel should not presume an understanding that the rules can be ignored. However, the fact that counsel for the appellant knew of the existence and involvement of counsel for the respondent and gave no notice of an intention to enter judgement is also a factor to be considered.

(f) Sexual Relations

Parley, Lewis & Hofstein, David**, "Ethics Update"**

American Bar Association [Section on Family Law], *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), pp. 820-821.

The absence of any ethical rules directly addressing problems arising from lawyer-client sexual relations generally does not inhibit courts and ethics committees from punishing and criticizing such behaviours. In Board of Professional Ethics v. Hill, 540 N.W.2d 43 (Iowa 1995) the offending attorney was suspended for a year. The fact that the attorney had previously been a minister, which he claimed "made him more of a 'hands-on' counselor than was true of most lawyers" did not excuse his misconduct. A similar suspension (a year and a day) was imposed in Colorado v. Good, 893 P.2d 1062 (Colo. 1995) with the Colorado Supreme Court noting that

several ethical provisions under both ethics codes, including DR 1-102(A)(6), DR 5-101(A), Rule 1.7(b) and Rule 804(h) would be violated by the relationship. Similar concerns appear in Oregon State Bar Legal Ethics Committee Opinion 1995-140, at ABA/BNA Manual, 1001:7123.

The seriousness of the issues are reflected in Kansas Bar Association Ethics Advisory Services Committee, Opinion 94-13, at ABA/BNA Manual, Current Reports, vol. 12, p. 86, where the committee warned that a lawyer's partners have a duty to investigate claims by a firm client against a partner and that there was a duty to report the offending lawyer to disciplinary authorities.

Paskind, Martin**, "Legal Ethics: Customs, Cases, And Confusion [:] Watch out for that sex stuff, Because it very often leads to trouble"**

(1998)15 *The Compleat Lawyer* No. 2 (American Bar Association, Chicago, 1998), at pp. 60-61.

…counsel really ought to watch out for that sex stuff, because it very often leads to trouble. John D. Landry, a lawyer in Illinois, last fall learned a lot about this principle.

Coming Across

Landry represented Belen Kling, first in a divorce where property and support were dominant issues, and later in a lawsuit to modify the dissolution order to give Kling custody of her son. The evening before the divorce trial in 1991, Kling alleged that Landry came to her home to prepare, threw the plaintiff on her bed, and in the court's words, "initiated sexual intercourse." Kling said she feared that Landry would abandon her unless she came across. Kling seemed for the moment content with the outcome of her divorce. At any rate, she didn't complain.

Attached to the final decree was a psychological report. In it, Kling was found suffering from severe psychopathology, including bizarre thought patterns, poor impulse control, affective liability, and perhaps hallucinations. Affective liability, for those few who don't already know, is a condition of fluctuating and unstable emotions.

When Kling decided she wanted custody of her son, she went back to Landry, Again, Kling says, her lawyer came out to the house to prepare for a hearing. This time, said Kling's lawsuit, Landry threw her down on a kitchen rug, and again "initiated sexual intercourse."

A couple of months after the second alleged instance, Kling found a new lawyer. Her new lawyer, naturally, sued Landry for legal malpractice, breach of fiduciary duty, negligence, and intentional battery.

Kling immediately ran into dispositive motions. The trial judge three times dismissed her complaint for failure to state a cause of action. Each time, however, the court awarded leave to amend. Finally, though, the case went to the Appellate Court of Illinois (Second District, Docket No. 95-L-1114). Appellate judges in an opinion released … November 18 [1997] upheld the trial court on all except the fourth count, for battery.

Judges first determined that Kling had not and under the facts could not plead legal malpractice. The reason: the alleged breach of duty was not "sufficiently linked to the attorney's representation."

Still, what about Kling? She said that each instance occurred the evening before trial. She feared loss of Landry's services at a critical moment. That looks like a link to me, but I'm not a judge.

In addition, said the appellate court, Kling didn't allege that Landry damaged her case, or that she incurred actual damages. Mental distress without "any quantifiable injury" wasn't enough. In Illinois, said the court, "for purposes of legal malpractice action, the existence of an attorney-client sexual relationship is only relevant to the extent that is has an adverse effect on the quality of legal representation."

Kling also alleged Landry malpracticed because in her second case, the motion to amend the decree was frivolous. The Illinois court found the allegation conclusory and without factual support elsewhere in the pleadings.

So the malpractice count bit the dust. But sexual relationships impair objectivity, don't they? This is not news. People learned this millennia ago. Love, after all, is blind.

Contingent Fees?

Then the court looked at Kling's claimed breach of fiduciary duty. The lawyer-client relationship is fiduciary, as everyone knows. Illinois judges ruled that a three-part test applies. First, the lawyer must make his representation contingent on sex. Kling didn't claim that. Second, the lawyer must compromise the client's legal interest because of the sexual relationship. Pleadings alleged no such facts. And third, the lawyer must use information obtained during the representation. Such information must suggest that the client may be vulnerable to seduction. Landry, said the court, didn't use factual knowledge stemming from the relationship. The mental health report wasn't available when the first incident occurred.

"We caution, however," said the court, "that sexual intercourse between two consenting adults is not, of itself, actionable conduct." The appellate judges upheld

the trial court's dismissal again. Illinois appellate judges made short work of Kling's negligence claim in one paragraph. Said the court, "[W]e fail to see how the defendant breached his duty of ordinary care toward the plaintiff by engaging in sexual intercourse with her."

Battered by Battery

So far, Landry is doing well. Then the court took up Kling's allegations of battery. In Illinois, battery is an intentional tort. "The plaintiff," said the judges, "must allege a willful touching of another person without the consent of the person who is touched."

Kling alleged that sexual intercourse was touching "without permission and provocation." That allegation, said the court, was good enough. In Illinois at least, you needn't allege lack of consent in so many words. Appellate judges remanded the case to the trial court for additional proceedings on the battery claim. That, perhaps, left Landry out on a limb.

(g) Withdrawal

Sheehan, Katherine C., **"The Ethics Of Settlement For A Family Lawyer"**

American Bar Association [Section on Family Law]. *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), at pp. 843-844.

… , **AAML [American Academy Of Matrimonial Lawyers] Standard 2.11** notes that the client's decisionmaking ability may be affected by emotional problems, substance abuse, or other impairment. The proper response to this situation under the AAML Standards, however, is *not* to withhold inflammatory information from the client but to refer the client to appropriate counseling.

. . . .

4. The Comment to **AAML Standard 2.11** suggests that the attorney must oppose an angry client's irrational decisions about settlement, urge the client to seek counseling where necessary, and document the attorney's rejected advice if the client's decisions seem likely to adversely affect the client's interests.

5. An Attorney faced with an angry or irrational client who refuses a reasonable settlement and insists on a fight to the finish may attempt to withdraw from the representation. Withdrawal is an option if it can be accomplished without material adverse effect on the client's interests, unless the case is pending

before a court, in which case the approval of the court is also required. **Model Rule 1.16(b) and (c)**. Even if the client's interests may be adversely affected, withdrawal may be possible if the client's behaviour has rendered the representation unreasonably difficult for the attorney or other good cause for withdrawal exists. **Model Rule 1.16(b)(5) and (6)**. The Model Code, although somewhat more restrictive in permitting withdrawal, authorizes withdrawal when the client has made representation unreasonably difficult or, if the matter is not pending before a tribunal, insists on conduct contrary to the judgment and advice of the attorney. **DR 2-110(c)(1)(d) and (e)**; see, e.g., Illinois Op. 89-12 (April 9, 1990), ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, 6 Current Reports 166-67 (June 6, 1990) (permitting withdrawal under Code where client, with severe psychological problems, rejected favorable settlement and, without the funds to pay for it, demanded commencement of proceedings to obtain custody of unwilling seventeen-year-old); see generally, LOUIS PARLEY, THE ETHICAL FAMILY LAWYER: A PRACTICAL GUIDE TO AVOIDING PROFESSIONAL DILEMMAS 96-120 (1995) (Ch. 10: Termination and Withdrawal).

4.6.2 Responsibility to third parties

(a) To client's spouse

Sheehan, Katherine C., **"The Ethics Of Settlement For A Family Lawyer"**

American Bar Association [Section on Family Law], *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), p. 838.

AAML [American Academy Of Matrimonial Lawyers] Standard 2.21 recommends that the lawyer inform the opposing party, in writing, as follows:

1. I am your spouse's lawyer.
2. I do not and will not represent you.
3. I will at all times look out for your spouse's interests, not yours.
4. Any statements I make to you about this case should be taken by you as negotiation or argument on behalf of your spouse and not as advice to you as to your best interest.
5. I urge you to obtain your own lawyer.

Sheehan, Katherine C., **"The Ethics Of Settlement For A Family Lawyer"**

American Bar Association [Section on Family Law], *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), pp. 845-846.

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1. Unless acting before a tribunal (which may include out-of-court depositions) the attorney ordinarily has no obligation to volunteer information to an opposing party or counsel unless required by court rules or unless necessary to avoid assisting the attorney's client in committing a crime or fraud. **Model Rule 4.1**. Even this obligation is qualified by **Model Rule 1.6**. The Model Code prohibits a lawyer from knowingly failing to disclose "that which he is required by law to reveal." **DR 7-192(A)(3)**.

. . . .

4. **AAML [American Academy Of Matrimonial Lawyers] Standard 2.13** advises the attorney not to encourage the client to hide or dissipate assets.

5. Whether or not required by the ethical rules, an obligation to reveal unrequested information may arise from the substantive law. For example, fiduciary duties owed by one or more of the parties in a family law matter may require fuller disclosure of information. Comment 8 to **Model Rule 1.2** suggests that, where the client is a fiduciary, the lawyer, too, may have special obligations to the client's beneficiary. In the context of separation and divorce, a finding that the spouses owe each other fiduciary duties usually translates into a ruling that they must fully disclose marital assets.

(b) To Court/Opposing Counsel

Sheehan, Katherine C., **"The Ethics Of Settlement For A Family Lawyer"**

American Bar Association [Section on Family Law], *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), pp. 847.

C. Must Uninvited Errors Be Corrected?

AAML [American Academy Of Matrimonial Lawyers] Standard 3.3 urges that "[a]n attorney should not rely on a mistake by opposing counsel as to matters agreed upon to obtain an unfair benefit for the client." According to the Comment to Standard 3.3, "[t]he need for trust between attorneys … requires more than simply avoiding fraudulent and intentionally deceitful conduct." As an example of the operation of this standard, the AAML suggests that an attorney reviewing an agreement for maintenance drafted by opposing counsel which fails to create the tax consequences agreed upon by the parties should bring the error to the drafter's attention, even if the error favors the reviewing attorney's client. However, if the error concerns a topic that was not discussed in negotiations, "the attorney's obligation to the client precludes disclosure of the mistake without the client's permission."

Parley, Lewis & Hofstein, David**, "Ethics Update"**

American Bar Association [Section on Family Law], *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), pp. 825-826.

Various ethics committees [have] issued opinions dealing with the complexities of balancing lawyers' "candor" obligations with their duties of loyalty and respect for client confidences. The Philadelphia Bar Association Professional Guidance Committee, in Opinion 95-3, at ABA/BNA Manual, Current Reports, vol. 11, p. 269, addressed the issues of a lawyer's disclosure obligation when the lawyer knows the client has given false answers at a deposition. The committee disagreed with several ABA Opinions that would have required the lawyer to disclose the inaccurate information; see, ABA Formal Opinions 87-353 and 93-376; and, instead, took the position that the lawyer was not obligated to make the corrective disclosure. In the committee's view, the lawyer had not assisted the client, as the false testimony was given in response to questions asked by opposing counsel, and not in response to questions asked by the lawyer. Unlike the ABA Opinions, the lawyer's "silence" was

not considered to be "assistance." The committee did warn that the lawyer could not use the deposition responses for the client or elicit the same testimony.

In a different vein, the Pennsylvania Bar Association Committee in Legal Ethics & Professional Responsibility in Opinion 94-182, at ABA/NBA Manual 1001:7346, concluded that a lawyer who learned from opposing counsel that both parties in a pending divorce were actually female and that the child involved was born as a result of artificial insemination had a duty to disclose that to the court and had to correct the inaccurate pleadings. If the client insisted that the disclosure not be made, the committee felt the lawyer was required to withdraw.

Parley, Lewis & Hofstein, David**, "Ethics Update"**

American Bar Association [Section on Family Law], *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), pp. 826-827.

[Respecting] serendipitous opportunities to examine documents of an opponent that might otherwise be confidential … : … [in] District of Columbia Bar Legal Ethics Committee Opinion 256 at ABA/BNA Manual, Current Reports, vol. 11, p. 267, the committee felt that a lawyer who has the opportunity to examine an opponent's confidential document because of it's inadvertent disclosure should proceed as follows: (1) if told of the disclosure prior to actually reading the document and if asked not to read it and to return it, the lawyer should comply, and that the failure to do so would be a dishonest act in violation of Rule 8.4(c); (2) on the other hand, if the lawyer's awareness of the nature of the document arises from having read it or being informed of its nature after it is read, the lawyer is not inhibited from using the information. The committee also noted that the lawyer making the disclosure may be guilty of violating Rule 1.1 Competence as a result of the negligent handling of the materials.

On the other hand, dismissal of a party's civil action was an appropriate sanction where the party surreptitiously took documents from the opposing counsel, copied them and gave them to her attorney, and retained copies even after being told by the court not to. See, Lipin v. Bender, 83 N.Y. 993, 616 N.Y.S.2d 474 (1994), aff'g, 597 N.Y.S.2d 340. Since the plaintiff had the documents, the disqualification of counsel would not solve the problem as she could provide them to new counsel.

Parley, Lewis & Hofstein, David**, "Ethics Update"**

American Bar Association [Section on Family Law], *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), pp. 827-828.

In a non-matrimonial case an attorney was suspended for ten days for communicating directly with a represented party, which communication included a criticism of the behavior of the party's counsel. See, The Florida Bar v. Nunes, 661 So.2d 1202 (Fla. 1995). To make the suspension meaningful, the court gave the lawyer 30 days to notify his clients and to make arrangements to have his cases covered, prohibited him from taking on any new cases until the suspension was completed, and required him to take the ethics portion of the State Bar exam within 18 months.

In Disciplinary Proceedings Against Kinast, 530 N.W.2d 387 (Wisc. 1995) a parent's attorney was reprimanded for interviewing the client's children without first obtaining permission of the children's guardian ad litem. Although the children were not nominal parties in the case, they were "real parties in interest" and had a status in the case akin to being parties, particularly by having court-appointed representation, all of which makes the restrictions of Rule 4.2 applicable.

In Keisic v. Keisic, 618 N.Y.S.2d 155 (Sup. Ct. Erie Co. 1994) the court held that notes taken by the child's attorney during an interview with one parent were discoverable by the other side. As a general matter, there was nothing privileged or confidential about the communications, even if made with the party's counsel present. Further, as statements of a party they were discoverable under the state's discovery rules. The court also rejected a claim by the child's attorney that such interviews were so important to representing the child that they should be accorded special treatment, concluding that the attorney was bound by all the rules applicable to all lawyers.

Sheehan, Katherine C., **"The Ethics Of Settlement For A Family Lawyer"**

American Bar Association [Section on Family Law], *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), pp. 848.

In the context of contentious divorce negotiations, clients may wish to engage - or expect counsel to engage - in conduct that, although lawful, will have the effect of lengthening procedures, increasing costs, heightening the emotional tension between the parties and inhibiting settlement. **AAML [American Academy Of Matrimonial Lawyers] Standard 2.9** cautions the attorney not to "abdicate

responsibility for the propriety of the objectives sought or the means employed to achieve these objectives."

Mohsen v. Watson

[1995] W.D.F.L. No. 270, Ont. Gen Div., Forget J.
09 November 1995.

The parties commenced divorce proceedings and agreed that the matrimonial home should be sold. The defendant, who was solicitor for the husband in the divorce proceedings, was appointed solicitor for both parties in the sale of their home. Before closing of the transaction, a court order was issued to the effect that the proceeds were to be held by the husband's solicitor in an interest bearing account in trust for the parties to be paid out on consent of the parties, or on further order of the court. The defendant agreed by letter to the terms of the order. Both solicitors met and spent considerable time reviewing figures related to the closing. The defendant's evidence was that the parties, at the time, reached an understanding that the plaintiff's entitlement was $15,648 and that this satisfied the consent requirements. However, the wife's solicitor alleged that, as a result of this meeting, the defendant was to provide him with further documentation and that no agreement as to distribution of proceeds occurred on that date. The wife's solicitor by follow-up letter, spoke of retaining $1,600 from the interest bearing account, being two months of arrears of support at $800 per month as ordered by the court. The letter also suggested that the moneys in the account be retained for a 1-year period. However, the next day the defendant proceeded to pay out to the husband the sum of $13,000 as his share of the proceeds of sale, despite the letter from the wife's solicitor. He then sent a cheque to the plaintiff's solicitor, advising that he had no intention of holding any part of his client's share to cover support payments. The wife's solicitor then wrote reminding of the agreement to hold the moneys in trust until the parties agreed or the court ordered, but proceeded to state that he had no quarrel with the defendant if the plaintiff's share of proceeds was in accordance with his letter, wherein he spoke of retaining the $1,600 from the account for arrears of support. A family law expert testified that a solicitor could not withhold future possible arrears unless directed by order to do so. Under cross-examination, he stated that if there was an agreement between counsel, a solicitor could still pay out … [although] would be doing so at his own risk, but expressed the opinion that the wife's counsel's letter did not prohibit the disbursement of funds by the defendant. The wife brought an action against the husband's former solicitor to recover the sum of $13,587 which she claimed had been wrongfully paid out to the husband defendant.

Held - Action successful in part; wife entitled to recover $1,600 plus pre-judgment interest at 9.1 percent.

In view of the court order regarding retention of the proceeds, and the subsequent meeting between solicitors which was obviously not conclusive, it could

not be said that a consensus had been reached as a result of that meeting. Knowing of the outstanding order, the defendant was certainly ill-advised to proceed to distribution of the proceeds without specific authorization. However, in light of the plaintiff's solicitor's letter requesting the $1,600 in respect of arrears of support, that was the appropriate measure of damages suffered by the plaintiff as a result of the wrongful paying out of the proceeds against the provisions of the order.

(c) To Children (As Amicus Curiae)

[No Entry]

(d) To Parties (As Arbitrator)

Sheehan, Katherine C., **"The Ethics Of Settlement For A Family Lawyer"**

American Bar Association [Section on Family Law]. *1996 Fall [Continuing Legal Education] Conference Course Materials* (Chicago, 1996), p. 835, fn. 2.

Increasingly, family lawyers are called upon to act as mediators in dissolution, custody and support matters, assisting persons who are not their clients to reach agreement. …. . Discussions of these issues may be found in ABA STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES (1984); Association of Family Conciliation Courts Model Standards of Practice for Family and Divorce Mediation (1984), available in the December 1984 Dispute Resolution Forum published by the National Institute for Dispute Resolution; Linda J. Silberman, *Professional Responsibility Problems of Divorce Mediation*, 7 Fam. L. Rep. 4001 (1981).

Garwin, Arthur, "**Double Identity [:] Ethics issues do not disappear for lawyers who serve as mediators**"

(1998) 84 [*American Bar Assocation*] *Journal* June 1998 (Chicago, 1998), at p. 88.

In sorting through the ethics issues that arise for lawyers or firms providing mediation services, it is important to recognize that a variety of professional conduct rules apply.

For instance, as stated in Rule 3.4 of the Maine Code of Professional Responsibility, "The role of mediator does not create a lawyer-client relationship with any of the parties."

Florida Bar Opinion 94-6 (1994) holds that a mediation department operated within a law firm is subject to rules stating that a firm may not allow non-lawyer ownership participation, must comply with state advertising rules for lawyers and may not use a trade name.

On the other hand, Kentucky Bar Opinion E-377 (1995) states that a lawyer or firm may form a separate corporation using a trade name for the purposes of conducting mediation.

Indiana Bar Opinion 5 (1992) states that using a trade name when the service is separate from the firm is acceptable because mediation itself does not constitute the practice of law.

ABA Model Rule 5.7 describes when a lawyer is subject to professional conduct rules with respect to the provision of law-related services. The rule describes such services as those "that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited, as unauthorized practice of law when provided by a nonlawyer."

Pennsylvania is the only state that has adopted some version of Model Rule 5.7 since it was added to the Model Rules by the ABA House of Delegates in 1994. Pennsylvania Bar Opinion 96-39 analyzes mediation services as distinct from the practice of law in the context of the rule.

. . . .

Under Rule 5.7, the opinion states, it is critical that the mediation entity not serve the firm's clients and that the firm not take on any mediation customers as clients.

In addition, the mediation customers must not be led to believe they are receiving legal services.

Maintaining a distinction between legal clients and mediation customers is consistent with Arizona Bar Opinion 96-01 (1996), which, in citing Section IIIA of the ABA Standards of Practice for Lawyer Mediators in Family Disputes, takes a strict view in stating that a mediator may not represent either party in any legal matter during or after the mediation.

On the other hand, Dallas Bar Opinion 1991-06 states that a mediator may represent one of the parties in a subsequent unrelated matter as long as confidentiality is maintained.

Texas Bar Opinion 496 (1994), characterizing a mediator as an adjudicatory official concludes that, under Rule 1.11 of the Texas Disciplinary Rules of Professional Conduct, a lawyer may not subsequently represent anyone in connection with a matter related to one in which the lawyer acted as mediator unless all parties to the proceeding consent after disclosure.

A U.S. District Court in Utah, however, reached a different conclusion in *Poly Software Intern., Inc. v. Su,* 880, F. Supp. 1487 (1995).

"Although mediators function in some ways as neutral coordinators of dispute resolution," the court stated, "they also assume the role of a confidant, and it is that aspect of their role that distinguishes them from adjudicators."

This interpretation, stated the court, strikes a good balance between encouraging parties to disclose freely their positions during mediation and limiting the range of disqualifications so as not to discourage lawyers from serving as mediators.

Lawyers must remember, however, that, even though mediating may not be viewed as the practice of law, it can trigger the application of various professional conduct rules once they put back on their lawyer hats.

4.6.3 Contempt

[No Entry]

4.6.4 Barrister's services

(a) "Fair Advocacy" rule

[No Entry]

(b) Ensuring Proceedings Merited

[No Entry]

(c) Undertakings to court

[See: Part 4.5.8(a): Affidavit Evidence.]

(d.1) Agreements: Generally

"Settlements and Agreements Between Counsel"

McLeod, James G. and Mamo, Alfred A., *Annual Review Of Family Law*
(Carswell, Toronto, 1997),
at pp. 384-385

Settlements of pending litigation between counsel acting within the scope of their retainer usually will be upheld in order to maintain the integrity of the negotiation process regardless of whether the agreement meets the formal requirements under the local domestic contract legislation: *Gilchuk v. Gilchuk* (1996), 22 R.F.L. (4th) 422 (B.C. S.C.) (lawyer having authority to bind client). While a court may decline to enforce a settlement between counsel, it is unlikely, as long as the lawyer acted within the scope of its retainer and there was no obvious overreaching: *Inkumsah-Cosper v. Cosper* (1995), 14 R.F.L. (4th) 152, 141 N.S.R. (2d) 344, 403 A.P.R. 344 (C.A.) (court upholding settlement against wife's wishes); *Best v. Cote*, [1996] W.D.F.L. 068 (B.C. S.C.) (court may decline to enforce unfair settlement); *Delutis v. Heisler*, [1996] W.D.F.L. 2166 (Ont. Prov. Div.) (counsel properly retained, client bound by settlement); *M. (D.L.) v. M. (G.W.)*, [1997] W.D.F.L. 190 (B.C. S.C.) (court maintaining settlement over wife's objection).

In *Chapman v. Chapman* (1996), 25 R.F.L. (4th) 309, 155 N.S.R. (2d) 19, 457 A.P.R. 19 (N.S. S.C.), the court confirmed that without prejudice correspondence between counsel concerning settlement may be taken into account by a judge to decide whether counsel reached an agreement to settle pending litigation.

If a person acts as his or her own lawyer, a court may uphold a settlement arranged by the person and his or her spouse's lawyer in the course of pending litigation. In *Boomhour v. Boomhour*, [1996] W.D.F.L. 805, additional reasons at (April 1, 1996), Docs. 846/89, 2174/91 (Ont. Gen. Div.), the court refused to allow a

wife to resile from a settlement arranged without independent legal advice where she understood the agreement and had the opportunity to obtain counsel if she wished. However, it is questionable whether a court will uphold a settlement of pending litigation negotiated between spouses acting for themselves. Arguably, courts should enforce a reasonable settlement of pending litigation with or without lawyers to maintain the integrity of the settlement process, especially when more litigants are

unrepresented than in the past. However, to do so seems to ignore the clear words of s. 55(1) of the Act: *Sagl v. Sagl* (July 11, 1997), Doc. 93-FC-000956 (Ont. Gen. Div.) (*Family Law Act* designed to protect spouse being held to an informal agreement); *Arvelin v. Arvelin* (1996), 20 R.F.L. (4th) 87 at 101 (Ont. Gen. Div.) (purpose of s. 55).

The onus is on a person who alleges settlement to prove that litigation covering the points was pending and that a settlement on all substantial issues was reached between counsel: *Lynch v. Lynch* (1994), 8 R.F.L. (4th) 48 (Ont. Gen. Div.), appeal dismissed (June 17, 1996), (Ont. Gen. Div.).

A person who accepts a clear offer to settle is likely to be held bound by the settlement even if one of the parties later states that he or she did not mean what the agreement clearly provides: *Johnson v. Johnson* (1996), 68 B.C. A.C. 233, 112 W.A.C. 233 (C.A.).

Settlement is reached whenever an outstanding offer to settle is accepted. Lawyers should keep track of outstanding offers and ensure than an offer is withdrawn if a client is no longer prepared to be bound by the offer.

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

Delutis v. Heisler

[1996] W.D.F.L. No. 2166, Ont. Prov. Div., Stauth Prov. J.,
10 May 1996.

The parties had settled the matter of custody and access and the only outstanding issue was that of child support for their 5-year-old son. Although there had been a pre-trial conference, no formal agreement was reached. The mother had formally retained a lawyer to represent her in these family law matters. The mother made an offer through her counsel which was forwarded to the husband's counsel stating that she would accept $400 monthly plus a cost of living clause. The mother's counsel also stated that if the offer was not accepted, pleadings would be amended, seeking retroactive child support and solicitor-and-client costs. The offer was open for a period of two months. One week before the expiry date, the father accepted the offer. Upon learning of the settlement, the mother dismissed her counsel and refused to execute a proposed consent for child support in the amount of $400 monthly. The father applied for judgment in accordance with the offer.

Held - Application granted.

The mother's counsel, whose retainer had been established, had authority to bind her client by a compromise of the proceedings in the absence of the mother clearly limiting her counsel's authority or becoming incompetent to instruct her

counsel. In the present case, the mother's counsel was properly retained, she made a specific offer which was accepted within the allotted time, and there were no allegations of the mother's incompetence. Furthermore, the award was reasonable when compared with the Paras principle [(1970), 2 R.F.L. 328 (Ont. C.A.)] and the new proposed federal guidelines [since promulgated and effective from 01 April 1997: S.O.R. / 97-175 to 180].

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

[No Entry]

4.6.5 Costs

(a) Generally

Lawyer Account Taxation Issues

(1998) 15 *The Complete Lawyer [:] General Practice, Solo & Small Firm Section* No. 1
(American Bar Association, Chicago), at pp. 46-47 (in part).

Issue	Comment	Examples
Administrative or Overhead Time	Time not properly billable to client because not for professional services.	
Clerical Time	Time billed for nonprofessional services, especially services that could be performed by nonbilling clerical personnel. Part of the firm's overhead.	
Issue	**Comment**	**Examples**
Chipping (multiple small entries)	A project or task is broken down into numerous small tasks adding up to more time than the task should have taken.	
Double Charge	Possible double charge for time or expense, i.e., the same thing appears to have been entered twice on the bill.	

Duplicative Time	Two or more people doing the same task.	
Excessive Time	Time for the stated task or activity appears excessive. May also be due to excessive repetition of the task.	
Questionable Expense	Expense (out-of-pocket cost) item that is or may be questionable, e.g., because excessive, unnecessary marked up, etc.	
High Hourly Rate	Hourly or other rate appears high.	
Internal Conference or Communication	An internal, i.e., usually within the firm (or team), conference. Includes internal meetings, telephone calls, or other communication.	
Long Days	Total time entries by timekeeper for that day exceed a reasonable amount, usually 8.0 hours. Even if the time is worked, value likely suffered.	
Mixed Time Entry	Time entry contains mixture of tasks or activities, not all of which may be a problem or which may have multiple problems. (Sometimes so prevalent that virtually every entry would be flagged.)	
Issue	**Comment**	**Examples**
Nonprevailing Issue	Where a party is entitled only to compensation for work on some aspects of matter, e.g., issues on which it prevailed, this entry relates to something else.	
Off- or Over-Budget	The fees (or some portion) are over the budgeted amount or were not provided for in the budget (i.e., off-budget). Once the lawyer gives an estimate, she has a duty to update the estimate.	

Overstaffing	Staff appears to be larger than necessary, causing unnecessary internal communication, etc. May also result in duplication, excessive time, etc.	
Cryptic Entry	An ambiguous, vague, illegible, or incomplete entry without sufficient detail to determine whether it is properly billable to this client and matter.	
Rate Change	Hourly or other rate changes.	
Travel Time	Time spent in transit, regardless of transportation mode. May depend upon whether local or not.	
Training Time	Time spent training staff or lawyers; learning time. May also apply where second timekeeper's experience and role are limited, indicating on-the-job training. Especially common for junior lawyers, paralegals, or summer associates.	
Violates Billing Agreement, Client Instruction, or Other Standard	The firm is acting contrary to a billing policy, ethical rule, procedural rule, or the client's instructions, for example.	
Issue	**Comment**	**Examples**
Wrong Bill or Client	Entry appears to relate to another matter or client.	

***Even though task-based billing is relatively new and not always required, preparing task-based bills will avoid problems in the long run. The ABA has also promulgated a set of standardized codes by which to describe services. ABA &ACCA, "Uniform Task-Based Management System: Litigation Code Set" (May 1995) (ABA Publication #5310129).**

Minkarious v. Abraham, Duggan

(1995), 44 C.P.C. (3d) 210 (Ont. Gen. Div.), E. I. MacDonald J.

From 1993 to 1994 the respondent solicitor was retained by the applicant client with respect to matrimonial proceedings in St. Catharines. The solicitors practiced law in Toronto. Seven interim accounts were rendered over the first eight months, followed by a final fee and final disbursement account. The total amount billed was $143,603. The client paid $104,000. The balance related to the final two accounts that were totally unpaid and to another account that was only partially paid. The client applied under ss.3, 4, and 11 of the Solicitors Act (Ont.) for an order referring for assessment all interim and final accounts, and fixing St. Catherines as the place for the assessment. At issue was whether special circumstances justified the assessment of the paid accounts and the assessment of accounts that were paid more than 12 months before the application.

Held – The application was allowed and assessment was ordered to be held in St. Catherines.

All the paid accounts were interim accounts. There was a continuum of accounts in that they all related to the same matrimonial action. A determination of the reasonableness of the final accounts required examination of the interim accounts. Partial payment of the bill left the client vulnerable. The limitation period could not begin before the whole contract was performed or the retainer was terminated. The 12-month time limit in s. 11 of the Solicitors Act ran from the date of the final account, not from the dates of each of the interim accounts.

Under s. 11 voluntary payment raised a presumption that the client accepted the reasonableness of the account. The term "special circumstances" sets a high standard to meet before assessment could be ordered. However, that did not limit assessment referrals under s. 11 to cases of gross and exorbitant claims amounting to fraud. Special circumstances for the purposes of s. 11, as in s. 3, were broadly defined as circumstances of an exceptional nature, in the particular case.

The exceptional circumstances could be of a contractual or an equitable nature. The phrase "appear to require" meant that the court had a broad judicial discretion to order an assessment under s. 11.

Here, the presumption of satisfaction with the paid bills was rebutted because the client increasingly questioned the bills. Special circumstances of both equitable and contractual natures were found, including the solicitor's total opposition to an assessment of the paid accounts when questioned by the client, the delay caused by the failure of other law firms to act on the client's behalf in applying for an assessment, and the solicitors' failure to adjust the final account to reflect the complexity of the case as called for in the retainer agreement.

Although the solicitor was based in Toronto, St. Catherines was the forum of convenience as it was easier to obtain an early assessment date and the matrimonial proceeding was heard there.

Hoffman v. Syed

[1996] W.D.F.L. No. 2127, Alta. C.A.
10 June 1996.

The law firm and the client entered into a 25 percent contingency agreement. After the client turned down a settlement offer, the law firm refused to act further, and rendered a large bill. The taxing officer gave an unusual alternative decision, which was appealed to the Chambers Judge. The appeal to the Chambers judge was based on the client's clear affidavit, which alleged that the law firm had specifically agreed to waive its fee if the matter was not taken to judgement or settlement. The law firm did not cross-examine on the client's affidavit, nor present any rebuttal evidence, and the Chambers judge determined that the law firm was not entitled to payment. The law firm appealed.

Held -Appeal dismissed.

Rule 618, or any of the preceding rules, does not overrule an express precondition to earning a fee. In light of the client's uncontradicted evidence as to what the parties agreed to, the Chambers Judge was entitled to rely on that evidence and to find that the law firm was not entitled to payment.

McMullan v. Danoit

[1996] W.D.F.L. No. 2282, B.C. S.C., Horn, Master
22 July 1996.

An application by a solicitor for interim payment of fees out of the net proceeds of sale of a matrimonial home was refused where a party had claimed an unequal division of the proceeds. The order sought by the solicitor might possibly jeopardize that party's position.

Mega, Marcello and Ungoed-Thomas, Jon, **"Surge in complaints over solicitors' 'padded' bills"**

The Sunday Times (London, 24 May 1998)

The solicitors' firm stunned a … client with a £34,000 demand for photocopying, at more than £4 a sheet. The case has been revealed as solicitors face a barrage of complaints from customers angry at huge bills and poor service.

Tods Murray, an Edinburgh-based firm, included the £34,000 photocopying charge in a £204,000 bill sent to a building firm. The bill has now been cut by more than a third.

The revelation of apparent overcharging coincides with growing concern among clients that some firms are unfairly "padding" their bills. The number of complaints against solicitors has risen by about 30% in the past 12 months.

The invoice drawn up by Tods Murray was examined by the auditor at Scotland's Court of Session after the solicitors sued Glasgow-based Arakin Ltd. for not paying. The auditor discovered a catalogue of apparent overcharging, including;

- Telephone calls recorded in units of six minutes. If a client was on the phone for just seven, he would be charged for 12.

- Charges for work that either did not take place or for which there were no file entries.

- Charges for jobs that appeared to have been duplicated elsewhere in the bill.

- Charges for work … by qualified solicitors, although it was carried out by trainees.

Tods Murray firmly denies any overcharging and the dispute continues. The Office for the Supervision of Solicitors (OSS), the legal watchdog that covers England and Wales, has highlighted the Scottish case as it faces a growing backlog of complaints, coming in at a rate of about 3,000 a month.

"The huge surprise bill that turns up on the doorstep has always been one of the biggest problems," said Ashley Holmes, head of legal services at the Consumers' Association. "Solicitors may say they charge on an hourly basis, but they often don't explain in enough detail what they'll be charging for and, in some cases, they just overcharge."

The OSS reports that the number of complaints averaged about 3,000 a month between September 1997 and February 1998, an annual rise of about 30% on the same period in the previous year.

A survey by the National Association of Citizens' Advice Bureaux has revealed how some firms are failing to abide by the Law Society's written professional standards, which require them to keep clients informed about charges. An Essex woman who hired a solicitor to attempt to improve the terms of her divorce settlement won an extra £50 a month from the court, but was given a bill by her solicitors for £2,400. She was advised to pay it back at the rate of £50 a month over a five-year period.

Scottish solicitors have been astonished by the size of the cuts imposed on Tods Murray by the court. The biggest bill, for £204,000, was cut to £124,000, and a second bill for £178,000 was cut to £162,000. The £34,000 photocopying charge, which was included on the bigger bill, has now been cut to about £7,500.

Robert Dobie, a senior partner at Tods Murray, said the bill reflected the complexity of the work involved. He denied that full rates had been charged for work by trainees. Andrew McNamara, the principal director of Arakin, said he was still in dispute with the solicitors' firm and would not comment on the case.

Tods Murray, which numbers David McLetchie, a vice-president of the Scottish Conservative party, among its partners, has had a number of high-profile clients, among them one of the parties involved in the notorious 1963 divorce involving the Duke and Duchess of Argyle. The duke claimed his wife had numerous lovers in one of the most acrimonious marriage splits in recent decades. An infamous photograph, which apparently showed the duchess performing a sexual act with an unidentified man, was stored for years in the firm's vaults.

(b) Security for costs

[No Entry]

(c.1) Liens/Charging orders: allowed

Tzembelicos v. Tzembelicos

[1997] O.J. No. 2911 (Ont. Gen. Div.), Ground J.

Text: On the question of the discharge of Farano Green as solicitors [for the Defendant in this family law proceeding], it seems to me that the only evidence before me is that any dissatisfaction with their prior services appears to have been resolved at the meeting in May and that accordingly the discharge of Farano Green resulted from the Notice of Change of Solicitors served upon them. Therefore I do not think that the cases that say there is no solicitor's lien if the solicitor removes himself or herself are applicable.

. . . .

…. Accordingly an order will issue that the defendants Nikitas Tzembelicos and Eleanor Tzembelicos pay into a segregated trust account to be maintained by [the defendant's present solicitors] Mr. Sinukoff's firm the amount of $13,834.27 claimed to be owing to the firm of Farano Green on account of fees and that upon being advised that this payment has been made, Farano Green forthwith deliver to Mr. Sinukoff the whole file in their possession relating to this action and that, upon completion of the trial of this action or other disposition of this action and completion of the assessment of the accounts of Farano Green, Mr. Sinukoff's firm pay out of such segregated trust account any amount owing to Farano Green on account of fees and remit the balance in such account to the defendants Nikitas Tzembelicos and Eleanor Tzembelicos. No order as to costs.

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

Wilson v. Wilson

[1996] W.D.F.L. No. 2437, Ont. Gen. Div., Herold J.
19 June 1996.

After the parties separated, title to a cabin cruiser remained in serious dispute throughout the litigation. The cruiser was ordered sold and the proceeds of sale were to be held in the names of counsel for both parties. No order was made at that time with respect to ownership of the boat or the proceeds of sale thereof. As a result of the sale of the boat, an excess of $80,000 remained invested in the names of both counsel. Counsel for the wife then sought and obtained a charging order to protect an account which was not disputed by her client but could not be paid, in the amount of $120,000. Before the account was ever paid, the wife made an assignment in bankruptcy. The charging order … [had been] sought to avoid having the sum go to the wife's trustee in bankruptcy for the benefit of her creditors. In effect, the charging order would enable the solicitor to claim as a secured creditor and the order would survive the bankrupt's discharge. As a result of lengthy litigation, the boat was finally included in the wife's net family property. Also as a result of the litigation, the wife was required to pay to the husband an equalization payment of $260,000 plus interest. The husband was the major creditor in the wife's bankruptcy, followed by her counsel … . The husband brought a motion to set aside the charging order. The wife brought a motion wherein she resisted setting aside the charging order or in the alternative, sought a charging order de novo.

Held - Husband's motion allowed; wife's motion dismissed; charging order set aside and claim by wife's solicitor for charging order dismissed.

The Judge had clearly made no order with respect to the ownership of the boat or the proceeds of sale thereof. Therefore, until the court declared the extent of the spouses' interests by equalization, there was no property recovered by the wife to which the charge could attach. At the conclusion of the litigation, there was no fund or property which had been recovered or preserved by the solicitor claiming the charging order and the client, in fact, was indebted to the client's former husband in a substantial amount.

Foley v. Davis

(1996), 49 C.P.C. (3d) 201 (Ont. C.A.)

Manual Editor's Note: Due to the failure of F. to pay child and spousal support, his wife obtained an order that he do so. Support payments were due and owing under that order when, approximately six weeks later, F. obtained an order for costs in other (unrelated, non-family) litigation. F.'s wife sought to satisfy sums owing to her by F. under the court order for child and spousal support from the costs payable to F. in the other litigation. F.'s solicitors, in the other litigation, claimed a lien against the costs in the unrelated litigation.

The trial judge refused the claim of F.'s solicitors for a lien on the costs in priority to the wife's claim to satisfy F.'s obligations to her for child and spousal support. F.'s solicitors appealed.

Held - Appeal dismissed

Headnote: Although absent improper conduct, a solicitor was entitled to a charge in first priority on funds recovered or preserved by the efforts of the solicitor, the court retained the discretion to order otherwise.

Consideration was given to the facts that: the wife's claim was based on a court-ordered charge made before the funds [including costs] were paid as part of the settlement [to F's solicitors], the court order was necessitated by the plaintiff's failure to pay child and spousal support, there was no indication that the law firm could not recover fees from at least one of the two plaintiffs, and the wife did not benefit from … [F's] litigation giving rise to the solicitors' fees.

Reid v. Fishman

(1996), 1 C.P.C. (4th) 369 (Man. C.A.), Helper J.A. for the Court,
at paras. 1; 17-21.

This case addresses the competing claims by a solicitor [Fishman] for payment of his fees and by a trustee in bankruptcy on trust monies held by the solicitor. Following the payment of the monies to the solicitor [in trust], but before the trust conditions were satisfied, the solicitor's client [the husband Reid], one of the beneficiaries of the trust [the other being the wife Reid], made an assignment in bankruptcy. The motions judge found that the solicitor was entitled to a charge or lien

on funds in his possession in priority to the interest of the trustee in bankruptcy. The trustee appeals that determination.

. . . .

Mr. Reid made an assignment in bankruptcy prior to Mrs. Reid having advanced her claim against the fund, prior to any agreement between the beneficiaries [the husband and wife] and prior to the trust conditions being satisfied. At that point in time, September 10, 1991, the claims on the fund became crystallized and could not thereafter become perfected. Mr. Fishman's lien could not attach to trust funds in which his client's interests were not determined and were not divisible. The existing order to pay did not perfect his claim and did not elevate his status as an unsecured creditor of the bankrupt to one of a secured creditor. See Bank of Nova Scotia v. Harman (1984), (sub nom. Re Harman) 32 Sask. R. 118 (Q.B.).

The order to pay does not constitute an assignment, transfer or other charge against Mr. Reid's property from the time of its execution. Mr. Reid's interests were not identified until April, 1995. Only then could Mr. Fishman's lien attach to the monies in his possession [to the extent the husband was entitled to the monies]. But it was too late.

Upon an assignment being made, a trustee in bankruptcy acquires rights that supersede the prior existing rights between the bankrupt and a third party. See Re Harman.

The trustee's interest in funds in which the bankrupt has an interest takes priority to the claims of the bankrupt's unsecured creditors. There is no authority for Mr. Fishman's submission that the order to pay had the effect of securing his claim against the trust monies from the time those monies were deposited with him. Mr. Reid's interest in those funds was neither identified nor divisible until 1995. Until then the order to pay and any solicitor's lien could not attach any particular funds.

The trustee's interest in the disputed monies arose in 1991 and takes precedence over the solicitor's unsecured claim for professional fees.

In the result, I would allow the appeal, set aside paragraph 1(b) of the order of August 14, 1995 and in its place order that Mr. Fishman pay to Keith G. Collins, as trustee of the estate of Alvin Bruce Reid, the sum of $3,465.50.

Appeal allowed.

(c.3) Liens/Charging orders: priority

[No Entry]

(d) Equitable assignment

[No Entry]

(e.1) Taxed costs: upheld

Clark & Co. v. Berg

[1996] W.D.F.L. No. 2280, B.C. S.C., Horn, Master
22 July 1996.

The solicitors had represented the client in a matrimonial action. The client complained that the solicitors had not applied for a restraining order against her husband, although she had asked them to do so. The solicitors testified that the plaintiff had not asked for a restraining order and that, due to the absence of violence or threat, no order would have been granted in any event. The client also complained that she should have been advised to contact the Family Maintenance Enforcement Program in regard to arrears of maintenance. The solicitors agreed that this matter was never discussed, but testified that if the Program had been discussed, they would have pointed out that enrolment could result in delays up to six months. The client applied for a review and reduction of the solicitors' accounts.

Held - Application dismissed.

The client's criticisms that the solicitors had wasted time and achieved poor results were not merited. The solicitors' bill was high, but not excessive.

(e.2) Taxed costs: reduced

Heath Giovando & Hansen v. Mazzarotto

[1996] W.D.F.L. No. 2281, B.C. S.C., Horn, Master
22 July 1996.

The solicitors represented the client in a matrimonial action. Early in the proceedings, the client's spouse obtained a maintenance order based upon an affidavit that, on examination for discovery, was found to be untrue. The maintenance order was later set aside. The client complained that the solicitors had not defended the original application properly, in that they had used a solicitor's affidavit on information and belief, as opposed to his affidavit, because he was out of the country. He expressed the view that he should have been advised to return to Canada to deal with the matter. The client also complained that four months before trial, his counsel was appointed a judge, requiring another counsel to review the file prior to trial preparation. The incoming counsel had made a deduction of three-and-a-half hours to take this review time into account. The client's third complaint was that he was forced to make an unfavourable settlement at the courthouse just before trial. The solicitors testified that the client had been advised to proceed with the trial if he was unhappy with the proposed settlement terms. They pointed out that the settlement meant that the client was not exposed to the risk of an order entitling the spouse to one-half of all of his assets. The client applied for a review and reduction of the solicitor's accounts.

Held - Application allowed in part.

It was true that the system had failed the client, in that the spouse had been able to obtain a maintenance order based upon a false affidavit. However, the evidence to prove that the affidavit was false only became available at examination for discovery. Advising the client to return to the country would not have assisted the solicitors in defending the application. It could not be said that the solicitors did not vigorously defend the client's interest, either at the maintenance application or at the settlement discussions. Having said that, the success of litigation is a factor considered on a review of accounts. The client did not get what he wanted out the litigation. Furthermore, the incoming counsel had not given a sufficient discount for review time necessitated by the appointment of the original counsel to the Bench. In light of these two points, the solicitors' fee was reduced from $16,210 to $14,210.

Merchant Law Group v. Zinger

[1997] A.J. No. 746 (Alta. Q.B.), Christensen, T.O.

Headnote: This was a taxation of a solicitor's account. The client was billed $10,457 in fees in connection with a divorce proceeding. The litigation involved a petition for spousal support and division of matrimonial property. Examinations for discovery were held. The client was billed twice for the examinations. The solicitor and the client did not enter into a formal retainer agreement. The client was advised of the solicitor's hourly rate in advance of being retained.

Held - The account was reduced to $5,149.

The account was reduced to account for double billing and inaccuracies in the solicitor's time keeping system. The file was a typical family law file. It did not have any complexities. The account was also reduced to account for the benefit of the solicitor's work to the client and the skill level demonstrated by the solicitor.

Text (paras. 5-36)**:**

Background

The file concerned divorce and matrimonial property proceedings. The divorce had previously been obtained with spousal support for Ms. Zinger reserved.

The issues in the litigation were spousal support and division of the matrimonial property. The property consisted of a home held in joint names with equity of $100,000, furniture of nominal value, a law practise, cash, and investments. Relevant too were Ms. Zinger's representations that $30,000.00 in student loans were paid off during the course of the marriage and while Ms. Zinger was contributing to the family income, that $40,000.00 was given to Mr. Zinger by Ms. Zinger from her savings account just prior to him leaving her, and that Mr. Zinger dissipated approximately $100,000.00 in monies from other bank accounts for his own uses.

Services Performed

An application was heard on August 1, 1996, wherein Mr. Smith (Mr. Merchant's Edmonton associate who did most of the legwork on the file) sought to obtain interim spousal support. Because of a failure to serve counsel for Mr. Zinger the learned Justice adjourned the application and awarded costs of $500.00 against Ms. Zinger's lawyers, the Merchant Law Group. The $500.00 paid to Mr. L. Pollock, Q.C. were added as a disbursement to the September 13, 1996 account (plus GST) and the law firm billed for the appearance before the Court that day.

A 1.6 hour Examination on Affidavit was held August 13, 1996 and conducted by Mr. Smith.

A further application was heard August 18, 1996, conducted by Mr. Smith, 2.5 hours. I do not know what it concerned or what transpired. I do know that it and preparation for it was billed for twice.

A second Examination on Affidavit was held September 20, 1996, conducted by Mr. Smith, and lasting for approximately 2 hours. Both Examinations resulted in the giving by Mr. Zinger of one (1) undertaking, which was not received during the course of the law firm's tenure on the file.

The conclusion reached at the hearing was that there was never any disclosure by Mr. Zinger, no answer to the Notice to Disclose, no Affidavit of Documents, and no undertakings.

October 15, 1996 the interim maintenance application proceeded and Mr. Merchant flew in from Regina to conduct it. The Court ordered Mr. Zinger to pay spousal maintenance of $750 per month for four months. It directed that the matter proceed to Trial within four (4) months, that Examinations for Discovery be completed by the end of October and that undertakings be exchanged by the end of November, 1996.

Thereafter letters and telephone calls were exchanged between counsel and in-house conferences were held between Mr. Smith and Mr. Merchant resulting in memorandums to the file.

On May 21, 1997 Mr. Smith appeared on a further application for interim support. No Examinations for Discovery had been held, no disclosure by either party, and no Trial set or Pre-Trial Conference held. The Court denied the application and again directed the matter to Trial, as ordered by the Court back on October 15th.

Ms. Zinger then terminated the services of the Merchant Law Group and retained Mr. Broda.

Ms. Zinger submitted that she retained the Merchant Law Group because she is the wife of a local barrister and solicitor and thought it best to use outside counsel who also had a presence in Edmonton. Merchant Law Group is based out of Regina, Saskatchewan, but has offices in Alberta.

No retainer agreement was entered into or engagement letter sent to Ms. Zinger. Ms. Zinger acknowledged that at the first meeting with Mr. Smith she was advised that Mr. Merchant's hourly rate was $370.00 and Mr. Smith's rate was $105.00

Ms. Zinger submitted that at the meeting she was advised that fees would amount to approximately $6,000.00 to take this matter to and including trial of the issues. Neither Mr. Merchant or Mr. Smith were present at the taxation hearing to

respond to this submission and Mr. [B.G.] Neill had no knowledge of the circumstances. [He was a law student with the Law Group which instructed him, the day before taxation, to appear on the taxation.]

The accounts are taxed on a quantum merit basis.

Time

The first two accounts detail the time recorded, the last one did not. No issue was taken with the accuracy of the time recorded save for the fact that 5.35 hours billed on the October 29, 1996 account were a duplication of time billed on the September 13, 1996 account.

The law firm's "Brief of Law" [filed on taxation] submitted that Mr. Merchant's time averaged $278.00 per hour and that in combination with Mr. Smith's time the average hourly rate came to $150.00. I did not investigate to confirm this assertion.

Legal Complexity

Mr. Merchant's "brief" states that the case "was difficult" and that "the legal complexity of the arguments required in issues were significant." However, no examples were given of what those issues were or of their complexity.

The applications made were for interim spousal support. The spouse was on Unemployment Insurance and the husband was working as a solicitor in Edmonton. There was nothing particularly complex about that. Granted, had this matter gone to Trial there may have been some complex issues to address, but the work itemized and billed for in these accounts did not touch significantly on such issues. This was a normal, work-a-day, family law file.

Monetary Value of the Matters

The client's interest in the matrimonial property was in the $100,000 plus range. Nothing earth-shattering.

Importance of the Matter to the Client

Mr. Merchant's brief complained that, "Ms. Zinger had a great deal of difficulty dealing with the emotional aspect of the proceedings and the resulting pressures. Mr. Merchant and the other lawyers who worked on the file found it necessary to talk with Ms. Zinger on a regular basis to get her through the difficult process and the complex proceedings that had to be engaged." Yet, my review of the time records revealed no out-of-the-ordinary time expenditures in dealings with Ms. Zinger.

As one who reviews hundreds of divorce and matrimonial property files each year this seemed a typical matrimonial property and spousal support file.

Competence and Skill of the Lawyer

Merchant Law Group's "Brief of Law" submitted that Mr. Merchant "has a reputation of being a strong matrimonial lawyer," "has vast experience in the field of family law," "is a well-known, successful family law practitioner," "has dealt with hundreds of matrimonial property and support cases and knows exactly what to expect," "has a well-deserved reputation of being in the top rank of family lawyers in Western Canada," "is one of the best," "is indeed a lawyer with 'special skills' in the area of family law," "['s] 'expertise' in the area of family law is well-known throughout Western Canada," and "is the western editor of the Reports of Family Law". Furthermore, the brief submitted, "it may be argued that no one in Western Canada has the same expertise in matrimonial law as Mr. Merchant."

I will let the results speak for themselves.

Results Achieved

The results of the services provided were that over the course of almost exactly one year four applications resulting in a reprimand by the court, an award of costs against the Merchant Law Group, spousal support obtained of $4,000.00, and directions given to hurry this matter to trial which were not followed through on. Further, two Examinations on Affidavit were conducted which Mr. Broda represented resulted in no significant admissions and one (1) not complied with Undertaking. And further, to the best of my knowledge no disclosure of income, worth, assets, income tax returns, etc. was obtained from Mr. Zinger. No Examinations for Discovery were held. Very little was actually accomplished.

Expectations as to Fees

Ms. Zinger was led to believe that she would be billed about $6,000.00 to take this matter to and through trial. Mr. Neill was unable to refute this assertion.

Conclusions

In the absence of a retainer agreement or of any verification that Ms. Zinger was clearly apprized of the significance of a "straight time bill" retainer agreement accounts were being taxed on a quantum merit basis.

Ms. Zinger agreed to retain legal counsel from outside the jurisdiction and consequently has to pay his travel expenses and pay for his reasonable travel time. I allowed $900.00 for Mr. Merchant's travel time to and from the October 15th interim spousal support special chambers application. The travel disbursements are allowed as billed in the accounts.

Anything related to the August 1st interim spousal support application wherein the Court awarded costs against the Merchant Law Group of $500.00 is disallowed. It was an ill-executed exercise and the client should not have to pay for the charges

associated with it, most particularly the $500 disbursement ordered to be paid by the law firm!

For the results achieved, for the services provided that proved to be of any benefit to the client, for the time usefully spent, for the level of legal complexity involved, for the skill and competence demonstrated, and even allowing for the fact that this was a matrimonial file, I allowed $2,500.00 in fees.

Accordingly, $2,500.00 for legal services, plus $900.00 for travel time, puts total fees at $3,400.00, a reduction of $4,461.00. Disbursements are reduced by $500.00 to $1,459.55. Other charges remain at $67.81. GST is adjusted down $347.27 to $221.69. Total fees, disbursements, other charges and GST are set and allowed at $5,149.05, [See Note 2 below] a reduction of $5,308.27 (Note 2: This figure differs from the $4,816.30 I gave at the taxation hearing. I made an error of calculation at the time.).

Costs of the Taxation

Costs of the taxation of $300.00 are awarded to Ms. Zinger. Pursuant to Rules 604 & 641 these costs are set-off against the barrister & solicitor charges, further reducing them to $4,849.05. Any payments (if any) which may have been made towards these accounts would of course be deducted form this amount.

(f.1) Costs against counsel: procedure

[No Entry]

(f.2) Costs against counsel: allowed

[No Entry]

(f.3) Costs against counsel: not allowed

Conklin v. Milligan

[1996] W.D.F.L. No. 2126, Sask. C.A.,
03 June 1996.

The registrar concluded that the appellant advanced a claim with no sustainable basis. On a review of the registrar's taxation, a chambers judge confirmed the order of solicitor and client costs. The respondent appealed. The respondent also appealed a second order of solicitor and client costs, respecting an adjournment in the

taxation proceedings the judge made against the lawyer representing the lawyer whose account was in issue.

Held - Appeal allowed in part.

Neither the registrar nor the chambers judged erred in their conclusions and that part of the appeal should be dismissed. However, the judge erred by ordering costs against the lawyer personally and not his client. The costs were also excessive. The costs should be reduced to $300, to be paid by the client.

(g) Judgments for costs

Day v. Day

(1994), 3 R.F.L. (4th) 432 (N.S. S.C.), Goodfellow J.

The parties separated after an 18-year childless marriage. In the wife's application for divorce and corollary relief, two issues remained outstanding: the resolution of disagreements with respect to the valuation of a motor vehicle and certain items of household furnishings, and the entitlement of the wife to maintenance. The evidence indicated that the wife had retained certain household items and refused to return them to the husband solely to deprive him of their use.

Following a one-day hearing and a second day for argument, the wife was awarded a higher level of maintenance than had been offered by her solicitor in settlement negotiations. The parties were invited to make submissions on costs.

The wife sought costs in the amount of $2,250, in accordance with Tariff A of the Nova Scotia *Civil Procedure Rules*, disbursements in the amount of $814.51, including long distance and photocopying charges, and an additional $2,000, representing costs for issues pursuant to the *Divorce Act*.

Held – The wife was entitled to party and party costs in the amount of $1,700 and disbursements in amount of $751.01 plus GST in the amount of $52.57, for a total of $2,503.58.

Costs of matrimonial causes were at the discretion of the court. The discretion was to be exercised judicially. Nothing in the *Divorce Act*, the *Matrimonial Property Act* (N.S.), the *Judicature Act* (N.S.), or the Nova Scotia *Civil Procedure Rules* mandated any suggestion that costs were not to be awarded in a matrimonial cause. Although the general rule is that costs followed the event, unless the court ordered otherwise, in matrimonial causes, the cause "following the event" was rarely as clear cut and obvious as in most civil cases. Adopting a policy of not awarding costs in

matrimonial proceedings was wrong in law, counterproductive, and contrary in R. 67, dealing with offers of settlement and their effect upon an award of costs.

In the case at bar, despite the efforts of the wife's solicitor, the matter could not be settled. The wife's stubbornness and intransigence were not conducive to settlement.

The wife's entitlement to maintenance was the major issue, the most important feature being that the judgment obtained at trial was more favourable to the wife than her negotiating position. Tariff A was not appropriate in matrimonial causes such as this one when, on a dollar basis, the actual amount in dispute was very small in the final analysis.

Despite the wife's conduct, in particular, her conduct that necessitated a second day at trial, she was entitled to costs.

She was also entitled to disbursements, excluding long distance telephone charges between herself and her solicitor. The amount claimed for photocopying was reduced by 25 per cent.

The wife was entitled to GST on the disbursements. GST on disbursements was in an entirely different category than legal fees and represented an expense actually incurred for the purpose of litigation; thus, it was recoverable as part of the disbursement. PST incurred on disbursements since December 14, 1993, was also recoverable by the wife.

GST and PST were applicable only to legal fees and disbursements and not to a discretionary award of party and party costs. The discretionary award of costs was the property of the party to whom they were awarded.

(h) Appeals from taxation of costs

P. (M.J.) v. P. (P.A.)

(1996), 8 C.P.C. (4th) 223 (Sask. Q.B.), Dickson J.

Headnote: On taxation of bill of costs following trial between Petitioner mother and Respondent father, they disputed four items on the bill: fee of registered psychologist where not declared professional witness when he testified; fee of physician and surgeon; psychologist fee for written report where psychologist also testified at trial, and court ordered report about mother's psychiatric condition. At request of Respondent father, the taxing officer referred the four disputed items in the Bill to the Court (under R. 563 of The Queen's Bench Rules).

Text (para. 16)**:** In summary, the taxing officer has no authority to "refer" (in effect, to delegate) to the court taxation of any part of a bill of costs. If this practice has been developed by taxing officers it should be discontinued. The function of the court in the taxation process is limited to hearing appeals by parties dissatisfied by an allowance or disallowance made by a taxing officer. Allowance by the court of expense incurred in procuring evidence or the attendance of witnesses has nothing to do with the procedure of taxing a bill of costs.

4.6.6 Criminal liability

[No Entry]